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WHY DIDN'T THE RABBIS ELIMINATE MAMZERUT? PART 5

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Sanhedrin 71a cites a beraita which declares that three Biblical laws “never were and never will be,” rather are purely hypothetical. The Talmud associates the declaration with beraitot conveying a specific legal position about each law.

In Parts 1-4 of this series, I showed that regarding the Rebellious Son and the Idolatrous City, those legal positions are not radical **reinterpretations** of the laws in response to moral concerns. Rather, the declarations of hypotheticality are **reactions** to those preexisting legal positions,

A fair counterquestion is: What motivated these extreme legal positions, if not moral discomfort with the law as it would otherwise be understood?

This seemingly powerful question rests on a false premise. It assumes that these legal positions could only have been produced by extreme interpretations, i.e. interpretations arrived at by methods that the interpreter would dismiss in other circumstances. But this is not so.

Let's turn for example to the third law, that of the Leprous House. Mishnah Negaim 12:3 records a Tannaitic dispute:

... שהיה ר' ישמעאל אומר:

עד שיראה בשני גריסין על שתי אבנים או על אבן אחת;

ר"ע אומר:

עד שיראה כשני גריסין על שתי אבנים, לא על אבן אחת;

רבי אלעזר בר"ש אומר:

עד שיראה כשני גריסין על שתי אבנים בשני כתלים בזויות, ארכו כשני גריסין ורחבו כגריס.

... as Rabbi Yishmael would say:

(The lesion does not make a house leprous) until it appears in the size of two beans on two stones,

or on one stone;

Rabbi Akiva says:

Until it appears the size of two beans on two stones,
not on one stone;

Rabbi Elazar beRabbi Shimon says:

Until it appears the size of two beans on two stones
on two walls in a corner.

It is the legal position of Rabbi Elazar beRabbi Shimon that the Talmud associates with hypotheticality. How is his position arrived at? Vayikra 14:36 first speaks of the lesion appearing on the **קיר/walls** of the house, and then of its appearance on the **קיר/wall**. Rabbi Elazar beRabbi Shimon therefore requires a wall that is also walls, i.e. a corner. There is nothing unusual about this mode of legal reading; if anything, it is not clear why the resulting requirement is so unlikely to be met.

Note that roughly the same mode of reading generates Rabbi Yehudah's requirement for the parents of the Rebellious Son to have identical voices; in Devarim 21:18; the mother and father say that their son “does not heed our **voice**” – singular. Moreover, an anonymous Mishnah on Yoma 62a, identified by the Talmud with the same Rabbi Yehudah, requires the two goats of Yom Kippur to be identical in appearance, height, and value. The reason no one declares that the goats never happened is that it is easier for human beings to overlook minor physical differences among goats than among people, especially when the people are of different genders.

In other words: the legal positions that the Talmud associates with hypotheticality are extreme only in their effect on the likelihood of the law being applied in practice. There is nothing extraordinary about the interpretations that generate them.

A further proof that these interpretations are not generated by moral concerns is that the third case, the Leprous House, is not morally bothersome to the extent that a reader might feel compelled to eliminate its practical application. (This argument is also made by Rabbi Ethan Tucker [here](#).)

Rabbi Dan Margulies (WBM '16) disagreed with this proof when I published it on Facebook some months ago. He argued that destroying someone's house is a uniquely demoralizing punishment, especially when it results from a secondary event rather than directly from a specifically identified sin. Destroying a house can also be a form of collective punishment. The ongoing public conversation about whether destroying the homes of terrorists is a legitimate punishment suggests that my initial dismissal of the moral issue was too facile.

Rabbi Tuvy Miller (SBM '13) in his [CMTL alumni DT](#) “[The House That Was?](#)” took a diametrically opposite approach to constructing a moral issue. Rabbi Miller begins from Rashi (based on midrashim), who notices that the Torah introduces the ‘leprous house’ with language that sounds more like a promise than a threat.

ונתתי נגע צרעת –
בשורה היא להם שהנגעים באים עליהם,
לפי שהטמינו אמורים מטמוניות של זהב בקירות בתיהם,
כל ארבעים שנה שהיו ישראל במדבר,
ועל ידי הנגע נותץ הבית ומוצאן

*This was an announcement to them that these ‘afflictions’ would come upon them,
because the Amorites concealed gold treasures in the walls of their houses
during the Jews’ forty year sojourn in the wilderness,
and via the ‘affliction’ they would tear down the house and find them (the treasures).*

I had always assumed that this interpretation **rejects** the position that the Leprous House is purely hypothetical: promises of wealth that depend on an unrealizable condition are simply cruel. Rabbi Miller argued, however, that the “never was and never will be” position might be a moral **reaction** to this interpretation. Since the Torah in several contexts recognizes that despoiling a defeated enemy undermines the morality of war, how could the Torah promise financial benefits from the destruction of the Seven Nations?

These critiques are wonderful contributions to Torah, and I am grateful for them. Nonetheless, I don’t see them as plausible drivers for extreme reinterpretations.

With regard to Rabbi Miller’s suggestion, Tanakh doesn’t always ban spoils – sometimes it seems to strongly encourage spoiling – and the bans seem clearly unusual, beyond-the-ordinary gestures. Even those bans might not apply to abandoned safe deposit boxes discovered years later.

With regard to Rabbi Margulies’ suggestion, I am not convinced that destroying a dwelling raises moral challenges as serious as execution. Moreover, since the Torah does not explicate the cause of house-plagues, perhaps they occur only when every inhabitant of the house has sinned, and so there is no issue of the innocent suffering together with the guilty.

The true underlying issue, then, is: Must we assume that Torah laws are intended to have real-world application, and therefore reject interpretations which make them hypothetical?

Maimonides presumed that we must, That’s why with regard to all three of the Leprous House, the Idolatrous City and the Rebellious Son, he ruled against the positions that the Talmud associates with hypotheticality. The Amora Rabbi Yonatan also rejected hypotheticality on ideological grounds, declaring that he was as certain of the actuality of the Idolatrous City and the Rebellious Sin as if he had sat on their tell/grave. The only reason Rabbi Yonatan doesn’t make a parallel statement about the Leprous House is that he doesn’t need to; Sanhedrin 73a records a beraita in which two Tannaim report actually seeing ruins that were identified as those of Leprous Houses.

I contend, however, that the author of the “never was and never will be” beraita rejects this assumption. Like Rabbi Joseph B. Soloveitchik’s Halakhic Man, he is not bothered if an ideal structure of Halakhah has no precise real-world correlate.

I suspect that many readers will immediately accuse me of anachronism. Halakhic Man is a product of NeoKantian philosophy and Brisk, and his positions cannot reasonably be assigned to a member of Chazal. Surely it is beyond reason to think that the Rav and the Chazon Ish were simply recreating a Tannaitic dispute.

This argument is powerful, but it is also demonstrably false. The Tannaitic dispute about this issue is explicit in Mishnah Zavim 2:2. The Mishnah discusses which sorts of emissions make a man a *zav*, and which are considered the product of ordinary processes. Rabbi Yehudah holds that one is not a *zav* if he even experienced any sort of visual sexual stimulus. Rabbi Akiva holds that one is not a *zav* even if he merely ate or drank anything.

אמרו לו:
אין כאן זבין מעתה!?
אמר להם:
אין אחריות זבים עליכם
*They said to (Rabbi Akiva):
Now there will be no zavim!?*
He replied:

The responsibility for (the existence of) zavim is not yours.

It seems unavoidable to me that Rabbi Akiva held like Halakhic Man, and his interlocutors like Maimonides.

Stay tuned for Part 6!