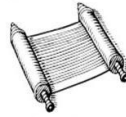


# CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



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## A TALMUDIC MOTION TO RETRY THE SNAKE

Rabbi Aryeh Klapper, Dean

*G-d to Adam: Have you eaten from the tree that I commanded you not to eat from?!*

*Adam: The woman that you placed together with me – she gave me from the tree, and I ate.*

*G-d to Eve: What have you done!?*

*Eve: The snake seduced-me-astay, and I ate.*

*G-d to the snake: Because you did this, you are cursed . . .*

There is a rhythm to this dialogue, of increasing impatience. G-d asks Adam an extended question, receives an extended answer; asks Eve a curt question, receives a curt response; asks the snake no question at all, and no response is recorded. Read *k'byakhol* (as if it were possible) psychologically, the Torah makes no statement about relative guilt or innocence. The snake receives no opportunity to defend itself simply because G-d has heard too many excuses already. Anyway, all three defendants are punished, and we have no way of knowing whether Adam and Eve's displacements of responsibility lessened or worsened their punishments.

Or: The snake had nothing to say in self-defense. Or: The snake sincerely repented and was prepared to accept the consequences of its actions. Or: The snake was unwilling to legitimate what it saw as an unjust and biased forum by speaking. Or: The snake was so powerful a rhetor that G-d could not allow it to speak, lest He be swayed, or: lest the audience in His court be corrupted, (fallen angels are not unknown to Jewish tradition). But are those fears legitimate reasons to silence a defendant? In this, the first trial in history, should the Judge of all the land not do justice?

Rav Shmuel bar Natan, citing Rabbi Yonatan (*Sanhedrin* 29a), goes yet one step further. "How do we know that one

does not make arguments on behalf of a seducer-to-idolatry? From the primeval snake." Not only did the snake not get to speak in self-defense, G-d did not argue on its behalf. The clear implication is that G-d had valid arguments to make for the defense, but did not make them, and G-d's behavior is a proper model for our own behavior in trials of seducers-to-idolatry. Perhaps the intention is that one should not make purely technical arguments on behalf of a seducer-to-idolatry, but of course one must make arguments that suggest the accusation is false. Still, this is dangerous territory.

The Talmud relates Rav Shmuel bar Natan's position to a statement of Rabbi Simlai, but Rabbi Simlai seems to point in quite different directions: "The snake had many arguments to make, but did not make them. Why did The Holy Blessed One not make the arguments for him? Because he did not make the arguments." Here it seems clear that the snake *chose* not to speak. But what is the sense of G-d being silent because the snake was? Had the snake spoken, no Divine argument would have been necessary!

The common assumption of Rav Shmuel bar Natan and Rabbi Simlai is that there is a technically valid defense for the snake. If the snake represents the eternal *yetzer hora*, perhaps that defense should remain unstated. But the Talmud chooses to state it nonetheless. "What could he have said? 'If the words of the master and the words of the disciple contradict, whose words must one heed? The words of the disciple.'" Human beings always have the direct responsibility to obey G-d, and nothing anyone says should be able to persuade them otherwise. We sin only when we choose to be persuaded, and no one else should be held responsible for our choices.

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This allows a new explanation of Rav Shmuel bar Natan. Perhaps the only argument that we may not make on behalf of a seducer-to-idolatry is that he—and by implication, we—cannot be held to account for the effects of our own decisions on those of other people. Freedom and influence can coexist.

Tosafot point out, however, that every talmudically knowledgeable seducer-to-sin can now make the argument themselves. Surely we cannot wish to punish only the ignorant seducers! Their response is that the snake had not been directly commanded not to seduce-to-idolatry, and so could be held liable only for consequences, whereas post-Sinai Jews have been so commanded, and so are liable for disobeying G-d regardless of the success of their attempts at seduction. (This may be hyper-technical casuistry, or fascinating moral philosophy, or both.)

But Tosafot's position is difficult to square with the Talmud's use of this argument elsewhere as the basis for the rule **אין שליח לדבר עבירה**, which exempts principals for crimes committed by agents at their behest.

A note to Siftei Kohen (*Choshen Mishpat* 32:3) brings this discussion back to our narrative. If a principal sends an agent to damage someone else's property, only the agent can be sued. But does the principal have any moral responsibility? The note argues:

- a) moral responsibility is idiomatically described as **חייב בדיני שמים** (liable in the Heavenly court);
- b) the snake was surely tried in the Heavenly court;
- c) the Talmud says that this argument would have worked to get the snake acquitted.

Therefore the argument works in Heavenly court, and so principals do not bear even moral responsibility for the damage caused by their agents.

A note to Mishneh P'Melekh (*Laws of Murder* 2:2) sharply limits this claim. It argues (on the basis of *Kiddushin* 43a) that principals escape moral responsibility only if the agent directly and immediately derives benefit from sin, and they do not, as for example when the agent eats a forbidden food: "We have never found in the Torah that A benefits and B is held liable."

But this seems morally tone-deaf. The evil of the seducer-to-sin is magnified, not diminished, when the seducer has no motive other than causing the agent to sin. Moreover, both notes to my mind are literarily tone-deaf. The core

assumption of Rav Shmuel bar Natan is that the trial of the snake *is* a valid model for *human* justice.

Tosafot and Ritva offer additional qualifications. Tosafot notes that the principal is liable for an agent's sin of *meilah* (misuse of sanctified objects) because the sin actually happens before the benefit, when the object is picked up with malicious intent. Ritva asserts that the principal is liable if the seduction took the form of action rather than mere speech.

Rabbi Meir Shapiro dazzlingly reads these legal discussions into our narrative. His starting point is that since the Torah describes the snake as the slyest of creatures, it would certainly have thought of all available legal arguments, and made them. So why did it mistakenly believe that this argument was unavailable?

In Genesis 3:3, Eve tells the snake that G-d had ordered the humans not to **touch** the Tree of Knowledge of Good and Evil lest they die. (She was apparently misinformed by Adam, who disastrously added a "Rabbinic" prohibition when instructing her without making clear that he had done so.) Why is this error relevant to the story? Rabbinic tradition records that the snake physically shoved Eve against the tree. When she did not die, she lost faith, and was willing to eat too.

What the snake correctly guessed, and Eve did not, was that G-d did not mean that violating His command would lead to immediate death; He meant only that it would make them mortal. (I hope in some future context to address why the snake understood G-d better than Eve did.) But the snake believed, with Eve, that G-d had forbidden touching the tree.

So at the trial, the snake thought that the sin happened when Eve touched the tree, and that it had caused her sin through its action. Under those circumstances, if one accepts Tosafot and Ritva, the argument that Eve should have listened to the master rather than the disciple was unavailable.

G-d, however, knew that the sin was the eating, meaning that Eve derived benefit from the sin, and so the snake should not have been held liable according to Mishneh P'Melekh. Further, her eating came as the result of the snake's words (in 3:5; the shove happens between 3:4 and 3:5), not its actions, and so the snake should not have been liable according to Ritva either. But G-d chose not to enlighten the snake.

If the snake reads Talmud, a motion for retrial is doubtless on file. *Shabbat Shalom!*

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