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Center for Modern Torah Leadership



חירות ואחריות

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## WHO SHOULD DECIDE WHEN WE REOPEN WHAT?

### TOWARD A MORAL DECISIONMAKING PROCESS FOR THE HALAKHIC COMMUNITY

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The sixth chapter of Talmud Berakhot concludes with a learned discussion of what blessings to make before or after drinking water. Rav bar Chanan asks Abayay, or perhaps Rav Yosef, for a halakhic bottom line. He responds: "Pok chazi mai ama dvar," "Go out and see what the people are doing."

Why should popular practice matter? I can think of at least three possibilities:

- A. All that matters is that practice be standardized; the easiest way to do that is to find out what people are already doing.
- B. People are probably doing what some great scholar told them to do a long time ago
- C. The collective intuition of the community is very likely to arrive at a practice that fits organically with the rest of Torah.

A fits well with the many places where Halakhah follows the prevailing custom, for example the seven places where the Mishnah says *bakol keminbag medinah* = everything follows local custom. This is largely so with regard to commercial practice and labor contracts - see for example Mishnah Bava Metzia 7:1; but see Mishnah Sukkah 3:11, which applies it to blessings/ritual.

B fits well with Talmud Pesachim 66. Hillel is asked what a Jew should do if he forgot to bring a shechitah knife to the Temple before Erev Pesach that falls on Shabbat. He responds: "I heard this halakhah but forgot it; leave the Jews to their own devices, for if they are not prophets, they are students of prophets." The next day he sees the knives arriving attached to the bodies of the animals to be sacrificed, and exclaims: "This was the tradition I received from Shemayah and Avtalyon."

A applies when we don't really care which option is picked. B applies when an option was already picked, but we've forgotten which it was. C is the only model in which the intuition of the halakhic masses makes an original contribution that matters substantively. It suggests that

sometimes collective lived experience is more reliable than collective intellect in determining halakhah.

C may be the best fit for our case, where the goal is to decide among conflicting scholarly opinions (and the eventual outcome is a melding of those opinions). More importantly, C may be the only explanation for several Talmudic rulings on apparently literal life-and-death issues:

1. On Talmud Avodah Zarah 30b, Rabbi Eliezer permits eating figs and grapes at night, citing as his rationale Psalms 116:6: "*shomer petaim Hashem*" = "Hashem is the guardian of fools." The implication is that eating those fruits at night is dangerous. Since Talmud Chullin 10a rules that "*chamira sakanta mei'issura*" = "risk of death is halakhically graver than risk of violating a prohibition," it follows that *shomer petaim* in some way overcomes that halakhic gravity.
2. On Niddah 45a, the opinion attributed to anonymous Sages (against that of Rabbi Meir) is that some women for whom childbirth is dangerous are nonetheless not obligated (or perhaps even forbidden) to use certain contraceptive methods. The rationale given is "and they will have mercy from heaven, as Scripture says: Hashem is the guardian of fools." (Note that on Talmud Avodah Zarah 18a Rabbi Chanina Ben Tradyon justifies his willingness to defy a Roman ban on teaching Torah publicly by saying "they will have mercy from Heaven," but Rabbi Yose ben Kisma responds: "I speak to you reasonably, and you say they will have mercy from Heaven!" and in fact Rabbi Chanina is executed.)
3. On Talmud Shabbat 129b, Shmuel bans bloodletting on Tuesdays as risky, but permits it on Fridays. The Talmud challenges this ruling, contending that the same risky condition exists on Tuesdays as on Fridays! The answer is that: "*keivan dedashu bei rabim – shomer petaim Hashem*" = "since many have trodden this underfoot – Hashem is the guardian of fools."

4. Similarly, on Talmud Yebamot 72a, Rav Pappa bans circumcision on cloudy days. The anonymous Talmud simply overrules him, saying that “Nowadays, since many have trodden this underfoot – Hashem is the guardian of fools.”

In at least cases 3 and 4, and possibly in all four cases, it seems that popular willingness to accept a certain degree of risk establishes the halakhic acceptability of that risk. (One might argue that the Talmud actually believes that Hashem’s guardianship actually eliminates the risk, but this seems unlikely to me.) Why should that be?

I suggest that while intellectually/textually derived halakhah establishes some fixed halakhic points regarding which risks can be morally justified, the Rabbis left these cases to be decided by the masses. They saw this as the kind of issue that is best left largely to the intuition generated by collective lived halakhic experience. (I say intuition rather than wisdom, as there is no claim that the decision of the masses was made reflectively or after extensive deliberation.)

This seems to me an impressive gesture of humility. But it has a cost that may not be immediately apparent. What happens when genuinely unprecedented cases arise, and the laity turns to the scholarly elite for moral guidance? By definition, unprecedented cases cannot be decided by prior custom.

The problem is that much of the halakhic literature about the boundaries of legitimate risk defaults easily to *shomer petaim Hashem*. That leaves us intellectually exposed when people come to us asking for guidance about, for example, allowing in-class school during this pandemic. Is it possible that Torah texts have nothing to say about these central moral issues, other than “Please wait to see whatever most people do?”

We could respond by using *daas Torah*, understood minimalistically as a claim that the greatest Torah scholars have a commensurate capacity to intuit proper Torah reactions to real-world situations that cannot be decided confidently on textual or intellectual grounds. But I suspect that many of us will find it odd to think of *daas Torah* as a backup plan for if/when mass intuition is sidelined.

Rather, I suggest that the best plan is to create a hybrid, in which scholars set textual and intellectual frameworks, but the conversation consciously integrates halakhically observant laypeople of diverse experience, backgrounds, and economic status. The key question for them, asked in the halakhic laboratory, is which options feel most like an organic continuation of the tradition they observe.

We must acknowledge that the answers we receive will be imaginative rather than reportorial, and will therefore have less probative value than pure *pok chazi*. That’s why the conversation must be framed in Torah. But I contend that the consultation is vital for developing authentic halakhic morality.

All this matters NOW because we are facing a set of risk-evaluation cases whose moral cost-benefit analysis is unprecedented. How do we weigh the advantages of in-person schooling against the risk to teachers? How do we help teachers who cannot afford to retire and yet are unwilling to teach in-person because of well-founded safety fears? What parts of public ritual are essential enough for our national psyche as to justify taking risks of what sort and degree, for whom?

I don’t have firm answers, and I don’t believe that my rabbinic colleagues do either. Nor do I believe that our lay community has the answers, nor the medical community – “following the science” is not a policy without a moral framework, although I share Rav Asher Weiss’s courageously articulated sentiment that Western medical ethics largely works toward the same ends as halakhah.

At least within Modern Orthodoxy, each constituency has done superb work in meeting the emergency of the past six months. The rabbis got out in front on the need to shut down, and to consider not just our own risks but those we pose to others, and worked tirelessly to care for the human needs of their congregations. The doctors developed sane and reasonable protocols for reopening synagogues, and worked heroically to save lives directly. The laity developed creative ways to sustain the social and economic fabric of our communities, while dealing with loss, radical changes, and onerous restrictions.

But we have been too busy for collective moral deliberation. As we move into the new year, and our emergency becomes a crisis, we need to think more deeply – TOGETHER - about immediate issues, and more broadly about longer-term issues. We need Torah conversations that produce moral and halakhic policies that are sensitive, nuanced, humane, rigorous, and where necessary creative. I pray this essay stimulates many such conversations.