2020 SBM Teshuvot

"*Dina D'Malkhuta Dina*: Obligations and Limits"

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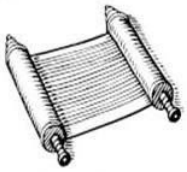

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Week One Summary: Dina Demalkhuta Dina: How Broad a Principle?

by Avi Sommer
July 3, 2020

Mishnah Bava Kamma 113a places various restrictions on transactions with tax collectors on the ground that their coins are considered stolen. For example, one may not accept charity from tax collectors or ask them to change larger denominations.

You may be wondering: why would someone having a private economic transaction with a tax collector receive coins collected as taxes in change? Likewise, how could tax collectors give tax money away as charity? Shouldn't it all have been given to their government? The answer is that the governments with which *Chaza"l* interacted, such as the Roman Empire, would sell the right to collect taxes to private individuals. Those individuals could legitimately keep the tax money they collected.

The Gemara asks: given Shmuel's statement that *dina demalkhuta dina* (the law of the government is the law), why is the money of tax collectors considered stolen? After all, the government authorizes them to collect it! The Gemara gives two answers. The first answer is that the Mishnah is referring to tax collectors who have no upper limit on the taxes they can collect. They are viewed as having purchased a license to extort from the government, and Shmuel's statement is not intended to cover *all* government laws. The second answer is that the Mishnah is referring to tax collectors who set up shop without governmental authorization – essentially organized thieves, like highwaymen charging "tolls." Taken together, the answers imply that governmental taxes with quantitative limitations are legitimate and are not theft, and that this is so because of Shmuel's statement that *dina demalkhuta dina*.

The Gemara then cites versions of the sugya in which the objection from Shmuel's statement that *dina demalkhuta dina* and the answers to that objection are responses to Tannaitic texts other than the Mishnah with which we began. One version relates them to a text in which Rabbi Akiva permits wearing *kil'ayim* (i.e. *shatneiz*) in order to evade taxes on goods (which sometimes exempted the clothing one was wearing). Another version related them to a mishnah that permits taking false oaths to the effect that certain food is *terumah* to dissuade a tax collector from taking it. Interestingly, and disturbingly, the last version adds a third answer to the challenge from Shmuel's statement, that it refers to non-Jewish tax collectors. The relationship of this answer to the question is unclear. It does not seem to reconcile the mishnah permitting taking the false oath with Shmuel's statement that *dina demalkhuta dina*, since a non-Jewish tax collector is certainly a representative of the government.

The Gemara then moves to a discussion of Shmuel's statement in its own right. Rava states that the statement must be accepted as *halakhah*, because "they cut down date trees [belonging to private individuals] in order to build bridges, and we walk over them." The government, in other words, used a right of eminent domain. If that was theft, then those bridges would be stolen objects, so crossing them should be forbidden as using someone else's property without permission. Since we do cross over them, they must not be considered stolen, so cutting down the palm trees must not be theft. This demonstrates that the government has a right to take private property. In other words, *dina demalkhuta dina*.

Abaye (as was his wont) rejects Rava's evidence: perhaps the reason that we can pass over these bridges is not that *dina demalkhuta dina*, but rather that the owners of the palm trees despaired of recovering them, so that they become government property despite having been obtained illegally. Rava replies that, if it were not for the fact that *dina demalkhuta dina*, the owners would not thus despair. (Rashi, going against the apparent pshat of the Gemara, interprets this to mean that the despair (*ye'ush*) which they feel would not, by itself, legitimate using the bridges. A "transfer of possession [to a third party]" or an "active changing [of the stolen object]" is also necessary.)

The Gemara then objects that in Rava's case, *dina demalkhuta dina* should not be sufficient to legitimate traversing the bridges. Why? Because the people who, on the orders of the government, cut down the palm trees, did not precisely follow the government's orders. The government told them to cut down trees from various people's properties, but they cut down all the palm trees on one person's property. How then, are the timbers of the bridge not stolen?

The Gemara replies with a sweeping statement of governmental authority: "the emissary of the government is like the government," and, consequently, whatever *dina demalkhuta dina* permits the government to do, any emissary of the government can do within the scope of their discretion. If the government itself had ordered its emissaries to cut down all the palm trees in one person's property, that would not be theft. Consequently, it is not theft for the emissaries of the government to cut down all of one person's palm trees, even though it is not what their instructions said. This is why we can pass over the bridges.

In shiur, we discussed various possibilities regarding the scope and power of *dina demalkhuta dina* that emerge from this sugya and other sugyot. With regard to the government's ability (to use a word which is, hopefully, neutral between various possibilities) to take things from its subjects, Rav Klapper outlined three possibilities. Firstly, and most narrowly, perhaps the principle of *dina demalkhuta dina* says merely that when the government takes things from its subjects, they are not considered stolen. The sugya in Baba Kama requires at least that much. A much more expansive possibility is that *dina demalkhuta dina* creates a positive obligation to give things to the government, to pay taxes. Rav Klapper suggested a third possibility, which is that relations with a person acting with government authorization are considered to be relations with the government. For example, even though the tax collector has already paid the government, and is now collecting for his own pocket, evading such a collector is considered halakhically to be evading the government. This third option is neutral regarding what exactly one's obligations toward the government are. Consequently, as Zach Orenstein pointed out, there is no immediately apparent *nafka minah* (practical difference) between this third option and the other two.

We also discussed possible ways in which Shmuel's principle could apply beyond the sphere of taxation or eminent domain (which can be understood as a form of taxation). For example, it might be possible for legal documents (*shtarot*) originating in Gentile courts to be halakhically valid because of that principle. Mishnah Gittin 10a states that, with a few exceptions, legal documents from non-Jewish courts are valid. The Gemara objects that performative legal documents, such as gift deeds, should not be valid, since they do not have halakhically valid witnesses! Its first answer is that *dina demalkhuta dina* nonetheless validates those documents. This would extend the statement's power well beyond taxation. However, the Gemara offers a second answer that limits the Mishnah's rule to evidentiary documents. A Geonic tshuvah favors the second answer, and furthermore claims that the second answer rejects the application of Shmuel's statement even to evidentiary *shtarot*. So it is possible that the statement *dina demlakhuta dina* is far-reaching, but also that it is extremely limited.

Week Two Summary: What Makes Taxation Halakhically Legitimate?

by Zack Orenshein and Tzophia Stepansky
July 10, 2020

The Talmudic ruling, cited in the name of Shmuel, that "the law of the kingdom is law" (=*Dina Demalkhuta Dina*) requires us to ask: according to Judaism, how much power do governments have over their citizens? The Talmud itself provides several possible specific limits to Shmuel's rule, and later commentators develop these into broader conceptions of the source, extent, and enforceability of "the law of the kingdom." In shiur this week we focused on Rav Asher Weiss's presentation of several rishonim's positions in an essay distributed for Parshat Chukat 2010.

We'll start with the Terumat haDeshen #341 (Rabbi Yisroel Isserlin, 1390-1460). His approach makes ethical demands on both the government and its citizens and is grounded in sophisticated political theory.

Terumat haDeshen presents his approach as an answer to a specific real-world question. An official-in-authority (=*sar*) imposed annual tax assessments on two Jewish communities. Between tax years, four wealthy citizens moved from one community to the other, and paid part of their new community's assessment. Their previous community asked the *sar* to lower its assessment to account for this, but the ruler instead gave them the right to dun the four expatriates. When they in turn pleaded their case to the *sar*, he maintained the assessments on both communities, but gave the four individuals the right to sue in beit din to determine whether the original community could dun them.

Terumat haDeshen formulates the central issue as whether rulers have the right to allocate individuals among communities for tax purposes. The implicit alternative is that the communities have fixed political identities that they control autonomously, and the "law of the kingdom" applies to the communities rather than to their constituent individuals. Furthermore, he suggests that the principle of *dina demalkhuta* does not allow the kingdom to arbitrarily change the annual assessment for a community.

The primary evidence Terumat haDeshen cites is a series of apparently inconsistent rulings in the responsa of Maharam (= Rabbi Meir of) Rothenburg (1215-1293).

The first cited responsum states that after a communal tax assessment has been negotiated, individuals may not reach private agreements with the government to disproportionately limit the share they must pay. Rather, any abatement must be shared by the community. Terumat haDeshen explains that "Since the way of officers is to impose a heavier burden on others when they lighten it for an individual, and since each individual is obligated to bear the yoke with his friends," causing others' burdens to increase by obtaining a personal exemption is considered stealing, as well as an abdication of one's communal responsibility. Moreover, any attempt by the government to alter the community's assessments on individuals is treated by halakhah as the illegitimate "robbery of the kingdom" rather than as the legitimate "law of the kingdom."

However, another responsum clarifies that this is true only once the communal assessment has been fixed. Before that point, when no collective liability has been imposed, a government decision to exempt individuals from taxation must be recognized by the Jewish community.

Finally, in a third responsum, Maharam declares that ALL government taxes in his time and place were robbery and illegitimate. Terumat haDeshen asks: If this is so, then there can be no legal communal liabilities, so why should individuals be constrained from negotiating private deals with a government of bandits? His final explanation is that the tax assessments are nonetheless binding because "it is with this expectation (that illegitimate/arbitrary assessments will be imposed) that we establish residence under them and accept upon ourselves their yoke and their burden."

Rav Asher Weiss reads this last line of Terumat haDeshen as providing an underlying source for Shmuel's principle. He argues that according to Terumat haDeshen, the basis for *Dina Demalkhuta Dina* is that the act of living in a certain place implicitly declares that one consents to the government.

Rabbi Klapper argued that this understanding of Terumat haDeshen produces a theory that is very difficult to accept. Individuals often have little choice as to where they live, let alone as to which form of government to live under. People may find themselves in a particular polity because of war, hunger, or just that their parents decided to live there. It seems difficult to say that this would constitute a strong enough consent to bind the people to its government's laws.

However, Rabbi Klapper argued, a close reading of the Terumat haDeshen suggests that he did not actually view implicit consent as the basis for *Dina Demalkhuta Dina*. The context of the aforementioned line which gives that impression is his attempt to justify the contradictory statements of Maharam, that on the one hand all taxes in his time were theft, and on the other hand they create a legal communal liability. Terumat haDeshen understood Maharam to be arguing that the taxes were theft under the ordinary rules of government, and not legitimated by Shmuel's principle. He therefore suggested that perhaps the taxes could nonetheless be justified by a kind of constructive consent. In other words, this kind of constructive consent is NOT the ground of Shmuel's principle.

Moreover, Terumat haDeshen's constructive consent was not that of individuals. Rather, Rabbi Klapper argued, he was referring to the consent of the Jewish community. Jews were not defined as members of the nation they lived in, but rather as making communal decisions to live or not live within specific nations. The decision of a Jewish community to live within a specific nation could be constructed as consent to the tax assessments of that nation, EVEN THOUGH such assessments would not be legitimated by Shmuel's principle that "the law of the kingdom is law."

Furthermore, Terumat haDeshen's tone offering this explanation is that of low confidence, not that of someone laying out his own commitments. He introduces his solution to the contradiction among Maharam's positions with the words, "ונראה קצת טעם לדבר," a phrase which as a whole is difficult to translate, but *ketzat ta'am* means a slight or partial reason rather than a compelling ground.

On this reading, Terumat haDeshen offers a complex approach to halakhah and government. In principle, halakhah recognizes only governments that follow established rules. Governments that follow such rules create collective obligations, so that it becomes theft for an individual to evade a personal obligation when that simply shifts the burden to everyone else. Governments that do not follow established rules (more work is necessary to define those rules and how they are established) are not legitimate unless – perhaps – they nonetheless can be constructed as having been consented to by those over whom they have authority.

Rav Weiss next presents the positions of Ran and Rashba in their commentaries to Nedarim 28a. Each of them quotes a Tosafist position that Shmuel's ruling does not apply to Jewish kings in the land of Israel. The reason is that the entire Jewish people are *shutafim*, partners, in owning the land of Israel, and therefore their king does not own the land. By contrast, non-Jewish kings own all the lands of their nations. They state that Shmuel's principle is grounded in that ownership, which gives them the right to charge people for residing in or benefiting from the land, and generally to make all laws associated with the land in some way.

Rabbi Klapper argued, however, that Rashba presents his position differently in a responsum (Meyuchasot laRamban 22). Rashbam there states that a kingdom has the right to make regulations that improve the regulation of the state, even to the extent of transferring property that belongs to one person to another. (But when done for reasons other than improving the regulation of the state, such transfers constitute robbery.) He then states that this right applies ALL THE MORE SO in states where the king owns all the land, and makes acceptance of this right a condition of land ownership. This suggests that the primary ground of government authority is not the king's ownership, although the king's ownership may provide an alternate or additional ground for some forms of governmental authority. Moreover, Rashba here offers a formulation similar to that of Terumat haDeshen above, which ultimately depends on consent rather than power. He therefore adds that this argument is more compelling if the kingdom publicizes its rules before distributing land.

A more radical formulation of the Tosafist's political view may emerge from the She'eilot u'Teshuvot Maharich Or Zarua #110 (1200-1270). When delineating how the secular government has authority due to

its ownership over the land, he makes an attention-grabbing comparison: “When it comes to the nations of the world this is the law, because all of the land is his, and this too is the law for ordinary people that if they were to gather and declare that no one may benefit from their land without paying their assessment – their law is law.” Maharich presents the authority of the government and of groups of individuals as fundamentally the same. This seemingly limits the weight given to the central authority of the secular government and gives it back to the people.

Moreover, the position that the Jewish people in their ideal sovereign state are not per se subject to government regulations may have far reaching implications. It suggests a strong bias toward very limited government. However, any such claim must account for the capacity of the Sanhedrin to legislate, and also that Jewish kings may have powers derived from a different source than those given to other kings by Shmuel’s principle.

Week Three Summary: Does Halakhah Permit Taxation Without Representation?

by Adena Morgan and Eliana Yashgur
July 17, 2020

In four *sugyot*, the Babylonian Talmud cites the *amora* Shmuel as stating that that *dina demalkhuta dina* (DMD)= "the law of the kingdom is law." Neither Shmuel nor the Talmud provides a source, or even rationale, for Shmuel's far-reaching statement. Leaving the "why" of Shmuel's statement unstated makes it very hard to determine the "what" – which laws, of which sorts of government, under what circumstances, and in what relationship to halakhah.

Various Geonim and Rishonim fill the breach. Their answers can be understood as ranging philosophically from Divine right of kings, to a Hobbesian contention that the state must in principle be all-powerful to prevent the war of all against all, to various modes of constructing consent, to a "social contract," to a claim that the Noahide mitzvah of "dinnim" provides a Biblical basis for legitimating governmental authority. Each of these opinions can also be understood as making narrower or shallower claims.

SBM focused this week on an essay by Rav Asher Weiss about Shmuel's principle. Rav Weiss begins by citing, and sometimes modifying or rejecting, versions of the five positions above. Rav Weiss then presents an apparently original position articulated by Chatam Sofer in two of his responsa (OC 208 and CM 44). Chatam Sofer seems to identify the source of Shmuel's principle in a *drashah* attributed to him on Talmud Shavuot 35b:

אמר שמואל:
מלכותא דקטלא חד משיתא בעלמא – לא מיענשא,
שנאמר:
כרמי שלי לפני
האלף לך שלמה – למלכותא דרקיעא;
ומאתים לנוטרים את פריו – למלכותא דארעא.
Said Shmuel:
A kingdom which kills one sixth of the world – is not punished,
as Scriptures says (Shir HaShirim 8:12):
My vineyard is before me –
a thousand are for you Shlomo – *meaning for the kingdom of Heaven;*
two hundred are for those who guard his garden – *meaning for the kingdom of the earth.*

Chatam Sofer understands this statement of Shmuel as authorizing taxation or the draft (=the law of the government is law) as necessary for government, so long as the percentage is no more than one sixth of the total.

Rav Weiss contends that this *drasha* cannot be the source for the entire concept of DMD, for two reasons: It is addressing a specifically Jewish king, and has no necessary application to Gentile governments, and teaches only that a king may appropriate funds for his own use, but not about his right to levy for the sake of running the country. Rav Weiss concludes that this drasha is really only a "hint" as to **how much** a government may tax its citizens, rather than a fundamental basis for governmental authority.

Neither of Rav Weiss's challenges are compelling. Shmuel's line is classically interpreted to mean that a king may draft one sixth of his population for their labor (Rashi) or into the army (Tosfot, Maharsha). This is not just a reminder of how much a king is allowed to tax. (This drasha has even been used by Rabbi J. David Bleich as theoretical justification for launching a nuclear war that would kill one sixth of the world's population). Moreover, the Talmud understands Shmuel as interpreting the "*Shlomo*" of the verse as a reference to G-d, rather than to the Jewish king Solomon,

In fact, Chatam Sofer understands this drasha as encompassing a government's authority to use one sixth of the country's resources for public works and improvements, or just for maintaining what already exists. He even argues that this drasha combined with the principle of darchei shalom permits the government to

use the death penalty on criminals who disturb the public peace, though only up to one sixth of the population of course.

Rav Weiss's summary and analysis of the Chatam Sofer allow him to dismiss this specific construction and conception of DMD. Yet, we are left puzzled by how such a great talmid chakham can offer such inadequate evidence. Is this merely an exercise in rhetoric to assure his audience he is familiar with the Chatam Sofer, or is this actually what Rav Weiss thinks?

Rav Weiss also addresses the Chatam Sofer in his dissection of the position of RAN (Rabbeinu Nissim), who claims *that dina demalkhuta dina* is justified by the fact that the government has the power to expel residents. However, RAN says, this power does not extend to a Jewish king ruling over Jews in Israel, because all Jews are partners in the Land. RAN seems to be implying that DMD does not apply to Jewish kings at all. This troubles Rav Weiss, whose underlying position is that government is a necessity of human society.

Chatam Sofer, however, offers a radical reinterpretation of RAN. He contends that RAN agrees with RASHBAM that DMD depends on the (constructed) consent of the governed, and on this basis argues that RAN does not eliminate DMD with regard to Jews in the Land of Israel – he merely limits it.

Outside Israel, in Chatam Sofer's account, RAN contends that the government's right of expulsion means that residents implicitly consent to the government's authority to tax and draft. In Israel, where that authority does not (in principle) exist, a Jewish government requires specific popular consent to tax and draft. However, even in Israel, we can presume that the population consents to governmental authority to regulate interpersonal and commercial relations etc., and in those areas the law of the government is law even without specific popular consent. (Chatam Sofer understands RASHBAM as saying that the people can be constructed as consenting to all powers of government, including taxation and the draft up to one sixth, even without the factor that the king can expel them should they disobey.)

All of this comes to mean that Chatam Sofer fundamentally believes in autonomy, since he interprets even RAN as rooting government authority in the consent of the governed. Where that consent cannot be presumed or constructed, Chatam Sofer contends that authority requires actual consent.

This is in contrast to Rav Weiss himself. Rav Weiss challenges Chatam Sofer's account by arguing that government must be allowed to tax or draft regardless. Consent, he contends, may determine **who** governs, or the **form** of government, but it is not necessary for the **fact** of government. Where there is no consent, government remains necessary, and the Torah will allow other justifications. Rabbi Weiss argues that according to RAN, in a halakhic state in the Land of Israel the **king** does not have the authority of DMD, but the **government** still does, because the Sanhedrin is authorized to make laws by virtue of its authority derived directly from Torah. (Rabbi Klapper however notes that the Sanhedrin's Torah authority can itself be understood as deriving from the consent of the Jewish people at Sinai.)

Rav Weiss himself ends up taking a position that can be described as Hobbesian or anti-Enlightenment. (This explanation may differ sharply from the presentation of Rav Weiss' position offered by Professor Chaim Saiman at http://www.jidaily.com/LmJs). He believes that the Torah understands anarchy to be the worst of all worlds, and therefore government is necessary; there is no idyllic state of nature in which all human beings are free. Chatam Sofer, by contrast, can be understood as understanding RAN at least as imagining a society in which government is the product of a voluntary social contract. However, Rabbi Weiss follows Chatam Sofer in seeing consent as the basis for legitimating any **specific** claimant to government authority. This appears to be a very modern position.

However, it is important to understand that requiring "consent" is not the same as endorsing democracy. As noted above, RAN validates constructive consent granted under the threat of expulsion. Even RASHBAM nowhere suggests that governments are legitimate only if they have been democratically elected. Similarly, RAMBAM seems to agree with RASHBAM that government authority is rooted In consent. He seems, however, to assert that when a people in practice accepts a government's currency, it consents to that government's authority as well.

An offshoot of this discussion then is, what are the limits of presumed consent? Can it apply to a conquered population? Can it apply to people who were not alive when the government was formed (i.e. descendants of those whose originally consented)?

Rishonim such as RAMBAN and ROSH struggle with this question when they discuss the authority of halakhah as a whole, or of the authority halakhah grants for Jewish communities to make enforceable *takkanot*. We can analogize this issue to the halakhic concept of *zakhin adam shelo b'fanav*, where we make an assumption of what is good and what a person might want even when they are not present. Typically, whenever this principle is used, the context involves an individual (with respect to conversion, for example). There isn't a strong precedent for applying it to communal or social questions, let alone an entire polity. This remains as further territory for exploration.

Week Four Summary: Are Israeli Labor Laws Binding on Chareidi Schools?

by Bracha Weinberger and Batsheva Leah Weinstein
July 24, 2020

In a 2008 case before the Beit Din of Ashdod, the undisputed background facts were as follows:

1. Israeli labor law guarantees all employees rights such as paid sick leave.
2. Teachers in government-run (*mamlakhti*) schools work under a collectively bargained contract that includes a wage scale and a severance package. Licensed non-government schools receive government subsidies that pay their teachers' salaries. The Ministry of Education's licensing process requires schools to affirm that their teachers will be paid the same salary and benefits mandated by the government contract.
3. Haredi school systems sign this affirmation every year.
4. Haredi school systems pay their teachers less than they would receive under the government contract, and do not provide all the benefits required by the general labor law.
5. The Ministry of Education licenses Haredi school systems despite being fully aware of this, and has done so for many years.

In the specific case, a former teacher sued the El HaMaayan school system for backpay and paid sick leave. The teacher states that in the hiring conversation, he asked to be paid according to the government contract scale plus an additional stipend to compensate for not receiving the legally standard benefits. The principal responded noncommittally, and he started work without receiving a clear answer. The principal contends that he explains to all teachers that the school cannot afford to pay at scale or provide full benefits. If they didn't want to work under those terms, he said, then they didn't have to accept the job.

Each of the three dayyanim on the beit din panel wrote a full separate opinion. These opinions offer wide-ranging and creative treatments of the halakhic principle that *dina demalkhuta dina* and express and reflect fundamentally different political philosophies. We'll discuss the first opinion and part of the second below, and look forward to covering the third next week.

Dayyan Mordekhai Ralbag begins from a halakhic principle (perhaps parallel to "freedom of contract") that "*kol tenai shebemamon kayyam*" = "any stipulation relating to money is valid." The Talmud (Bava Metzia 76a) uses this principle to validate contracts in which workers accept less than the prevailing wage, even though workers with no explicit contract receive the prevailing wage. If we construct the principal's refusal to commit as a *tenai*, and the teacher as accepting that *tenai* by coming to work, then the teacher should lose the case. Does coming to work imply acceptance of the principal's stipulation?

Shulchan Arukh Choshen Mishpat 221:1 discusses a case in which a seller asks for 200 and a buyer offers 100. They separate, and later complete the transaction without discussing price. The ruling is that whoever initiated the second conversation is presumed to have accepted the other's price. In our case, one might argue that the teacher's showing up for work is equivalent to initiating the second conversation.

Dayyan Ralbag rejects this parallel. He explains that in our case the parties never "separated," and the principal never outright refused the teacher's demands. Therefore we have no basis for presuming that either side accepted the other's price.

A second consideration is that, according to the beit din's legal advisor, the general Israeli labor law invalidates any stipulation that lowers or eliminates mandated benefits. If so, then even if we construct the teacher as accepting the principal's stipulation, and even though halakhah internally permits such stipulations, perhaps halakhah recognizes the right of the government to invalidate them! The school would therefore owe the teacher those benefits. (The school might also be vulnerable to similar lawsuits from all its present and former teachers, even if they explicitly waived those benefits in their employment contracts.) Does *dina demalkhuta dina* govern the relationship between the Israeli state and the Haredi school system? If it does, can *dina demalkhuta dina* override *kol tenai shebemammon kayyam*?

Dayyan Ralbag begins his analysis with standard citations of RASHBAM as grounding *dina demalkhuta dina* in the people's consent to the government (*mekablim al atzmam*), and RAN as grounding it in the

government's ownership of the land, and consequent power to expel anyone who rejects its authority. RAN excludes Jewish kings in the Land of Israel from this principle on the ground that all Jews are partners in the land (and therefore cannot be expelled at will).

However, Chatam Sofer (Teshuvot OC 44) contends that RAN's exclusion applies only to taxes, which are presumptively against the will of the people, and not to practices and laws categorized as "*tovat hamedinah*" (for the welfare of the state). If RAN sees the authority of law as grounded in the power to expel, how can *dina demalkhuta dina* apply to any government that lacks such power?

Dayyan Ralbag suggests that RAN agrees with RASHBAM that popular acceptance is **sufficient** for *dina demalkhuta dina* to apply. However, he felt that *dina demalkhuta dina* must apply (outside of Israel) even where such acceptance is lacking (perhaps he felt that RASHBAM incorrectly viewed popular obedience to totalitarian regimes as sufficient "acceptance"). Under this explanation, one can argue even more broadly than Chatam Sofer and say that RAN would apply *dina demalkhuta dina* even to taxes instituted by a **democratic** government in the Land of Israel.

Dayyan Ralbag argues that by signing the affirmation required for licensure, the principal (acting as agent of the school) automatically accepted the laws and regulations that come with it. This acceptance means, he contends, that according to both RASHBAM and RAN, those laws and regulations become binding on the principal (and school) as *dina demalkhuta dina*. (According to Chatam Sofer, this is especially true If we view those laws and regulations as "for the welfare of the state.")

This argument seems to imply that individual consent is needed for every single law. That would be very odd. Adena Morgan suggested in shiur that consent applies on a group level. Groups who accept the laws are bound by them, while those who don't. By signing the affirmation required for licensure, the principal included himself in the group of people who do accept the laws. Therefore he becomes bound by them. (Rabbi Klapper thinks this still seems very odd.)

Assuming that *dina demalkhuta* applies, does it invalidate the principal's *tenai*? Dayyan Ralbag answers that it does with regard to the benefits directly guaranteed by the general labor law. Since the law is that one cannot stipulate against these regulations, *dina demalkhuta* invalidates the *tenai*.

However, this may not be so regarding the salary and benefits arising out of the principal's commitment to pay according to the contract with government teachers. There is no law stating directly that such salary and benefits cannot be waived.

Dayyan Ralbag contends that the issue depends on whether the licensing process creates a direct obligation to the teacher. If it does, then the teacher can sue the school to fulfill that legal obligation, regardless of any waiver. However, if the process only creates an obligation toward the Ministry, a private *tenai* would be valid and the teacher would not be entitled to his benefits. Does the commitment made by the school during the licensing process create a right for the teacher?

Dayyan Ralbag here introduces a Beit Din HaGadol opinion written by Dayyan Avraham Sherman in a similar case. Dayyan Sherman notes that the licensing process doesn't say that if a school breaches its obligations. its license **will** be revoked; it says only that a breach gives the state the **right** to revoke its license. This right is never invoked, even though the Ministry is perfectly aware that Haredi schools pay less than they commit to paying. If the state understood the process as deputizing the schools as its agents to pay teachers, then the schools would be stealing government money intended for teachers, and in that case the license would certainly be revoked. However, if the schools don't become government agents, then the money can be used in any way they see fit. (Moreover, the state's consistent failure to enforce the schools' commitment to the Ministry means that it is not regarded by halakhah as *dina demalkhuta*.)

Dayyan Ralbag derives from Dayyan Sherman's exclusive focus on the state's failure to enforce that the process does not create a direct obligation from the school to the teacher. Consequently, a *tenai* made between them would be valid. He concludes that there is at least a *safek*/doubt as to whether a stipulation made against the contract is valid. Therefore, he falls back on the rule of המוציא מחברו עליו הראיה – a halakhic tie favors the defendant. Hence the teacher is only entitled to the sick pay and convalescence pay demanded by the general labor law, but not to the severance and salary required by the teachers' contract.

Dayyan Ralbag then provides Haredi schools with a mechanism that he believes would validate even stipulations against the general labor laws. If the principal made a *tenai* that explicitly overrode rights provided by *dina demalkhuta dina*, that would be effective even if the *dina demalkhuta* prohibits such stipulations. We questioned whether this would actually work. since this can be viewed not as stipulating regarding money, but rather as stipulating against an halakhic obligation to obey the *dina demalkhuta* (assuming such an obligation). Rabbi Klapper argued that since the *dina demalkhuta* would ban Rabbi Ralbag's *tenai* as well, this is a case of infinite regress. It was also not clear to us why Dayyan Ralbag offered this suggestion.

Dayyan Mikhael Tzadok's opinion begins from completely different premises. He declares that since Rambam and Shulchan Arukh each rule explicitly against RAN that *dina demalkhuta* applies to Jewish kings in the Land of Israel, and Rav Ovadiah Yosef writes that defendants cannot rely on any position which is against Rambam and Shulchan Arukh, we can follow the "acceptance" theory and wholly disregard RAN. However, once the majority of a society accepts a government law, it becomes binding as *dina demalkhuta* on everyone without exception; this includes Haredim and Haredi schools, whether or not they sign individual commitments.

Dayyan Tzadok next contends that Rabbi Ralbag is fundamentally mistaken in seeing labor laws as giving privileges to individuals; rather, they are for the benefit of all of society, both employers and employees. If one employee waived these rights, all employees would be pressured to do so, and the entire labor market would be affected. Employers would suffer as well because they could be outcompeted by others more willing to abuse their workers. Social stability would be negatively affected by increased inequality, and the government would have to spend more to support the working impoverished. Therefore, the principle *kol tenai shebemamon kayyam* is irrelevant to the rights granted by labor law, since those rights are collective rather than individual.

Over the next several days we'll be discussing the opinion of the Av Beit Din, Dayyan Yekutiel Cohen, who contends that *dina demalkhuta* cannot apply in a democracy, and Rabbi Tzadok's response.

Week Five Summary: Does Dina Demalkhuta Dina Apply in Democracies?

by Eli Putterman and Binyamin Weinreich
July 31, 2020

The very wording of the Halakhic principle of דינא דמלכותא דינא – "the law of the kingdom is the law" – might lead one to wonder whether this principle, which (in certain circumstances) grants secular law Halakhic force, applies to systems of government which can't reasonably be defined as "kingdoms," and in particular to democratic states. The two major legal theories offered in the Rishonim to explain the principle of דינא דמלכותא, namely Rashbam's theory that validity of secular law derives from the consent of the governed and Ran's theory that the king's law is the law of the land because, very simply, the king owns the land, would at first glance come out on opposite sides of the question: Rashbam's proto-contractarian understanding applies even more so to a state in which the citizens choose their lawmakers, whereas Ran's feudalism-derived construction of דינא דמלכותא seems to fall apart when faced with any kind of state in which the sovereign is not a single individual holding allodial title to all the land under his or her jurisdiction.

Modern and contemporary decisors faced with the problem of applying דינא דמלכותא in democracies, however, often did not content themselves with this naïve analysis. In last week's summary, we discussed the opinions of two of the judges on the Ashdod rabbinical court in a labor-law case involving secular Israeli law (Case 1323-35-1), R. Mordekhai Ralbag and R. Mikhael Tzadok. Briefly, while R. Tzadok simply ruled that Rashbam's position is binding and hence דינא דמלכותא applies in the State of Israel, R. Ralbag held that with regard to a democracy, Ran would accept Rashbam's position that societal consent suffices to legitimate secular law. Below, we discuss the opinion of the third judge in that labor-law case, R. Yekutiel Cohen, and also the opinion of R. Yosef Eliyahu Henkin, one of the leading Torah scholars in mid-20th century America (*Teshuvot Ivra* §96).

R. Cohen stakes out the opposite position to that of R. Ralbag. He holds that even the "contractarian" theory of דינא דמלכותא would not apply to a democracy. Why? Surprisingly, because the social consent necessary for דינא דמלכותא to apply is available only in an absolutist state! In Rabbi Cohen's understanding of the contractarians, the only relevant kind of consent is complete submission to any laws the sovereign promulgates. In a democracy, it's clear that voters don't accept the laws passed by their rulers absolutely – after all, they often vote them out in favor of new rulers who will change those laws.

Among R. Cohen's proofs for consent-as-submission is the language of Rambam in *Hilkhot Gezelah* 5:18, discussing the applicability of דינא דמלכותא:

במה דברים אמורים?
במלך שמטבעו יוצא באותן הארצות,
שהרי הסכימו עליו בני אותה הארץ, וסמכה דעתן שהוא אדוניהם והם לו עבדים.
To which [rulers] does the preceding apply?
To a king whose currency is legal tender in those lands,
since the inhabitants of that territory have accepted him, and their minds rely that he is their lord and they are his slaves.

Rambam here seems to rule that inhabitants of a certain territory must consent to be slaves (עבדים) of the king in order for דינא דמלכותא to take effect. R. Tzadok however argued that Rambam here is using עבדים to mean 'subjects' rather than 'slaves'; all he requires is that the inhabitants accept the king's political authority.

But leaving aside the textual debate, there's a conceptual weakness in R. Cohen's notion of consent, as R. Klapper pointed out: according to R. Cohen, 'true' consent cannot be attained in a democracy because there's always a minority which supports replacing the current government and fights against it at the ballot box. But R. Cohen fails to take into account that (in the ordinary course of things) the minority nonetheless follows the laws passed by the government they're unhappy with, which shows that they do consent to them on some level. In other words, R. Cohen fails to distinguish between support of a particular leader and acceptance of the democratic process, which means accepting its outcomes even if one's preferences are not aligned with the party in power. The fundamental underpinning of a functional

democracy is that the citizens consider themselves to be bound by the framework even if one is unhappy with a specific government and its laws. Certainly this should suffice for the consent theorists of דינא דמלכותא to apply the principle to a democratic government.

We move on to R. Henkin, who laid out his very different understanding of דינא דמלכותא in in a 1956 discussion of the Halakhic validity of the New York City rent control law. His theory not only leads to an enthusiastic acceptance of דינא דמלכותא in democracies, but radically revises our conception of the Halakhic civil law as a whole.

According to R. Henkin, because society changes all the time, no community can function with a static legal system. In the past, Jewish communities were legally autonomous, and they met the need for legal change with binding Halakhic enactments (תקנות) made by the rabbinic and communal leadership. In such a situation there was no need for דינא דמלכותא. However, when Jews live in a society with no permanent *batei din* or communal leadership with enforcement authority – as in R. Henkin's time and our own – Halakha looks to the secular legal system, which continually adapts in order to promote public welfare, and obligates Jews to follow its provisions via the principle of דינא דמלכותא דינא.

Moreover, R. Henkin argues that in a constitutional democracy, the Jews are a part of the citizen body which (indirectly) makes the laws, and hence the secular law is also "Jewish." Thus R. Henkin breaks down the dichotomy between the Jews' law and the law imposed upon the Jews which has animated Halakhic discussion of דינא דמלכותא for two millenia: in a democracy, Jews are part of the government which imposes the law. Thus, of all the theories of דינא דמלכותא we've seen, R. Henkin's theory proves uniquely able to integrate fidelity to Halakha with a conception of democratic citizenship.

Of course, R. Henkin's wholesale adoption of secular law into Halakha must have limits: it can apply only to areas of Halakha which are meant to change with the times. So there is of course no question of secular law overriding areas of Halakha like *kashrut* or *Shabbat*. But R. Henkin sees all of Halakhic civil law as open to revision, and hence superseded by secular law, with one prominent exception – inheritance law, which cannot be changed either by דינא דמלכותא or by internal תקנות. (It is understood as well that secular law cannot permit Jews to charge or pay interest to each other.)

R. Henkin's theory of דינא דמלכותא can fairly easily be read into the Rishonim who adopt the consent theory of דינא דמלכותא, but seems impossible to reconcile with Ran and others' "feudal" theory of דינא דמלכותא as deriving from the king's ownership of the land under his rule, which Ran formulates as an implied threat: if one does not observe the king's laws, the king has a right to expel them from the land. To resolve this problem, R. Henkin argues that Ran doesn't mean to say that דינא דמלכותא only applies when the sovereign has deportation power, but rather whenever the government provides any services to the population in its territory, such as public works, security, and artificially depressed prices (!). Yet despite the attractiveness of R. Henkin's theory of דינא דמלכותא, it must be said that his is not the simple reading of Ran.

We conclude this summary by opening a can of worms we discussed on several occasions in *shi'ur*: modern democratic societies generally see civil disobedience as a legitimate form of protest against governmental injustice. Yet an expansive theory of דינא דמלכותא in democracies which applies it to secular law *tout court* (or close to it) would seem to make violation of secular law prohibited by Halakha as well – and Halakha may have no provision for principled disobedience. Can a theory of דינא דמלכותא which gives the laws of a democracy Halakhic force also make room for Halakhically-committed Jews to disobey those laws when conscience requires it?

Week Six Summary: Introduction to the Sh'eilah

by Rabbi Aryeh Klapper
August 7, 2020

We've just finished an amazing summer of learning at SBM with outstanding draft teshuvah presentations! The 2020 SBM Sh'eilah deals with the intersection of Halakhah and U.S. immigration law and policy. Fellows addressed broad questions such as the scope of dina demalkhuta dina generally, and specifically in a democracy; (whether there are) other halakhic mechanisms that better or additionally delimit the right of governments and/or the duties of citizens; and whether Torah and Halakhah are committed to underlying political theories such as those of Hobbes or Locke, or theories of justice such as that of Rawls. We discussed whether/how the concept found in rishonim that law must be equally applied can be extended to modern antidiscrimination law; how citizens should respond to a case in which a generally reasonable law yields an unreasonable and unjust outcome; whether a law can be binding on those it disenfranchises; whether halakhah grants legitimacy and authority to unjust government laws; and much more.

I can't wait to share the final teshuvot with you (they're due motzaei Yom Kippur)! Meanwhile, here is an excerpt from the draft I shared with the Fellows yesterday, followed by the sh'eilah. Your comments are very welcome as always.

———————————

RAN to Nedarim 38a appears to ground *dina demalkhuta dina* (DMD) in power. The king owns all the land, and therefore has the right to tell anyone: "Obey my rules, or I will expel you." Therefore, RAN adds, DMD does not apply in the Land of Israel, since "All Jews are partners in the Land."

RAN's addition at first glance seems incoherent. The partnership of all Jews in Israel is a theoretical construct; in practice, the Roman Empire, or whichever empire held sway in the Land in RAN's time, had the same power of expulsion there as it did elsewhere. So if power is the basis of DMD, why shouldn't it apply in Israel as elsewhere?

The plain answer is that RAN is not based in power per se, but rather in **legitimate** power. Because the sovereign has the **right** to expel, therefore the sovereign has the **right** to set conditions for non-expulsion.

This generates three new questions. First, what gives the sovereign the right to expel? Second, is that right unlimited and arbitrary, or bounded? Third, does the right to set conditions create a duty of obedience to those conditions?

Astonishingly, there seems to be little if any discussion in our tradition of the first question. Rabbi Yekutiel Cohen, Av Beit Din of Ashodod, suggested that RAN constructs the governed as consenting, even if it is consent under threat of exile. But this proposal seems to founder on the Israel exception as well – Jews in Israel would proffer their "consent" under the same threat.

Therefore, RAN must believe that property rights in Israel precede the establishment of government authority, whereas property rights elsewhere are subsequent to that establishment. He adopts a quasi-Hobbesian approach in which all rights are conceded to the Leviathan state at its formation. I say quasi because I don't yet have evidence that he believes that one concedes rights other than ownership of real property to the state (leaving aside issues of conscience, which are obligations to a higher Sovereign).

An alternative read of RAN is that he is explaining only why DMD applies to Jews as an autonomous community of voluntary noncitizen residents, as they were in medieval Europe. He believes that **citizens** generally have property rights parallel of those of Jews in Israel. RAN's comment therefore provides no guidance for Jews in the United States, where our community does not have legal autonomy, and we are individually full citizens.

SBM 2020 Sh'eilah

Dear …,

You may not remember me, but I was a student in your 11th grade Talmud class in Rabbi D.Z. Hoffman High School in 2012. Some of the things we learned in that class have stayed with me throughout, and I'm turning to you because of them, and because I know that you have a reputation as deeply learned, profoundly sensitive, and unswervingly ethical.

I remember your telling me about your grandfather, a German Holocaust survivor, overpaying his taxes each year to express his gratitude to America. You argued that *dina demalkhuta dina* was more than a grudging accommodation to the reality of exile; in America at least, it was an expression of our responsibility to be the best of citizens. We spent several periods researching and then discussing whether speeding was a halakhic violation, and I argued very strongly that it was, which led to pretty serious family conflicts on the way up to the Catskills on Friday afternoons.

But I also remember that you brought in Rabbi Saul Berman on Martin Luther King Day to tell us about his experience being jailed in Selma, and that you introduced him as a halakhic hero. So you must think that there are times when disobeying American law is ok, or even necessary. It actually wouldn't surprise me to learn that you were among those trying to form a barrier between police and Black Lives Matters protesters, even though that technically involves standing in places that have been made legally off-limits.

Here's the thing – you may not know that I was adopted from abroad (Colombia) and converted as an infant. I didn't know this at the time, but until 2001, adopted children of U.S. citizens did not automatically receive citizenship, and my parents never arranged for me to become a citizen, so I am in fact "undocumented." This means that unless I buy fake ids, it will be hard for me to get hired, to get a driver's license, to get on airplanes, and certainly to leave the country and come back. Do you think maybe that I'm allowed to buy these fake IDs *davka* because I'm not a citizen? Or do I have to leave as soon as I can, and apply for citizenship from abroad (which I'm unlikely to get), because it's illegal for me to be here? I intend to pay all the taxes I owe, at least as long as the US maintains its rule that the IRS can't share its records with immigration agencies. I think that in a rational world everyone would realize that I should have citizenship; this is the only home I've known, and my parents are citizens, and the law has even been changed so that people never face my situation. But the controversy about Dreamers and DACA makes clear to me that I'm not living in a rational world.

Please tell me what I must do. Please also note that my mom's lawyers told her that if anything positive is to happen, I need both my parents' support and cooperation. We had a long conversation and we all agreed to follow your psak. I'm enclosing their letters. Please respond to all of us together.

Your student,
Yonatan Yosef Rose

Dear …,

I am Y.Y. Rose's adoptive mother. I know that he has reached out to you about his immigration status, and I wanted to make sure that you know where I stand. You should know that Y.Y.'s father and I have divorced, and I have since remarried. Yonatan's father may write to you separately.

In the young, affluent Modern Orthodox community that I live in, almost everybody hires undocumented workers. The nannies, the construction workers, and so forth – all undocumented, and everybody knows it. I think most people pay cash and don't withhold FICA taxes, but of course I can't know that for sure. But it seems ridiculous to me to say that our community holds that immigration law is halakhically binding, especially when the law is immoral. We certainly didn't think that about British Mandate law in Palestine!

So please just tell Y.Y. that he can do whatever he needs to do to live a normal life here while my husband and I hire lawyers to straighten this out, which I'm sure we can do. Please tell him that he needs to cooperate with whatever the lawyers advise. This is still the United States of America, and I'm sure everything will work out just fine if we have a little time and don't do anything precipitous.

Sincerely,
Zoe Wood

Dear ...,

I am Y. Y. Rose's adoptive father. Let me tell you a little bit about myself. I was born to secular parents, and became frum through Chabad. I was deeply influenced by the Rebbe's commitment to educating non-Jews to follow the *sheva mitzvot*, but over time I started to feel that this was too narrow, in two ways: first, that we need to encourage morality and not just legalism, and second, we need to understand that in a democracy in which we have full citizenship, it's not just about education – it's about building a society together in which each of us fulfill our moral responsibilities. Because of this I am a regular participant in demonstrations for causes as disparate as preventing abortions and preventing police violence, and I've been arrested several times in those connections.

My son's case, sadly, is not one of these big moral issues. It's just one of those things that inevitably happen because law is a blunt instrument. Civil disobedience loses all meaning, and becomes dangerous, when people start disobeying the law out of self-interest, even when the law is wrong. Think of the people cutting chains to parks in Brooklyn so their kids can play during a pandemic!

So I can't see how I could countenance supporting any illegal activities by my son or on his behalf, although I will do all I can to support him wherever his journey takes him. I hope you will tell him the same.

Sincerely,
Yaakov Hadin-Ethahar

State Authority and Religious Obligation – An Introduction

by Rabbi Aryeh Klapper

It is a given in Modern Orthodox Torah discussions that Jewish citizens of the United States residing within its borders are bound by US law. Yes, we all understand that there are theoretically heroic exceptions, such as if the state were to compel us to engage in idolatry. But it is hard for most of us to imagine that as a possibility under the Constitution. Our instinctive image of Orthodox-identifying lawbreakers relates instead to self-interested white-collar criminality, or more recently, to irresponsible and dangerous flouting of public health regulations (although some flouters portray themselves as heroic).

Like many positions that carry almost universal assent, our deference to secular law is undertheorized and often honored only in the breach, or in the censure of others who breach. We don't know why it's so, and our behavior proves that we don't believe it to always be so, but our rhetoric often assumes it.

However, in discussions and classes not explicitly bounded by Torah, Modern Orthodox Jews find inspiration in stories of civil disobedience from the civil rights movement. Many read and are influenced by Thoreau's powerful notion of serving the State with one's conscience:

> THE MASS of men serve the State thus, not as men mainly, but as machines, with their bodies. They are the standing army, and the militia, gaolers, constables, posse comitatus, etc. In most cases there is no free exercise whatever of the judgment or of the moral sense; but they put themselves on a level with wood and earth and stones; and wooden men can perhaps be manufactured that will serve the purpose as well. Such command no more respect than men of straw or a lump of dirt. They have the same sort of worth only as horses and dogs. Yet such as these even are commonly esteemed good citizens.
>
> Others—as most legislators, politicians, lawyers, ministers, and office-holders—serve the State chiefly with their heads; and, as they rarely make any moral distinctions, they are as likely to serve the devil, without *intending it, as God.*
>
> A very few, as heroes, patriots, martyrs, reformers in the great sense, and *men,* serve the State with their consciences also, and so necessarily resist it for the most part; and they are commonly treated as enemies by it.

The moral worlds of "Torah" and "Mada" sometimes merge, as when listening to Rabbi Saul Berman speak about being jailed in Selma. But not often, and I think, not often enough.

A clearer formulation of the religious bounds of government authority is plainly needed if we are to seriously address the situation posed to SBM 2020. The consensus position requiring obedience to civil law applies to citizens. Yonatan, the protagonist of our situation, is not a legal citizen, even though he always thought of himself as one, has never wanted to be anything else, and under just about any substantive concept of justice would be legally naturalized at once.

(This is a situation that Orthodox Jews are very familiar with, because it happens all the time with regard to halakhic Jewish identity. I don't think we have handled such situations well at all. But plainly we could be doing worse, as if the United States gave Yonatan an option equivalent to what is popularly if inaccurately called "giyyur lechumra," that would be a fine solution.)

Let's begin from the phrase most often employed to create a religious justification for mandating civil obedience: דינא דמלכותא דינא (*dina demalkhuta dina*, henceforth "DMD").

As used in the Talmud, always with attribution to the amora Shmuel, DMD is, as Professor Chaim Saiman puts it, mostly a defense against the charge of גזילה (robbery), for example when tax collectors seize the property of defaulters. Governments have the right to raise revenue, exploit resources, and regulate financial affairs, when necessary by force.

It's not clear from the Talmud whether DMD has any applicability outside of property issues, such as immigration. We'll have to first understand how it works, and then see how far it applies.

DMD may mean that, within the rule of law, all property within the territory of a sovereign is held at the sovereign's will, and can be transferred whenever and by whatever means the sovereign sees fit. This approach requires us to define what constitutes the "rule of law."

The sovereign's power may also be limited with regard to means. For example, some forms of taxation may be considered robbery even if they are legislated and enforced under due process of law. (Alternatively, halakhah may have a concept of "substantive due process," meaning that some outcomes per se violate due process).

The Talmud provides no source or justification for DMD. The two most-cited rationales are those of RAN in the name of Tosafot (Nedarim 28a) and RASHBAM (Bava Batra 54b), so let's turn to them.

RAN:

וכתבו בתוספות
דדוקא במלכי עובדי כוכבים אמר דדינא דמלכותא דינא
מפני שהארץ שלו, ויכול לומר להם:
'אם לא תעשו מצותי - אגרש אתכם מן הארץ'
אבל במלכי ישראל – לא,
לפי שא"י - כל ישראל שותפין בה
They wrote in the Tosafot
that DMD was said specifically regarding idolatrous kings
because the land is (the king's) and he can say to them:
'If you don't fulfill my commands – I will expel you from the land'.
But with regard to Jewish kings – this is not so
because the Land of Israel - all Israel are partners in it

RAN appears to ground DMD in power. The king owns all the land, and therefore has the right to tell anyone: "Obey my rules, or I will expel you." But why does might make right?

Rabbi Yekutiel Cohen, Av Beit Din of Ashdod, suggests (פסקי דין רבניים מתוך המאגר המקוון פס"ד רלה) that RAN constructs consent, even if it is consent under threat of exile. This builds on the halakhic principle תליוהו וזבין זביניה זבינא (Bava Batra 48a; lit. "If they hung him up and then he sold – the sale is a sale"), meaning that a coerced sale is legally valid if the seller received full value for the goods. However, the analogy is imperfect. In תליוהו וזבין, the intimidator threatens to take the goods and pay for them in full even if the seller refuses; thus in terms of objective value the seller cannot lose. Here, the sovereign threatens to remove the right of residence unless the subject agrees.

Moreover, under any theory, RAN's exclusion of the land of Israel seems incoherent. The partnership of all Jews in Israel is a theoretical construct; in practice, the Roman Empire, or whichever empire held sway in the Land of Israel in RAN's time, had the same power of expulsion there as it did elsewhere. So if power is the basis of DMD, why shouldn't it apply in Israel the same way it does everywhere else? Even if we accept Rabbi Cohen's understanding of RAN, Jews in Israel would proffer their "consent" under the same threat.

The answer must be that RAN's DMD is not grounded in power per se, but rather in **legitimate** power. Because the sovereign has the **right** to expel, therefore the sovereign has the **right** to set conditions for non-expulsion. If the sovereign has no right to expel, any conditions it sets for non-expulsion are simple extortion.

This understanding generates three new questions. First, what gives the sovereign the right to expel? Second, is that right unlimited and arbitrary, or bounded in some way? Third, does the right to set conditions create a duty of obedience to those conditions?

Astonishingly, there seems to be little if any discussion in our tradition of the first question.

I suggest that RAN must believe that property rights in Israel **precede** the establishment of government authority, whereas property rights elsewhere are **subsequent** to that establishment.

Outside of Israel, he adopts a Hobbesian approach in which all property rights are conceded to the Leviathan state at its formation, in exchange for the state's prevention of the otherwise inevitable "war of all against all." Individuals who live in the territory of a sovereign only have such property rights that the sovereign chooses to allot them.

For Jews in Israel, land-ownership and the right of residence are granted by the Torah/Constitution, and therefore, a sovereign state constituted by the Torah is bound to honor that right. (However, RAN might apply DMD to a non-Torah state with practical sovereignty over the Land of Israel, unless he believed that non-Torah sovereignty in the Land is by definition impossible.)

An alternative reading of RAN is that his purpose here is only to explain why DMD applies to Jews when they are voluntary noncitizen residents in the territory of a sovereign outside the Land of Israel, not to explain why it applies to governments generally. He may have an entirely different basis for the authority of government over citizens, under which all citizens in all countries have property rights that precede that authority.

RASHBAM:

כל מסים וארנוניות ומנהגות של משפטי מלכים
שרגילים להנהיג במלכותם –
דינא הוא
שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו
והלכך דין גמור הוא
ואין למחזיק בממון חבירו ע"פ חוק המלך הנהוג בעיר משום גזל.

All the taxes and levies and standard practices of the mishpatei melakhim
that they are accustomed to enact in their kingdoms –
are law
because all the bnei hamalkhut *willingly accept upon themselves the* chukim *and* mishpatim *of the king so that taking possession of someone else's money on the basis of the king's chok practiced in that city is not an issue of robbery*

This is sometimes read as an endorsement of democracy. But RASHBAM knew perfectly well that the Persian Empire of Shmuel's time and place was not a democracy, and therefore he cannot have read Shmuel's statement as applying only in democracies.

Rather, RASHBAM must also be endorsing a social contract model of constructive consent (assuming that he paskens like the position that he is explaining). However, his limitation of DMD to the bounds of "*mishpetei hamelakhim*" and "standard practices" show that his social contract is not an absolute surrender of individual rights, but rather that the sovereign's powers are bounded by consent. So he is more Locke than Hobbes. (Note that RAMBAM's formulation of consent theory in Hilkhot Gezeilah 5:18 requires separate analysis.)

The upshot is that both standard approaches to DMD ultimately rest on a social contract theory of government authority. The positions of rishonim roughly correspond to the options developed by philosophers as to whether there are rights that all sovereigns must respect even if a majority of their subjects agrees to cede them. The universally accepted "rule of law" condition for DMD means that the state must regardless respect all rights enshrined in its own constituting. (Where there is no formal constitution, the scope of such rights, if any, are determined by criteria such as "*mishpetei hamelakhim*.")

Social contract theories naturally apply outside the realm of property, so DMD should as well, even though the Talmud only cited it in property contexts. RASHBAM and RAN's formulations offer no basis for limiting DMD to financial affairs. See also for example Terumat HaDeshen 341, who explicitly extends DMD to אנגריא, or impressment.

Note that Rav Shaul Yisraeli ("Maaseh K'biya"; see also Amud HaYemini 32) held that nonJews – but not Jews – can cede all their rights to the state, including their right to life, and therefore that DMD can justify the secular state in sending soldiers to die and in carrying out capital punishment. Rav Shlomo Yosef

Zevin ("Maaseh Shylock") disagreed, holding that all human lives belong to G-d and may not be voluntarily sacrificed except in fulfillment of His will.

Rav Yisraeli's approach is untenable in a pluralistic state. But there is room to discuss whether Rav Zevin is the only alternative, or whether we ought instead to extend Rav Yisraeli's approach to Jews as well.

All social contract approaches raise the question of why social contracts are binding on subsequent generations.

One possible answer is that they aren't, at least not fully; they create legitimacy for the state, but not duties for individuals. For example, a tax collector who seizes hidden property under due process of law is not a robber, but the taxpayer's attempt to hide the property was not theft. Taking it one step further, the gaoler who imprisons the tax cheat is not a kidnapper, but the cheat has no obligation to surrender, and is not forbidden to escape. However, it is in our collective self-interest to uphold and support the government's legitimate authority.

A second answer is to posit an a priori basis for the bindingness of contracts, even across generations. Many rishonim defend the authority of Torah on such a basis.

A third answer is that the social contract within any given sovereign is renewed by default until a majority of the population actively rebels.

A fourth answer is that enabling effective political sovereignty is an ethical duty, because the alternative is איש את רעהו חיים בלעו. This is suggested, in different ways, by Rav Cohen and by Rav Asher Weiss.

Some of these answers may grant the state halakhic authority, or create halakhic duties to the state, in ways that are independent of DMD.

From a religious perspective, it may make an enormous difference whether obedience to government authority is a matter of pragmatism, or of religious duty.

To this point, we've functioned as if the only issue for individuals is whether or not to obey. But there might in some cases be a third option, namely a duty to disobey. Even in a Hobbesian approach, the right to defy the sovereign's will on matters of conscience may remain, because one cannot waive one's obligations to a higher Sovereign. So the nature and basis of a religious duty to obey also matters greatly, because we need to weigh it against other such duties.

We also need to make clear that DMD may not be the only halakhic basis for governmental authority. In a democracy, for example, it may be that all citizens (at least) are considered partners (as RAN suggests regarding Jews in the Land of Israel). In some democracies, as Deborah Klapper suggests, all citizens may be co-sovereigns. See in this regard Sukkah 30a, where Rav Yochanan in the name of Rabbi Shimon bar Yochai explains that G-d hates stolen sacrifices, even though all property really belongs to Him, because the king must set the example of obedience to the law.

Teshuvah - Bracha Weinberger

Dear Y.Y.,

The commandment to love the *ger* (stranger) is mentioned 36 times in the Torah (according to Rambam). Our forefathers were "strangers in a land not their own," and this experience should lead us to understand the importance of kind treatment and providing for *gerim*. You too are a *ger*-- a person who inhabits a land that is not legally recognized as your homeland. In this painful ordeal, perhaps you can take some comfort in the fact that you are not the first Jew who has taken this path, rather you are walking in the history of thousands of years of ancestors.

Fully addressing your situation requires analysis of a number of discrete halakhic issues:

1) whether *dina dimalchusa dina* (DMD) applies to your case.
2) whether, if it applies, it generates not just a right of enforcement but also an obligation of obedience
3) If an obligation of obedience, whether that obligation prohibits only active disobedience, or even passive failure to self-report
4) the morality of immigration law, and whether that affects DMD
5) halachic factors outside of DMD

The central sugya about DMD (Bava Batra 54b) does not explicitly state why governments have the power to make laws that are binding on Jews. However, many *Rishonim* provide explanations.

a) Ran (to Nedarim 28a) writes:

מפני שהארץ שלו, ויכול לומר להם:
"אם לא תעשו מצותי - אגרש אתכם מן הארץ"
because the land is (the king's) and he can say to them:
"If you don't fulfill my commands – I will expel you from the land"

Ran assumes that the power of DMD is derived from ownership and power over the land, which generates the right and power to expel someone if they wish. The United States government also has this power under The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA). **Even though *Ran*'s abstract government has the power to remove anyone, while IIRAIRA allows the deportation only of illegal immigrants, the *Ran's* understanding of DMD is applicable to you because you are subject to deportation under IIRAIRA.**[1]

b) Rashbam (to Bava Batra 54b) writes:

כל המסים וארנוניות ומנהגות של משפטי מלכים
שרגילים להנהיג במלכותם –
דינא הוא,
שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו
והלכך דין גמור הוא
All the taxes and levies and standard practices of the mishpatei melakhim
that they are accustomed to enact in their kingdoms –
are law
because all members of the kingdom willingly accept upon themselves the king's laws and regulations –
therefore they are absolute law

Rashbam explains that the laws and customs of governments are binding because the people accept them upon themselves. This might lead you to the conclusion that law is binding only on citizens, (and perhaps only in democracies). However, Rashbam does not differentiate between citizens and residents. Therefore, it seems that he is not referring to what we call "consent of the governed" in 21st century democracies, but

[1] RABBI KLAPPER NOTE: This may generate the counterintuitive conclusion that according to RAN, illegal aliens in the US are bound by DMD, but citizens are not.

rather to a coerced form of consent - the choice to live in any governed land automatically entails consent to the laws of its government. It follows that anyone who lives within the geographic jurisdiction of a government, including illegal immigrants, is bound by its laws.

Note that Jews in Europe were non-citizens before Emancipation. Nonetheless, they viewed *dina dimalchusa* as binding. Therefore, I do not believe it is logical to differentiate within Rashbam's reasoning between citizens and non-citizens. Rather, halacha deems voluntary presence in a country to bet consent. Therefore, since you remain here willingly, the government has the right to enforce American law on you.

Ran and *Rashbam* each provide a source for governments' right to make laws, but do not explicitly address the extent to which people are obligated to follow those laws. **However, I believe that we must be prohibited to actively transgress any law that the government has the halakhic right to enforce, because otherwise we would have anarchy or violence. Similarly, we must fulfill any active obligation that the law imposes, such as paying taxes. However, passive failure to obey a law that imposes no active obligation is not a violation of DMD.**

Since remaining in the country is only a passive violation of the law, you are not violating *dina dimalchusa* according to RAN and RASHBAM. However, you would not be permitted to obtain false identification, as that would be an active violation of the law.

c) One understanding of *Rashi* Gittin 10b is that DMD arises out of an obligation all human societies have to set up a system of law.[2] Under this understanding, governments may actively enforce laws that create a functioning, just society. Individuals are obligated to actively follow these rules when they are enforced in order to maintain that society. However, I contend that it would still be permitted to passively transgress the law when such a transgression does not harm society, and one is not resisting an attempt at enforcement.

a) *Terumat HaDeshen* raises a different angle that might create an individual obligation to follow secular law. He argues that individual choices can have unfair implications for other members of the community. The specific case he discusses is one where a tax was applied to the Jewish community as a whole, and the community decided how to divide up the tax burden. What happens if a specific individual then negotiates an abatement with the government? *Terumat HaDeshen* explains that if the communal obligation will only be redistributed to others, accepting the abatement violates "Don't steal."

While *Terumat Hadeshen* does not discuss this issue with regard to anything other than money, it makes sense for the same principle to apply in other types of cases: you may not benefit yourself at the expense of others without their consent. You therefore must be very cognizant as to how your choices will affect both your Jewish community and other immigrants from Latin America.

b) Talmud Nedarim 20a allows one to deceive tax collectors who are halakhically regarded as illegitimate. This can perhaps be generalized into a claim that DMD is limited in some way by the morality or ethicalness of the secular law under discussion.

   For example, *Rashba* to that sugya writes:

   במוכס שאין לו קצבה – כלומר: ושלא כדין הוא עושה. ודינא דמלכותא - דינא, אבל גזילה דמלכותא - לאו דינא

   Rashba explains that DMD does not require us to cooperate when the government is stealing money rather than raising revenue via legitimate taxation.

While *Rashba* cannot be directly applied to immigration law, the concept he introduces is important. He suggests that we are entitled and perhaps obligated to evaluate government actions, as governments may be corrupt. I would not go so far as to say that he permits breaking any law that we determine is unjust.

[2] Rashi thus parallels Ramban's position that the Noachide commandment of *dinim* relates to a comprehensive legal system, and disagrees with Rambam's position that it entails only an obligation to enforce the other 6 Noachide commandments.

However, he makes clear that we do not automatically accept everything the government does as moral or just. This acknowledgement may have many indirect halakhic effects.

c) RAMO (חושן משפט שסט:יא) writes that DMD can be enforced only when it is either "להנאת המלך" = for the benefit of the king, or else "לתקנת בני המדינה" = improvement for the people of the country. Here again, I do not believe this principle directly justifies disobeying any law the individual determines is not for the benefit of the king or the people, largely because it is so vague. Nonetheless, this also introduces an important potential limit to the power of the government.

d) Or Zarua, quoting one of his rebbeim, writes:

"לא אמרינן דינא דמלכותא דינא אלא כשהמלך משוה מידותיו על כל בני מלכו...
אבל אם משנה למדינה אחת - לא הוי דיניה דינא"

DMD applies only when the law treats everyone equally. I understand this as a moral criterion.

This idea seems at least somewhat applicable to your current situation. America deports immigrants from Latin America at a proportionally higher rate than immigrants from any other region. Therefore, this law seems to be unequally enforced.

However, I do not feel that this reason alone is strong enough to break the law. This simply strengthens the already existing argument to allow passively transgressing the law in your situation.

Another factor to be considered here is that you are an *oness* (a person forced into a situation not by their own will.) Your adopted parents brought you into the country, and their failure to acquire legal citizenship for you is what caused your illegal status; there was, and still is, nothing you can do to change that reality.

The final factor I will consider is that of *pikuach nefesh*, potential risk to life. From the limited research I have done, Colombia does not appear to be a safe country to be deported to. If you conclude that deportation would be a potential risk to your life, you would certainly be allowed to obtain false documentation and use any other means necessary to avoid deportation. Therefore, I strongly encourage you to do research on this issue so we can address it completely. However, this would not allow you to permanently stay here if that were otherwise forbidden; it would only give you time to make safer plans.

To summarize: *Ran* and the *Rashbam* in *Nedarim, Rashi* in *Gittin,* and *Ramban* (?) all support the position that you may passively transgress the law by remaining in the country, but you may not actively transgress the law by obtaining false identification. *Trumas Hadeshen* adds the qualification that you can remain only if this will not cause harm to your communities. *Rashba* and *Ramo* acknowledge that the law of the state is not always moral, and an immoral law is less binding under *DMD*. *Or Zarua* quotes his teacher's position that DBM applies only to laws that are implemented equally. Your being an *oness may* also play a role. The final factor is that if moving to Columbia is a risk to your life, you are allowed to do whatever is necessary to avoid deportation.

From all these different approaches it seems clear to me that so long as you do not actively transgress American law, you are allowed to remain in the country according to *dina dimalchusa*. However, you are not allowed to obtain false documentation.

I hope this was helpful. Please let me know if you have any follow up questions.

Sincerely,
Bracha Weinberger

Teshuvah - Talia Weisberg

Dear YY,

It is so nice to hear from you after all these years! I'm so pleased to hear that my lessons about dina d'malchusa dina resonated with you at the time and have stuck with you even after all these years. I am sorry to hear that you've found yourself in such a predicament, but I hope that I can provide you with some helpful solutions.

The following halachic principles that are relevant to your situation:

Pikuach nefesh

Although your shaila is broad, it is anchored by the question of whether it is permitted to obtain fake IDs and use them to attain gainful employment, or *parnasah*. The halakhic system recognizes the import of parnasah. See for example Rambam Hilchos De'os 5:12: "It is the way of sensible people for a person to establish work that supports himself first, and after that to purchase a home, and after that to marry a wife." Parnasah is the cornerstone of material success, without which Torah cannot be properly observed; *im ein kemach, ein Torah*.

At the same, time, obtaining and using a fake ID might put you at even greater risk of detection, and of deportation if you were detected. Being deported to Colombia, a country where you don't speak the language and have no relevant connections, might be considered a pikuach nefesh situation, without even taking into account the instances of fatal violence against deportees upon arrival. I would strongly advise thinking very hard about whether obtaining fake IDs is worth the potential risk.

Geneivas da'as

Procuring false identification and misleading your employers about your status might also be a violation of geneivas da'as. Even if your lawyers advise that possession and use of a fake ID would not be a sufficiently serious crime to endanger your citizenship status, it would be halachically problematic to present yourself as something you are not. This can be seen in the Shulchan Aruch Choshen Mishpat 228:6: "It is forbidden to trick people with regard to business transactions or to deceive them. For example, if there is a defect in his purchase, you must inform him, even if he is not Jewish." I would not call your citizenship status a "defect," but it is certainly an important piece of information about you that you need to disclose to any prospective employer before signing a contract.

Relatedly, being a kiddush Hashem and ohr lagoyim are meta-halachic concepts that must be part of the conversation when interacting with the world around us.

Dina d'malchusa dina

Let's turn to the broader question of whether dina d'malchusa dina forbids you to remain in this country illegally, even assuming that you abide by all the country's other laws.

Regardless of what I may have taught you in high school, I am not at this point in my life convinced that the halakhic principle of dina d'malchusa dina applies in modern democracies. I am compelled by the school of thought advocated by the Rashba and Ran, both of whom believe that dina d'malchusa dina only applies in countries when the king owns the land itself. This is obviously not the case in the US.

However, it is worth noting the divergent opinion of the Rambam and Rashbam, that dina d'malchusa dina applies in countries where the king derives his power from the consent of the people. Although the US is an indirect democracy, and it could be argued that the people only indirectly consent to the president (especially in an election where the winner lost by three million popular votes), I think it is fair to say that a democratically elected president rules via the consent of the people, and thus by this logic, dina d'malchusa dina applies.

Assuming that we hold like Rambam and Rashbam, does dina d'malchusa dina make US immigration law halakhically binding? Some opinions hold that it covers only financial, land-, or tax-related laws, and it would be a stretch to include immigration law under any of those rubrics. Rav Asher Weiss however seems to conclude that the president has the halachic authority to enforce all of the laws of the country. That would obviously include immigration law. This would mean that the public has the halachic obligation to abide by US law on immigration status, absent a serious conflict with other halachic principles or with a moral code.

If we hold by Rav Weiss, the next question is whether the public is halachically required to adhere to a law that is clearly absurd and/or immoral. To take this from the abstract to the concrete, I believe that any thinking person would agree that your legal situation is both absurd and immoral. It is just unthinkable to deport someone to a country where they have no social or familial connections and they do not have any knowledge of the language or culture, and also unthinkable to rip someone apart from the only life they have ever known, especially when they are living an upstanding and respectable life. And especially when laws have since been passed that would obviate your situation!

I argue that the public is not halachically obligated to uphold absurd and/or immoral laws. Given how shaky the halachic grounds of dina d'malchusa dina are in the governmental context in which we live, and how many meta-halachic principles we have about creating a just society and a world which is fair and kind, I do not think there is any space for absurdity or immorality in this halachic world. So, I do not believe that you have any sort of obligation to self-deport, nor do you need to believe that you are living in a state of sin as long as you live here without holding citizenship. You were thrust into this situation due to no fault of your own, and I don't think you have any halachic obligation to pursue citizenship in any specific way.

Having said all of that, there are two other halachic and clearly legal solutions to your problem:

Yishuv ha'aretz

I do not mean to minimize the difficulty of uprooting yourself from the only life you have ever known and making aliyah, especially if you are only doing so to get out of America and not because you have a great desire to live in Israel; as it says in Brachos 5a, Eretz Yisrael is given only by way of yissurim. It is not easy to execute a move anywhere abroad, although it is certainly easier to move to a country with a solid job market and reasonably high standard of living that pays for many of your moving expenses and early living costs, and where you have likely spent time as a tourist, likely have friends and/or family to welcome you, and likely speak the language with some facility. In the absence of successful legal action for you to remain in the US, the mitzvah of moving to Israel is something that you should take into serious consideration.

Marriage

I also do not want to minimize the difficulty of dating and finding a suitable life partner amidst the throes of a shidduch crisis, but marrying a (Jewish) American citizen is another valid, halakhic way to remain in this country. As I discussed above, it is assur to violate geneivas da'as, so any marriage contract you enter must be real, and not solely to obtain citizenship. However, it is considered a mitzvah to marry (Rambam Hilchos Ishus 1:2), and thus another path to citizenship that you should seriously consider, regardless of whether legal action works.

Kibbud av v'eim

Respecting one's parents is of paramount importance in Judaism, as you well know. As I inform your parents below, they are both obligated to do whatever they can to assist you in obtaining American citizenship. As far as this is relevant to your obligation of kibbud horim, you should take all of the help that they (and their attorneys) give you, so as to enable them to be mekayem their obligations to you.

Best of luck, YY. I'm rooting for you.

Talia Weisberg

Dear Ms. Wood and Mr. Ethahar,

I was disappointed to do some legal research and find that YY's current predicament would have been entirely avoided had you just gone to the effort of filling out some forms when you adopted him as an infant, or at basically any point before he turned eighteen. You have both done a grievous disservice to your son that you must now do your best to rectify.

Teaching your son a trade

Although kibbud horim is known as a central tenet of our faith, there are also obligations of the father to the son, and one of them is to teach him a trade. As it says in Kiddushin 29a, and then Kiddushin 30b:

> **We learn that which the Sages taught**: **A father is obligated with regard to his son… to teach him a trade…Rabbi Yehuda says: Any** father **who does not teach his son a trade teaches him banditry.**
>
> The Gemara expresses surprise at this statement: Can it **enter your mind** that he actually teaches him **banditry?**
>
> **Rather,** the *baraita* means that it is **as though he teaches him banditry.** Since the son has no profession with which to support himself, he is likely to turn to theft for a livelihood…
>
> "A father is commanded **to teach** his son **a trade." -**
>
> The Gemara asks: **From where do we** derive this?
>
> **Ḥizkiyya said: As the verse states: "Enjoy life with the wife whom you love"** (Ecclesiastes 9:9). **If** this verse is interpreted literally, and **it** is referring to **an actual woman,** then one can derive as follows: **Just as** a father **is obligated to marry** his son **to a woman, so too, he is obligated to teach him a trade,** as indicated by the term: Life. **And if** the wife mentioned in this verse is allegorical, and **it is the Torah,** then one should explain the verse in the following manner: **Just as he is obligated to teach him Torah, so too, he is obligated to teach him a trade.**

By never obtaining citizenship for your son, you did not set him up to make a living via honest methods; it is functionally impossible for him to work in this country in a legal and halachic manner. What a shame that he has reached such a point of desperation that he seeks permission to lie in order to obtain gainful employment. We see this further detailed in Kiddushin 82a:

> **Rabbi Meir says: A person should always teach his son a clean and easy trade and pray** for success **to the One to Whom wealth and property belong, as** ultimately **there is no trade that does not include** both **poverty and wealth,** since a person can become rich from any profession. **Poverty does not** come **from a** particular **trade, nor does wealth** come **from a** particular **trade,** but **rather, all is in accordance with** a person's **merit.** Therefore, one should choose a clean and easy trade, and pray to God for success.

It is up to YY to pray to God for success and make his way within his chosen career -- but you have rendered him effectively incapable of choosing a career to start out with! As YY's parents, you are still obligated to ensure that he can effectively learn and make good on a trade, regardless of the fact that he is above bar mitzvah and the age of majority. Essentially, you have shirked your parental duty at teaching your son a trade. Fortunately, you still have time to right this wrong and dedicate all of the resources you can drum up to fix this.

Dina d'malchusa dina

Although my amateur legal research does not indicate that you had a specific legal requirement to naturalize your son, by putting him in a situation where he would become an illegal occupant of this country, you were certainly not acting in the spirit of the law. As I argue above in my letter to YY, I do not believe dina d'malchusa dina obligated you to pursue citizenship for your son, but as I made clear above in my letter to you, you were obligated as a parent to pursue citizenship for your son. You have made the bed, but your son is the one who must lie in it. You created this situation, and it is up to you to fix it.

How to move forward

Ms. Wood, I am pleased to hear that you are seeking to rectify the wrong you have created by hiring attorneys at your expense to find a path to citizenship for your son. From a halachic perspective, I encourage you to move forward in this way and put into practice the advice that you receive from your legal team.

Mr. Ethahar, I find it deeply problematic that you conceptualize your son's predicament as equivalent to cutting the padlocks on Brooklyn parks. These situations could not be more disparate. YY has never personally done anything against the law except exist, and he is not a threat to anyone; the threat of coronavirus spread in public places is a serious public health risk, and the people who cut the padlocks on the gates were engaging in a specific act of violating the law. Given that your negligence in obtaining citizenship for him brought him to this situation, it is rich that you seek to clean your hands of any personal responsibility or support for your son. I hope that you can engage in a real cheshbon hanefesh and consider whether the Lubavitcher Rebbe, who you claim to be a chossid of, would approve of such a dismissive attitude towards a fellow yid. You claim that you are interested in "building a society together in which each of us fulfill our moral responsibilities," but you positively ignored that for eighteen years when you should have protected your son from possible deportation and a lifetime of hardship and put him on a path towards citizenship. I believe that I have successfully demonstrated that you have a halachic obligation to obtain American citizenship for your son; I recommend you begin to do so immediately, and begin a process of teshuva for all of the years that you have shamefully shirked this duty.

Sincerely,
Talia Weisberg

Teshuvah - Avi Sommer

שאלה:

יונתן נולד לאשה אינה יהודיה במדינת קולומביה ונאמץ תיכף ע"י הורים יהודיים אזרחי ארצות הברית לפני שנת 2001 למניינם. נתגייר כתינוק ע"י בית דין אורתודוקסי מוכר. לפי חוקי ארצות הברית אין אזרחות אוטומטית לילד שנאמץ קודם שנת2001, אלא שהמאמצים צריכים למלא טפסים מסוימים בעבורו, ומאמצי יונתן או לא ידעו או לא טרחו למלאם. על כן יונתן אינו אזרח, ולפי חוקי ארצות הברית אסור לו לעבוד או אפילו להשאר בארצות הברית. ונפשו בשאלתו אם הוא חייב על פי הלכה לצאת מארצות הברית שבו נולד וגר שם כל חייו.

תשובה:

המצב רציני מאד, ויש בו אפשרות לכאב גדול ליונתן ולהוריו, ויש צורך גדול לנהוג ליונתן בחסד וסימפתיה יתירה.

הנה בגמרא איתא בכמה דוכתאי "אמר שמואל: דינא דמלכותא דינא," ויש להסיק מזה שיהודי חייב לשמור את חוקי המדינה. על כן לכאורה חייב יונתן לצאת מארצות הברית.

אלא שאפשר להטיל ספק על מסקנה זו, מפני כמה סיבות, כאשר אפרש.

הרשב"ם בב"ב נד. כתב שסיבת דמ"ד הוי "שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו, והלכך דין גמור הוא." אולם הר"ן שם כתב שדמ"ד מפני שהארץ של המלך "ויכול לומר להם 'אם לא תעשו מצותי - אגרש אתכם מהארץ.'" בחוות דעת משפטית של בית הדין הרבני - אשדוד כתב הרב מרדכי רלב"ג: "הסיבה שחלקו הר"ן וסיעתו בטעמם על טעמו של הרשב"ם – כיון שבמדינות שאין לומר שקיבלו עליהם את דיני המלכות, דהיינו שהשלטון אינו דמוקרטי שנבחר ע"י העם, אלא כפי שהיה נהוג ברוב המדינות, שהמלך היה שולט בארצו מכח שהוא צאצא של משפחת המלוכה, והמלכות היתה דיקטטורית, וממילא לא קיבלו העם עליהם את דיני המלכות – משום כך נקטו הר"ן וסייעתו שהטעם הוא מכח שיכול לגרשם מארצו - דינא דמלכותא דינא. (ומכאן אנו למדים כדברינו שבכה"ג אין לומר שקיבלו עליהם את דיני המלכות)."

ולפי זה נראה שלשיטת הרשב"ם כפי שהר"ן קרא אותו אין יונתן חייב לציית לחוקי ארצות הברית מטעם דמ"ד, משום שכיון שאינו אזרח ואינו רשאי להצביע ולכן אינו משתתף בשלטון הדמוקרטי של ארצות הברית – אין לומר שקיבל עליו את חוקי ארצות הברית מרצונו.

אך פירוש הרב רלב"ג אינו מתיישב כלל אם הרקע ההיסתורי של הרשב"ם והר"ן, שהרי בזמניהם דמוקרתיה היה נדיר מאד, וקיים אולי הויינציה, אבל לא בהרבה מקומות אחרים, והרשב"ם והר"ן היו מנסים להסביר למה דמ"ד היה שייך בחוקי המדינות בו גרו רוב יהודי זמניהם, ולכן אי אפשר לומר שהרשב"ם חשב שרק בדמוקרתיה יש הסכמת בני המדינה. ולכן אין לפטור את יונתן מדינא דמלכותא על פי סברא זו.

אך אולי יש לפטור את יונתן מדינא דמלכותא לגבי כל חוקי ארצות הברית על פי סברא אחרת העולה מן הר"ן (בלי הסבר הרב רלב"ג), דהיינו שלהר"ן דמ"ד משום שיכול המלכות לומר "אם לא תעשו מצותי אגרש אתכם מהארץ," ובמקרה דידן גם אם יעשה מצות המלכות יגרש אותו המלכות מן הארץ, ואם יטיב ואם לא יטיב לפתח גירוש רובץ, ואין מבחינה זו כל חילוק בין עשיית מצוות המלכות לבין אי עשייתם, ולכן אין לחייבו בדינא דמלכותא מחמת יכולת המלכות לומר "אם לא תעשו מצותי אגרש אתכם מהארץ," ולכן להר"ן פטור הוא.

אך אני לא רוצה לבסס את מסקנתי כי יונתן לא חייב לצאת מארצות הברית על סיבה זה, מפני שאיני יודע בודאות שההלכה כשיטת הר"ן היא נכונה, דלמא שיטת הרשב"ם היא להלכה, וגם מפי שיש סיבות יותר טובות למסקנה הזאת, כאשר אפרש לקמן.

ומחוות הדעת המשפטיות מאותו הדין לפני בית הדין באשדוד עולות כמה סיבות אפשריות שלא יוחיל דמ"ד במקרה דידן. הראשון, שהרמ"א בחו"מ סימן שסט סעיף יא כתב "דלא אמרינן דינא דמלכותא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה." והרב מיכאל צדוק בחוות הדעת המשפטית שלו הביא ציטוט מפסק דין של בית הדין הגדול בישראל שמנמק את המסקנא שאין דמ"ד במערכת דיני העבודה, וזה לשונו: "לכאורה נראה שמכל מערכות החוקים שבמדינה – דווקא מערכת דיני העבודה היא זו שמשקפת יותר מכל את האידיאולוגיה של מחוקקיה, וממילא גם אלו השופטים לפיה. נכון שמידת ההגנה על העובד במדינת ישראל הינה פחותה מזו הקיימת במדינות קומוניסטיות וסוציאליסטיות מובהקות, אך בוודאי שהיא שונה מהקיים במדינות קפיטליסטיות. עצם השינויים ממדינה למדינה - יש בהם כדי ללמד שמקור החוקים הללו הוא יותר בהשקפה מאשר בתקנת הציבור." ונראה ש"תקנת הציבור" האמור בציטוט היינו "תקנת בני המדינה" האמור ברמ"א, ולפי ציטוט זה, כל חק שנתקן מחמת אידיאולוגיה אינו לתקנת בני המדינה ולכן אינו בכלל דמ"ד. ואם יש קבוצה של חוקים בחברה שלנו שיותר אידיאולוגי ממערכת דיני העבודה בישראל, היא בטח מערכת דיני ההגירה ומכס (immigration and customs), ולכן אין חוקים אלו דינא לפי שיטה זו.

וא"ת דלמא פסק הב"ד הגדול כי חוקים אידיאולוגיים אינם בכלל דמ"ד שייך רק בארץ ישראל, שב"ד הגדול פסק כן בגלל שחוקים אידיאולוגיים לוקחים את מקומם של חוקי התורה, משא"כ בחוץ לארץ לגבי מצוות בני נח,

יש לומר שסיבת ב"ד הגדול אינו שחוקים אידיאולוגיים לוקחים את מקומם של חוקי התורה, שהרי כתבו בהדיא "שמקור החוקים הללו הוא יותר בהשקפה מאשר בתקנת הציבור," ונראה שזה סיבתם, דהיינו שחוקים אידיאולוגיים אינם לתקנת בני המדינה, כמו שפירשתי, שאם זה לא סיבתם, למה להם לכתוב "שמקור החוקים הללו הוא יותר בהשקפה מאשר בתקנת הציבור?" ותו, אם סיבתם היא שחוקים אידיאולוגיים לוקחים את מקומם של חוקי התורה, היה להם גם להוציא הרבה חוקים אחרים מכלל דמ"ד, שהרי, חוץ מחוק משפחה, אין שום חלק של החוק במדינת ישראל שבו חוקי התורה הם חוקי המדינה.

אך לא נראה לי שחוקים אידיאולוגיים אינם בכלל דמ"ד, כי אם כן, איך נידע אם חוק מסויים הוא בכלל דמ"ד אם לא? שהרי דרך כלל אין המחוקקים מגידים שסיבת החוק היא אידיאולוגיה טהורה, אלא טוענים שהיא תקנת בני המדינה, ואיך נידע מה היא כוונתו האמיתית? אם דמ"ד שייך רק בחוקים שאינם אידיאולוגיים, אז אין ביכולתנו לידע אם הוא שייך בחוק מסויים אם לא, וזה לא יתכן. ותו, במדינות דימוקרתייות, החוקים נעשים על ידי בית מחוקקים שיש בו מחוקקים הרבה, ואם בית מחוקקים עשה חוק והיו מחוקקים בה שהצביעו בעד החוק בגלל האידיאולוגיה שלהם וגם היו מחוקקים בה שהצביעו בעד החוק בגלל תקנת בני המדינה, אז, למאן דאמר שכל חוקים אידיאולוגיים אינם בכלל דמ"ד, האם החוק ההוא הוא בכלל דמ"ד או לא? הואיל והוא גם אידיאולוגי וגם לתקנת בני המדינה, ולכן לשיטתם הוא חייב להיות גם בכלל דמ"ד וגם לא בכללו, וזה סתירה גמורה. ומשני סיבות אלו אין להוציא את דיני ההגירה והמכס מכלל דמ"ד מכח סברא זו.

ובחוות הדעת המשפטית של הרב יקותיאל כהן באותו הדין לפני בית הדין באשדוד, כתב, "ועכשיו, בבוחני זאת, נראה לי שענינו אינו שייך כלל לכל האמור 'בדינא דמלכותא,' מאחר וכל הדינים האמורים בשו"ע 'בדינא דמלכותא' – הם בדברים שבהם 'מקפידה המלכות' ליישם את 'דבר המלכות' לשלב הביצועי שלה באותה מלכות, וכך דרך ההתנהגות בפועל של כל בני אותה המלכות, המצביע באופן מפורש על הסכמתם ככזו, ואין היחיד יכול לפרוש מהכלל ולעשות דין אחר לעצמו, ולכן מחוייב הוא לחלוטין ל'דינא דמלכותא.'" לפי דעתו, כלומר, כאשר אין המלכות אוכף חוק מסויים, אין דמ"ד מחייב לשמור על אותו החוק. והרב כהן מסיק על פי זה שאין חיוב על המגזר החרדי לשמוע למערכת דיני העבודה במדינת ישראל בגלל שאין הממשלה אוכפת את החוקים האלה על אותו המגזר. ונראה מכך שהרב כהן סובר שאם המלכות אוכפת חוק שמחקוק לכל רק על חלק מהאכלוסיה, אין החלק שעליו אין המלכות אוכפת את החק חייב לשמוע לו. יש, על כן, להעלות את האפשרות שבגלל שבמקרה דידן ממשלת ארצות הברית עוד לא ניסה להוציא את יונתן מארצות הברית, אין הממשלה אוכפת עליו את החוק, ולכן אינו חייב לשמוע לו.

אך אין להסיק כך, קדם כל בגלל שלא ברור שהרב כהן כיוון כי (1) כשאין המלכות אוכף חוק על היחיד, אין אותו היחיד חייב לעשות כחוק. יכול שכיון רק כי (2) כשאין החוק אוכף כלל אין חיוב לשמוע לו ושכשאינו אוכף על מגזר מסויים או על אכלוסיה מסויימת או על קבוצה מסויימת, אין למגזר או לאכלוסיה או לקבוצה חיוב לעשות כחוק. הסיבה שזה לא ברור הוא שהמקרה שבה דן הרב כהן הוא מסוג (2), ולכן קשה לדעת מה דעתו על מקרים מסוג (1). ותו, זה שלא ניסה ממשלת ארצות הברית להוציא את יונתן מארצות הברית אינו כיון דניחא להו שהוא פה בדרך בלתי חוקי, אלא בגלל שלא ידעים שהוא לא מתועד, ואילו היו מגלים כך היו מיד מוציאים אותו.

ובחו"מ סימן שסט סעיף ח כתב המחבר, "כללו של דבר, כל דין שיחקוק אותו השר לכל, ולא יהיה לאדם אחד בפני עצמו, אינו גזל, וכל שיקח מאיש זה בלבד - שלא כדת הידוע לכל וכו', הרי זה גזל," והרמ"א הוסיף, "ואם המלך חקק לבעל אומנות אחת, כגון שחקק למלוה ברבית איזה דבר – יש אומרים דלא אמרינן ביה דינא דמלכותא דינא, הואיל ואינו חקוק לכל." ומזה נראה שכדי שיחיל דמ"ד בחוק, צריך שיהיה החוק שווה לכל, ונראה לי שחוקי ההגירה והמכס אינם חקוקים לכל במובן הנצרך בגלל שיש באיכוף שלהם גזענות. לעובדת הגזענות באיכוף חוקי ההגירה והמכס ראה https://projects.iq.harvard.edu/files/deib-explorer/files/aranda_and_vaquera.pdf. בגלל שיש באיכוף חוקי ההגירה והמכס יתר קושי לאנשים שאינם לבנים, חוקי ההגירה והמכס אינם שווים לכל, ולכן אין דמ"ד חל בהם ולא חייב יונתן לצאת מארצות הברית.

הרמ"א הביא דבריו בשם "יש אומרים," אך הרב כהן כתב "ואמנם כתב זאת הרמ"א בשם "יש אומרים," אבל לא הביא כל שיטה שתחלוק על זה, ומובנו הוא שהיא הלכה מוסכמת." וזה נראה לי נכון. ואפילו אם אין דברים אלה דעת הרמ"א, אפשר לסמוך על דברי המחבר שרק "דין שיחקוק אותו השר לכל" הוא בכלל דמ"ד, בגלל שמחבר כתב את זה משמו.

אך אפשר להשיב שלמרות הגזענות באיכוף חוקי העלייה והמכס, אין החוקים הללו כתובים בצורה שהיא מפלה במפרש, שהרי אינו כלל מתיחס לגזע, ולכן יש לחשב אותו כחק השווה לכל ובכלל דמ"ד. הרי לשון המחבר הוא "כל דין שיחקוק אותו השר לכל," ולא "כל דין שיאכף אותו השר לכל בצורה לגמרי שווה."

אך יש לתרץ שבימי המחבר לא היה חילוק ברור בין הכח המחקק והכח המבצעת. חילוק זה הוא סוג של הפרדת סמכויות, והראיון של הפרדת סמכות הוא חידוש של מונטסקיו (Montesquieu), שחי אחרי זמנו של המחבר. לכן גם החק הכתוב וגם ביצועו ואיכופו הם החוק כפי תפיסת החוק של המחבר, ולכן אם האיכוף של חוק מסויים אינו שווה, אז בהכרח החק עצמו אינו שווה. לכן נראה לי שמסקנתי כי אין שייח דמ"ד בחוקי ההגירה והמכס של ארצות הברית של ימינו היא נכונה.

ונראה לי שיש עוד סיבה לא לחייב את יונתן לצאת מארצות הברית, וסיבה קשור לרמ"א שכבר ציטטתי לעיל, היינו הרמ"א בחו"מ סימן שסט סעיף יא: "דלא אמרינן דינא דמלכותא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה." כבר כתבתי שאין להוציא חוקים אידיאולוגיים מכלל דמ"ד על פי רמ"א זו מפני שאי אפשר לידע אם מחוקק מסויים עשה חוק מסיבות אידיאולוגיות או לא. אותו הסברא מראה גם בדרך כללי יותר שכשהרמ"א כתב שרק חוקים שהם "לתקנת בני המדינה" הם בכלל דמ"ד, הוא לא כיון שרק חוקים שמחוקקיהם חיקקו מפני כוונה לתקנת בני המדינה הם בכלל דמ"ד, כי, אם כן, איך נידע אם חוק מסויים הוא בכלל דמ"ד או לא? אין ביכולתינו לידע כוונתו הפנימי של מחוקקים. אלא ודאי הרמ"א כיוון שרק חוקים שהם באמת גורמים לטובת בני המדינה הם בכלל דמ"ד. ופירוש זה מתיישב יפה אם לשון הרמ"א, שכתב "שהוא לתקנת בני המדינה" ולא "שהוא נעשה לשם תקנת בני המדינה."

וחוקי ההגירה והמכס אינם גורמים לטובת אזרחי ארצות הברית. אדרבה, מהגרים שלא מתועדים, שנכנסים לארצות הברית בצורה בלתי חוקי, גורמים ליתרון כלכלי למדינה. לעובדה זאת, ראה
https://www.unidosus.org/issues/immigration/resources/facts

וגם

https://phys.org/news/2020-05-economic-benefits-illegal-immigration-outweigh.html.

וא"ת שבאמת חוקי ההגירה והמכס הם לתקנת בני המדינה וגורמים ליתרון לארצות הברית כי המצב העכשוי שבו החוקים האלה הם בקיים הוא גורם ליתרון כלכלי למדינה, יש לומר שנראה שהקריטריון שבו ניתן להחליט אם חוק מסויים הוא לתקנת בני המדינה הוא לא שהמצב העכשבי שבו החוקים האלה הם בקיום צריך לגרום ליתרון למדינה כדי שיהיה לתקנת בני המדינה, אלא שצריך להיות שאם היה כל אחד תמיד שומע בכל החוק אז היה החוק גורם ליתרון למדינה כדי שיהיה לתקנת בני המדינה. אע"פ שהאיכוף החלקי של חוקי ההגירה והמכס שהוא כל מה שיש ביד ממשלת ארצות ברית לעשות עם האמצעים המוגבלים שיש לה גורם ליתרון כלכלי לארצות ברית, מ"מ אם היה כל אחד תמיד שומע לחוקי ההגירה והמכס, זה לא היה גורם לירון לארצות ברית, ולכן חוקי ההגירה והמכס הם לא לתקנת בני המדינה.

.לכן, חוקי ההגירה והמכס אינם בכלל דמ"ד, ויונתן לא חייב לצאת מארצות הברית

(Translated from Hebrew by Rabbi Klapper)

Question:

Yonatan was born to a non-Jewish woman in Colombia. He was adopted soon after birth by American parents sometime prior to 2001, and converted to Judaism as an infant by a recognized Orthodox beit din. Under United States law, children adopted before 2001 did not receive citizenship automatically. Rather, their adoptive parents needed to fill out certain forms, and Yonatan's parents were either unaware of this or simply did not bother to fill out those forms. Yonatan is therefore not a citizen, and under US law is forbidden to work or even remain in the US. His life-and-death question is whether he is halakhically obligated to leave the US, where he was born and has lived all his life.

Response:

This very serious situation has the potential to cause Yonatan and his parents enormous pain. It is vital for us to treat Yonatan with great sympathy and every consideration.

The Talmud in several places reports that "Shmuel said: *Dina demalkhuta - dina*" (henceforth DMD). Literally translated, this means "The law of the government – is (halakhically valid) law." We can conclude from this that a Jew is obligated to obey all laws of the state s/he resides in. Yonatan would therefore be obligated to leave the US.

However, we can cast doubt on this conclusion for several reasons, as I will explain.

The two standard approaches to DMD are as follows:

a) RASHBAM to Bava Batra 54a writes that the rationale behind DMD is that

> "all the *bnei hamalkhut* willingly accept upon themselves the *chukim* of the king and his *mishpatim*; therefore it is absolute *din*."

b) RAN there writes that the rationale of DMD is that the land is the king's and

> "he is able to tell them: 'if you do not do my *mitzvot* – I will expel you from the land'.

In an opinion written as a member of the Beit Din Rabbani of Ashdod (insert cite), R. Mordekhai Ralbag writes:

> The reason that RAN and those with him offer a rationale that disagrees with the rationale offered by RASHBAM is that in countries where one cannot say that they have accepted upon themselves the *dinim* of the *malkhut*, meaning that the government is not democratic and chosen by the people, but rather, as is the practice in many states, the king governs the land on the basis of his being a descendant of the royal family, and the monarchy is dictatorial, it follows (from Rashbam) that the people never accepted upon themselves the *dinim* of the *malkhut* – that is why RAN and those with him chose as the rationale for DMD that he can expel them from his land. (From here we learn, as we argued above, that in such (non-democratic) circumstances one cannot say that they have accepted upon themselves the *dinim* of the *malkhut*).

Since Yonatan is not a citizen and is not permitted to vote, and therefore does not participate in the democratic governance of the US – one cannot say that he willingly accepted upon himself the *chukim* of the US. Therefore, if we understand RASHBAM as R. Ralbag claims that RAN understood him, DMD does not obligate Yonatan to obey the *chukim* of the US.

However, R. Ralbag's interpretation is not at all consistent with the historical context of RASHBAM's opinion. RASHBAM was attempting to explain why DMD applied to the *chukim* of the states where most Jews of their times lived. Therefore, since most such states were not democracies, it is impossible to say that RASHBAM thought both that DMD requires the consent of the populace **and** that consent of the populace exists only in democracies. Therefore, we cannot exempt Yonatan from DMD on the basis of this line of reasoning.

However, perhaps we can exempt Yonatan on the basis of a different line of reasoning that arises out of RAN. According to RAN, the rationale for DMD is that the government can say "If you don't do my *mitzvot*, I will expel you from the land." The obligation to obey the law is transactional, an exchange for permission to stay in the government's territory. But in our case, the government will expel Yonatan regardless of whether he keeps its mitzvot! Therefore, he is exempt according to RAN.

However, I do not wish to base my conclusion entirely on RAN, as perhaps the Halakhah follows RASHBAM.

Several reasons for exempting Yonatan emerge from other opinions written by members of the Ashdod Beit Din in the same case.

1) RAMO Choshen Mishpat 369:11 writes:

> We don't say DMD except with regard to matters that provide the king with a benefit or that perfects things for the populace.

How does one determine whether a particular law meets those criteria? Dayyan Mikhael Tzadok cites a decision of the High Rabbinic Court which excludes the entire framework of Israeli labor law from DMD:

> It seems that of all the legal frameworks in the state, the framework of labor law is the one that most expresses the ideology of its legislators, and it follows naturally, the ideology of those who judge according to it. True, the extent to which the laborer is protected in Israel is less than that which exists in actually communist or socialist states, but certainly it also differs from that in a capitalist state. The fact of differences among states teaches that the source of these laws is more in outlook than in perfection for the populace.

"Perfection for the populace" here refers to RAMO's "perfects things for the populace." According to this opinion, a law made for ideological reasons is not considered to be made for the perfection of the population, and therefore is not included within DMD.

If any collection of laws in our society is more ideological than the framework of labor laws in Israel, it is certainly the framework of immigration and customs law. It follows that this opinion excludes these laws from DMD even for citizens, let alone for Yonatan.

If you were to say:

Perhaps the High Rabbinic Court expressed this opinion only with regard to laws that apply in the Land of Israel, because in Israel such ideological laws would infringe on the proper jurisdiction of Torah laws, but with regard to the Diaspora, we are much less concerned conflicts with the jurisdiction of the Noachide Commandments?

We can reply:

The High Court wrote explicitly that "the source of these laws is more in outlook than in perfection of the community," so it seems that their reason is that ideological laws **are not for the perfection of things for the populace**. Moreover, if their reasoning was that ideological laws would take the place of Torah laws, they should also have excluded many other laws from DMD, because outside of family law, no section of Israeli law adopts Torah law.

However, the exclusion of ideological laws from DMD does not seem correct to me. If we adopt this standard, how can we reliably know whether or not any specific law is included within DMD? Legislators generally don't acknowledge that the basis of their legislation is pure ideology, rather they claim that their purpose **is** the perfection of things for the populace, and how can we know their true intention?! Moreover, in democratic countries, laws are made by a legislature with many people in it, and those voting for it can have differing motivations, some ideological and some not, so whose intentions are controlling for the purpose of DMD?!

Therefore, this rationale is not a sound basis for excluding immigration and customs laws from DMD.

2) Chief Judge R. Yekutiel Cohen's opinion for the Ashdod Beit Din states:

> Now, as I evaluate this, it seems to me that our issue is not at all connected to everything said about DMD, since all the *dinim* stated in Shulchan Arukh about DMD relate to matters regarding which "the government insists on" implementing "the government will" via the government's "executive component," and that are in fact the way that government's populace behaves, which explicitly indicates their acceptance, so that no individual is permitted to separate from the collective and create a separate *din* for themselves, and therefore they are absolutely obligated to the DM.

R. Cohen contends that DMD does not obligate obedience to laws that the government is not enforcing. On this basis, he concludes that the Charedi sector has no obligation to obey the framework of labor laws in Israel, because the government does not enforce those laws on that sector.

It therefore seems that R. Cohen holds that DMD does not obligate any sector of society to obey laws that the government is not enforcing **on its members**. We can therefore raise the possibility that because the US has not so far tried to deport Yonatan, it is not enforcing immigration law on him, and he is therefore not obligated by DMD to self deport.

But this conclusion would be incorrect, for two reasons. First, it is not clear that R, Cohen intended to go so far as to say that if the government chooses not to enforce a law on an **individual**, that individual is not bound to obey it. Also, perhaps the US is simply unaware of Yonatan's presence, and would deport him immediately if it became aware.

3) In Choshen Mishpat 369:8, Mechaber writes:

> The general principle of the matter is:
>
> > Any *din* that the person with authority legislates for all, rather than for an individual alone, is not robbery; but anytime (the person with authority) takes from a specific individual, not in accordance with a publicly known law etc' – is robbery.

RAMO adds:

> > If the king made a law for those of one craft, e.g. he made a law for usurers – some say that we do not include this within DMD, since it is not legislated for all.

From this it appears that DMD gives authority only to laws that apply equally to all. It seems to me that US immigration and customs law are not equally applied in the necessary sense, because their enforcement is affected by racism. (For the facts of racism in the enforcement of these laws see https://projects.iq.harvard.edu/files/deib-explorer/files/aranda_and_vaquera.pdf.) Because the enforcement of both immigration and customs is harsher for nonwhites than for whites, DMD does not apply to them, and it follows that Yonatan is not halakhically obligated to self-deport.

RAMO introduces this position as "some say," but Rabbi Cohen writes:

> > Although RAMO wrote this in the name of "Some say," he brought no conflicting position, and his meaning is that it is the consensus halakhah.

This seems correct to me. Moreover, even if RAMO's statement regarding crafts cannot be generalized to other subsections of society, let alone to individuals, one can rely on Mechaber's formulation that only "a *din* that the person with authority legislates for all" is included within DMD, since the Mechaber wrote this as his own position.

One could challenge this by saying that despite the racist enforcement of immigration and customs law, these laws are not **written** in a form that explicitly discriminates, and it is the written form that matters for DMD. These laws as written don't relate to race at all, and therefore, they can be considered 'laws that apply equally to all' and included within DMD. After all, the language of Mechaber is "Any *din* that the person with authority legislates for all," and not "any *din* that the person with authority enforces in a manner completely equal for all."

We can reply that in Mechaber's time there was no clear distinction between the legislative and executive arms of government. This distinction is a type of Separation of Powers, and the idea of separation of powers is the creative contribution of Montesquieu, who lived after Mechaber. Therefore, the law as written, executed, and enforced are all 'law' in the framework of Mechaber, and the unequal enforcement of US Immigration and Customs law suffices to exclude it from DMD.

4) RAMO (cited above) writes in 369:11 that:

> > We don't say DMD except with regard to matters that provide the king with a benefit or that perfect things for the populace.

I wrote above that we should not exclude ideological laws from DMD on the basis of this RAMO, because we cannot know the motivations of any particular legislator. The same logic indicates that when RAMO writes "perfects things for the populace," he means to judge not the intent of the legislator but rather the effect of the legislation. This also fits well with his language, which speaks of effect rather than intent.

But US Immigration and Customs law does not lead to good for the citizenry of the US. On the contrary, undocumented aliens, who enter the US illegally, cause economic growth. For the facts on this, see https://www.unidosus.org/issues/immigration/resources/facts and https://phys.org/news/2020-05-economic-benefits-illegal-immigration-outweigh.html.

If you were to claim that they are to perfect things for the populace and profit the US, because the present situation benefits the US, we can respond that the proper criterion is not whether they have a positive

impact currently, but rather whether they would have a positive impact and perfect things for the populace **if everyone were to follow them consistently**. It's true that the partial enforcement that the US currently engages in leads to economic growth, but universally effective enforcement would be economically damaging, Therefore, these laws should not be considered as "perfecting things for the populace. Therefore, they are not included within DMD.

On the basis of these four arguments, I conclude that Yonatan need not self-deport.

Teshuvah - Zack Orenshein

Dear Yonatan, Ms. Wood, and Mr. Ethahar,

I am sorry to hear that you are in such a difficult situation. I recognize that this is a decision of enormous consequence for each of you. Please be assured that I have thought long and hard about the factors involved before reaching my conclusion as to the halakhically proper course of action.

Following secular law is a serious and far-reaching Jewish obligation. While the Talmudic *phrase dina demalkhuta dina* ("the law of the government is law', or "DMD") can be interpreted as referring exclusively to taxation, some of the most prominent voices in Jewish law over the past few centuries have clarified that Jewish law obligates Jews to follow various other types of secular law that enhance society, including copyright laws, traffic laws, sanitation laws, and many others.[3]

There are at least two reasons for this. First, government policy can elevate a society in ways that are more than the sum of individual choices. That's what allows for our modern day infrastructure, economy, and general sense of security. This is why the Torah legitimizes the power of kings. Some leading rabbis went so far as obligating paying taxes fully even when Jews were being taxed more than those around them.

Second, the Torah may have a general interest in encouraging respect for human authority as a model for our relationship with God. If people accept government authority only when they fully agree with its policy, they run the risk of relating to God in a similar way. A relationship with God requires loyalty even when it is difficult and even when the law is hard to understand.

This may also be a reason for the Divine command to honor parents. In the tablets given to Moshe at Har Sinai, honoring parents is grouped with the laws between people and God, not in the interpersonal laws such as "Don't murder."[4] This seems to teach that in order to properly relate to God's authority, people must relate to human authority with respect. As the Talmud says explicitly, "Scripture equates the honor of one's father and mother to the honor of God."[5] If we appreciate that there is a significant gap between ourselves and our parents, then we can better appreciate the gap between ourselves and God as well.

If the approach of our people towards secular law is to follow only when it makes perfect sense to us and is of a certain level of convenience, then I think that demeanor will improperly color our attitude towards God. I see it directly leading to overconfidence in thinking about how our current understanding of the world should influence the practice of traditional Judaism. Therefore, we should think long and hard before disobeying the government in any way and we should be passionate about following the law even at a personal cost.

However, our obedience to human authority cannot be allowed to compromise our obedience to Divine authority. For example, a child is not supposed to obey a parent when the parent's demand would compromise the child's observance of another Jewish law. Similarly, secular law is not binding when it contradicts a Jewish law.[6] Throughout our history, Jews have risked their lives to defy governments that banned circumcision, Shabbat observance, and the like. Following authority is only a value if it can claim some sort of Godly semblance.[7]

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[3] See התעוררות תשובה ד:כד and Rav Asher Weiss "וישב ממנו שבי': דינר דמלכותא דינא"

[4] רמב"ן שמות כ:יב

[5] קדושין ל:

[6] ש"ך על שולחן ערוך חושן משפט הלכות גניבה סימן שנו סעיף ז ס"ק י: "דלא אמרינן דינא דמלכותא מה שהוא נגד דין תורתינו";
התעוררות תשובה ד:כד: "ונראה הגם אם חק המלכות נגד דין התורה - אין אנו פוסקים דינא דמלכותא."
Also see רשבא as cited by טור חושן משפט סימן כו, where he says regarding following secular law when it contradicts Torah law:
נ"ל דאסור לפי שהוא מחקה את העכו"ם וזהו שהזהירה התורה.

[7] Although the Rambam rules in Hilkhot Melakhim Chapter 3 that the king cannot tell people it is forbidden to do a mitzvah, the Rambam also rules there that the king himself can do severe issurim such as killing. He also says that the king can tell an individual to go to a specific place, which seems to contradict my argument that deporting Yonatan would violate לא תגנוב. However, this allowance seems to be limited by their logic which the Rambam provides. He says the king can do these things for the purposes of: "לְתַקֵּן הָעוֹלָם כְּפִי מַה שֶּׁהַשָּׁעָה צְרִיכָה (to improve the world according to what the time requires) and "לְהָטִיל אֵימָה וּלְשַׁבֵּר יַד רִשְׁעֵי הָעוֹלָם (to instill fear and the break the hand of the wicked people of the world.)" While these would both apply to many other cases of deportation and incarceration, neither goal is accomplished by deporting Yonatan, and thus the government should not have the right to do so.

Human authority also cannot overstep its proper bounds. For example, Jewish law understands that parents can be abusive. There are limits to how far a parent can go in demanding respect from a child. The same logic applies to governmental authority.

I believe it is clear that in our case, we should assist Yonatan in evading the law until his status is properly settled. Following the law would cause him to leave his home against his wishes and force him to live in a specific alternative location. That is tantamount to kidnapping and is absolutely prohibited according to Torah law.[8] It is thus likely that we do not view such a law as within the proper sphere of government. Even if government has a right to make this law, I am confident that we do not have an obligation to obey it with regard to Yonatan. Furthermore, if someone is kidnapped, there is a Jewish obligation to save that person.[9] We must therefore do everything we can to prevent Yonatan from being deported by the government, even by means of obtaining a fake ID for him (so long as it is obtained in a way which does not harm others or put Yonatan at greater risk if he is caught).[10]

Yonatan's case should be distinguished utterly from the government's duty to imprison or deport a person who is deemed a threat to society. In such cases, Jewish law would obligate us to support the government in constraining that person's ability to harm others. This would legitimate methods such as imprisonment, deportation, and even killing if necessary to protect the lives of innocent people,[11] or to otherwise improve society.[12]

However, Yonatan is not threatening anyone by living here, nor are people in similar circumstances a threat. Nobody would be made safer by their deportation, and such action would not obviously contribute

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This is reinforced by Meyuchas LiRitva's formulation that DMD applies only to laws that were "accepted as the law of kings from the first kings." This seems to mean that a law has to have a certain level of universal acceptance for Jewish law to give it weight. The specific law which concerns us now is a fluke of the system and it would likely seem absurd to most of the world. Thus, it would not be binding even though other cases of deportation would.

[8] The law of kidnapping (Lo Tignov) can be violated even without a sale of the victim. This is clear in the Rambam who presents it as a prohibition separate from that of selling a person:

כל הגונב נפש מישראל, עובר בלא תעשה: שנאמר "לא תגנוב" (שמות כ:יבֵדברים ה:טז). פסוק זה, האמור בעשרת הדברים, הוא אזהרה לגונב נפשות. וכן המוכרו - עובר בלא תעשה, שזה בכלל "לא יימכרו ממכרת עבד" (ויקרא כה:מב). ואין לוקין על שני לאוין אלו, מפני שהוא לאו שניתן לאזהרת מיתת בית דין, שנאמר: "כי ימצא איש גונב נפש" (דברים כד:ז), ומיתתו בחנק.

[9] Rambam in Mishneh Torah Matnot Aniyim 8:13 teaches that this commandment applies even if the captive's life is not obviously in danger

פַּעַם רִאשׁוֹנָה וּשְׁנִיָּה - מִצְוָה לִפְדּוֹתָן; שְׁלִישִׁית - אֵין פּוֹדִין אוֹתָן, אֲבָל פּוֹדִין אֶת הַבָּנִים לְאַחַר מִיתַת אֲבִיהֶן.
וְאִם בִּקְּשׁוּהוּ לְהָרְגוֹ - פּוֹדִין אוֹתוֹ מִיָּדָם אֲפִלּוּ אַחַר כַּמָּה פְּעָמִים.

However, it seems that this mitzvah classically applied in circumstances where at least the captive's quality of life would be severely compromised, such as when their captors had complete control over the clothes they wore and the food they ate. Therefore, I do not think we should view Yonatan's situation as a formal mitzvah of pidyon shivuyim. However, we should rather learn from pidyon shivuyim that Jewish Law expects us to help fellow Jews avoid being taken away against their will. We should feel a responsibility to help members of our community in those kinds of situations. Following the law is an important value, but so is protecting the autonomy and quality of life of others.

[10] While Rav Sheishet in the Talmud Tractate Bava Metziah 73b implies that kings own their citizens as if they were slaves, this does not seem to give the government the right to deport people who do not pose a threat to society. The law of servants in the Shulchan Aruch Yoreh Deah 267:80 states that slaves who are sold to non Jews are automatically considered free.

הַמּוֹכֵר עַבְדּוֹ לְעוֹבֵד כּוֹכָבִים אוֹ לְגֵר תּוֹשָׁב - יֵצֵא לְחֵרוּת, שֶׁאִם בָּרַח מֵהַגּוֹי - אֵין רַבּוֹ יָכוֹל לְהִשְׁתַּעְבֵּד בּוֹ עוֹד/ וְאִם לֹא בָּרַח, קוֹנְסִים אֶת הָאָדוֹן לְפַדּוֹתוֹ עַד עֲשָׂרָה בְּדָמָיו וְלִכְתֹּב לוֹ גֵּט שִׁחְרוּר לְהַתִּירוֹ בְּבַת חוֹרִין.

Therefore, even for the Ritva who considers the king as actually owning the people of his land as slaves, it seems that deportation of a person to a foreign government would obligate the Jewish community to intervene.

Furthermore, Meyuchas LiRitva says that the government's right to enslave one person to another comes from the fact that it is considered generally reasonable for a king to do that, for example where someone failed to pay their taxes. That criterion is not met here. The Meiri similarly seems to view it this way, since he describes this interaction as similar to that of a boss and employee ("ולהשתעבד בהם עד שיפרעו מהם מצד שכירות מלאכתם") rather than owner and slave. This is much less compatible with a claim that the government owns people to the extent that it can deport them without necessity.

[11] סנהדרין עג. says that one may kill someone who is a threat to another's life. Does the government also have the right to incarcerate someone for non-violent crimes? The Talmud discusses multiple cases in which the government takes money as taxes for non-essential matters and says that those are considered part of DMD. This could be either because the government is considered to own the land to the extent that all property rights of residents within its jurisdiction are conditional, or else because the government has the right to raise funds in order to implement laws which will benefit the nation. On the one hand, the government's ownership might stop at land use and not give it control of people's non-economic behavior. However, Rav Asher Weiss and others believe that DMD applies to areas of life which are unrelated to money, such as sanitation and traffic laws. This suggests that government's powers extend beyond the economic, in which cases it should have have the ability to incarcerate people as well for the benefit of society. Immigration law would thus often be binding, as it can serve constructive purposed and in some case may even be a matter of saving lives. However, it would be very difficult to argue that incarcerating Yonatan is in any way constructive, and thus the government has no right to override the Torah law of kidnapping to do so (as per footnotes 6 and 7.)

[12] See footnote 7

to the betterment of the world. Therefore, the government's law mandating Yonatan to leave would be considered kidnapping, and Jewish law demands that we go to great lengths to allow him to stay, even if that means defying secular law.

Regardless, it should be clear that we have no obligation to turn Yonatan in. The law of *mesirah*,[13] namely that a Jew may not turn a fellow Jew over to a government for punishment, does not apply to Jews who pose a threat to others because of their crimes, such as abusers.

However, Yonatan poses no such danger.[14]

The issue of Chillul Hashem should also discourage us from reporting Yonatan. I think that a Chillul Hashem would come as a result of actively bringing this case to the attention of the government. Whereas the standard case where Chillul Hashem interacts with DMD is when we hide relevant information from tax collectors, the opposite is true when the consequence of a law seems immoral to the public. If people hear that Jewish law made an adopted young man kick himself out of the country because his parents missed some paperwork when adopting him, that would make Jewish law seem absurd and Jews immoral. Thus, even Yonatan leaving the country on his own accord for the purpose of adhering to the secular law may be prohibited, since his reason for leaving may become known and cause Jewish law to be less respected.[15]

Following the law of the land generally is a prominent Jewish value which helps us develop a proper attitude towards authority. However, we are not supposed to follow secular law when that would compromise some of our other values and laws. In this case, Jewish law against kidnapping, our value of protecting a harmless fellow Jew, and the importance of avoiding Chillul Hashem supersedes that of obeying the government. Therefore, while we should generally be strict about following the authority of the government, Yonatan should do what he can to remain under the radar, even if that means technically breaking the law.[16]

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[13] The Rambam formulates this law as follows:
אָסוּר לְמָסֹר הָאָדָם בְּיַד עַכּוּ"ם, בֵּין בְּגוּפוֹ בֵּין בְּמָמוֹנוֹ, וְאֲפִלּוּ הָיָה רָשָׁע וּבַעַל עֲבֵרוֹת, וַאֲפִלּוּ הָיָה מֻצָּר לוֹ וּמְצָעֲרוֹ.
וְכָל הַמּוֹסְרוֹ בְּיַד עַכּוּ"ם, בֵּין בְּגוּפוֹ בֵּין בְּמָמוֹנוֹ - אֵין לוֹ חֵלֶק לָעוֹלָם הַבָּא.
Our case might seem one of מסירה בגופו. But I suggest that Rambam's description of *mesirah* relates to cases where imprisonment is life-threatening.
Nonetheless, this law teaches us that we should be reluctant to hand over to the authorities a Jew who is not a menace to society. Therefore, since there is already room to say that this secular law is not considered binding from a Torah standpoint, the law of mesirah is a further ground for helping Yonatan avoid immigration enforcement.
This application of the law of mesirah seems to accord with the parameters set by Rav Herschel Schachter: "Even if one is guilty of a crime and deserves a punishment according to the laws of the land, but due to anti-Semitic attitudes he will probably suffer more than if he were a non-Jew; or, the (state) prison conditions are such that he will suffer at the hands of the other inmates (or at the hands of the guards) in a manner that is not prescribed by law, then turning the offender in would constitute *mesirah*, since his added suffering will be *shelo kadin*. However, *mesirah* is permitted in situations where one is a public menace (see Shach to *Choshen Mishpat* 388, 59), or if one is physically or psychologically harming another individual (for example, in instances of sexual abuse of children, students, campers etc., or spousal abuse) (see Shach to *Choshen Mishpat ibid*, 45)."
I think that the difficulties involved in being deported to another country would constitute suffering "shelo kadin." Certainly, Yonatan is not a menace to society. Therefore, according to Rav Schachter, reporting him to the government to be deported could be *mesirah*.
This also would fit with Rabbi Michael J. Broyde's position that: "The basic central message of Jewish law is that an ethical person involved in incarcerating a criminal — witnesses, prosecutors and judges — bears an ethical duty to ensure that the actual punishment fits the actual crime which the convict is guilty of."
[14] The law of mesirah should have this effect even if my argument about לא תגנוב is wrong and the law which is affecting Yonatan is legitimate. This is because the prohibition of mesirah seems to have the following logic. On a national scale, it is important that laws are enforced in a blanket manner even though certain individuals will be punished unjustly. However, the Jewish community can keep better watch over itself to better ensure that the law is enforced in general while individual cases which do not benefit society to be punished are kept away from law enforcement. This might be bad public policy for a whole nation, but it can be expected of a tightly knit community. Thus, we should save Yonatan from punishment even though the law in general might accomplish a positive goal of incentivizing filing for citizenship properly.
[15] The concern of preventing Chillul Hashem should also extend the prohibition of mesirah to non-Jews who commit crimes, but do not deserve the punishment they would receive. If a Jew informed on a non-Jew in such a case, it would similarly make Jews seem cruel. Thus, if there was a non-Jew in Yonatan's situation, I believe reporting such a person to the authorities would constitute a Chillul Hashem and would be prohibited as mesirah.
I think we can even say that if the punishment for a crime is justified enough that we should turn in a non-Jewish criminal, then it would similarly be required to override mesirah and turn in a Jew who committed such a crime.
[16] While mesirah only prohibits others from causing Yonatan to be deported, I believe it would even be inappropriate for Yonatan to decide on his own to leave the country and apply for citizenship legally, even within the possibility that Jewish law considers this

I hope everything turns out well and please reach out if you have any further concerns,

Zack Orenshein

type of deportation as legitimate government action. Yonatan's decision to move outside of the United States on principle could arouse the hatred of various populations who are fed up with this law due to the difficulties it causes them. Yonatan might be able to pull it off. However, for many, the prospect of being forced out of the country would have severe consequences for their lives and the lives of their families. If such people hear that the Jews are taking this noble stance and leaving the country on principle so that they can apply for immigration legally, that might cause serious animosity against the Jewish community. Furthermore, people might start viewing Jews as callous for not being sensitive to the plight of the many people whose lives are made difficult because of these laws.

It seems to follow that the consideration of Chillul Hashem makes an argument that in our case, civil disobedience is a Jewish obligation. The classic cases of Chillul Hashem in discussions of Dina Dimalkhuta Dina and Mesirah involve making Jews look bad by disobeying the law. However, in a democratic country where the law is viewed as essentially coming from its citizens, the act of obedience to a law which hurts many people in the country seems to be a bigger problem of Chillul Hashem. Thus, just as a tax takes on a force like Dina Dimalkhuta when it would make the Jews look bad not to pay it, so too, we may be obligated to speak up in the face of unjust laws in a way which makes it obvious to the world that Jews do not agree with such laws. In general, Jewish law grants great weight to Kiddush and Chillul Hashem over that of many other considerations. Thus, I think it is more important for Yonatan to avoid Chillul Hashem among the public than it would be for him to model loyalty to the government even if this particular secular law is legitimate in the eyes of Jewish law.

Teshuvah - Sara Schatz

שרה שץ
קיץ תש״פ

Dear Yonatan Yosef, Ms. Wood, and Mr. Hadin-Ethatar,

Thank you for reaching out to and trusting me with this important question. Yonatan Yosef, I fondly remember your strong debating skills in 11th grade Talmud, and it gives me much *nachat* as a Rebbe to hear how much you retained from that year. It also gives me much pain to hear what you are currently going through.

All three of you raised excellent and relevant considerations. *Be'ezrat Hashem*, I hope to clarify all your thoughtful points and reach the conclusion that is best for Yonatan Yosef's well-being and simultaneously under *halachic* authority.

Introduction: The Basics of *Dina d'Malchuta Dina*

Let's begin by analyzing a concept that Y.Y. quoted in the context of speeding.

The Talmud in several places (*Bava Kamma* 113b, *Nedarim 20b,* and more,) quotes the Amora Shmuel as stating *"dina d'malchuta dina"* (DMD). In these contexts, this principle legitimizes government enforcement primarily in tax-related scenarios, and also recognizes evidentiary *shtarot* (legal documents) produced by non-Jewish courts. Many foundational *Rishonim*, including the Rambam and the Shulchan Aruch, contend further that not paying taxes violates the Torah prohibition of "*lo tigzol*," "do not rob" (Vayikra 19:13). This makes clear that not only does government have the right to enforce those taxes, we have a Torah obligation to pay them. Understanding the logical basis for DMD may clarify that Torah obligations apply to other areas of secular law as well.

Rav Asher Weiss shlita organizes the great debate amongst *rishonim* as to the basis for DMD into two streams:

1. **Rashba/Ran** - we keep *din malchut* because the king (or in our case, the federal government) owns the land, and thus makes the rules. If one is not following the rules, the king has every right to expel someone from of his land.

2. **Rashbam/Terumat HaDeshen/Rambam** - we keep *din malchut* because we have consented to the government's laws.

In the United States, we clearly follow the second approach.

However, as both Y.Y. and Mr. Hadin-Ethahar proposed, the Torah also obligates us to protest against moral misdeeds. We learn on *Shabbat* 54b that anyone who can protest and does not is liable. However, when the law is primarily for the purpose of *takanat hamedinah*, the benefits of society, then we must absolutely keep the law. Rav Asher Weiss uses a specific example from RAMO to include zoning laws, security laws, and more.

Now that we have the basics down, we are left with two questions:

1. Does this specific immigration law fall under both *takanat hamedinah* and the Rashbam's 'implied consent' theory?

2. Is false identification *halachically* permissible in general?

From what I understand about this law, I have a hard time saying that it is considered "*takanat hamedinah*"; rather, the Child Citizenship Act of 2001, which was intended to prevent and correct situations such as yours, is much more *takanat hamedinah*.

However, Rashbam's 'implied consent' thesis is a compelling argument to state that in normal circumstances, you cannot simply lie to the government and administer false papers. A democratically elected government enacted this rule, and therefore it has validity**.** Such deceptive behavior may also violate it is *genevat da'at, Chilul Hashem*, and other prohibitions beyond the scope of *dina d'malchuta*.

Therefore, the only ground for permitting YY to obtain and use false identification would be if we considered your situation to be one of "*pikuach nefesh*." Sanhedrin 74a identifies three primary exceptions to *pikuach nefesh*: idol worship, forbidden relations, and murder. While you are no under a specific and immediate threat, the Chazon Ish rules that we generally err towards the side of caution in the case of epidemic or war, and perhaps we can regard deportation Colombia as the equivalent because of its high violent crime rates, especially as you would be an utter stranger there.

However, the Shulchan Aruch rules that though one may damage property or steal to save one's life, one must compensate the owners. If your deceptions cause an individual or the government losses, you must do your best to compensate them for those losses. However, *Shulchan Aruch HaRav* states that the compensation must be paid "whenever he will have the capacity to do so," and *Shut Maharam Schick* notes that one is **allowed** to steal to save one's life even if one may never be able to pay the compensation.

Regardless, **you should wait to obtain false papers until there is absolutely no other option**. From what I understand, you just found out about your status. There are honest way to live in the US as an undocumented resident; for example, you can obtain a special driver's license. If you continue to be conscientiously law-abiding, it seems highly unlikely that you will be deported anytime soon. In my opinion, you are not yet in a status that can be considered *safeik pikuach nefesh*.

Thank you again for trusting me about this important issue. If you have any further concerns, or simply just want to chat, you know how to contact me.

Best regards,
Your 11th grade Rebbe

Teshuvah - Batsheva Leah Weinstein

Dear Yonatan,

Thank you for reaching out to me. I cannot begin to express the pain that I felt for you while reading your and your mother's letters. Of course I remember you well from high school, and I remember your passion and love for America. It must have been a terrible shock for you to discover this. It is a testament to your religious caliber that you decided to ask a *shayla* about the matter instead of just doing what the lawyers tell you to do. *Dina demalchusa dina* is an issue that, unfortunately, many people often overlook. I am humbled that you chose to share your struggles with me. I ask that you share my response with your parents. I will *b'ezras* Hashem answer all of you together, addressing specific points that you or your parents made individually.

Dina demalchusa dina (henceforth DMD) is among the Torah concepts that have taken on new meaning in modern times. Throughout most of our history, Jews were considered second class citizens wherever we lived. We lived mostly mostly in semi-autonomous communities and dealt with the government as individuals only when necessary. We were taxed unfairly and in other ways treated differently, but were also mostly left to our own devices within our close knit, insular communities. DMD was a concession. It was a *halacha* that required obedience to certain government rules even when the government hated us, tried its best to keep us downtrodden, or perhaps even to destroy us.

In the United States, Jews are treated as equal citizens and are politically integrated into general society. We regard most laws that the American government makes as benefitting not only society in general, but also us as Jews in particular.

The American and Israeli poskim of our day have revisited the *sugya* of DMD and offered new and often completely opposed understandings. The original *sugya* is not in any way clear about how *halacha* would for example regarding speeding laws, let alone immigration laws. Modern interpreters have stretched the sources every which way and have reached opposite extremes in their understanding of the *sugya*.

I have decided, therefore, not to start with contemporary authorities and go backwards, but rather to begin from the original *sugya*, the Gemaras, Rishonim, and early Acharonim, and engage in an honest assessment of how what they say can answer your question. I do not claim to be anywhere close to an expert on the topic; this is but one woman's attempt to honestly learn the *sugya*, without biases, and understand what it means for your case.

If I understand correctly, your question has two parts. The first is if you are obligated to turn yourself in to the government as an undocumented citizen. The second is if you are allowed to purchase fake documents that say you are a citizen.

Your first question depends on four core issues:

1. Does the rule of DMD apply in America?
2. Are you, as a non citizen, obligated by DMD to obey government laws?
3. Does DMD give the government the authority to enforce laws unrelated to monetary matters?
4. Does DMD obligate citizens to actively obey laws, or rather only give the government the right to enforce them? Or in other words, does DMD allow for "civil disobedience" (a term which we will have to define later)?

The Talmud cites DMD in four places, each time in the name of the *Amora* Shmuel. Since it is not challenged, the *poskim* regard it as a halachically binding principle.

The four in short:

1. Nedarim 28a - DMD means that certain government taxes are valid, and it forbids lying to someone collecting these taxes, unless they are collecting an unlimited amount and/or are not government-authorized collectors.

2. Bava Kama 119a - adds a third modifier to the above case - one may to a non-Jewish tax collector (on the assumption that his assessment of your liability will be unjust or corrupt, since he is not part of your community.). The Gemara then brings a number of other examples relating to the king's right to tax, stating that a tax that the king, or one of his messengers, collects, is not considered theft, at least to the extent that a Jew who then took possession of the tax is not considered to be in possession of stolen property.

3. Bava Basra 54b – DMD gives halakhic validity to the government's regulation of real estate sales, according to Abaye. Rav Yosef seems to disagree.

4. Gittin 10b – DMD validates documents produced by government courts in financial matters.

Why should the government have a right to tax? The two main schools of thought are the Ran and Rashba on one hand, and Rashbam and Rambam on the other. The latter position is codified in Shulchan Arukh.

The Ran to Nedarim (op cit), writes as follows:

וכתבו בתוספות
דדוקא במלכי עובדי כוכבים אמר דדינא דמלכותא דינא, מפני שהארץ שלו ויכול לומר להם 'אם לא תעשו מצותי אגרש אתכם מן הארץ',
אבל במלכי ישראל – לא, לפי שא"י כל ישראל שותפין בה

He attributes to Tosfos the position that DMD works in non Jewish lands because "the land is the king's," and thus the king can say to any of the people living in his land: "Do what I tell you to, or if you don't, I will expel you from the land." The Ran's model of DMD is a simple ownership law. If you are living on my land, I can regulate certain things that you do. If you do not wish to listen to me, you may leave the land. The relationship between a government and its people is analogous to a private landlord-tenant relationship.

Rashbam to Bava Kama writes:

כל מסים וארנוניות ומנהגות של משפטי מלכים שרגילים להנהיג במלכותם - דינא הוא
שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו
והלכך דין גמור הוא, ואין למחזיק בממון חבירו ע"פ חוק המלך הנהוג בעיר משום גזל

All taxes etc. set in the normal way of kings are law because the people willingly accept those laws. Therefore, anyone who takes possession of his friend's money in accordance with such laws is not considered to have stolen it. In short, this is a theory of consent.

The Rambam proposes the same idea in slightly different language:

שהרי הסכימו עליו בני אותה הארץ וסמכה דעתן שהוא אדוניהם והם לו עבדים

When the king takes taxes, he is not stealing because all the people who live in the land agreed that he is their master and they are his slaves - thus they agreed to give him money if he demands it.

The Shulchan Arukh *paskens* like the Rambam and uses the same language.

We will treat all these positions as halakhically significant. In accordance with normative halakhic practice, if we have reached a clear conclusion based on the Rambam and Shulchan Aruch, and are inconclusive regarding the Ran and Rashba, we will rely on the Shulchan Arukh.

Let us now return to our four main issues.

1. Does the rule of DMD apply in America?

The Rishonim were discussing monarchies. A king can collect taxes because everyone agrees that he is their master, or because the king owns the land and can thus expel people who disobey him. How do these explanations apply to modern day democracies?

I suggest that according to both opinions, DMD would apply in the United States of America. Regarding the consent theory, American citizens clearly accept the authority of their government and its laws. Regarding the expulsion theory, as a general rule the American government cannot expel citizens. They can, however, force one to sell them land through a law called eminent domain. Thus the government does to some extent own the land.

I acknowledge that this explanation is somewhat of a stretch, and I will therefore explain what I believe is my underlying rationale. The Mishnah in Avos says that we should *daven* for the welfare of the government because "אלמלא מוראה של מלכות איש את רעהו חיים בלעו" - if not for the fear of government, each man would devour his friend. Without government there would be no order in the world. Having an authoritative government is in the best interest of all people of a land who wish to live a peaceful life. I cannot imagine that any of the Rishonim would say that any form of government is per se not authoritative. Therefore, even though I recognize one can explain the Ran so that DMD doesn't apply), I believe it is more honest to explain it in the way that I did. Regardless, I think that certainly according to the consent theory DMD would apply in America.

2. Are you, Yonatan, as a non citizen, obligated under the principle of DMD to obey government laws?

This is a complicated question, as the concept of citizenship does not really exist in *halacha*. However, we see in practice that even non-citizens are expected to follow the law of the country they are in. Furthermore, in the times of the Gemara and Rishonim Jews were never citizens, and yet DMD still applied. Thus the law of DMD seems to apply to residents of a land and not only to those with official citizenship.

3. Does DMD give the government the right to make laws unrelated to monetary matters?

Based solely on the four Gemaras that explicitly mention DMD, governments do not have the right to make, nor do we have the obligation to obey, any laws outside of the realm of transferring money from one person to the government, such as taxes. The Rambam puts his discussion of DMD in *hilchos Gezeilah V'Aveida*, the laws of theft, because its significance is only that it requires one to pay taxes in order to avoid being a thief (*gazlan*).

However, the scope of DMD has slowly expanded over the years. The Terumas Hadeshen validates taxes that are not strictly money (such as quartering soldiers). The Rama says that we follow government law whenever it is "להנאת המלך" to benefit the king, or "לתקנת בני המדינה," for the benefit of the country as a whole. These categories are quite vague, but many later Acharonim used them to expand DMD well beyond the realm of money. The Chasam Sofer, for example, establishes the government's appointment of a rabbi as binding on the community, meaning that they are obligated to pay his salary and provide the perks of office, even if the community does not want him to serve as the rabbi.

The Rama's reasoning does not give us detailed instructions for how to *pasken* in future situations. What exactly does "for the benefit of the people of the country" mean? Rama's comment related specifically to a law of the land that says that a lender must wait a year before selling his collateral, instead of only 30 days which is the Torah law. This benefits the borrowers but not the lenders! How did he decide that overall it is a benefit to the entire society? Does the government's making a law establish it as "beneficial to society?" What about laws that some of the government disagrees with? It is therefore difficult to know how and when to apply DMD once we leave the realm of monetary matters. The later Acharonim interpret it every which way.

American immigration law is currently the subject of heated political dispute. However, I think everyone would agree that having some form of immigration laws is vital to maintaining stability and security in the country. There are, however, arguments regarding the economic impact of illegal immigrants. Therefore on both the *halachic* front and the *metzius* front I feel it necessary to leave this question in a *tzarich iyun*. The government may or may not have the *halachic* ability to make binding immigration laws.

4. Does DMD create an obligation on the citizen to actively obey the law, or only give the government the right to make the law? Or in other words, does DMD allow for "civil disobedience?"

DMD is a tool to validate government actions. Any obligations resulting from the government's actions are binding. However, DMD does not seem to create active obligations.

In the realm of taxes, it was very easy to answer the question of what exactly DMD does. DMD gives the king the right to take a set amount of money. By his word, the money becomes legally his. By withholding this money, the person would be stealing. Thus DMD indirectly imposes an obligation on the citizen to pay taxes.

When we extend DMD beyond taxes, this model becomes more difficult to uphold. However, I think that it can still stand. Let us use the case of the Chasam Sofer as our example. The king appointed a certain person as the rabbi of a community. The Chasam Sofer rules that DMD establishes the king's act as valid. The person has therefore become the rabbi. This then places an obligation on the people to give him the respect and salary that they would to any rabbi. To state this idea more generally, DMD establishes certain acts of the king as valid. These acts often have ramifications that place obligations on those living in the country. These obligations are then binding.

Let us now examine the law regarding illegal immigrants to determine its specific ramifications. The law states that one is not allowed to illegally immigrate to the United States. What happens once one has already done so is unclear to me. All that the law has done is establish you as an illegal immigrant. Specifically, DMD enables the government to create immigration laws and establishes them as binding. It is, however, unclear to me exactly what the law does practically. It seems to do no more than establish certain people as being illegal immigrants with no particular ramifications in terms of their obligations to the government.

Therefore, I think that it is *halachically* allowed for you to remain in the United States, as DMD does not require you to leave.

However, there are certain monetary issues that we must take into account. You said that you plan to continue to pay taxes; I believe that this is essential, as not doing so would constitute stealing from the government.

I will now address your second question: are you allowed to purchase false documents claiming that you are a citizen?

Here there are a number of moral issues that come into play aside from DMD. You might on some occasions receive a benefit to which you are not entitled, or receive money under false pretenses. You might violate *geneivas da'as*, causing someone to think something is so when it is not, which Rambam rules applies to both Jews and non Jews. You might unfairly place an employer in a compromised position.

None of this qualifies as civil disobedience. Civil disobedience is publicly showing that you think the government policy is wrong, in hopes of forcing the government to change their laws for the betterment of society as a whole. In this case you would be doing something illegal secretly and for you specifically.

Mrs. Wood, you mentioned that many people in our community hire illegal immigrants and pay them under the table. I recognize that this is true, and it very much upsets me. By doing so people are literally evading taxes, which is stealing from the government and certainly not allowed under DMD.

You also mentioned that this law is immoral. I am not convinced that this matters; the government still has the ability to make the law. The ramifications of the situation might be immoral, but the law itself does not seem to me to be immoral. Every country has a right to protect its boundaries.

Regarding your analogy of immigration to Israel during the Palestinian mandate – I believe there was some halakhic controversy at the time (although not when it became obviously a matter of saving lives), but regardless, living in Israel is itself a *mitzvah* and we do not need to listen to people who tell us to do something against the Torah.

In addition, I think we must consider the issue of *chillul* Hashem. You, Yonatan, represent the Jewish people. To disobey American law in 2020 would cause Jews to be looked upon as dishonest and ingrateful to America.

Were this a life threatening case, perhaps I would rule differently. In this case, however, there are still ways to live. If making *aliyah* is something you've wanted to do, this is a good reason to do so. Assuming that you would like to remain in America, there are paths for you to become a citizen. To become a US citizen you must first have a green card. If you are planning to get married in the near future, you can apply for a green card as the spouse of a US citizen. If not, you can apply as an unmarried child of a U.S. citizen. Alternatively, you can apply to college and then obtain a student visa.

I understand that my answer is probably not the one that you wanted to hear. My heart truly goes out to you. Please be in touch and let me know if I can help you through the process in any way.

Sincerely,
Batsheva Leah Weinstein

Teshuvah - Joshua Skootsky

Joshua Skootsky
Fellow of the Summer Beit Midrash of the Center for Modern Torah Leadership
Rav Aryeh Klapper *shlit"a*, Dean

יהושע סקוטסקי
חבר בית מדרש הקיץ של המכון לתורה מתקדמת ומודרנית,
בנשיאותו של הרב אריה קלאפפער שליט"א

Rashba, Ran, and Or Zarua base the principle *dina demalchuta dina* (DMD) on the ground that the governing authority can say

אם לא תעשו מצותי **אגרש אתכם מן הארץ**
*"If you do not follow my commands, **I will remove you from my lands.**"*[17]

Does this grant a King or government the right to evict anyone from lands that they control? Some believe that right makes might, but we believe "Not by might, not by power, but by My Spirit, sayeth the LORD of Hosts" (Zecharia 4:6).

It is true that a King or government can remove people from their country, in the sense that they possess the might or power to do so. Countries have expelled Jews, or in some cases, the Jews, in the course of human history. Kings and governments have done this. This does not make that right.

The true explanation of the Ran, Rashba, and the Or Zarua is that **all monetary matters related to land** must be paid to the government, such as a head tax for living on the land, and this is justified by explaining that the government has the *halakhically* recognized authority to regulate monetary matters. But there is no obligation to actually leave the land at the command of the King, because such an obligation to follow secular law does not exist as a *halakhic* or religious imperative.

Consider, for example, how *halakha* obligates Jews to pay government taxes. Not only is the government entitled to levy such taxes, Rambam (Gezela 5:11) rules it is **forbidden** for Jews to evade them, and one who evades taxes is a **thief**.

אלא שהוא **עובר** המבריח ממכס זה מפני **שהוא גוזל מנת המלך**

RAMO in Shulchan Arukh CM 569:8 also rules that it is **forbidden** by *halakhah* to evade taxes. The clear *halakhah* is that the government has the right to impose taxes, and also that it is *halakhically* forbidden for us to evade the taxes or cheat the process of paying taxes. As a corollary, there exists a halachic obligation to pay taxes honestly and properly.[18]

But this ***halakhic obligation*** only applies to monetary laws. This is obvious from the codification of Rambam in Zechiya and Matana (Chapter 27), which clearly states:

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[17] Ran to Nedarim 28a; see also Rashba to Nedarim 28a:
ופירשו בשם ה"ר אליעזר דדוקא במלכי אומות העולם אמרו דינא דמלכותא דינא ומשום דמצי לומר להו אם לא תעשו מצוותי אגרש אתכם, שהארץ שלו הוא.
and Or Zarua 447 to Bava Kamma, quoted by Beit Yosef CM 369:
לא אמרינן דדינא דמלכותא **אלא בקרקע ובמשפטים התלויים בקרקעות כגון מכס**, שאומר לא יעמוד אדם בארצו, אם לא יתן מכס, וכדאמר בחזקת הבתים (ב"ב נה,ע"א) דאריסתא דפרסאי עד מ' שנין ואמר נמי דמלכא אמר דיהיב טסקא ליכול ארעא וגם כרגא דאקרקף דגברא, **שאמר לא יהא בארצי אם לא יתן כך, וכך והיינו טעמא דדיניה דינא**, שהארץ שלו הוא ואינו רשאי אדם שיעבור בארצו אם לא כמצוותו" (אור זרוע בב"ק ס' תמז,
וראה גם בב"י חו"מ שסט
ורמ"א שם סעיף ח

[18] cf. Judge Learned Hand: "Anyone may arrange his affairs so that his taxes shall be as low as possible; he is not bound to choose that pattern which best pays the Treasury; there is not even a patriotic duty to increase one's taxes." Gregory v. Helvering, 1934. But Learned Hand was not the last word on the subject, Gregory v. Helvering was decided by the Supreme Court in the other direction. To quote the ruling of the majority delivered by Justice Sutherland,
"Putting aside, then, the question of motive in respect of taxation altogether, and fixing the character of the proceeding by what **actually** occurred, what do we find? Simply an operation having **no business or corporate purpose** -a **mere device** which put on the **form** of a corporate reorganization as a **disguise for concealing its real character**, and the sole object and accomplishment of which was the consummation of a preconceived plan, **not to reorganize a business** or any part of a business, but to transfer a parcel of corporate shares to the petitioner. No doubt, a new and valid corporation was created. But that corporation was **nothing more than a contrivance** to the end last described."

אם דין אותו המלך ומשפטו שלא יזכה בקרקע אלא למי שכותב שטר, או הנותן דמים, וכיוצא בדברים אלו-
עושין כפי משפט המלך: **שכל דיני המלך בממון, על פיהן דנין.**

If the government has a rule that no one should transfer land except to a person who has written them a document, or has given them money, and so forth –
Jewish courts rule in accordance with that stated rule,
for all laws of the king regarding money – we rule on their basis

A Jewish court of law, Beit Din, would have ruled that Jews were obligated to follow the monetary law, such as paying taxes. This fact is the fundamental reason for a *halakhic* imperative to follow "the rules of the king in monetary law," as Rambam puts it, even before such a ruling is issued. It is "obvious" that the monetary customs followed in practice are those established by the government, and monetary law must take into account the expectations of all parties to a transaction.

For example, later *poskim* will rule that although there is no internal halakhic notion of copyright, copyright laws are within government's proper sphere or regulating markets, and therefore Beit Din should enforce the local secular government's laws of copyright if a case came before them. Therefore there is a *chiyuv* to proactively follow these laws, since Beit Din would enforce them as halakhah. See Hit'orerut Teshuva (Rav Shimon Sofer,התעוררות תשובה ד:כד, and also the Beit Yitzchak YD 2:75, שו"ת בית יצחק יורה דעה ב סימן עה) for how **halakhah recognizes and compels obedience to secular copyright law**.

Rambam's codification is a restatement of Shmuel: (Bava Kamma 113a, and Bavli Nedarim 28a) "דינא דמלכותא דינא" "*dina demalchuta dina*."

Throughout the Talmud, **"*Dinim*" refers to monetary law rather than to** Halakhic categories such as *Isur* and *Heter*. For example, "הלכתא כרב באיסורי **וכשמואל בדיני**" (Bavli Bekhorot 49b) means that when Rav and Shmuel disagree, we rule **like Shmuel in monetary matters**, and like Rav when *halakhic* prohibitions are involved, like *isur ve-heter*.

So too Rashbam in his commentary to Bava Batra 54b:

כל מסים וארנוניות ומנהגות של משפטי מלכים **שרגילים להנהיג במלכותם** דינא הוא
שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו
והלכך דין גמור הוא ואין למחזיק בממון חבירו **ע"פ חוק המלך הנהוג בעיר** משום גזל**.**

***All** taxes, land taxes, and customary laws of kings **that are ordinarily promulgated within their kingdoms - are** law,*
since all the inhabitants of the country accept upon themselves the laws of the king and his ordinances,
therefore they are totally lawful, and one who** takes his fellow's property **according to the royal law practiced in that city is not liable** for theft**.

The "customary laws of kings" also include the power of kings to punish, execute, and discipline people who live in their land.

However, Rav Moshe Feinstein explains (HM 2:62) that inheritance law is removed from *dina demalchuta*, as well as damages due to animals (as in Bava Kamma), the laws of Shekheinim, Shluchim, Kiddushin, and Ketubot. See the Rogatchover Gaon's explanation in *Shu"t Tzafenat Paneach 313* that the Torah sees inheritance as about the continuation of the *etzem* of the deceased, not simply money being moved around, even though this is how it looks to the secular government. See also Rav Ovadia Hedayya *zt"l* in Yaskil Avdei CM 6:22.

See also Tashbetz 1:158, who clearly states that **it is impossible to permit something *assur* through *dina demalchuta*, because it only applied to monetary matters**.

<u>שו"ת תשב"ץ חלק א סימן קנח</u>
יש מקום עיון, שאפילו תמצא לומר דדינא דמלכ' דינא הוא בהכי, מ"מ א"א לומר כן בכל ענין, דמילתא פשיטא היא
שבכל דבר שיש בו איסור **א"א לומר דינא דמלכות' דינא להתירו, דבענין ממון הוא**

The Tashbetz cited the pesak of the Rambam, who *paskens* that *Shtarei Matana* from the secular court system aren't effective in being able to transfer money! In fact, it is worthless, like **a shard of broken pottery**!

רמב"ם הלכות הלכות מלווה ולווה פרק כז
וכן שטרי הודאות ומתנות ופשרות ומחילות, שהן בעדים שלהן--אף על פי שיש בהן כל הדברים שמנינו, **הרי הן כחרס**

And this is how we pasken in Shulchan Aruch CM 68. ***So even within monetary law***, we don't automatically extend the penumbra of power and deference that *halakha* definitely extends to taxation.

Since *dina demalchuta dina* can't be totally determinative in monetary law, how can it possibly be expanded to create new *issurim*, when the Torah said, "Do not add to it" (Devarim 4:2).

The upshot is that ***dina demalchuta* does not apply to the topic of illegal immigration**. It's like asking the bowling alley if you can drive your Zamboni to Kansas. There's no application or relevance. The government certainly has the power, potentially, to enforce its laws and its own procedures of who is a citizen and who is a legal resident, but that isn't *dina demalchuta*. It may be prudent to follow the law, or to find a different *modus vivendi*, but no halakhic obligation to follow "the law" as written can be derived without rewriting Shulchan Arukh. Halakhah forbids speeding down a highway with disregard for human life. However, it is not halakhically forbidden to break the speed limit. It may be unwise. If ticketed, you would certainly have a *halakhic* obligation to follow the legal procedure of either paying the fine or contesting it in court. ***Halakhah* does not compel compliance ahead of government enforcement of its own laws** once we leave the realm of monetary laws, unless those laws have separate validity under Torah, for example if they save lives. I don't believe that if you break the speed limit, you should mail in the monetary value of a ticket to your local law enforcement, and such a conclusion would be absurd, although if a halakhic legal theory of *dina demalchuta* is not carefully constructed, it could lead to exactly that absurd conclusion.

We cannot hand Jews over to a secular court to be judged for things that the Torah has no concept of as a crime, such as being an illegal immigrant. Moreover, the Torah tells us not to oppress the stranger, the *ger*, who is not like the *ezrach*, the citizen. So laws that oppress people who are in a country without citizenship are against what is explicitly written in the Torah, and ipso facto invalid.

Furthermore, as an "illegal immigrant," it is not clear to me what laws you violate by simply being here. It may be a violation of the civil law code, and in theory the government could choose to enforce that law by deporting such a person. If it were a felony, it could be construed as theoretically a crime against the public safety, and perhaps *halakha* or good judgement would treat the crime differently.

I contend that there is nothing against *halakha* about trying to live a normal life wherever you find yourself. This seems to be a bit surprising as a claim. Does *halakha* recognize "normal" as a value, and if so, in what areas? I would like to provide detailed evidence that *halakha* answers "yes," and that the evidence directly related to economic activity ought to quiet any doubts.

The Gemara in Bava Metzia 112a notes that people endanger themselves to earn a living, climbing ramps and trees to engage in "normal" agricultural work.

(דברים כד, טו) "ואליו הוא נושא את נפשו"
מפני מה עלה זה בכבש ונתלה באילן ומסר את עצמו למיתה? לא על שכרו!?

"Why does the verse say, 'his soul is offered for his wages?' Why does this worker go up a ramp, climb a tree, and offer himself up to death? Is it not to recieve payment?" The Gemara accepts that workers take on real risks while engaging in economic activity. These are the risks of normal working conditions and economic life, not unsafe work environments or hazardous risks. Someone might say it is forbidden to accept reasonable risks, but the Gemara accepts that normal economic life depends on people making and accepting those calculations.

Shulchan Aruch 248:4 notes that for three days before Shabbat, it is forbidden to join a camel caravan that will necessarily violate Shabbat as part of the *pikuach nefesh* situation of being in a desert. So it's

ordinarily supposed to be avoided being in a situation where you will end up permitted to break Shabbat. But RAMO notes:

יש אומרים שכל מקום שאדם הולך לסחורה או לראות פני חבירו חשוב הכל דבר מצוה

Some say that in any case that a person is going for business, or to see his fellow – all these are considered "mitzvah activity," (and therefore it is permitted to join a camel caravan even within three days of Shabbat)

So normal participation in economic life is a *dvar mitzvah*, and there are even certain heterim or understandings that go along with that aspect of "being normal" or "living a normal life" that *halakha* recognizes.

Now, I could not help but notice the claim that sometimes people pay illegal immigrants in ways that avoid taxes. According to everything I have written, that is *asur*, and the people who do it are literally stealing from the government. As literal thieves, they have the halakhic status of *reshaim* and are forbidden to give testimony or serve as witnesses, including witnesses at a Jewish wedding, as the *passuk* says,

"אל תשת רשע עד."

Other issues, such as whether you would be safe in the country you would be deported to, must also be taken into account, especially during a global pandemic. It would be terrible to risk depression or danger in a foreign country that one was not prepared for unless there were no choice at all, and to travel now on the basis of an imagined *halakhic* obligation to follow non-monetary laws "as written," as imagined by non-lawyers and non-judges, would be the definition of *chasid shoteh*.

My answer: it is obvious that it is permissible halakhically to remain in America and try to live a normal life, and to the greatest extent possible find a *modus vivendi* that will be sustainable and workable.

Teshuvah - Eliana Yashgur

פסקי סב"מ

אליענה ישגור

שאלה

גבר אחד בשם יונתן ומשפחתו באו לשאול על מעמדו כאזרח של ארצות הברית. הוריו אימצו אותו והוא והתגייר בילדותו. הוריו לא רשמו אותו לאזרחות והוא לא אזרח אוטומטי מכיוון שהגיע לפני שנת 2001. אולם הגבר עדיין צריך איכשהו לעבוד, לנסוע, ולגור חיים רגילים. הוא רוצה לדעת האם אפשר להשתמש בכרטיס זהות מזויפת או אם הוא צריך לחזור קולומביה, מדינה מסוכנת יחסית. בנוסף, אמו תוענת שלחוקי אזרחיות אין משמעות הלכתית. אביו מביא את הרעיון שבלתי–צייתנות אזרחית יותר קשורה לשאלת האינטרס אחרים משל עצמו.

תשובה

יש לשקול כמה עניינים שונים - כדאי להתחיל עם השאלה, איך להגדיר את התחום שחל בו "דינא דמלכותא דינא?" צריך להתמקד בנושא של מטרתם של חוקים בחברה. הרשב"א והרב אשר וייס מציעים שתי נקודות מבט בעניין זה. הרשב"א מבואר "אלא שכך הסכימו כל המחברים וכל המפרשים, דלא אמרו דינא דמלכותא דינא אלא בדברים שהם חוקי המלכים, אבל שהמלך נוטל בזרוע - אינו דין, שחוקי המלכים ידועים ומוסכמים הם." לפי הרב אשר וייס, "ואף אם בדברי הרשב"א היה מקום לומר שלא בא אלא להוכיח דיש חוקים קבועים למלכות ואינם עושים ככל העולה על רוחם." האם החוקים הנדונים במקרה שלנו משקפים את מה שנועדות ממשלות לעשות, על פי דעות כמו שהוזכרו לעיל? אפשר לטעון שלגרש אדם שתורם בחברה רק בגלל שהוריו שכחו להירשם אותו כאזרח אמריקאי בקופה מסוימת הוא מעשה לא הגיוני. חוק זקוק לאיזשהו תקדים; ממשלה לא ראויה לעשות סתם את מה שעולה על רוחה. מסיבה זו, חוקי הגירה עשויים להיות מחוץ לתחום ההלכה הקשורה למלכים או לממשלות. עלינו גם להודות כי החוק "הלא נאמר," שנקבע על ידי נורמות בחברה, הוא דבר אמיתית גם במערכת הלועזית. למשל, מבואר בבא קמא קיג: "גופא אמר שמואל דינא דמלכותא דינא אמר רבא תדע דקטלי דיקלי וגשרי גישרי ועברינן עלייהו"; כלומר, מותר להשתמש בגשרים כי נהוג לעשות מפני שזה מקובל על ידי העם. לכן, דד"מ מתייחס לחוק המקובל על ידי האומה בפועל במידה דומה לחוק שנכתב, לפחות במקרים מסוימים. מדוע על התורה לכבד את החוק שבעל פה, ובינתיים לגבי חוקי הלאום המקבילים בדרך זו (שהם גם "בעל פה") אין דרישה כזו? זו אחד מן החידושים העולים מן הדיון שלנו. לחוק הלועזי צריך להיות חלק בעל פה מעבר לקבלה של התנהגויות מסוימות משום שכולם עושים אותם. השייכות של העניין של דעת הקהל של האומה לדד"מ, כפי שזה שמוצגת בעניינים שונים, תידון בהמשך.

היבט חשוב של חוה"ל, הנוגע לדינא דמלכותא דינא, הוא האופן בו הוא תורם ל"טובת המדינה." הרב אשר וייס טוען כי החוקים לרווחת הציבור הם אלה שמכוונת דד"מ. אנו מקיימים את החוק האזרחי בחברה כדי שהחברה תהיה הטובה ביותר, כמו דיני תחבורה ובריאות הציבור.ד"א, חוקים צריכים להיות שימושיים באמת.
הרב אליעזרוב אמר כי חוקים שרק אידיאולוגיים המשתנים על בסיס אידיאולוגיות ללא קשר למציאות אינם נחשבים תחת דד"מ. האם לשלול מאדם כמו יונתן שהוא חלק מן החברה האמריקאית את היכולת לחיות חיים רגילים (לנסוע, ולעבוד בחופשיות) זה דבר טוב למדינה? האם זה מוסיף לרווחת החברה? יש סיבות להגיד שהחוק הזה לא שימושי. ההפסד ליונתן, שכבר חי כפי שאזרחים אמריקאים חיים, אינו שווה להרווחים שוליים הנפרשים על פני החברה כתוצאה ממניעת ההגירה, אם יש כאלה ·בכלל. לכן, יש להסיק שדד"מ לא חל מפני שהתקנים השייכים לעניין אינם עומדים במצבנו. עוד, לפי הבנת העניין של דד"מ שמנגנון שלו תלוי במידה רבה בהבנות המקובלות לגבי מה שהמדינה צריכה לעשות ובחוק שלא נאמר, דד"מ אינו יכול לאכוף כאן מדיניות בעייתיות.
נקודה חשובה שכדאי לשים לב אליה היא שממשלה המבצעת חוק צריכה להתבסס על הסכמה סבירה מצד הנשלטים. על פי האור זרוע לכל קבוצה שמתארגנת יש את סמכויות של מלך. אז הממשלה הדמוקרטית של ארה"ב ומערכות ההחלטות שלה הן לגיטימיות על פי השיטה הזאת. י"א שהבעלות על הארץ נחשבה כקריטריון למלכות. הר"ן קובע כי המלך הוא הבעל של האדמה והרמב"ן כתב "דלא אמרינן דדמ"ד אלא במה שתיקנו המלכים הקדמונים מקדם, אבל אין בכחו של כל מלך לתקן חוק חדש עי"ש, ולכאורה יפלה: מה בין חדש לישן? אלא דאין דדמ"ד אלא במלך הכובש שקנה. בכיבוש מלחמה, ולא במלך שלא כבש את הארץ עי"ש." למרות זאת, לפי הרב אשר וייס, איננו זקוקים בהכרח לכיבוש כדרך להעניק לגיטימציה למלך; "אך לענ"ד אין ראיה כלל מדברי הראשונים הנ"ל דיסוד הלכה זו דדמ"ד משום קנין כיבוש הוא."

הקבוצה שכיבשה את אדמת ארה"ב לפני ארבע מאות שנה היא קבוצה שונה לחלוטין מזה אלה שנמצאים בממשלה הנוכחית בארה"ב, שנמצאת במציאות אחרת לגמרי היום. הם שכיבשו את הארץ דווקא היו תומכים ביונתן להישאר בארה"ב מכיוון שהם ראו בארה"ב מקום שמטרתו הוא לקבל אנשים מכל רקע או אזרחות כלשהם המבקשים לחיות חיי חירות וחתירה לאושר בארה"ב. זה בדיוק מה שיונתן רוצה לעשות. הוא לא יוכל להיזרק מהארץ לפי הדברים האלו.

נותר לנו לבדוק את המשמעות של הסכמת הנשלטים להבטחת תקפות החוק. הרשב"ם טוען כי הנחת היסוד של דד"מ היא הסה"נ. יש להבין את הר"ן על הרשב"ם, חוה"ל בדמוקרטיה כמו ארה"ב תקף מכיוון שכולם מסכימים לחוק זה, לפי דעת הרב רלב"ג. מצד שני, ר 'כהן כותב שקשה לבוא להסכמה בדמוקרטיות, כי תמיד יש מיעוט שאינו בעד החוק. טעות בתפיסה זו היא

שאפילו אותו מיעוט מסכים למערכת הדמוקרטית ופעול גם על פי החוקים שהם לא מצביעים עליהם. ר 'הנקין מוסיף כי אם יהודים הם חלק ההצבעה האזרחית, הם מסכימים - והוא גם סבור שדד"מ בדמוקרטיוה מתייחס גם לעניינים כספיים וגם לסוגיות אחרות.

כיצד אנו יכולים להתמודד עם האתגר של השגת הסכמה מושלמת? הבעיה נובעת מהקושי לגרום לכולם להסכים, ואפילו להבין מהי הסכמה. האם להיוולד במדינה באמת סימן שאתה מסכים לחוקיה? מה לגבי הדורות הבאים שעבורם נכתבים חוקים, אך אינם מסכימים לחוק ואך יום אחד יהיו כפופים לו? כמה פתרונות אפשריים. יש עיקרון של זכין אדם שלא בפניו. הרב אשר וייס מעיר בדעת הרשב"ם: "אלא יסוד שיטתו בדרכו של הרשב"ם, דיסוד הלכה זו בהסכמת בני המדינה, ולא מהני אלא בחקים המקובלים במשפחת העמים ורוב בני המדינה דעתם מסכמת עליהם, ולא בכל חק שעלה על דעתו של כל מלך ומושל." **ניתן לטעון כי הסכמה היא לא על חוקים פרטניים אלא על הבנות מקובלות שיש לאנשים על מה רצוי בחברה שלהם.**

זה עשוי לתת לממשלות מרחב פעולה לקבוע חוקים לפי האינטואיציות שלהן התואמות את ההבנה הכללית הזו – במיוחד בדמוקרטיה ששם הממשלה מייצגת את העם.

(יש בתיאוריה פוליטית כמה כללים הבאים מתחום תורת המשחקים, כמו:

משפט האי-אפשרות של ארו, שאי אפשר לבוא להסכמה בחברה מבלי להפר לפחות עיקרון אחד מבין: קונצנזוס מושלם, אי-תלות באפשרויות מאחד שני, ושום מחליט אינו נכון יותר מהאחרים.

הכלל של קונדורסה מציינת שככל שגודל הקבוצה עולה, הסיכוי שהחלטת הרוב נכונה מתקרב למאה אחוז, במקרה שכל משתתף צודק בהסתברות גבוהה מחמישים אחוז, ודעותיהם בלתי תלויות.

קשה למצוא מצב שבאמת הדעות של אנשים יהיו בלתי–תלויות ואין השפעה בכלל מן החברה. ההסתברות לאזרח להיות צודק לגבי עניין לאומי היא קשה למדוד במדינה ששם לכל אחד באוכלוסיה יש אורח חיים ונקודת מבט קצת אחרת. אולי עלינו לבנות חברה ששם תהיה לכל האזרחים קול, וללמוד איך לפטור את המחלוקות שלנו לטובת הנזקקים.

כתוצאה מכך, עלינו למצוא דרך הטובה ביותר לקחת בחשבון את העדפות של כל אחד.

למשל, נקח את המסך של בערות של ג'ון רולס: ראוי ליצור חוק כדי להועיל לחבר החלש ביותר בחברה. יותר כללי, מומלץ לחברה לנסות להתגבר על ההטיות העלולות לגרום לאמוד בצורה לא–נכונה את הסבירות לקבוצה להיות נכונה, העדפת רצונות מסוימים על פני אחרים, להגביר את רמות האמון בין החברים כדי שיוכלו להגיע להסכמה כנה יותר, ועוד. לפיכך, תפיסתם של אותם פוסקים האומרים כי חוסר יכולת להשיג הסכמה מושלמת של הנשלטים היא מניעה לדמוקרטיה נדחית כאן, ואנו עומדים לצד הרשב"ם שאומר כי דינא דמלכותא נשען לחלוטין על הסה"נ. עם זאת, בהתבסס על דיונינו בעבר כיצד דינא דמלכותא מחייבת גם את העקרונות הללו בכדי לאכוף את החוק ולהפוך אותה לתוקפה, ולדרוש מאחרים לעקוב אחריו.

בנידון דידן, יונתן חי בארה"ב, שהיא דמוקרטיה עם תחושה חזקה של שלטון חוק ומסורת של שמירה על מדיניות המאפשרת למפלגות שונות להשמיע את האינטרסים שלהן (דמוקרטים ורפובליקנים מתקיימים יחד באותו ממשל וכו'). אזרחות והצבעה נוטים ללכת יד ביד - מי שנחשב אזרח מסוגל להצביע בעד העדפותיהם ומוצג באופן דמוקרטי על ידי נציגיהם שבחרו, אשר ניתן לטעון כי אז יש להם את המומחיות להעמיד את החוקים האידיאליים, כאשר הם משולבים במספרים הנכונים. והאזרחים המצביעים יכולים להזמין את העדפתם כרצונם, כל הבוחרים וההעדפות מתחשבים וכו'. יונתן אינו מתחשב בשום דבר מכיוון שהוא אינו יכול להשמיע את הצבעתו בדרכים רגילות, אולם החוק עדיין טוען כי הוא מסוגל "לזרוק אותו מהארץ." אין לו שום אמירה בחוק זה. ההלכה ממסגרת את הסה"נ כמה שאנשים היו רוצים, בהתבסס על מה שאנשים ממשלתיים רוצים בדרך כלל, מה הם הציעו שהם רוצים, על מה הם הצביעו, או אפשרויות אחרות. אף אחד מאלה אינו מתייחס ליונתן ולא לאנשים במצבו. מעצם הגדרתו, חוק זה משפיע על אנשים שאינם יכולים להצביע עליו. היא מתנגדת להבנה ההלכתית של ההסכמה הנדרשת להחלת דינא דמלכותא. זו עילה עבורו שלא לציית לחוק זה.

כמובן, חשוב שחוק יהיה מוסרי – גם לפי דד"מ. יונתן אומר, "אבל המחלוקת על דרימרס ודק"א מבהירה לי שאני לא חי בעולם רציונלי." עלינו להבין שחייבת להיות איזושהי רציונליות בחוק.

המלך שהיה לא הוגן (חמסנותא) איבד את הלגיטימיות שלו. כאן הצורך להסה"נ מציע את הדרישה מהחוק להיות סביר ומוסרי. אנשים לא נרשמו לחוק קשה ובלתי סביר גם אם הם גרים במדינה. לדד"מ יש פונקציה חשובה של ארגון חברתי.תפיסת הרמב"ן היא שבני נח מבוססים על דינים – זאת אומרת שהם צריכים להקים מערכת שיפוטית. על פי דעת הרמב"ן, דד"מ כעקרון הלכתי הוא בעל ערך בפני עצמו. לפי רב אשר וייס "ובכל מלכי עולם הלא כתיב (משלי כ"ט צ ') ׳מלך במשפט יעמיד ארץ׳. ועוד, דגם מצד הסברא בהכרח שיש מוראה של מלכות, ד׳אלמלא מוראה - איש את רעהו חיים בלעו׳ (אבות ג: ב). והוא שקראו חז"ל דינא דמלכותא דינא" עכ״ל. החוק צריך להיות הגיוני ולממש באמת את פונקציית הארגון, והאתיקה היא חלק בלתי נפרד מהחוק. החברה לא תשרוד אלא באמצעות חוקים אתיים.

חוק שייקח בחור צעיר כמו יונתן ויחזיר אותו למדינה כמו קולומביה, ששם משפחתו הקרובה אינה נוכחת, ועם תנאי המחיה שעשויים להיות בלתי צפויים- זה אינו אנושי. זה מפר את הנחת היסוד האתית של דד"מ שנדונה לעיל. אביו של יונתן עשוי להיות משוכנע מכך כי חוסר–הציות האזרחי של בנו תקף מכיוון שהוא לא מציית לחוק שאינו מוסרי, שהוא סוג של חוסר–ציות אזרחי שאביו חושב שהוא "מקובל."

במקרה של יונתן, הוא לכוד על ידי חוק אמריקאי מטריד. יש סיבה להגיד שהחוק הנזכר לעיל הוא לא תקף לפי דד"מ בכלל משום שהוא לא עומד בקריטריונים של דד"מ. במערכת דמוקרטית אנו יודעים שקיימים מגוון חוקים שעדיף להיות על ידי החברה, ולתת דין וחשבון למגוון ההשקפות שיש לאנשים ולזכותם של אנשים לחיות, במידת האפשר, בהתאמה למערכת החוקים האידיאלית שלהם (אם סביר). יש דרכים לכל אדם להכניס את קולו ולפחות בחלק מהזמן החוק תואם עם רצונותיו. אז ברגע שאפילו דרכים אלה לא עובדות, אפשר להתחיל לעסוק מבחינה אתית באי–ציות אזרחי. אי ציות אזרחי מעיד כי יש אתיקה מעל לחוק, שהיא אמת העולם ויש לקדם אותה כאשר זה ראוי להמצב. במקרה של יונתן, הוא אפילו לא אזרח ובכך אינו יכול לייצג את צרכיו בזמן שהוא חי על פי אותו החוק כמו כל האחרים במדינתו ואף אומר שישלם את מסיו אם הוא יכול. זה מציב עליו תקן כפול וכתוצאה מכך, לבנות את החיים שלו כאזרח הוא הגיוני ביותר.

Teshuvah - Eli Putterman

Dear Yonatan, Zoe, and Yaakov,

Thank you for bringing this sensitive and difficult question to me. Yonatan, I can only try to imagine the shock you must have felt when you discovered that you do not have American citizenship, and the stress of leading a life under the threat of deportation that you face every day. As you say, in a "rational world," you would not have to face these problems, but it is a broken world we live in, and a broken world we are called to heal.

Your case touches upon our deepest commitments as halakhically-committed Jews, as proud Americans – and I hope you still see yourself as one, for all that the law does not – and as human beings. It also turns out to be a "hard case" from the standpoint of technical Halakha, so that treating it properly will be intellectually as well as morally and emotionally taxing. Unfortunately, the difficulty is compounded by the fact that in recent years, the subject of immigration has been at the forefront of partisan politics. The rancor and reflexive judgments characteristic of partisanship are the farthest thing possible from the thoughtful and principled reflection which is a *sine qua non* for either halakhic or ethical discussion, both in the abstract and certainly when faced with a concrete and painful case such as yours. Far be it from me to claim that I am immune from the biases endemic to our current discourse, but we must strive to view our current dilemmas not from the perspective of the current news cycle, but *sub specie aeternatis*.

You have asked me, Yonatan, to tell you what you must do. I can lay out the Halakhic issues at hand, and delineate the course of action which seems to me to be best from a Halakhic and moral standpoint. But I will not tell you what to do, both because a knowledge of the limits of my own Halakhic competence prevents me from assuming such authority, and because I conceive of the practice of *pesaq* not as a judicial decision, but as a dialogue between the *sho'el* and the *meishiv* – a Gadamerian "fusion of horizons," if you will. Though you may choose to follow my guidance in the realm of Halakha, I cannot replace your conscience; you alone must examine the Halakhic options in light of your own moral commitments.

Our first loyalty is to the Torah, and though we do not *pasken* from Scripture, we would be equally remiss in undertaking a dry Halakhic analysis without Torah values informing the discussion. And what the Torah has to say on this matter cannot be clearer: "Do not mistreat or oppress a *ger*, for you were *gerim* in the land of Egypt" (Ex. 22:21); "When a *ger* resides among you in your land, do not mistreat them. The *ger* residing among you must be treated as your native-born. Love them as yourself, for you were *gerim* in Egypt. I am the Lord your God" (Lev 19:33-34); and such examples could easily be multiplied. According to R. Eliezer, who knew something about oppression by a majority, the Torah warns us not to oppress the *ger* no fewer than thirty-six times (Bava Metzia 59b)! Of course, the Halakha sets out different categories of *gerim*, the *ger toshav* or "resident alien" and the *ger tzedek* or proselyte, and some of the Torah's references of the *ger* are interpreted by our tradition as referring to one category, some to the other. But the fact remains that the Torah has made clear, in the most unambiguous way possible, that the oppression of foreigners is fundamentally antithetical to its vision for society.

Again, *pesuqim* do not equal *pesaq*; still less can the Torah be used to argue for a particular immigration policy. But our *pesaq* must be guided by the Torah's sensitivities.

I.

The main Halakhic principle operative in your case, Yonatan, is *dina d'malkhuta dina*, "the law of the government is the law." By means of this principle, the secular law is recognized in certain circumstances as having Halakhic force. Owing to the fundamental and wide-ranging disagreements among authorities both medieval and contemporary with regard to the grounds, scope, and function of *dina d'malkhuta dina*, it is almost impossible to make any more specific statement than this about *dina d'malkhuta* which would be agreed upon by all halakhists. Moreover, these disagreements are not merely technical, but reflect different approaches to core questions of political philosophy relating to the underpinnings of the state and the Jewish community's relations with it. As your case touches upon several of these fundamental disputes, Halakha provides you not with one clear path to tread but with a range of

approaches, each having its advantages and disadvantages in terms of faithfulness to Halakhic tradition and coherence with our own philosophical and ethical views of the state. I will state at the outset that the vast majority of these approaches do accord with your moral intuition that you should be allowed to stay here.

The primary point of dispute with regard to *dina d'malkhuta dina*, which bears upon all as to the limits of its applicability, is the source or grounding for this principle. After all, one will not find "obeying the secular authority" on any list of the 613 *mitzvot*. The two most prominent legal theories of *dina d'malkhuta* are Rashbam's theory that validity of secular law derives from the consent of the governed[19] and Ran's theory that the king's law is the law of the land because, very simply, the king owns the land, and can condition the right to live in his territory on adherence to his law.[20] (It may be difficult to read about the theoretical possibility of deportation brought into the discussion so drily to solve an analytical problem, when for you it is an all-too-real peril. I apologize.) A third possibility, going back to Meiri, views the obligation to obey a secular authority as deriving from the same source as the obligation to obey a Jewish king appointed according to Halakha.[21] Other groundings for *dina d'malkhuta* have been found (or read into) the Rishonim, but these will suffice to illustrate the complexity of applying *dina d'malkhuta* to your case.

These different understandings of the grounds for *dina d'malkhuta* served as a basis for discussions in the Rishonim about the scope of *dina d'malkhuta*.[22] However, applications of *dina d'malkhuta* in the Talmud and Rishonim almost never venture outside the boundaries of *dinei mamonot*: in the Talmud, *dina d'malkhuta* is applied to assert a broad though not unlimited legitimation of taxation by the secular government,[23] and, more equivocally, to grant certain aspects of secular civil law recognition by Halakha.[24] The situation does not change much in the Rishonim.[25]

Hence, the Rishonim did not address a question which from our contemporary perspective seems to be fundamental: does *dina d'malkhuta* impose an independent Halakhic obligation to follow the laws of the secular government, or merely cause pecuniary obligations imposed by the secular law to be seen as valid in Halakha as well? This question has fundamental ramifications not only for heartbreaking cases of immigration law such as yours, but for prosaic questions arising in a modern administrative state, such as whether Halakha prohibits speeding or jaywalking.[26] It seems that the answer would depend on one's legal theory of the basis for *dina d'malkhuta*: under the theory attributed to Meiri that the authority of a secular government derives from the same source as that of a Jewish king, one has a positive obligation to obey secular law just as one must obey a Jewish king. However, both of the prominent theories of *dina d'malkhuta* – Rashbam's consent theory and Ran's feudal theory – are tailored towards justifying Halakhic recognition of secular law in the realm of *mamonot*, rather than rendering obedience to secular

[19] Rashbam, Bava Batra 54b, s.v. *ve-ha'amar Shemu'el dina de-malkhuta dina*. The other prominent exponent of this theory is Rambam, *Hilkhot Gezelah* 5:18.
[20] Ran, Nedarim 28a, s.v. *be-mokhes ha-omed me-elav*, citing Tosafot. See also Rashba, ibid., s.v. *be-mokhes she-ein lo qiẓba*.
[21] Meiri, Bava Kamma 113b, s.v. *kol mah she-amarnu*; Nedarim 28a, s.v. *kevar be'arnu*. It is possible to read the Meiri differently, but in any case, a clear statement of this position is found in Mabit, *Qiryat Sefer* to *Hilkhot Gezelah* 5. A recent treatment of *dina d'malkhuta* which arrives at this theory, though ignoring these earlier precedents, is R. Asher Weiss, "Dina de-Malkhuta Dina," http://www.torahbase.org/פרשת-חוקת-דינא-דמלכותא-דינא/, also printed as *Minḥat Asher* 2:121.
[22] For instance, one of the major disputes in the Rishonim with regard to *dina d'malkhuta* concerns whether the principle applies to "new laws" promulgated by a king or only to customary forms of royal power. Rambam, *Hilkhot Gezelah* 5:14 takes the position that *dina d'malkhuta* applies to new legislation, whereas Ramban, Bava Batra 55a, s.v. *im ken bitalta* and Meiri, Bava Kamma 113b, s.v. *kol mah she-amarnu*, limit the application of דינא דמלכותא to customary law. The dispute was mostly resolved by the time of the *Shulḥan Arukh* in favor of the former side; see *Beit Yosef*, *Ḥoshen Mishpat* 369, s.v. *umah she-katav bameh devarim amurim bedin kelali*.
[23] Nedarim 28a; Bava Kamma 113a-b.
[24] Bava Batra 54b-55a; Gittin 10b.
[25] Gil Graff, *Separation of Church and State - Dina D'Malkhuta Dina in Jewish Law, 1750-1848* (Tuscaloosa: University of Alabama Press, 1985), 28: "During the long span of years between the third and eighteenth centuries, there was a remarkable uniformity in the range of issues arising in connection with the definition of *dina d'malkhuta dina*. The applications of the principle cited in the few Talmudic references to it - taxes, confiscations, and bills executed in non-Jewish courts - were the primary issues that arose in further interpretation during the following one and one-half millennia."
[26] Unfortunately, when reading the (admittedly scant) literature on these questions one does not get the sense that they are purely academic.

law Halakhically obligatory.[27] It is unsurprising that such legal theories do not address the question of obedience to the state in general, as they were formulated in a period when the state played a much more limited role in the lives of its subjects.

Contemporary decisors who have considered the issue of obedience have come out on opposing sides of this question. On the one hand, R. Zalman Nehemiah Goldberg convincingly proved from the language of Ran that *dina d'malkhuta* only "creates a legal situation" as to the ownership of property rather than imposing obligations to act in a certain way.[28] On the other hand, a responsum of R. Moshe Feinstein seems to take as given that *dina d'malkhuta* creates a substantive obligation to obey American law, and several other decisors, particularly in the Religious Zionist sector in Israel, have taken this position as well.[29]

Given the range of Halakhic opinion on this matter and the lack of clear statements in the Rishonim, I believe that as a matter of technical Halakha, it is perfectly legitimate to take the position that *dina d'malkhuta* does not create an obligation to obey secular law. In particular, under this view Halakha does not obligate you to follow immigration law which views your presence in the country as illegal. Admittedly, even a technically sound Halakhic position may be unsatisfactory from a hashkafic perspective. Relegating *dina d'malkhuta* to civil matters creates a disconnect between our commitment to Halakha and our fealty to America and its laws; our value system becomes divided.[30] But you might not see this a problem at all; perhaps you feel that as an undocumented immigrant, persecuted by the laws of this country through no fault of your own, the American system has betrayed you, and you owe no loyalty to the state beyond the bare minimum Halakha demands. I see nothing worthy of reproach in a person in your situation choosing to take this position.[31]

Nevertheless, since many and distinguished *poseqim* have ruled that *dina d'malkhuta* imposes a general requirement to obey secular law, I will briefly explain why I feel that even according to this approach, there are several reasons to suppose that this principle would not apply in your case, based on the substantive limitations placed on *dina d'malkhuta* by the Rishonim and codified by the *Shulḥan Arukh*. I believe most of these arguments fail, but some of them appear to me to be sufficiently convincing; of course, your judgment as to the strength of each argument may differ from mine.

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[27] Halakhic private law, generally speaking, does not give parties the ability to obligate themselves contractually to perform certain actions in the future (*qinyan devarim*). This would seem to prevent any theory of *dina d'malkhuta* founded on civil law, including those of Rashbam and Ran, from imposing any obligations other than monetary ones under Halakha. (Most of the less-often cited theories of *dina d'malkhuta* have the same limitation.) But as I have not found this argument in any other source, I leave it as a *tsarikh iyyun*.

[28] Zalman Nehemiah Goldberg, "Toqef ha-Hithayvut Limkor be-Zikhron Devarim," *Tehumin* 12 (5751), pp. 279-299, at pp. 292-293. Interestingly, his argument does not rely on the Ran's rationale for *dina d'malkhuta* but on a close reading of a particular ruling of Ran with regard to tax evasion. See below, note 73.

[29] *Igrot Moshe, Hoshen Misphat* 2:30; see R. Asher Weiss, "Dina de-Malkhuta Dina" (above, note 21). Also see *Minḥat Asher* 2:123, which argues that *Tashbetz* 1:158 and *Teshuva me-Ahava* 1:117 implicitly hold this understanding of *dina d'malkhuta* as well; as an argument from silence, however, this is not dispositive.
For Religious Zionist decisors, see R. Uri Sadan, "Avodat Yeladim be-Ḥufshat ha-Qayiẓ," *Emunat Itekha* 97 (Tishrei 5773), pp. 79-87 (available at http://asif.co.il/download/kitvey-et/amon%20a%2095/amon%2097/1%20(10).pdf), mentioning the positions of R. Yaakov Ariel and R. Dov Lior.

[30] The claim that loyalty to (modern, democratic) states is founded in Halakhic tradition is made in a letter of R. Joseph B. Soloveitchik to R. Samuel Belkin printed in Nathaniel Helfgot, ed., *Community, Covenant and Commitment: Selected Letters and Communication* (New York: Toras HaRav Foundation, 2005), pp. 56-60, at p. 57: "We must note that our decision [to send rabbinical students to be chaplains in Vietnam – EP] is not primarily an expression of a pragmatic-utilitarian approach but reflects a halakhic-historic tradition which has always wanted to see the Jew committed to all social and national institutions of the land of his birth or choice which affords to him all the privileges and prerogatives of citizenship." R. Soloveitchik here lapses into his unfortunate habit of assuming his favored position to have been agreed upon by Halakhists of all times and places. It is very difficult to make any blanket generalization about the halakhic tradition which is universally valid, and this case is no exception, though R. Soloveitchik's silencing of alternative voices – e.g., the Haredi community in Israel – is particularly blatant in this instance.

[31] I find the demand for axiological unity unconvincing for a different reason: it is simply not the case that a Jew committed to morality as well as Halakha can avoid the charge of competing loyalties. Even a discriminating and self-critical identification with contemporary Western moral culture entails many commitments which cannot be convincingly represented as deriving in some fashion from Halakha. Indeed, in some cases, such as gender equality, it is difficult enough to defend the position that Halakha does not flatly contradict morality. If it is conceded that morality imposes obligations upon us in areas where Halakha is silent, there is no difficulty in asserting that the responsibility to obey American law derives from our moral rather than Halakhic commitments – but in that case, it is to morality rather than Halakha we must turn to determine whether any particular law should be followed. And as I already stated at the outset, I cannot replace your conscience.

Firstly, *dina d'malkhuta* applies only to laws which are intended to promote the public welfare.[32] Originally, this principle was stated to exclude the application of secular law in purely private matters such as inheritance law.[33] Contemporary judges on Israeli rabbinical courts have used this principle in a wholly different context, to distinguish between laws motivated by concern for the public welfare and ideologically-motivated laws whose goal is to socially engineer society in line with the rulers' worldview.[34] On this basis, one could argue that the immigration laws in their current form derive from nativist ideology rather than a concern for public welfare,[35] and hence are invalid under *dina d'malkhuta*. But this argument suffers from a conceptual problem, namely the lack of an objective criterion for deciding whether a law promotes public welfare or not; after all, from the perspective of the ruling party, it would be best for society if its ideology were implemented in full. Hence, to use the "ideologically-motivated law" test to strike down a given law, one would have to suppose that Halakha intends the *poseq* to substitute his or her own judgment as to the public welfare for that of the legislators (and their voters). Given the inherent subjectivity of this determination, this will lead to Halakhic anarchy.[36]

Another limitation on *dina d'malkhuta* is that Halakha does not recognize secular enactments which are "against the Torah." I use this vague phrase because over the course of Halakhic history, this principle appears in many guises. Firstly, it is agreed upon by all decisors (at least until the rise of the Reform movement) that *dina d'malkhuta* cannot be used to permit what Halakha forbids.[37] In addition, the Rishonim deployed the principle to prevent secular law from preempting various areas of Halakhic private law, from inheritance[38] to the law of legal instruments (*shtarot*),[39] and so on. Ahronim who were sensitive to inconsistencies in earlier authorities' application of this exception argued that this principle preempted secular enactments from overriding only Halakhic principles which are "clear in our law,"[40] or "written explicitly in the Torah"[41] but this criterion never received a rigorous formulation and seemed to be deployed *ad hoc* to resolve difficulties.

Above, I argued that fair treatment of the *ger* – stranger, foreigner, proselyte, however one translates it – is a fundamental Torah value. Accordingly, one might claim that this value prevents Halakha from recognizing immigration law, which is based on a diametrically opposed conception allowing citizens control over the residency rights of noncitizens.[42] However, it cannot be ignored that Jewish tradition did not interpret the Torah's injunctions against oppression of foreigners as guaranteeing any sort of freedom of movement in practice. For instance, Ashkenazi communities in the medieval period operated under a strict regime of internal "immigration controls," under which a Jew wishing to settle in a town had to obtain the unanimous consent of the existing members of the local Jewish community in order to do so.[43]

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[32] Rashba, responsum 6:254; Maharik, 187; *Shulḥan Arukh*, *Ḥoshen Mishpat* 369:11.
[33] In Rashba's responsum (see previous note), the argument for the limitation of *dina d'malkhuta* to the public sphere is that if not for this limitation, Halakhic civil law would otherwise completely be preempted by secular law under *dina d'malkhuta*, which is absurd. In other words, for Rashba this exception is a corollary of the next limitation I discuss. However, other statements of this exception, such as *Maggid Mishneh* to *Hilkhot Malveh ve-Loveh* 27:1, s.v. *aval kol ha-shetarot*, do not give this justification.
[34] Israel Rabbinical Courts, case 1 - 35 - 009063413, opinion of Dayyan A. Sherman; also published as A. Sherman, "Minhag ha-Medinah be-Yaḥasei 'Oved u-Ma'avid," *Teḥumin* 18 (5758), 236-247.
[35] The oft-cited contention that undocumented immigrants benefit the American economy might be used to buttress this argument. On the other hand, some economists have argued that immigration tends to lower wages in the unskilled sector, in which case immigration restrictions could certainly be motivated by a concern for public welfare. The impact of immigration on the labor market is hotly disputed; for a recent review of the research on both sides, see Christian Dustmann, Uta Schönberg and Jan Stuhler, "The Impact of Immigration: Why Do Studies Reach Such Different Results?" *Journal of Economic Perspectives* 30:4 (2016): 31–56.
[36] In this regard, it is noteworthy that the opinion of Dayyan Yaakov Eliazrov in the case cited above, note 34 (also published as Y. Eliazrov, "Ma'avid ha-Ḥoreg mi-Minhag ha-Medina," *Teḥumin* 20 (5760), 71-77), accepts Dayyan Sherman's distinction between publically-beneficial and ideologically-motivated laws, but disagrees with Dayyan Sherman as to whether a particular law should be considered ideologically-motivated or not, which leads the author to a different ruling.
[37] E.g., being drafted into the army does not allow one to violate Shabbat (outside of a situation of *piqquah nefesh*, of course) even if one's commander so orders. See *Ḥatam Sofer*, 6 (*Liqqutim*), 29.
[38] *Tashbetz* 1:158.
[39] *Pisqei 'Or Zarua,* Bava Batra*, Get Pashut,* 5:19-20.
[40] *meforash etzlenu*; Shakh, *Hoshen Mishpat* 73:36.
[41] *mah she-katuv ba-torah be-hedya*: *Ḥatam Sofer* 5 (*Hoshen Mishpat*), 44.
[42] In this connection one could also mention Deut. 23:16-17, which explicitly guarantees the freedom of residency of fugitive slaves.
[43] These controls were known as *ḥezqat ha-yishuv* or *ḥerem ha-yishuv*. See the Encyclopedia Talmudit article on *ḥezqat yishuv* for a halakhic overview, and for an explanation of how this practice arose, see Shimon Schwarzfuchs, "Hishtalsheluto shel Ḥerem ha-Yishuv - Re'iyah mi-Zavit Aḥeret," in Aharon Oppenheim et al. ed., *Sefer Yovel le-Shlomo Simonson* (Tel Aviv: Tel Aviv University, 1993), 105-117, available at https://lib.cet.ac.il/pages/item.asp?item=22062&kwd=8638.

Hence, it is difficult to take seriously the argument that immigration law as a whole is so obnoxious to Halakha that *dina d'malkhuta* would not apply to it on those grounds.[44]

A third line of argument proceeds from the undisputed fact that a sizable majority of Americans support allowing those in your situation, who were brought to the United States as children but lack legal status – i.e., Dreamers – to remain in the country; in a recent poll, 61% of respondents expressed support for offering Dreamers a path to citizenship, a further 17% said Dreamers should be allowed to remain without a path to citizenship, and only 12% thought they should be deported.[45] Surely, one might contend, the fact that a vast majority of the country supports changing the law implies that Halakha would not compel obedience to the present law.

This intuition can be turned into a Halakhic argument in multiple ways, though I have not found a formulation which is completely convincing. One may straightforwardly argue that according to Rashbam's consent theory of *dina d'malkhuta*, a law which a majority of society opposes cannot be considered binding. The problem is that this understanding of the consent theory, in which the subjects are imagined to consent to every individual law, takes consent too literally: after all, few people consent to a law when they find themselves on the wrong side of it, so *dina d'malkhuta* would break down immediately once it comes time to enforce the law upon criminals.[46] Hence, the consent the Rashbam requires must be recognition of the legitimate authority of the sovereign as a whole, rather than consent to individual acts of legislation. But acceptance of a democratic government as the legitimate sovereign also means acceptance of the "rules of the game," under which the law doesn't change until someone manages to get the bill through Congress, however large the majority behind it.

A wholly different approach relies on the novel theory of *dina d'malkhuta* proposed by R. Yosef Eliyahu Henkin.[47] According to R. Henkin, because society changes all the time, no community can function with a static legal system. In the past, Jewish communities were legally autonomous, and they met the need for legal change with binding Halakhic enactments made by the rabbinic and communal leadership. In such a situation there was no need for *dina d'malkhuta*. However, when Jews live in a society with no permanent *batei din* or communal leadership with enforcement authority – as in R. Henkin's time and our own – Halakha looks to the secular legal system, which continually adapts in order to promote public welfare, and obligates Jews to follow its provisions via the principle of *dina d'malkhuta*.

For R. Henkin, then, Halakha recognizes a legal system as legitimate if it adapts to changing conditions. In the current state of partisan gridlock in the United States, Congress has proven incapable of passing common-sense legislation even when a considerable bipartisan majority supports it. Perhaps, then, according to R. Henkin Halakha would withdraw its blanket recognition of *dina d'malkhuta* from American law, or at least from those areas in which there is clear agreement among a vast majority of the voting public that the law needs to change. Theoretically and morally, I find this argument attractive, but it relies too heavily on a unique and novel position of a single authority to stand on its own.

A fourth limitation on *dina d'malkhuta* in Halakhic tradition which may have bearing on your case is the concept of *ḥamsenuta*. Many Rishonim argue that certain forms of state action are to be considered *ḥamsenuta d'malka*, state robbery, rather than *dina d'malkhuta*, and hence are not recognized by Halakha. However, it is difficult to extract a consistent definition of *ḥamsenuta* from the sources. Some authorities use *ḥamsenuta* to refer to unjust laws, such as taxation with the amount taxed left to the discretion of the tax collector.[48] Other authorities, though, seem to limit *ḥamsenuta* to cases in which the

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[44] Support for this contention, though hardly necessary, can be brought from the fact that *Avnei Nezer*, *Yoreh Deah* 455 explicitly applies *dina d'malkhuta* to Ottoman immigration law.
One could also argue that it is obnoxious to Halakha for Yonatan to suffer due to his parents' negligence, but the existence of the category of *mamzerut* belies this argument.

[45] Politico/Morning Consult, June 2020. See https://www.politico.com/news/2020/06/17/trump-supporters-dreamers-poll-323432.

[46] I am implicitly assuming here that the consent posited by Rashbam's theory is individual, which is the most straightforward reading of his language. Admittedly, there are mechanisms in Halakhic civil law for a majority's consent to bind a minority, such as *taqqanat ha-qahal*, which requires formal institutional action on the part of the Jewish community, and *minhag ha-maqom*, which seems to require only the sort of implicit consent Rashbam discusses, but the whole point of *dina d'malkhuta* is that it applies even when these other mechanisms do not (otherwise, it would be unnecessary).

[47] *Teshuvot Ivra* 96.

[48] *Nimmuqei Yosef* to Rif, Nedarim 10a, s.v. *be-mokhes she-ein lo qiẓbah*.

secular authorities fail to follow due process of law, and grant legitimacy to any state action, no matter how harsh, if it has the form of law.[49] At the other extreme, Ramban holds that *dina d'malkhuta* applies only to the traditional legal system of the country, and any new legislation by the ruler, in whatever domain, is considered *ḥamsenuta*.[50]

Given the wide range of state action dubbed *ḥamsenuta* by the Rishonim, it is tempting to read the term broadly as meaning "grave injustice." On this reading, *ḥamsenuta* would serve as a general-purpose tool for the *poseq* to reject laws which offend common-sense morality, even when they fall under none of the other categories of exceptions to *dina d'malkhuta*. Such an understanding certainly has its advantages: if an unjust law need not be obeyed *ipso facto*, a *poseq* could rule in accordance with the dictates of his or her conscience that Halakha permits violating such a law without needing to come up with technical arguments for why *dina d'malkhuta* does not apply.[51] But, as always, allowing *poseqim* to openly exercise power is a double-edged sword. If I do not wish to live in a world where different Halakhic communities consider themselves free to disobey laws which contravene their own ideologies,[52] one might object, I should refrain from relying on such in my own *pesaq*.[53] This meta-halakhic consideration, if you find it convincing, compels us to take the more limited reading of *ḥamsenuta* as referring to exercise of state power without legal justification; i.e., Halakha merely requires that the secular authorities follow the law, but not that the law conform to any external standard of justice or fairness. Such a limitation on *dina d'malkhuta* may be useful in justifying resistance to certain forms of governmental oppression which lack even the veneer of legality,[54] but it seems to be irrelevant to your particular case.[55]

To my mind, the strongest argument against the recognition of American immigration law by *dina d'malkhuta* relies on a widely-accepted principle in Halakhic tradition requiring that a law be nondiscriminatory in order to be recognized by *dina d'malkhuta*.[56] Though there is some dispute about the scope of this exception, which has been interpreted both so broadly that a government regulation applying to a particular sector of the economy was held to be invalid[57] and so narrowly that a tax regime under which Jews pay more than Gentiles was considered legitimate[58] – even more surprisingly, both of these rulings were made by the same authority – it has long been used to place substantive limitations on *dina d'malkhuta*. The fact that this exception dovetails with our contemporary democratic intuitions as to equal protection under the law makes it even more attractive as a tool for the contemporary *poseq*.

I do not intend to argue that Halakha categorically refuses to recognize immigration law because such law necessarily discriminates between people on the basis of immigration status.[59] At least *prima facie*,

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[49] See, e.g., Rambam *Hilkhot Gezelah va-Aveidah* 5:13 (which does not use the term *ḥamsenuta*); *Hiddushei ha-Ran*, Gittin 10b, s.v. *amar Shemu'el*; *Hiddushei ha-Ritva*, Gittin 10b, s.v. *ve-ha de-amrinan*.
[50] *Hiddushei ha-Ramban* to *Bava Batra* 55a; *Teshuvot ha-Ramban*, 46.
[51] As one might suspect that I am attempting to do in this very responsum.
[52] Note that I do not claim that we are not already living in such a world.
[53] I am glossing rather lightly over some very deep questions in the philosophy of law (and of Halakha in particular), which cannot be fully explored here. But I will nonetheless permit myself to take the argument one step further: suppose one takes the legal-realist position that to arrive at their preferred result, jurists will use any legal arguments necessary, whatever their strength (assuming that there is an objective notion of the "strength" of an argument). If so, then the judicial-minimalist argument that jurists should refrain from using powerful legal tools due to their potential for abuse amounts to unilateral disarmament: less high-minded or historically conscious judges or *poseqim* will not be similarly constrained in developing the tools they need to get the rulings they want. Is it fair that a higher degree of historical awareness – the knowledge that judges do not simply interpret but rather make law – should lead, paradoxically, to judicial paralysis?
[54] This may include certain aspects of US immigration enforcement: for instance, at various times – both due to aggressive enforcement action by individual officials, and as a matter of official policy – refugees claiming asylum under American law have been deported without a proper hearing of their claims. The current DHS policy known as Migrant Protection Protocols, under which asylum seekers are required to remain in Mexico while their claims are processed may also violate refugees' rights under US law, and hence, fall under *ḥamsenuta*. Again, though, this does not apply to the case at hand.
[55] Interestingly, these two possibilities for understanding *ḥamsenuta* mirror the controversy over the doctrine of substantive due process in American constitutional law, which interprets the due process clauses of the Fifth and Fourteenth Amendments as protecting fundamental rights of individuals against state action; opponents of the doctrine argue that the intent of the clauses is merely that state officials must follow proper legal procedure when acting against these rights, as we have argued is the preferable reading of the *ḥamsenuta* exception. I am indebted to R. Aryeh Klapper for this insight.
[56] Rambam, *Hilkhot Gezelah* 5:14; Rosh, Nedarim 28a; *Or Zarua*, Bava Qamma 447, citing R. Eliezer of Metz.
[57] Maharik, 66; Rama, *Hoshen Mishpat* 369:6.
[58] Maharik, 195; Rama, *Hoshen Mishpat* 369:8.
[59] Indeed, *Ḥokhmat Shlomo* to *Ḥoshen Mishpat* 369:8 specifically states that a law which discriminates between foreigners (*gerim*) and natives (*benei medinato*) does not thereby become invalid under *dina d'malkhuta*.

control of borders and privileging of citizens over noncitizens serve a legitimate state purpose.[60] To borrow American legal terminology, noncitizens as such would not be treated as a protected class under Halakha's antidiscrimination policy. However, the immigration laws may be discriminatory in other ways. R. Hayyim Regensburg, arguing for Jews to support the civil rights movement, argues that *dina d'malkhuta* requires equal treatment under the law not merely in theory but in implementation; hence, a law which is habitually enforced in a discriminatory fashion, no less than a facially discriminatory law, would be invalid.[61]

It is blatantly obvious to an unbiased observer that immigration enforcement in the contemporary United States is far from neutral. Despite a Supreme Court ruling to the contrary,[62] Border Patrol and ICE agents systematically racially and ethnically profile individuals in choosing whom to detain,[63] leading to documented statistical disparities between the ethnic makeup of the population targeted by of immigration enforcement – detainees and deportees – and the total undocumented population.[64] Given the harm immigration enforcement inflicts both on the targets themselves and on the surrounding communities,[65] such disparities cannot be waved away even if one believes that the current immigration enforcement regime is otherwise just. To my mind, Halakha's abhorrence of discrimination provides the grounds for viewing American immigration laws as illegitimate under *dina d'malkhuta*.[66]

I think the arguments above, taken as a whole, militate strongly in favor of the position that adherence to American immigration law is not Halakhically mandated. Before I move on, though, one final remark. It may be of little comfort to you, Yonatan, that with sufficient effort one can advance various legal rationales to justify your choice not to "self-deport." You may feel that Halakha should recognize the needless suffering you as an individual would undergo by doing so as sufficient reason to permit (and perhaps obligate) you to do otherwise, even in the absence of a "principled" legal argument.[67] In fact, Halakha does have internal mechanisms whereby the circumstances of the case at hand can sway the ruling to leniency – *she'at ha-deḥak*, *hefsed merubeh*, *ẓorekh gadol*, etc. Due to the historical accident that the law of *dina d'malkhuta* developed within *dinei mamonot* (in which such arguments are generally unusable, since every *qula* for one party is a *ḥumra* for the other), these mechanisms did not become part of the legal discourse relating to *dina d'malkhuta*,[68] and my halakhic competence is certainly not broad enough for me to feel comfortable introducing them here for the first time.

But I confess that the discomfort with dry legalities when a life is at stake, which I have conjecturally projected onto you, is, in fact, my own.

II.

The second aspect of your situation, Yonatan, is that as you said, if you stay in the country, the basics of a normal life – work, travel – seem to be out of your reach without further lawbreaking. While some states do allow undocumented immigrants to obtain drivers' licenses, which would allow you to drive and also to travel by air (at least until the Real ID Act comes into effect), it is true that federal law requires employers

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[60] Opposition to this seemingly self-evident claim has come from economists and moral philosophers alike, but the call for open borders is still extremely marginal in contemporary political discourse.

[61] *Mishmeret Hayyim* 39, at p. 153 of the 5726 Jerusalem edition. The doctrine of disparate impact in American labor law is based on a similar idea, though it applies to employment practices and not to legislation.

[62] *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

[63] See, e.g., Pat Goldsmith, Mary Romero, Raquel Rubio-Goldsmith, Manuel Escobedo, and Laura Khoury. "Ethno-racial profiling and state violence in a Southwest barrio." *Aztlán: A Journal of Chicano Studies* 34:1 (2009), 93-123.

[64] E.g., Aarti Kohli, Peter L. Markowitz, and Lisa Chavez, *Secure Communities by the Numbers: An Analysis of Demographics and Due Process*. The Chief Justice Earl Warren Institute on Law and Social Policy, 2011; Joanna Dreby, "The Burden of Deportation on Children in Mexican Immigrant Families," *Journal of Marriage and Family* 74 (2012), 829–845.

[65] E.g., Elizabeth Aranda and Elizabeth Vaquera, "Racism, the Immigration Enforcement Regime, and the Implications for Racial Inequality in the Lives of Undocumented Young Adults," *Sociology of Race and Ethnicity* 1:1 (2015), 88-104.

[66] It also creates an obligation upon those of us who have the unearned privilege of American citizenship to protest the current immigration regime.

[67] The point that inflexible adherence to general rules often leads to clearly undesirable outcomes, of course, could apply to any legal system – not least American law itself, which has put you in this position.

[68] Though, of course, one could argue that some of the exceptions to *dina d'malkhuta* developed by *poseqim* (in particular, *ḥamsenuta*) are essentially disguised substitutes for the principles of *she'at ha-deḥak*, etc., which are used in *issurin*, in the sense that in both domains, the function of these principles is to introduce sufficient flexibility to enable the *poseq* to avoid Halakhic conclusions he or she deems unpalatable.

to verify the employment authorization of newly hired employees. Thus, to be hired by a prospective employer who is compliant with the law, you would have to present false identification, whether forged or belonging to someone else.

Of course, working as an undocumented immigrant and using false identification presents the same *dina d'malkhuta* issues as simply remaining in the country. But the arguments advanced above to permit your remaining here despite your immigration status provide sufficient justification for contravening American law by seeking employment as well. However, the use of fraudulent identification to obtain employment presents two new issues.

First, misrepresenting your employment eligibility is, simply put, lying, which is intrinsically Halakhically forbidden according to most authorities. However, there is a wide array of cases in which lying is permissible for a constructive purpose, such as the principle of *mutar leshanot mi-penei ha-shalom* (Yevamot 65b), and it is likely that, were this the only concern, your ability to support yourself would justify the attendant misrepresentation in the eyes of Halakha.

The more difficult problem is that your lying puts your employer at risk of investigation if you are discovered by immigration enforcement. This is an unacceptable burden to place upon them unawares, even though the penalty your employer would face for a first offense is a relatively small civil fine, and even if they would likely be exonerated as having hired you in good faith. Such deception with the potential to harm others would certainly fall under the category of *genevat da'at*.[69] The fact that employers are rarely investigated under current immigration enforcement policy[70] mitigates but does not overcome this prohibition, as the risk to your employer is still non-negligible, and nothing prevents enforcement policy from changing in the future.

One remedy for this would be to explain your immigration status to your employer and request that they hire you anyway, such that they knowingly assume the risk of prosecution. I am far less comfortable, though, saying that Halakha permits you to conspire with others to actively violate American law – to say nothing of the risks to yourself if a potential employer does not take kindly to your attempt to implicate them in breaches of federal law and decides to report you to ICE.

Yet it is inconceivable that Halakha permits you to live in the United States but forbids you from making a living, thus requiring you, ironically, to become precisely the sort of "public charge" that immigration restrictions are designed to keep out. None of the options on the table - lying to your employer, conspiring with your employer, or remaining unemployed and being supported by family members and/or welfare - are attractive, but to my mind the most palatable one is the first. Indeed, Halakha does allow for misrepresentation in employer-employee relations when the alternative is a *davar ha-aved*, an irreparable loss.[71] Since your only alternative to misrepresenting your immigration status is not to work at all, I would argue that *ein lekha davar ha-aved gadol mi-zeh*. Hence, I cautiously suggest that Halakha permits you to deceive your employer as to your immigration status, using false identification if necessary. However, should future legislation strengthen the penalties faced by your employer, or the risk of their being prosecuted increase significantly due to technological advance or policy change, this *heter* can no longer be relied upon.[72]

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[69] A classic example of misrepresentation in employment is found in Mishnah Bava Metzi'a 4:12, *ein mefarkesin et ha-adam*, explained by the Gemara (ibid., 60b), as a case in which an old man disguises his age in order to be "hired" as a slave. The prohibition is codified in *Shulḥan Arukh, Ḥoshen Mishpat* 228:9. Also cf. *Igrot Moshe* 2:30, which prohibits cheating on the New York State Regents examinations to obtain a high school diploma, on the grounds that this leads to *genevat da'at* vis-à-vis future employers.

[70] Compare the number of worksite enforcement actions undertaken by ICE as reported in the official statistics at https://www.ice.gov/features/worksite-enforcement - in fiscal year 2018, thousands of investigations, hundreds of arrests, and only dozens of convictions - to the total unauthorized workforce, estimated at over 8 million (prior to the COVID-19 pandemic).

[71] Mishnah, Bava Metzi'a 6:1 and Gemara ibid., 76b; *Shulḥan Arukh, Ḥoshen Mishpat* 333:5. It is well-established that *davar ha-aved* applies not only to losses, but also to foregone opportunities for economic gain; see, e.g., *Hagahot Asheri* to Rosh, Bava Metzi'a 6:6.

[72] I have not discussed the question of the use of false identification to obtain a driver's license. As I mentioned above, you can obtain a driver's license in some states without breaking any laws, so I do not believe it is halakhically justified to fraudulently obtain a driver's license in other states, including your home state. However, if for some compelling reason you require a driver's license immediately, or cannot move even temporarily to a state with a friendly legal regime, ID fraud to obtain the license may be permissible. It should be noted that the Halakhic issues with obtaining a license are less severe than those involved in employment, as such fraud does not put anyone else in legal jeopardy.

III.

Zoe, your willingness to do anything necessary to allow Yonatan to live a normal life is admirable. I'm sure your support in this difficult situation means a great deal to him, and I urge you to continue doing all you can to resolve his status, though I confess that my optimism that everything tends to "work out just fine" in America has been badly shaken in recent years.

Above, I outlined several Halakhic routes leading to the conclusion that in Yonatan's particular case, he is permitted to flout immigration law and stay in the country. However, I am uncomfortable with your blanket statement that immigration law is not halakhically binding, and particularly with the widespread practice you describe of evading FICA taxes.

As I discussed at length above, several contemporary authorities have taken the position that *dina d'malkhuta* does compel obedience to secular law (among them R. Joseph B. Soloveitchik), and there are potential hashkafic advantages to taking this position as well. If you truly believe this position is "ridiculous," you may certainly rely on the opposite position, which has sufficient support in the tradition as well. But the example you cite as proof is irrelevant: the requirement to pay taxes is the core case of *dina d'malkhuta*, and tax evasion, according to the vast majority of authorities, is Halakhically considered to be theft.[73] Whether the practice of failing to withhold tax is as widespread in your community as you believe or not,[74] it has no Halakhic sanction.

It might be argued that filing taxes for undocumented workers, which requires yearly submission of a W-2 form containing their identifying information, places them at risk of deportation, and hence Halakha allows concealing the employee from tax authorities, with tax evasion as an unavoidable byproduct. Whether this argument passes Halakhic muster is irrelevant, as the factual assumptions it is based on are incorrect; as your son mentioned in his own letter, taxpayer protection laws prohibit the IRS from sharing information with law enforcement agencies in most circumstances.[75] The upshot of all this is that, in the current legal environment, there is no justification for defrauding the federal government by failing to withhold tax.

As for the immigration laws of the British Mandate, I should note that the *Avnei Nezer*, writing in less turbulent times than the Mandate period, explicitly prohibited immigrating to Ottoman Palestine without permission from the authorities on *dina d'malkhuta* grounds.[76] Thus, even the *mitzvah* of settling the Land of Israel was not seen as sufficient justification for flouting lawful immigration controls. With regard to the Mandate, perhaps the need to preserve the lives of the Jews fleeing the Nazi threat justified ignoring the White Paper, or perhaps the need for warm bodies in the struggle to establish a Jewish state overrode the general principle of obedience to the secular authority – I see no reason to decide the issue – but the analogy from mid-century Palestine to the contemporary United States is fundamentally flawed.

IV.

Yaakov, the life journey you have undertaken underscores the depth of your connection both to Judaism and to morality, as does your admirable commitment to protesting injustice even at personal cost. I share your conception of the necessity of civil disobedience to unjust law, and I wonder whether you see this as a Jewish value or a universal one; or, perhaps, you see no distinction between the two. With your broad perspective – having been exposed to the secular world, Ḥabad, and our community – I imagine that in less painful circumstances, we could have a fascinating discussion on the relationship between our commitments as halakhic Jews, as citizens of a democracy, and as human beings.

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[73] Ran, Nedarim 28a. The basis of his position is the principle that although outright theft from Gentiles is forbidden, it is permissible to cheat Gentiles so long as there is no possibility of being discovered (which would lead to *ḥillul Hashem*). The consensus of contemporary authorities is that this principle does not apply to Gentiles who observe the Noahide laws, and hence is not relevant in our day. I am deeply uncomfortable even mentioning this area of Halakha, though intellectual honesty compels me to do so.

[74] According to a Congressional Budget Office report, between 50 and 75 percent of undocumented workers in the United States pay taxes. See The Impact of Unauthorized Immigrants on the Budgets of State and Local Governments, pages 6-7.

[75] 26 U.S.C. §6103. See, e.g., https://www.americanimmigrationcouncil.org/research/facts-about-individual-taxpayer-identification-number-itin.

[76] Avnei Nezer, *Yoreh Deah* 455.

To the issue at hand: I share your conception of the value of civil disobedience to unjust law (and there is no need, here, to determine how to carve out a civil disobedience exemption to *dina d'malkhuta*). I also agree that self-interested lawbreaking is not civil disobedience under the usual understanding of that term. But it cannot be, as you seem to be arguing, that lawbreaking is *only* justified when it is disinterested. The many exceptions to *dina d'malkhuta* which have been put forward since the time of the Amora'im demonstrate that this is not the case.[77] And if the argument you are making is moral rather than Halakhic, I leave to your imagination to devise a law whose violation would be self-interested but also clearly morally required.[78]

In short, civil disobedience is only one of many possible justifications for violating the law; as such, one must decide on a case-by-case basis whether violation of a law is the right thing to do (Halakhically or morally), as I have attempted to do above. I hope you find my arguments convincing, but even if you do not, I urge you in the strongest possible terms to join the legal battle for Yonatan's right to live in America. It doesn't require you to violate your conscience either: after all, if Yonatan succeeds in obtaining legal status, whatever moral or Halakhic difficulties you might have with violating immigration law will no longer apply. Surely that would be the best outcome for all concerned?

[77] This is particularly apparent from the license Halakha grants under certain circumstances for tax evasion – clearly a self-interested act – which goes back to the original *sugyot*, Nedarim 27b-28a and Bava Qamma 113a.
[78] If you are having trouble, see, e.g., Ex. 1:22.

Teshuvah - Akiva Weisinger

Dear Yonatan,

Thank you for reaching out, and thank you for entrusting me with this question.

As I understand from your letter, here are the particulars of your case. You may correct me if I have gotten any of the details wrong.

You were born in Colombia, and adopted and converted as an infant. You were never made an official citizen of the United States, though you were raised here and have lived here your whole life, thus making you legally "undocumented." Prior to 2001, adopted children were not automatically made citizens, which is why you are in the predicament you are, but in 2001 a law was passed that, had you been adopted after that law, would have automatically made you a citizen. While your parents are trying to go through the proper channels to obtain your citizenship, you are at a significant disadvantage without a photo id; you can't drive, get a job, get on a flight, or leave the country and come back.

Your question is, given halakha's edict to follow the rules of the land, or **Dina D'Malchuta Dina**, (henceforth abbreviated **DMD**) whether you may buy a fake ID to be able to live a normal life, or whether you are obligated to self-deport and apply for citizenship abroad, from a country you have never lived in, don't speak the language of, or have any contacts in?

Let's divide your question into three component questions, each of which we will have to answer in our final resolution.

1. **Are you considered a citizen halakhically such that the laws of the land apply to you?**
   In other words, if you are not a citizen of the country according to its own laws, are you even obligated to follow the laws? Obviously, if you don't, we have a neat and tidy answer to your problem, but even if you do, figuring out the answer to this question will help us understand the source of your obligation to obey US Law.

2. **Do you have to turn yourself in/leave the country?**
   Does the obligation to obey the laws of the land require us to obey immigration law as currently constituted, full stop, no exceptions? Or does halakha allow for us to consider the validity of US Law and evaluate whether we are obligated to obey laws that are irrational or unjust, and if so, on what basis?

3. **Are you allowed to use a Fake ID?**
   Does DMD require us to obey ID Laws and immigration laws such that acquiring a fake ID would be prohibited? Are there other prohibitions at play here?

So now, let's start trying to figure out a way of answering your question.

First, let's figure out exactly what Dina D'Malchuta Dina, the obligation of Jews to follow the laws of the government, entails.

Broadly speaking, there are two different attitudes that Judaism takes in its relationship to the state and its laws. On one hand, we find sources that extoll obedience to the laws of the state. Perhaps most famously is Yirmiyahu 29:7, exhorting the Jews to "*Seek the peace of the city to which I have exiled you,*" but the attitude is well attested in rabbinic sources as well, which should not surprise us. These were people who talked about law all day. The idea of respect for the rule of law, without which society will descend into chaos (or as R. Chanina Sgan HaKohanim puts it in Pirkei Avot , "people swallowing each other alive") is certainly something the rabbis took into account, especially when formulating the concept of DMD. In this conception, individuals feeling themselves empowered to disobey laws they dislike or feel themselves above erodes society and thus people ought not to disobey laws even when they feel like they have good reason to do so.

However, Judaism[79] is not just a religion of laws, it is a religion of morality and ethics, and it is not always the case that laws will be moral and ethical in conception or practice. Judaism sees the conscience's ability to challenge the law and the state as necessary and praiseworthy, whether it's the neviim challenging the authority of the monarchy, the heroes of Channukah disobeying oppressive laws of the Seleucids, sages disobeying Roman laws against learning Torah, or any story of disobedience and martyrdom from throughout Jewish history. It's clear that Judaism does see a place for the ability of conscience to speak truth to power. In this conception, the ability of individuals to challenge the morality of a law must be safeguarded.

Now, as is true of many issues presented as binaries, the trick is finding the balance between the two. Halakha, by which I mean a process in which Jewish legal and (to a lesser extent) narrative sources are weighed and taken into account in response to a given question, must take both streams into account, that of the value of the rule of the law **and** that of the ability to of conscience to speak truth to power. Any conception of DMD must preserve both, and thus must have a way of evaluating which kinds of laws are deemed valid and must be obeyed to preserve the rule of law in society, and which laws can be disobeyed as an act of protest of conscience against power.

In order to do that, any conception of DMD must answer satisfactorily the following:

1. **What is the basis for the rules of the government having validity in general?**
   What is halakha's general theory of the basis for government authority? On what basis is a government able to demand obedience sanctioned by halakha?

2. **In what areas do governmental laws have validity and in which areas do they not?**
   Based on our answer to question number one, what kinds of laws have halakha-sanctioned validity, and what kinds of laws do not have that validity?

3. **In what situations can (or must) one disobey the law?**
   Which specific situations are applications of the principles of valid and invalid laws?

4. **What happens when Jewish law conflicts with government law?**
   While not strictly relevant to our question, which does not entail a conflict between Jewish law and US Law, any conception of DMD must answer this.

So now that we have quite exhaustively figured out which questions we want to answer, let's start looking at the sources.

The conceptual source of DMD is a matter of debate amongst the rishonim, with two primary positions emerging.

The first position is that of the Ran, who holds that DMD is founded upon the King's ownership of the land and his ability to kick anyone out he wants. Incidentally, this means that Jewish Kings do not have DMD, because under halakha, Jews own their property (and are not serfs under feudalism.)

This position has limited utility for us for a number of reasons.

1. We do not live under feudalism and the state does not own all the land in a country.
2. At least in theory the ability of the US government to kick people off their land or deport people is limited by law.
3. As we will see, it is not a conception of DMD that becomes codified in the Shulkhan Arukh.

We will deal with only one of those primary positions, that of the Rashbam/Rambam.

The Rashbam, in a comment on one of the main sugyot of DMD, **Bava Batra 54b**, says the following:

[79] By "Judaism," I do not mean to say or imply that Judaism speaks in one voice on this or any issue, only that sources that present this point of view are present in the Jewish tradition.

והאמר שמואל דינא דמלכותא דינא - כל מסים וארנוניות ומנהגות של משפטי מלכים שרגילים להנהיג במלכותם דינא הוא שכל בני המלכות מקבלים עליהם מרצונם חוקי המלך ומשפטיו

But Samuel said, The law of the land is the law - All taxes, tariffs, and customs of the rules of kings,which are regularly used to guide their kingdom, it is the law, for all the citizens have accepted the king's statutes and laws of their own free will.

The Rashbam sees the validity of "all taxes, tariffs, and customs of the rules of kings" as being based in the assumption that "all the citizens have accepted the king's statutes and laws of their own free will." In other words, we assume that by living in the kingdom, you have implicitly accepted a social contract that obligates you to follow the laws of the sovereign, and thus any demand made on you to obey a law is based on your having already implicitly consented to do so.

This conception of DMD, which we will call "Constructed Consent," seems to be what the Rambam is getting at as well, in his concluding remarks on his section on DMD (**Hilkhot Gezeilah v'Avedah, 5:18)**:

בַּמֶּה דְּבָרִים אֲמוּרִים בְּמֶלֶךְ שֶׁמַּטְבְּעוֹ יוֹצֵא בְּאוֹתָן הָאֲרָצוֹת שֶׁהֲרֵי הִסְכִּימוּ עָלָיו בְּנֵי אוֹתָהּ הָאָרֶץ וְסָמְכָה דַּעְתָּן שֶׁהוּא אֲדוֹנֵיהֶם וְהֵם לוֹ עֲבָדִים. אֲבָל אִם אֵין מַטְבְּעוֹ יוֹצֵא הֲרֵי הוּא כְּגַזְלָן בַּעַל זְרוֹעַ וּכְמוֹ חֲבוּרַת לִסְטִים הַמְזֻיָּנִין שֶׁאֵין דִּינֵיהֶן דִּין וְכֵן מֶלֶךְ זֶה וְכָל עֲבָדָיו גַּזְלָנִין לְכָל דָּבָר:

In what instances does this principle [the king's law is the law] apply? When the king's coins are accepted throughout those lands, for the residents of that country have agreed to him and have accepted that he is their master and they are to him as slaves. But if his coins do not circulate, he is like a robber by force and like a band of armed thieves whose laws are not enforced, and such a king and all his servants are considered thieves in all matters.

The King's law, to the Rambam, applies when we have physical evidence of consent of the governed, their acceptance of his currency. In such places, we know that the people have accepted that "he is their master and they are to him as slaves." If such consent cannot be constructed, like when his currency isn't accepted, his laws are invalid to the point that any funds seized by him and his government is considered theft.

The Shulkhan Arukh seems to codify Rashbam and Rambam's conception of DMD as halakhically binding, even using the Rambam's phrasing in **Shulkhan Arukh Chosen Mishpat 369:2**.

וכן כל כיוצא בזה שדין המלך דין והוא שיהי' מטבעו יוצא באותם הארצות שהרי הסכימו עליו בני אות' הארץ וסמכה דעתם שהוא אדוניהם והם לו עבדים שאם לא כן הרי הוא כגזלן בעל זרוע:

And this applies as long as his coin is used in all those areas, since the dwellers of those areas all agreed, and it is clear to them that he is their lord and they are his servants; and if this is not the case, behold he is like a robber user of force.

So let's go ahead and answer our first question on DMD:

Q: What is the basis for the rules of the government having validity in general?

A: Constructed Consent, ie, We assume that people living in a given place have implicitly consented to follow the laws of that land and its sovereign.

However, that is not a complete picture of the Shulkhan Arukh's conception of the basis of DMD. Later on, at the end of **369:8**, he gives this general rule, (which is itself using the Rambam's phrasing in **Hilkhot Gezeilah v'Avedah 5:14**)

אבל מלך שלקח שדה או חצר של אחד מבני המדינה שלא בדינים שחקק הרי זה גזלן והלוקח ממנו מוציאין הבעלים מידו כללו של דבר כל דין שיחקוק אותו המלך לכל ולא יהיה לאדם אחד בפני עצמו אינו גזל וכל שיקח מאיש זה בלבד שלא כדת הידוע לכל אלא חמס את זה הרי זה גזל

But a king who takes a field or courtyard of one of the people of the state that is not in accordance with the laws that have been written, this is theft, and one who takes from him, the original owners can take from his hand.

General rule: Any rule set for all and not for one individual by himself is not theft, and anything he takes from only this individual person against the law known to all, it is a corruption and theft.

I want to focus on the ideas of "not in accordance with the laws that have been written" and "against the law known to all," which the S"A says are not considered valid exercises of DMD power. Why are laws or decrees that go against previous laws, or not known to all, not considered valid? Why must all laws be consistent with previous laws in order to be considered valid? Are we saying that Kings are never allowed to make new rules? Do we think that the Persian system as described in Megillas Esther, in which any laws that are sealed with the King's signet ring cannot be taken back (even if its a genocide) is a good idea? Kings *have* to have the power to make new laws. It's incomprehensible that they wouldn't!

Additionally, if our svara is that society confers authority by dint of social contract, then we have already signed up for the system! In American terms, you agreed to abide by the laws as written by the elected representatives of the legislative branch, enforced by the executive, interpreted by the judicial. If a law is written that you're not happy about that goes against a law that you liked, tough. We constructed your consent for the system, not individual laws. Even if this is not a case of a king writing a new law, but just him taking stuff illegally, you consented to giving the king that amount of power! You signed up for the system! Deal with it, right? And yet, the Shulkhan Arukh is telling us that laws or sovereign actions that are "against the known law" or against previous laws are invalid by dint of DMD and can be disobeyed! What's going on?

It must be that our ability to construct consent for every law is perforce limited. We usually are able to construct consent by the governed to be governed. But we cannot stretch that construction for laws that we cannot assume would have been consented to. So when the Shulkhan Arukh talks about the new laws that are invalid, as opposed to the old laws which were valid, it's not just new versus old. It's a matter of constructed consent. Usually, we can assume that laws have been consented to, and thus have validity. But new laws don't necessarily have that consent, especially if people do not know about that law, and especially if the King is going against laws previously consented to by constructed consent.

And thus, according to halakha, it cannot be that *all* laws issued by a sovereign are valid by virtue of them being issued by a sovereign. There are limitations placed upon the power of a sovereign, even one who rules by consent of the governed, based on the limitations of constructed consent. So let us now answer question two of our questions on DMD.

Q: In what areas do governmental laws have validity and in which areas do they not?

A: In areas that we can assume constructed consent, laws have validity. In areas that we cannot assume constructed consent, laws do not have validity.

Under our theory, a lot of the details given about situations in which DMD applies and doesn't apply can be given an overarching theme and an underlying foundation. We've already seen two of those details: against "the known law" and against "the laws that are written down." We can explain those as being two sides of the same coin: we cannot assume that people would consent to being governed without the oversight that comes from laws that are written down and thus publicly accessible ("known to all"). By way of example, that the US Constitution is written down and accessible to be read by all US Citizens, which allows people like Ernesto Miranda (who had, at most, a high school education) to challenge the constitutionality of his arrest all the way to the Supreme Court, leading to the institution of "Miranda Rights."

Going through the cases listed in the Shulkhan Arukh and seeing which cases are seen as invalid under DMD, we find a tax collector who has been given unlimited power to collect funds (אין לו קצבה), as opposed to be a specific amount of money to collect is invalid. Under our working theory, this is because we can't construct consent to an individual being given power over others without limitations.

We also find the case of laws made against one individual, לאדם אחד בפני עצמו, are invalid, as opposed to מס על בני העיר או על כל איש ואיש דבר קצוב משנה לשנה או על כל שדה ושדה דבר קצוב, "taxes on the members of a city, or on every person, a set amount from year, or on every field year to year." In other words, laws

should be equitable, in theory and in practice, and not inconsistent or discriminatory. We cannot assume that people would willingly consent to a system that will be discriminatory. Even if the discrimination would in fact favor a certain individual, we cannot assume that is the kind of society people would consent to.[80]

In the **Rema on 369:11**, we find a statement that either is our theory, worded differently, or an example of the qualifications for DMD we've listed so far. He says:

> דלא אמרינן דינא דמלכותא אלא בדבר שיש בו הנאה למלך או שהוא לתקנת בני המדינה
> *We only say Dina D'Malchuta Dina in cases in which there's a benefit for the king or for the good of the people*

In other words, the basis of DMD is that governments are given power to do things for the benefit of their citizens, eg, cutting down trees to build bridges, paving roads, etc. Anything that would go beyond that purview[81] is something we could not construct consent for.

So here's what we're gonna work with: All of DMD is based on our ability to construct consent.

Constructed Consent is an assumption we make about people's willingness to obey laws of the land they live in. We say that generally, people would agree to abide by the rules of the state in which they reside. But there are things that falsify that we cannot carry that assumption to. There are rules that a government can issue that we cannot assume constructed consent for, such as rules that are unequally applied or discriminatory, or that confer unchecked power on individuals that cannot be challenged by citizens, or that fail to benefit society.

Perhaps it's best to borrow a thought experiment from political philosopher John Rawls to best understand the thinking here. If you were setting up a new society with a bunch of people, but once the society starts, you don't know where you will land socio-economically, racially, religiously, gender-wise, what have you, what laws would you consent to?

You wouldn't want inequitable or discriminatory laws, because you don't know if your gonna be the one discriminated against or the one with the smaller slice of pie. You wouldn't want to give anyone unlimited power without oversight, because the odds you're the guy with power are low. You want laws that will benefit society, generally. That's our test for validity of DMD.

So with that, let's answer our third question on DMD.

Q. In what situations can (or must) one disobey the law?

A. In situations in which we cannot construct consent of the governed.

These situations include

- **Discriminatory or unequally/inconsistently applied laws**
- **Conferral of power without limits or oversight**
- **Laws that are not for the benefit of society**

As for question four, we can perhaps say that we cannot construct consent for laws that would make people violate halakha, but I will admit this isn't the best answer. Being as it is not relevant to our case, we will leave it a tzarich iyun.

So having built our foundation for our discussion of DMD, let us return to the questions about your case:

1. Are you considered a citizen halakhically such that the laws of the land apply to you?

[80] See also, Or Zarua
[81] And yes, "benefit of the king" does kind of undercut the point.

If you are not actually a "halakhic citizen," defined as a person who is halakhically considered to have consented to the rules of the country they find themselves, that makes our task easier. If you're not in fact a halakhic citizen, then no need to follow immigration laws, and presto! No problems.

This won't work.

Under halakhic definitions you are a citizen because you participate in society. As stated in your letter, this is the only home you've ever known, and you even intend to pay taxes. In one of the foundational sugyot about DMD, a proof given for DMD is דקטלי דיקלי וגשרי גישרי ועברינן עלייהו, that (the government) cuts down trees and makes bridges and we go on them, (indicating that the wood is not considered stolen property). The fact that you participate in society, using roads, crossing bridges, making use of infrastructure and so on is the thing that proves that you are subject to its laws. This does not appear to depend on whether you are legally considered a citizen or not.

One point we might raise is that, given your inability to vote, have you really assented to be governed by the laws in this country? Can we really generate a prohibition without representation?

This likely won't work either.

Number one, historically, making one's obligation to obey the laws of the land dependent on representation in government would make the vast majority of Jews throughout history not obligated to follow the rules of the governments they were under, which were not democratic. Trying to fit our idea on the historical precedent just won't work.

Additionally and more crucially, the foundation we've built for our idea of DMD is "constructed consent," and that is dependent on an assumption, not the empirical fact of voting. We assume people consent to be governed by the laws of the country they live under, with a few limitations, we do not demand proof that they have in fact done so.[82]

So, halakhically speaking, you are a citizen of the United States such that we assume that the laws of the United States are laws you have consented to, owing to your participation in society and use of infrastructure.

2. Do you have a right to stay in the country, or must you self deport?

So, having established that you do in fact have to obey the laws of the United States, must you self-deport?

I would argue that you need not self-deport, as any law requiring you to do so fails our tests for validity based on Assumed Constructed Consent. We do not assume that people would consent to rules that are discriminatory or unequally applied. Without even getting into the discrimination against Latino people in immigration enforcement, which I think is well attested to, there's the simple fact that the only thing that would force you to self-deport is a technicality: The law that did not make adoptees citizens until 2001. There is no good reason why you should not be grandfathered into that law. If the concept is correct, that adoptees ought to become citizens, then it should be equitably applied to all adoptees. If the concept is incorrect, and adoptees should not automatically become citizens, then it ought not be applied at all.

While we only need failure on one criteria to invalidate the law, it fails on other criteria as well. If such a law, barring adoptees from citizenship, really was for the benefit of society, the law repealing it never would have passed. There is also the concern that current immigration law confers unlimited and unchecked power on immigration enforcement, and the fact that challenging the law puts you in a dangerous position, outing yourself as undocumented, means that the power of deportation and immigration enforcement has very little oversight.

[82] This might even extend to someone who says "I hereby refuse to consent to be ruled by the government of the United States," as our idea of constructed consent may override what people actually say unless they have an appropriate reason for doing so.

Additionally, if we want to go out on a little bit of a limb, one might be able to falsify the assumption of constructed consent because there is data that conflicts with that assumption, namely the numerous polls illustrating that there is broad consensus that immigrants who were brought to this country as children ("Dreamers") ought to be allowed to stay. (The fact that there has been no legislative action on this can be wholly attributed to partisan gridlock, not a lack of popular will.) Such polls would illustrate that the assumption that the public consents to this law can no longer hold, because a majority no longer supports it. We may even extend this principle to a "significant minority" (מיעוט המצוי) which would pave the way to a satisfactory halakhic theory of civil disobedience.

This runs into problems, though. There's a difference between our being able to falsify constructed consent based on our assumption that a rational person would choose xyz than accepting whatever the will of the majority is, rational or not. What if the majority is opposed to law that, if repealed, would violate our principles of validity we laid out? If the majority of US citizens can be shown to be opposed to the Civil Rights Act of 1965, should that mean that laws banning segregation ought to be ignored? Practically, we run into other issues. Who's doing the polling? Who decides what a majority is, let alone a significant minority?

For these reasons, I'm not going to base my teshuva on this principle, but Tzarich Iyun.

3. Are you then allowed to buy a Fake ID?

My first-glance view would be "I don't think so." Our criteria would not apply to a stam case of using a Fake ID. Laws requiring ID are not laws that are discriminatory inherently or in application. There are good societal reasons for laws against Fake ID's. Such laws are not subject to enforcement without oversight or checks. Requirements for ID are accessible and able to be used to mount a challenge. Geneivat Daat, the prohibition that includes falsely presenting yourself, means that there is a halakhic reasoning for it as well.

Practically, the risks for getting a Fake ID are high, as being caught with a Fake ID would immediately get you deported. You cannot claim that because the laws against immigration are unjust, the laws requiring ID's are unjust. The law you'd be breaking is against using false identification, not against illegal immigrants using ID's. The law is against Fake ID's, not immigrants.

Are there cases, though, in which using a Fake ID would be permissible based on the foundation of DMD we have built?

Here are two trial cases[83] in which I think false identification would be permitted

In 2010, Arizona passed a law (SB 1070) that required all "aliens" to have their immigration papers on them at all times, and gave police and state troopers broad power to stop anyone they wanted and demand they produce immigration papers to prove their legality if there is "reasonable suspicion" that someone is an illegal alien. While the law officially outlawed race or ethnicity as a valid reason to suspect that someone is an illegal alien, practically speaking, there is no way to be "reasonably suspicious" that someone is an illegal alien that involves, say, the cut of their jib, or a certain je ne sais quoi, and enforcement of this law was overwhelmingly racist and discriminatory. This led to numerous racial profiling lawsuits, with the US Supreme Court ruling that such suits could proceed despite the law being written to protect officers from such lawsuits.

In such a scenario, in which the application of a law is overwhelmingly discriminatory, (even if it is not expressly written that that is the intent), we cannot assume that we can construct consent for people to be harassed due to their race. In such a situation I do think that halakha would permit the use of false immigration papers, especially if deportation carried enough of a risk that it would override any concerns of gneivas daas.

Another, more relevant case are laws that demand ID's in order to vote. While not objectionable in of itself, such laws are, especially in the southern United States, part of a whole ecosystem of laws and

[83] Both in the United States, "Nazi Germany" is the easy way out here.

infrastructure decisions made to disenfranchise poor and black voters.[84] Such laws, for instance, will demand ID's be driver's licenses, disenfranchising poor voters who don't own a car, particularly when they bar public housing ID's, which would be more accessible. Additionally, if people decide to go get the driver's license, the DMV is typically way outside low-income neighborhoods and cities, and public transportation to the DMV (and anywhere else) is poor to non-existent.

There is compelling evidence that these laws and their constellation of provisions and infrastructure decisions are not just discriminatory in application, they are discriminatory in intent, has been legally declared as such in numerous courts of law,[85] [86] and even admitted to on the record by architects of such policies.[87]

In such cases, where ID laws are passed in order to discriminate against minorities and the poor, our understanding of DMD would indicate that the laws mandating ID to vote would be considered invalid. You would still have to deal with gneivas daas, and practically, I don't recommend it, but I do think there is a good case to be made that halakha would not mandate following a law that is discriminatory in intent beyond the shadow of a doubt.

Why am I giving these test cases?

Despite my initial sense that obtaining a fake ID would be prohibited, I'm offering you trial models to think through the question. I do not wish to make a concrete decision, as I think this is a decision you have to make yourself. You are the foremost expert on your own situation. So go through the mental flowchart I have laid out for you. Use Rawls's thought experiment.

If you were starting a society, and didn't know where you'd end up in that society, would this law, requiring an ID for whatever purposes, and that would exclude people in your situation, be accepted? Is the law inequitably, inconsistently, or discriminatorily applied? You know that better than I do. Does this law really benefit society? Your definition of the benefit of society may well differ from mine. Does this law confer unchecked power on individuals? Is there no means at your disposal to challenge the law? You know your reality better than I do.

At the end of the day, I think this is inherently an individual decision. We are discussing an individual's right to conscientiously object to the rules that are, at least theoretically, adopted by society. You're the individual here. Do you think you have that right, here? Are you willing to risk endangering the rule of law to exercise that right? Or is it more dangerous to the rule of law to let this law go unchallenged? All heavy, heavy stuff. But it's your decision. I've given you the tools. Mom, Dad, I've given him the tools. He's ready. I trust you, Yonatan.

With hope for your safety and success,
Rabbi Akiva Weisinger

[84] https://www.aclu.org/other/oppose-voter-id-legislation-fact-sheet
[85] https://www.theatlantic.com/politics/archive/2017/08/a-court-strikes-down-texass-voter-id-law-for-the-fifth-time/537792/
[86] https://www.ca4.uscourts.gov/Opinions/Published/161468.P.pdf
[87] https://www.snopes.com/fact-check/north-carolina-voter-id/