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Center for Modern Torah Leadership



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"Taking Responsibility for Torah"

HALAKHIC FLIGHT SIMULATORS? THE NEED FOR LABORATORIES OF LAW

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Modern Orthodoxy faces serious moral, intellectual, and spiritual challenges. Gender, sexuality, Zionism, and history each raise questions that deserve sustained, thoughtful, creative, and sensitive treatments better than those we've developed so far. Very likely we need big, radical ideas to accomplish this.

We are also properly conscious that most big, radical ideas are wrong, dangerous, or both. On average, we are better off sticking with the tried-and-true than following a series of brilliant flavors of the month.

Halakhah classically tried to find a middle ground by using the intellectual elite as a filter. Ideas were first floated to fellow talmidei chakhamim, and with genuine statements that they could be implemented only after they had gained support from the elite of the elite.

This method has broken down in our day. There is much to celebrate about the democratization of Halakhah – **מי יתן והיה כל העם חכמים** – but one loss has been the capacity for scholars great and minor to speculate without risk of immediate consequences. Nowadays, the move from blog to minhag happens at light speed.

A discussion rooted in this week's parashah may offer a way forward.

The Torah states that when a Jewish city is seduced into idolatry (*ir hanidachat*), it is the obligation of the rest of Israel to make war against that city, execute its (guilty) inhabitants, and burn all its spoils. Halakhah insists that each individual inhabitant be tried separately and with due process of law. That seems impractical; in a wholly corrupted society, who can bear reliable witness to another's crimes?

Perhaps it is not intended to be practical. Sanhedrin 71a records a beraita which states that the *ir hanidachat* "never was, and never will be". The Talmud identifies this bold assertion with the halakhic position of Rabbi Eliezer, who holds that the presence of even one mezuzah (or phylactery or Torah scroll) in the city prevents it from being declared an *ir hanidachat*. It then asserts that Rabbi Eliezer's position is based on Devarim 13:17, which requires the Jews to gather "*kol shelalab*" = "all the spoils" of the city and burn them. Since burning the Name of G-d is forbidden, it follows that this obligation cannot be carried out in a city which contains even one mezuzah.

But does it really follow? It would be at least equally reasonable to interpret "all the spoils" as meaning "all the spoils that may halakhically be burnt", in which case one could spare the mezuzah and yet spoil the city. (This interpretation is found in Sifre.)

A deeper question is the relationship here between Biblical interpretation and halakhic outcome. Here are three possibilities:

- Rabbi Eliezer began by understanding the verse. On the basis of that understanding, he decided that the law was purely theoretical.
- Rabbi Eliezer already held, on different grounds, that the law was purely theoretical. Therefore, he was able to adopt an interpretation that made the law impractical.
- Rabbi Eliezer wanted the law to be only theoretical. He adopted this interpretation *because* it had that implication.

Mishnah Sanhedrin 10:6 records the following anonymous position (also brought as a second option in Sifre):

"Its spoils" – but not the spoils belonging to Heaven.

Based on this they said:

The objects in (an ir hanidachat) that were dedicated to the Temple – should be redeemed (and returned to ordinary use);

The terumah (in it) – should rot (i.e., neither burnt nor consumed by human beings);

The sacred writings in it – should be hidden away (i.e., neither burnt nor used).

This position clearly holds that there can be sacred writings in an *ir hanidachat*. Sanhedrin 123a therefore states that this Mishnah disagrees with Rabbi Eliezer, who holds that the presence of sacred writings means that the status of *ir hanidachat* cannot apply.

Does this mean that the Mishnah held that *ir hanidachat* is practical law?

On Sanhedrin 71a, the Amora Rabbi Yonatan responds to the positions that the *ir hanidachat* and rebellious son (*ben sorer umoreh*) 'never were and never will be' by stating that he saw them and sat on their tomb and tell, respectively. Many commentators note that Rabbi Yonatan was a Kohen and had no business sitting in such places. Furthermore, Rabbi Yonatan lived long after the Sanhedrin surrendered capital jurisdiction. Finally, the tomb and tell might not be evidence for the correct halakhah but rather markers of grave

injustices committed by sectarians. For example, Josephus records the trial of Herod's sons under the *ben sorer umoreh* rubric, and neither the substance nor the form of the trial conform to our halakhah. It therefore seems likely that Rabbi Yonatan was not testifying from experience but rather asserting that these beraitot **must** be wrong, and that he was so sure of this that it was *as if* he had seen the executions.

Rabbi Yonatan offers no textual or legal grounds for this certainty. He does not argue with Rabbi Eliezer's reading of "all its spoils". Rather, he declares the idea of a purely theoretical law intrinsically implausible: why would the Torah contain these laws if they never happen in real life?

Now the beraitot themselves ask and answer this question:

If it is so (that these laws never were and never will be), why were they written?

Derosh vekabel sakbar = seek/expound and receive reward.

Why does Rabbi Yonatan find their answer insufficient?

In stereotypically Talmudic fashion, the best route to answering this question may be asking more questions. Are the content and experience of Torah study different when one is studying purely theoretical law? If yes, how?

Perhaps Rav Yonatan felt that taking responsibility for consequences is an essential component of *talmud Torah*, which otherwise degenerates into an intellectual game. Perhaps he felt that consequence-free halakhic conversations are meaningless, since there is no way of testing whether a particular position is correct.

One interesting way to parse the dispute is as follows: Rabbi Eliezer believed that because halakhah is derived in a way that crosses all disciplinary boundaries, so that, for example, conversations about temple sacrifices affect the laws of divorce, there is no loss of responsibility in making an area of law purely theoretical. There will still be consequences. But Rabbi Yonatan felt that this was not enough to prevent beit midrash discussions from deteriorating.

Or we can frame Rabbi Eliezer's position more positively. Perhaps he held that there is a need for areas of halakhah which are delimited as consequence-free *because* they will enable radical creativity, and he felt that such creativity is essential *because* it will expand the options available to poskim in the practical area of halakhah. *Ben sorer umoreh* and *ir hanidachat* are the laboratories of halakhah, or its DARPA.

Do we have examples of this working?

Perhaps. All the positions we have seen agree that the mezuzot of an *ir hanidachat* are not burnt. This outcome can be challenged on formal grounds. A general principle of halakhah, formulated as *aseh docheh lo taaseh*, is that when a positive

commandment is defined in a way that necessarily involves the violation of a negative commandment, the positive commandment wins out. A host of acharonim therefore ask: Why doesn't the positive commandment to burn the spoils of an *ir hanidachat* override the prohibition against destroying G-d's Name?

Minchat Chinukh 142 and Rav Moshe Feinstein (cited by Daf al Daf Sanhedrin 113a from Merapsin Igrei) give answers that can be seen as either identical or else as diametrically opposed. Minchat Chinukh suggests that the principle should apply, but the Sages overrode the law in order to prevent the degradation of the Divine Name. Rav Moshe says that the principle does not apply when the negative commandment relates to the Honor of Heaven.

These are far-reaching, even breathtaking, claims.

Minchat Chinukh implies that Chazal overrode Biblical law when its consequences seemed intolerable to their spiritually sensibilities, even when no ethical issue was involved. Should they not have worried about being "more righteous than their Creator", or of being arrogantly "zealous for His sake"?

Rav Moshe weights Biblical laws by their content and theme rather than by objective formal criteria. What happened to "being careful with the light mitzvot as with the heavy"? Can we use criteria of this sort in every area of halakhah, and without significant basis in precedent?

The answer, I tend to think, is that we can, but in practice very rarely, and only when the need is great. "Big ideas" are cannon; using them to kill fleas rarely works, and often causes immense collateral damage.

Fear of that damage, well-grounded in bitter experience, often generates an instinctive negation of big ideas. This too is dangerous. Some problems require wholesale rather than retail solutions.

Perhaps Rabbi Eliezer thought of *ir hanidachat* as a "halakhic flight simulator", which let him try out designs without risking actual passengers.

I'm not at all sure how it would work today. A fundamental misunderstanding that plagues Modern Orthodoxy is the notion that the existence of an intellectual possibility in Torah constitutes a sufficient basis for action, and that the choice among these possibilities is simply a matter of taste. This makes it very hard to keep even the unstated implications of halakhic conversations purely theoretical. But Modern Orthodoxy desperately needs to create forums which allow for radical ideas to be floated and examined without being immediately seized on as the basis for radical practice.

The mission of the Center for Modern Torah Leadership is to foster a vision of fully committed halakhic Judaism that embraces the intellectual and moral challenges of modernity as spiritual opportunities to create authentic leaders. The Center carries out its mission through the Summer Beit Midrash program, the Rabbis and Educators Professional Development Institute, the Campus and Community Education Institutes, weekly Divrei Torah and our website, www.torahleadership.org, which houses hundreds of articles and audio lectures.