

## CENTER FOR MODERN TORAH LEADERSHIP

*Center for Modern Torah Leadership*



חרות ואחריות

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"Taking Responsibility for Torah"

### WEEK THREE SUMMARY OF SBM 2017

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Our exploration of the halachic issues surrounding the mentally ill and mentally disabled moved this week from the Tannaim and Amoraim to rishonim and achronim, often through the prism of Sh'eilot Ut'shuvot.

Defining the halakhic category of the shoteh requires one to extrapolate from the specific halakhic contexts discussed by the Tannaim and Amoraim. While numerous relevant points are made in multiple sugyot in the gemara with regard to the halachic status of shoteh, they are limited to specific halachic contexts and extrapolations must be made to define the boundaries of the general halachic category of shoteh. As an example, the gemara in Gittin 22b concludes that a shoteh can write a get with Jewish supervision, which opens the door for shotim to perform multiple mitzvot while under Jewish supervision.

The Rambam's formulations regarding shoteh differ in some significant ways from the sources in Chazal he draws upon. In Hilchot Eidut (9:1, 7-12), the reason Rambam gives for shotim's exclusion from legal testimony is that they are not b'nei mitzvot. He omits any reference to their lack of daat, as is pointed out by the Lechem Mishnah. The term "b'nei mitzvot" is also defined quite liberally by the Radbaz as meaning that shotim are einam m'tzuvim v'osim (uncommanded actors) for all mitzvot. This formulation of the Radbaz could serve as a sweeping basis for giving halachic value to any mitzvah a shoteh performs.

The sources we have discussed thus far come to play in the shu"tim that directly deal with the practical treatment of shotim in a halachic context. In his shu"t, the Halachot K'tanot takes a morally radical stance on the issue by posing the questions of whether or not one incurs the death penalty for killing a shoteh (2:37) and whether one may violate Shabbat to save the life of a shoteh (2:38).

In essence, the Halachot K'tanot is debating whether or not a shoteh has the status of a halachic Jewish human and concludes that he does not, drawing a kal v'chomer from t'reifah, who is still chayav in mitzvot despite not being considered fully, to prove that killing a shoteh is not a capital crime. While he attempts to use a mystical

explanation to confirm the shoteh's human value in the case of lifesaving on Shabbat, he ultimately dismisses it as non-halachic.

The Maharil (Shu"t Maharil 196) on the other hand, views a shoteh as a complete halachic Jew in body, disagreeing with the Halachot K'tanot in both instances. As halachah has moved forward, the opinion of the Maharil seems to have been adopted as the halachically normative and morally superior view.

The Rabaz (Shu"t HaRabaz 3:48) responds to a proposition of Rabbi Shlomo Kluger that a katan's actions only lack halachic consequences because k'tanim don't possess daat. According to Rav Kluger's definition, a minor who knows all of Torah would be halachically considered an adult and would be able to perform halachically consequential actions.

The Rabaz starts by making a fundamental distinction between being exempt due to not being bar mitzvah and being exempt due to not being bar daat. Is it the case that cheireish, shoteh, and katan are fundamentally excluded from the category of commandedness, or are they formally included but exempt from certain mitzvahs due to their lack of daat?

He notes that Mishnah Chullin 1:1 states that their sh'chitah is acceptable if it was performed under supervision while a gentile's is not. The Rabaz explains this challenge by citing the Shach (YD 1:27), who says that since it is still forbidden for a cheireish, shoteh, or katan to be fed n'veilah (meat from an animal that died from a cause other than sh'chitah)—whereas it's permitted for gentiles—the commandment of sh'chitah is fundamentally relevant to them. Therefore, even if they are not themselves commanded, they may still perform sh'chitah under certain circumstances.

The Pri M'gadim (OC Petichah Kol'lot 2:3) makes a different distinction, claiming that a katan is ontologically in the parshah of mitzvot, but not all mitzvot. There are some mitzvot that they are not subsumed under at all, and

others that they are—but from which they are nonetheless exempt from due to their lack of daat.

In the end, the Rabaz adopts the position of the Minchat Chinuch, who claims that k'tanim are not b'nei mitzvah at all, and not just because they lack daas. He therefore rejects Shlomo Kluger's proposition.

We then looked at a t'shuvah of the Shoel Umeishiv (1:30) regarding whether one has to perform pidyon haben for a cheireish. He responds in the affirmative, even though he acknowledges that they are not chayav in mitzvot. This is because he thinks they have prerogative to do mitzvot even if they are not chayav in them.

This is contrasted with a teshuvah of the Yehudah Yaaleh (2:93), who aligns more with the view of the Halachot K'tanot. He makes use of midrash to claim that a shoteh can't do mitzvot because those without daat are halachically comparable to animals.

In Hilchot Korban Pesach (5:7), the Rambam says that a katan on Pesach Rishon who becomes a gadol before Pesach Sheni would need to bring a korban pesach, but if a korban was brought for him on Pesach Rishon, then he doesn't. The Kesef Mishneh asks how this can possibly be so, based on the gemara in Rosh Hashanah, which says that if someone eats matzah while they're a shoteh and then they recover, they haven't fulfilled their obligation. How could someone be able to fulfill their chiyuv in korban pesach while they're not chayav?! The Kesef Mishnah answers that the pasuk explicitly includes k'tanim when it says to bring a korban for your entire household.

But Rav Chaim Brisker takes issue with this answer, because there's a gemara which says that the verse including minor children is only used homiletically, and really they're included only under Rabbinic law, not Torah law. Rav Chaim instead makes a series of fine conceptual distinctions to explain this Rambam. He starts by claiming that even though they can't be chayav, a cheireish, shoteh, or katan are still somehow in the parshah of korban pesach.

According to Rav Chaim, a korban pesach involves an action, and it's possible that that action being done is enough to exempt a katan, even if they haven't fulfilled the mitzvah. He then further states that it might even be possible for them to *fulfill* the mitzvah, because the mitzvah is dependent on the transformation of an object (the animal) into a korban, after which the mitzvah is fulfilled automatically. This suggests that even if someone isn't chayav and can't do the action, they could still be included in the fulfillment of the mitzvah.

However, Rav Chaim ends up limiting this conceptual framework exclusively to the korban pesach. He concludes

that the verse is homiletic with regard to treating children as obligated, but that it does generate a Torah-law principle that they can nonetheless be included in a group that will bring a Pesach sacrifice, and this is sufficient to explain the Rambam. This may mean that children's or shotim's actions have no halakhic significance in other areas.

The B'er Moshe (Binyan Yersushalayim 18), who lived in the nineteenth century, also explored the issue of the halachic status of shoteh in his responsum to a beit din who asked about a man who had given a get to his wife but who had allegedly showed signs of being a shoteh.

In order to permit the man's wife to remarry, the B'er Moshe seeks to read a distinction into the Rambam in hilchot eidut between a complete shoteh and a peti. He writes that there is a safek as to the status of the peti's daat, but that the presence of daat can be recognized through his actions. Based on this distinction, he claims that while a peti may be ineligible for eidut since being a witness is "actionless", any action that he can be guided through by beit din is viable halachically. This would include the halachic act of divorcing. This method would theoretically work in any area of halachah with any shoteh whose actions could be guided properly.

There are many issues with the B'er Moshe's formulation. Firstly, there is no evidence that the shoteh understands what is going on just because beit din is walking him through the actions. Secondly, his classification of eidut as an "actionless" mitzvah is based on the formal legal classification of the prohibition against false testimony, and may have no proper relevance to the substantive question of whether action can demonstrate intent.

The B'er Moshe himself ignores these issues. However, he nevertheless ends up rejecting his own formulation. He discovers that Rambam states that gentile children and shotehs are not punished. This suggests that Rambam did not distinguish between eidut and other mitzvot. Instead, the B'er Moshe concludes that a shoteh cannot give a get or get married and does not even fall into the halachic category of "man." While the suspected shoteh in question is ultimately deemed sane on the basis that he is merely suffering from an "overabundance of black bile", the overarching question of how to treat a shoteh remains. While the B'er Moshe rejects his own liberal formulation of what halachic actions a shoteh can take, it can be argued that the formulation may still be used as a basis for a standing definition for shoteh moving forward.