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### DEVORAH AS SHOFETET: EXCEPTION OR PARADIGM?

Rabbi Aryeh Klapper, Dean

In his magnificent introduction to the Sheiltot d'Rabbi Achai Gaon, Rabbi Naftali Tzvi Yehudah Berlin (Netziv) describes two models of halakhic development. One model, which he identifies with the tribe of Levi, works pointilistically and intuitively. It sees each circumstance and set of facts as unique and seeks a religious response that addresses that uniqueness. The second model, which he identifies with the tribe of Yehudah, looks to build general principles and abstractions that apply to all circumstances and all times. It seeks to respond religiously to the universal aspects of particular experience.

Please understand the importance of Netziv's contention that each of these are **halakhic** approaches. Many other thinkers present similar binaries but see them as fundamentally opposed. What Netziv calls the Levite model, they present as antinomian *aveirah lishmoh*, sinning for the sake of Heaven. They make the compelling argument that the entire purpose of law is to subsume the particular into the general, to produce **rules**. There may be circumstances where the rules should or must be broken, but in such cases, we should honor law by acknowledging the breach rather than claim that the law can bend far enough to accommodate our actions.

By framing intuitive, situation-specific responses as a mode of halakhah – indeed, as **the** proper mode of the *posek* as opposed to the *lamdan* – Netziv rejects this approach entirely.

We might reasonably suggest that Netziv's own approach is intended to expand the reach of law and domesticate intuition. If halakhah validates situation-specific religious responses, how could there possibly be room left for *aveirah lishmoh*?

But the truth is that Netziv has the most radical and pervasive understanding of *aveirah lishmoh* in the Mitnagdic world. His bon mot was that one must always consider the benefits of a mitzvah (an action mandated by halakhah) against its costs, and the cost of an aveirah (an action forbidden by halakhah) against its benefits, *because sometimes*

*fulfilling the mitzvah isn't worth its costs, and sometimes violating the aveirah is worth its costs.*

Why should a halakhah that relates to situations in their particularity ever generate counterproductive mandates or prohibitions?

I think Netziv must distinguish between mediated and unmediated religious intuition. The *posek's* intuition is mediated by halakhah, and must produce law.

Perhaps Netziv imagines a sort of religious state of nature, in which each individual human being reacts to every situation in accordance with their direct perception of Divine Will. The problem is that the Divine Will may be different for you than for me. In Maimonidean terms, for example, my character might best be developed by cultivating uncritical generosity, while you need to overcome the culpable naivete that leads you to donate large sums to fraudulent charities. So the religious state of nature does not enable the building of a religious society, and since human beings are social creatures, it follows that the state of nature does not enable human fulfillment. We therefore need a religious social contract. Cue Sinai; enter the Torah.

Social contracts require individuals to exchange the right to make some choices ("freedom from") for the ability to make other choices ("freedom to"). We retain the ability to make choices that we no longer have a right to make, and sometimes we may have the obligation to exercise that ability (*aveirah lishmoh*). By organizing as a society, we gain the ability to make new choices that are simply wrong, such as limiting the autonomy of others unnecessarily.

Social contracts are based on principles that harden into rules, and rules harden into laws. Netziv argues that this must be an iterative process. One class of halakhists (*lamdanim*) constantly draws perfectly straight lines connecting previously decided halakhic points, and then argues that the lines define the boundary of the acceptable; another class (*poskim*) recognizes that an infinite number of curves can be drawn between two points, and contends that the existing pattern of halakhic points does not justify

an overwhelming preference for simplicity. The lamdanim must constantly revise their models to account for new points decided by the poskim, and the poskim must stay within lines that have already hardened. Great poskim recognize that lines are two-dimensional, which is to say that they can only create boundaries within a single plane. If we acknowledge the existence of infinite dimensions, then, the lamdanim can never fully constrain the poskim. But the vast majority of us live in a much less exuberant religious geometry.

This tension can be illustrated within midrash halakhah by comparing the terms “binyan av” and “chiddush”. Categorizing a legal detail as a binyan av lets one generalize it to a broad range of halakhot beyond its original context; categorizing it as a chiddush confines it to its original context, and biases one toward defining that context narrowly. The only difference between a binyan av and a chiddush is that the former seems intuitive and the latter seems counterintuitive.

Lamdanim generally have a bias toward seeing things as binyanei av, whereas poskim are more willing to categorize them as chiddushim. But there is at least one exception to this tendency. Points that are halakhic outliers, but that have great appeal on non-halakhic grounds, will often be generalized by poskim and minimized by lamdanim.

This brings us to the case of Devorah the Prophetess. There is no question that existing halakhic lines appear to be drawn with the intention of limiting women’s leadership roles. There is also no question that Devorah led, and more particularly, that she functioned as a judge. This is true even if one concedes that “shoftim” means political leaders rather than judges, since **ועלו אליה כל ישראל למשפט** clearly means that all Israel went up to her for legal judgement.

The simplest way of drawing the lines is to “*chokify*” Devorah, to say that she was an exceptional case that has no implications for the halakhot of leadership – she was in essence a living *aveirah lishmoh*. This is where lamdanim pull out their literal *deus ex machina*, namely **על פי הדבור שאני** – Devorah functioned on the basis of an explicit Divine decree that suspended all the ordinary laws regarding women.

An alternate approach is to say that the case of Devorah teaches us that the lines we had in mind are wrong, and we were drawing them on the basis of way too little halakhic data. **מקרא מלא אומר והיא שפטה את ישראל** – an explicit and perfectly straightforward verse says that she served as a judge. We might go further and seek to *chokify*

any undeniable halakhic restrictions on women’s leadership, while generalizing the example of Devorah to the extent we can.

This is not a new conversation. Tosafot record both options, and each reverberates throughout the subsequent rishonim of both Ashkenaz and Sefard. But more immediately, each found new and enthusiastic exponents during the early years of religious Zionism. For example, in 1920 Rabbi Yaakov Levenson published a book called **שויון נשים מנקודת ההלכה** = The Equality of Women from the Halakhic Point of View, which enthusiastically argued that the restrictions in Rambam had essentially no applications in a democratic society. Rabbi Levenson was Chairman and then President of American Mizrachi. See as well the respectful but strong disagreement expressed by Rabbi Yosef Kanovitz of Toronto, President of the Agudat HoRabbonim of the US and Canada, and Rabbi Levenson’s equally civil response. Note particularly that the full exchange was published originally by Rabbi Levenson in his **התורה והמדע** and then included in Rabbi Kanovitz’s posthumous collection **דברי יוסף**.

In this ongoing conversation, I have a quite strong opinion, which largely tracks that of Rabbi Levenson in practice. I think it is correct to say that on the immediate issue he addressed, which was women’s suffrage, there is now a practical halakhic consensus in his favor, and any line-drawers must take that into account. I think it is generally better not to draw lines than to draw absurd lines; hence my rejection of positions that allow Golda Meir to be Prime Minister of Israel but not President of a Young Israel.

I don’t think that halakhah should be decided by projections of historical trends, and there certainly remain areas of leadership about which reasonable and responsible halakhists and halakhic communities can differ passionately. For the time being, there will be shuls of observant Jews who eagerly seek the public presence of women as religious leaders, and others who sincerely find that presence to be a violation of the halakhic ethos, and still others where the issue will cause constant tension. But the examples of Rabbis Levenson and Kanovitz should show us that there is no reason, and perhaps no excuse, for making those passionate differences the cause of Orthodox schism. Let us rather try genuinely to convince each other.