

## CENTER FOR MODERN TORAH LEADERSHIP

*Center for Modern Torah Leadership*



חרות ואחריות

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### MUST HALAKHAH BE SPIRITUALLY FAIR?

Rabbi Aryeh Klapper, Dean

In the first month of the second year following the Exodus, G-d told Mosheh: “*Bnei Yisroel must make the Pesach in its appointed time, on the fourteenth of this month, in the afternoon, you must make it, in its appointed time*”. (Bamidbar 9:2-3) Even one “*in its appointed time*” would have been redundant, since the date and time are separately specified – two seems extravagant. Mosheh then tells Bnei Yisroel to make the Pesach, and they make it at the specified time and date, with no mention of the “appointed time”. The discrepancy is resolved by a back story – a group of men protested the initial command as discriminatory, and G-d agreed to the point of providing them with a reasonable accommodation in the form of a makeup date, not the “appointed time”.

Who were these people, and why were they initially excluded? They describe themselves as “*טמאים לנפש אדם*”, ritually impure to a human spirit” (corpse). Talmud Sukkah 25a provides three possible identifications. They might have been the ones who carried Yosef’s coffin from Egypt; or who carried Nadav and Avihu’s bodies out of the Holy of Holies; or simply Jews who fulfilled the obligation to bury someone who died with no one specifically obligated to bury them (*meit mitzvah*).

RITVA (the medieval Spanish Rabbi Yom Tov ben Asevilli) points out that the self-report and the Talmudic identifications each raises a grave difficulty.

Regarding the self-report – the men admit their *tamei meit*ness, and clearly understand this to be the ground for their exclusion. What then are they asking, and why isn’t the answer to their question obvious to Mosheh?

Regarding the Talmudic identifications – In a community of millions, one has to assume that many deaths happen each day, and therefore that some people will always be *tamei meit*. So what difficulty requires resolution via a more specific identification?!

Rabbinic tradition provides a series of brilliant technical responses to the first question. The Talmud itself notes that Torah describes the excluded as unable to do the Pesach *ביום ההוא*, on that day – meaning that they would

have been able to bring it the next day. Why, if *tamei meit*ness lasts seven days? Because the Pesach is slaughtered in the afternoon, but eaten at night. The people asking would no longer be *tamei meit* when the time came for eating the Pesach. Since the slaughtering of each Pesach is done by one person for the sake of a group, they contended that they could be part of such groups despite being *tamei meit*, and then participate in the eating at night.

Many later commentators note that the extra words *במועדו* are used to allow the Pesach to be brought when the community as a whole is *tamei meit*; the questioners here thought that this should also apply to individuals.

Some commentators root their answers in the specific identifications, e.g. perhaps Yosef’s coffin was designed to shield its bearers from *tum’ab*. To take one spectacular example, Tzror HaMor (Rabbi Avraham ben R. Yaakov Sabe, Spanish expulsion) notes that the people describe themselves as *tmei’im l’nefesh Adam*, rather than mentioning death. The deaths of Nadav and Avihu, he suggests, were not the result of sin but rather because they were so close to G-d that their deaths **reversed** the sin of Adam, and thereby enabled the exiled Divine Presence to return to Earth (in the Holy of Holies). Their pallbearers therefore contended that *tum’ab* related to this sort of death should not prevent them from sacrificing. On the contrary – association with the deaths that brought the Divine Fire to burn on the altar should be a qualification! Tzror HaMor’s reading is also supported by the odd locution that the people “draw near” to Mosheh and Aharon in order to ask their question. The Hebrew is *ויקרבו*, which is the verb for sacrifice and also recalls G-d telling Moseh that the deaths of Nadav and Avihu were a fulfillment of *בקרבי אקדש*.

The problem with purely technical explanations of the question is that they don’t explain why Mosheh needs to refer the question to G-d, or why G-d responds with a make-up date rather than with an explanation for the exclusion.

Or HaChayyim does a better job of matching the question with G-d's answer.

– צריך לדעת טענת האנשים במאמר למה נגרע –

הלא טעמם בפיהם יענו אנחנו טמאים,

ומה מבקשים ליתן להם תורה חדשה!?

ואולי כי לצד שנטמאו ברשותו יתברך,

בין למאן דאמר טמאי מת מצוה בין למאן דאמר נושאי ארונו של יוסף,

חשבו כי ידין ה' אותם כטהורים

*We have to understand the contention of the people when they said*

*"Why should we be subtracted?" –*

*Isn't the reason in their own mouths, when they said "we are temeim"?! –*

*Perhaps it was since they had become tamei with His permission, whether one follows the position identifying them as tamei via a meit mitzvah, or as Yosef's coffinbearers,*

*they thought that G-d would judge them as if they were tehorim.*

Or HaChayyim subtly shifts the framework. Technical explanations lead at most to doubt – maybe we should not be excluded. *Lamah nigora, why should we be subtracted*, has a much more aggressive valence. It establishes a presumption that they should **not** be excluded. Moreover, Or HaChayyim sees their appeal as not to the law, but rather to G-d directly. Fundamentally, they claim that it would be **unfair** for Him to exclude them from this mitzvah.

G-d's answer fits well this way. A makeup date leaves the law as-is while resolving the fairness issue. But Or Hachayyim's approach requires us to insert facts and arguments into the question that cannot be derived from the text, which states their *tamei meit* condition generically.

My own perhaps original suggestion is as follows. It is theoretically possible to bury someone without becoming *tamei*. Kohanim, however, are required to become *tamei* to their dead relatives. Since the Pesach date was announced two weeks in advance, perhaps everyone other than *kobanim* took technical measures to bury without *tum'ab*. The only deaths in the one small family of *kobanim* that month were of course those of Nadav and Avihu, and therefore their buriers were the only *tamei meit* people among Bnei Yisroel when the time for the Pesach arrived. (This assumes that Mishael and Eltzafan were obligated to become *tamei* even though they themselves were not *kobanim*, an issue beyond our scope here.)

Alternatively, perhaps everyone was avoiding participation in burials lest they miss the Pesach. This in effect made every Jew who died a *meit mitzvah*, and so some people volunteered to be the *chevra Kadisha* for those two weeks. The question these volunteers asked was whether the exclusion applied to them even though they had

become *tamei* in the process of fulfilling a communal obligation.

This question was both technical and moral. There is nothing about the law as formulated up to now that allows an exception. But the law also never explicitly rejected this exception. In this case, the law yields an unfair result without the exception, and that shifts the burden of proof.

Talmud Sukkah 25a learns from here that *ba'osek b'mitzvah patur min hamitzvah*, that one who is engaged in the performance of one mitzvah, such as burial, is exempt from other mitzvot (such as the Pesach; this means that they can also engage in actions that will make them unable to perform the Pesach a week later.) This principle had not been stated previously. The volunteers therefore assume that they are still obligated to bring the Pesach, and perhaps even that they will be punished with excision for failing to bring it, even though Halakhah forbids them to bring it, and their inability to bring it results from their fulfillment of a halakhic obligation! This seems doubly unfair to them.

Mosheh Rabbeinu might have responded by teaching the *ba'osek* principle – no, you will not be punished, because you are exempt. But he senses that this will not satisfy them; it removes the punishment, but not the fundamental unfairness of being excluded from one religious activity because they had volunteered on behalf of the community to perform another. So he refers them to G-d. G-d acknowledges that exempting them is insufficient, and so He provides the makeup date.

A makeup date has its own issues. As Chatam Sofer points out, there is still a vast experiential difference between doing the Pesach with "all Israel" and doing it with a small group. Moreover, what happens if someone has an equally valid reason for missing the makeup? The Torah does not provide for a second make-up.

In other words, halakhah is a part of human life, and therefore can never be perfectly fair. But this does not mean that unfairness is not grounds for complaint. Perhaps complaints that ask for absolutely clear Halakhah to change are excluded. But where there is ambiguity or undevelopment, challenges that seek to reverse presumptions are welcome.

However, we do not have Mosheh Rabbeinu's option of referring such challenges to G-d, immediate reply requested. It matters a great deal whether we decide that this justifies us in giving purely technical answers, because only G-d can respond morally, or rather that it obligates us to respond morally, as G-d would if the Torah were still in the possession of Heaven.