

The following is the edited record of an e-mail dialogue between Shani Offen, then a Harvard graduate student in the natural sciences, and Aryeh Klapper, then Rabbinic Adviser to the Orthodox Minyan at Harvard Hillel, with off-screen participation by Deborah Klapper. A version of this dialogue was published in **Mosaic** Summer 2001, a publication of Harvard Hillel.

**Shani Offen:**

So, my question:

**1. What is the role of current rabbinic and intellectual leadership within the ongoing process of interpretation of the Jewish canon?** This question is being asked with respect both to the process of halakhic development and the process of textual exegesis and midrashic creativity.

2. Our understanding of the nature of the halakhic process, and of the agency (or lack thereof) of contemporary rabbinic authorities, thinkers, and leaders to actively participate in that process, and in particular to alter its course in addition to refining it or shedding light on its historical progression, has changed over time. That change is sometimes understood to be a progression from seeing the rabbinic body as empowered to define halakhah and understand their rulings as having the effect of creating halakhah (as in the time of Mishnaic and Talmudic compilation) to seeing the rabbinic role as one of studying the (already complete, set and unchangeable) corpus of halakhic decisions and principles so as to be able to answer questions that arise and to apply these decisions and principles to new situations that might emerge from new technologies, new social orders, etc. Is there any support within the Orthodox perspective on the tradition of transmission for another attitude to be taken? In particular, **is there any support for an understanding of the current rabbinic role as one which is actively engaged in the halachic process, and empowered to define new halakhic principles and decisions? If so, what are the constraints which would outline the framework of such a conception?** For example, would it be possible to make new halakhic decisions which are different from pre-existing ones, on the basis of application of halakhic principles and reasoning? Would it be possible and/or necessary to re-introduce positions taken in the Talmud which were rejected as defining halakhah in favor of other positions taken as halachically binding? What would be the role of factors such as:

- a) who made the decision as to what became 'psak'?
- b) was the position rejected or merely never enforced as halakhah?
- c) was there significant debate as to the psak or was it straightforward?
- d) was there a history of change already on this topic?

The same set of questions/considerations can be applied to Rishonim and to Acharonim as well.

**3. Is our understanding of rabbinic empowerment with respect to halachic decision making independent from our understanding of its empowerment with respect to interpretation and midrashization of the texts of the Tanach?** If our understandings with respect to these two fields of interpretation can indeed differ, why? And how?

**Aryeh Klapper:**

Your question is both deeply thought and superbly formulated, and answering it in kind is quite a challenge. I think several books would be required to answer it fully, and the research for some of them has barely begun. But "the work is not (necessarily) ours to complete", and perhaps I can at least begin a substantive engagement.

The issues under discussion obviously touch on central issues of legal philosophy, and you are doubtless aware that controversy abounds as to whether judges in any system can be seen as merely applying preexisting rules rather than creating law, and somewhat conversely about whether it is ever legitimate for judges to do anything else. Accepting either of these claims, but especially the first, would require a radical reformulation of your thesis of historical development, or at least shift it from the realm of substance to that of self-perception.

I suspect, though, that universalizing the discussion evades rather than speaks to the question you really want to ask. Without further ado, then, let me offer a brief outline of my view of the roles of Chazal (meaning the sum total of the Tannaim and Amoraim, starting for the sake of

convenience at Hillel the Elder) and the current community of halakhic scholars in the development of Halakhah.

I start with the premise that the Torah regularly addresses legal imperatives to the Jews individually and communally, and that it further sets up mechanisms for authoritative decisionmaking with regard to those imperatives. I add to that the premise that there has always been a community of Jews who regarded the Torah as legally binding. I deduce therefrom that Chazal had no need to create the entirety of Halakhah de novo, but rather were the heirs of a live tradition of interpretation.

What would Chazal's attitude have been toward that tradition? The question of course takes the intellectually unjustifiable step of viewing Chazal as a collective rather than as a group of fiercely opinionated individuals, and answering it properly would require breathtaking breadth in rabbinic literature. So I know that the following hastily enters a place that ought to terrify angels. But "you are not a free man to exempt yourself from it".

It seems to me that rabbinic literature, certainly in the Talmuds but in many ways more so in stories of the early Tannaim, generally adopts a traditionalist posture with regard to the pre-Chazal period. I am unaware of any cases in which pre-Hillel sources are cited only to be rejected, and the claim that a tradition has a Prophetic pedigree seems, when accepted, to be a dispositive argument. And of course the Talmuds formally assume the binding authority of precedent with regard to Amoraic treatment of Tannaitic materials.

At the same time, rabbinic literature does not portray a static halakhah. For example, R. Eliezer ben Azariah seems to describe himself as being convinced, and therefore changing his practice, based on Ben Zoma's original argument/ Biblical interpretation with regard to mentioning the Exodus at night, and various midrashim describe the drashah "Moabites but not Moabites", which allowed Ruth to convert, as having been newly instituted as halakhah that day (and often questioned thereafter). Rabbinic legislation is dated to specific periods, and occasionally repealed.

My overall sense is that precedent played a very powerful role in Chazal's legal work, and that they (correctly) did not perceive themselves as applying and interpreting the Torah from scratch. But I would not claim that Halakhah left Chazal's hands in the same shape that it entered. Change happened, dramatic change. Legislative examples include

- a) the 'eighteen decrees', which banned consumption of such items as oil and bread produced by non-Jews, and thus created many new social and economic barriers between Jews and non-Jews;
- b) the erection of the system of rabbinic fences around the Biblical laws of Shabbat, and
- c) the *prozbul*, which practically eliminated the biblical provision for forgiveness of debts during the sabbatical year.

Interpretive examples presumably include the myriad cases in which Tannaitic names are attached to disputes in midrash halakhah. Halakhah also underwent immeasurable sociological change as the result of the destruction of the Temple, and the consequent suspension of animal sacrifice and centralized ritual generally, and the Talmud cites cases of rabbinic decrees that were vacated or initiated in response to that destruction.

Here let me note another powerful modality of rabbinic input into law, a principle known as *.m'saran hakatuv lachakhamim*. This means that the rabbis have the discretion to set Biblical law in situations where Biblical interpretation is not dispositive. The locus classicus for this is the Intermediate Festivals (*chol hamoed*), regarding which the Torah provides no regulations as to work at all. The rabbis' decisions as to what labor to permit and what to forbid carry the force of Torah law even though the Torah gives them complete discretion to define the area. *Yad Malakhi* suggests compellingly that almost all Torah law develops to a point at which Biblical interpretation is not dispositive. I would add that in many cases Chazal used their discretion to codify a particular way of doing things where many different ways were intellectually compatible with the Torah text, and where popular practice might previously have legitimately been highly diverse. I would say that it is legitimate to view Chazal, and to suggest that they viewed themselves, as creating law, but that perspective must be tempered by the realization that they did not view themselves and were not in fact revolutionary in the sense of rejecting or overruling the past in general or detail.

The above outline leads naturally, I think, to the claim that the difference between Chazal and moderns in the halakhic process is one of degree rather than kind. As a system develops, more and more detail is filled in, and discretion is limited to extremely fine details in areas of law that confront an essentially unchanging reality.

In other areas, especially in the realm of bioethics, I think the Orthodox rabbinate clearly is creating law. **Tradition** some years ago printed a fascinating bioethical back-and-forth between my teacher Rabbi J. D. Bleich and Rabbi Ezra Bick of Yeshivat Har Etzion which fundamentally centered on this issue, and Rabbi Bleich himself taught me this as a dispute between the Chazon Ish, who believes that past halakhah is comprehensive, and Siftei Cohen (Shach), who believes that halakhah can be confronted by cases that clearly fall within its ambit but with regard to which precedent is useless Rabbi Bleich was sympathetic to Chazon Ish, but I confess that I find Shach far more in accordance with the evidence. Of course, the law is created in accordance with the established procedure of halakhah.

It is also true that there are qualitative differences between the approach of Chazal and our own to halakhah; my point is only that these differences do not amount to saying that Chazal created and we merely apply. In particular:

- a. It is almost completely true that the midrash halakhah process, and direct interpretation of Torah generally, are not productive sources of law nowadays.
- b. It is almost completely true that there is no rabbinic legislation nowadays.
- c. It is almost completely true that rabbinic legislation is never overturned or vacated nowadays.

The first is largely a function of the absence of intellectual authority, the second of social authority, and the third of legal authority.

Legally productive midrash halakhah actually ceases almost entirely early in the Amoraic period, very likely because it somehow lost its live tradition. While some interesting work has been done toward recovering that tradition intellectually, I don't foresee it again becoming practically useful anytime soon.

Rabbinic legislators have authority only over communities that grants it to them. It is rare nowadays that even Orthodox rabbis are given authority to initiate religious legislation on serious issues even in their own synagogues. Accordingly, where such legislation is necessary it will generally either be disguised as interpretation or instituted indirectly as custom. I hope, for example, that it will soon be the case that Orthodox rabbis will be able to honestly rule that the signing of halakhic prenuptial agunah-prevention agreements is the universal custom and thus binding legally, and not just morally, on all couples; I would legislate it if I could.

How to overturn rabbinic legislation is a complicated legal topic, but for our purposes a short answer is that it generally requires a Sanhedrin.

I don't think the unavailability of these tools reduces the contemporary rabbinate to mere rule-appliers rather than rule-creators, especially as their ends can often be achieved through interpretation. Their absence does, however - and this is probably more the emotional heart of your question - greatly hinder attempts at re-creating Halakhah.

But all this is only relative to Chazal. We have virtually all the tools that were available to the rishonim, and I would resist efforts to claim that we are in a different era, for the purpose of the authority of precedent, than the acharonim. I regard myself, and certainly the great rabbinic decisors of our time, as actively involved in the halakhic process, and I think that post-Talmudic precedent is certainly more open to recreation than Talmudic. The detailed questions you lay out about halakhic process would be instantly familiar to students in my halakhic leadership training program, the Summer Beit Midrash (see [www.torahleadership.org](http://www.torahleadership.org)) as the heart of their curriculum.

To sum up: I think contemporary halakhists relate to pre-existing halakhah with great deference, but certainly and correctly do not view themselves as merely playing out the implications of a comprehensively pre-established system. They do, however, resist comprehensive reevaluation of the existing body of precedent; whether this is resistance is a necessary property of the system is not our issue here. In their use of the tools available to them, they are not substantially different than Chazal.

With some trepidation, I will try to concretize the discussion above in the context of women's role within Halakhah.

The shift in halakhic attitudes toward the education of women in the Oral Torah over the past half-century is nothing short of stunning. The practical effects are still playing themselves out, I hope ever more positively, but the merely intellectual shift is stunning in its own right. What had been widely seen, if never rigorously formulated, as an ontologically founded legal ban is now regarded by much of Orthodoxy either as a socially superannuated suggestion or else as a concession to an unfortunate social situation, and R. Aharon Lichtenstein among others has suggested that women are now obligated to engage in such study as a result of their obligation to know G-d. Certainly everyone involved in this interpretational enterprise understands that their decisions shape the halakhah rather than simply unfolding it in predetermined ways.

This shift could be justified more radically, and thus have more direct radical implications than it has heretofore. We could argue that the issue is dependent on a dispute between R. Eliezer ben Horcanus and R. Shimon ben Azai, in which the former says women are forbidden to learn and the latter that they are required to, and that we now rule like R. Shimon ben Azai. We could then argue that the exemption of women from *mitzvot asei shehazman grama* is derived, at least according to some, from their exemption from *Talmud Torah*, and that ruling like R. Shimon ben Azai thus carries the implication that they are obligated in *mitzvot asei shehazman grama* as well.

No Orthodox halakhist has, to my knowledge, accepted this argument (to my knowledge no non-Orthodox halakhist has suggested it); perhaps none ever will, and likely for good and sufficient reasons. I offer it merely to show that the legitimate process of halakhah does not ineluctably condemn it to stasis.

I note further that even obligating women in all *mitzvot asei shehazman grama* would likely have no impact on their capacity to be constitutive members of a prayer minyan, or to say *Elokeinu* at a zimmun. Both of these likely result from rabbinic legislation. Rabbinic will has no legal consequences until it discovers a legal means.

In tangential conclusion, I think the discussion above is entirely independent of the question of empowerment with regard to textual interpretation. The medieval peshat-avatars of France and Spain successfully freed interpretation (other than midrash halakhah, as per above) from the confines of precedent by denuding it of all authority.

As for midrashic creativity - i.e. new midrash aggadah - I think the constraints are intellectual rather than legal. In other words, modern midrashists can say whatever they want, but if what they say doesn't convince me that it is an organic extension of the text or the tradition, I see no reason to take it into account. If I am convinced that it is an organic extension of either, I see no reason to distinguish it from peshat. This on one foot - obviously any remotely satisfactory treatment of this issue would require a long discussion of literary theory and many other subjects.

I look forward to your response.

### **Shani Offen:**

I want to first off apologize for the long delay in my response, which has resulted in a delay in presenting this dialogue to the community. I want to also thank Rabbi Klapper for his response, both for the insight it provides through the information it presents, and for its willingness to address rather than to avoid the issues underlying the discussion. My apology is not unconnected to my thanks - part of what has prevented me from responding quickly was a desire to address Rabbi Klapper's response with the thoroughness and thoughtfulness it merits. This is an intimidating task. And so, instead, I will take heart from the advice Rabbi Klapper cites (to paraphrase, I may not have to finish, but I at least have to start!) and do my best.

I would like to start by expressing what I understand to be the essence of the response; I apologize for the inevitable loss that comes with summarization, a loss of content and subtlety. I think the benefit of contextualizing my response justifies the questionable practice of paraphrasing, but only as all those reading this have presumably already read Rabbi Klapper's text themselves. And so:

a. Rabbi Klapper offers evidence for the conclusion that the role of the current rabbinic body, in relation to the halakhic process, is not different from that of Chazal; what distinguishes them is the amount of precedent to which they are bound. Current halakhists are, by virtue of living so much later in Jewish history than early halakhists, necessarily constrained by far more legal precedent.

b. Rabbi Klapper also raises the point that lack of social authority also renders current halakhists unable to enact rabbinic legislation; this inability to enact legislation is thus different from the inability to overturn precedent. The latter is fundamentally prevented by virtue of the nature of the halakhic process, whereas the former is ruled out only by virtue of the perceived (and likely quite real) lack of social mandate.

The questions raised by this distinction are present in the example Rabbi Klapper brings, that of women's obligation in mitzvot asei shehazman grama. Rabbi Klapper offers, as an option within the halakhic process, that we might "rule like R. Shimon ben Azai," which has the potential to imply women's obligation in these mitzvot. Rabbi Klapper then goes on to say that even if such a ruling was made, it "would likely have no impact" on women's ability to take on roles that had been withheld from them under the understanding of their non-obligation (such as being part of a minyan), as these restrictions "result from rabbinic legislation." The obvious question raised by this distinction is how to distinguish those situations in which we can change how we rule, and those situations which constitute "rabbinic legislation" and therefore are beyond change.

Starting to draw these sorts of explicit distinctions, distinctions which are justified by logical foundations for why a particular case falls into a particular category, and why a particular category must be treated in a particular way by a halakhic system, might help to point the way for a community which is committed to maintaining an authentic halakhic process, as understood from within Orthodoxy, but is also committed to doing everything possible within that process to change practices which it considers morally problematic. Clarity and specificity can also help remove the option for certain communities to block certain changes, claiming halakhic powerlessness. Of course such communities would certainly maintain the ability to block change; some such blocks, however, would have to be acknowledged as being motivated by something other than straightforward halakhic commitment.

Of course, this project is problematized not only by the breadth it requires, but also by the lack of consensus that would undoubtedly be encountered. Nonetheless, it seems a project worth beginning. Movement occurs in small steps, and sometimes the process itself can provide the strength needed by those struggling within a system they value but whose process of development and change is frequently represented by those empowered to do so as designed to thwart any attempt to change it.

This question can be viewed in a different way (and with this I will end). I realized, in rethinking the issue to write my response, that in some sense the question I was trying to ask was the following: Chazal used halakhic ruling to impose a worldview via a system of laws governing action and social construction. This is part of what makes the halakhic system such a powerful and compelling one for me; I see it as not distinct from philosophy and belief, but rather as a way to manifest faith and moral commitment through action. Is the current rabbinic body similarly empowered to express a moral worldview? To what extent should we understand the current

state of affairs as reflective of the worldview held by the rabbinic body, and to what extent must we make reference to powerlessness? Part of achieving a perspective on this relies on the type of project reflected in this exchange: to clarify the questions, and to begin to draw lines -- based on fact and knowledge, as Rabbi Klapper has done -- that can differentiate between halakhic constraint, lack of social authority, and simple inaction.

My question as to the connection to Biblical exegesis was mainly aimed at ascertaining whether part of the constraint is due to a perception of who is qualified to interpret Biblical text. It appears to me from Rabbi Klapper's response that he does not feel this plays a role in the issue of halakhic empowerment; the question at hand can be discussed completely within the domain of Rabbinic process. I believe that this clarification also has a role in the project of delineation, as setting the context within which the discussion can ensue.

### **Aryeh Klapper:**

I fear the question has not gotten any smaller in its reformulation, but I do think it reflects significant accomplishment in the discussion. I also appreciate your willingness to accept the certainly not unchallengeable framework I laid out in my previous response as the context of discussion. I think that's useful for this format, although I hope we'll have other opportunities to discuss how compelling you actually find it (which will help me clarify that issue for myself).

If I can also indulge in reformulation, the first part of your question is whether

- a) Halakhah today reflects a coherent moral vision,
- b) whether that moral vision is that of the contemporary halakhic rabbinic and/or community, and
- c) if it isn't, what mechanisms exist for implementing the contemporary moral vision within Halakhah.

The premise of the question is that Halakhah in the time of Chazal did reflect their coherent moral vision. (Note: Obviously, this premise is qualified by the recognition that the term "Chazal" gives a collective identity to a far from homogeneous group.)

The second part of your question is what, if anything, **ought** to be done about cases where current halakhah diverges from the moral intuition of the contemporary rabbinic and/or community. This question is qualitatively distinct from the first part, and from your original version, in that it shifts from "is" to "ought", from asking for a description to asking for a prescription, or at least for a guide toward prescription. Any answer to it should therefore be preceded by appropriately extensive expressions of humility and tentativeness. Since this is intended for publication, however, and such displays tend toward the boring, especially in English, I hope you'll stipulate their presence and let me move on.

Let me start by saying that the very existence of Halakhah, of religious law, is eo ipso a profound philosophic statement. It prima facie (and deeper reflection doesn't require too much modification of what follows) rejects the Buberian claim that law and spirituality are antithetical, the deistic claim that G-d is not concerned with human beings, the relativistic claim that G-d is unconcerned with means but only with ends, the humanistic claim that humanity can provide its own standards of behavior, etc. In this sense the worldview expressed is consistent throughout the generations of Halakhah.

The question you ask, however - which is not trivialized but should be contextualized by the preceding paragraph - is whether the specific content of Halakhah at a particular point in time reflects a moral vision.

Let me start with an almost obvious, but nonetheless frequently obscured point: Halakhah is law, and law reflects a political process of compromise among legislators/judges and between them and their constituents. It is always difficult to induce a moral vision from the details of law, and never possible to induce one that accounts for all details. This task is further complicated by the legitimately rampant pluralism of contemporary Halakhah owing to the absence of a final halakhic authority. As an example, Ashkenazim generally permit women to make blessings on mitzvot aseh shehazman garman, but Sephardim do not. From which position should we induce Halakhah's contemporary moral vision?

I would suggest, then, that we reformulate your question yet again, this time in more subjective terms, to wit:

1) Is it possible to construct, by careful choosing among legitimate legal options, a contemporary halakhic system that is consonant with my personal moral outlook, that of the religious community with which I identify, or of the rabbinate which I regard as having halakhic authority?

2) If the answer to 1) is no, is it possible to rehabilitate sufficient currently foreclosed halakhic options to enable construction of such a system?

By definition, this would, at least at first, be a purely intellectual, Messianic, question. As an example, one could argue that the Torah would ideally be interpreted as forbidding non-consensual divorce. I choose this example specifically because its practical import has already been accomplished; I think that in general the goals sought by such ambitious means can be achieved less spectacularly, or not at all within one lifetime. The usefulness of such efforts lies primarily in enabling individuals to reconcile themselves to the divinity of Torah. Perhaps they have a secondary role in creating a climate more hospitable to the less spectacular means of achieving the same goal. We will get back to that issue.

3) If the answer to 1) is yes, two subsidiary questions follow:

a. Is the system thus constructed practically and socially feasible for me to practice? In other words, if I live by that system, will the halakhic community accept me as one of its own? Will I find poskim who will decide in accordance with this framework? If not, what can I do to change this situation?

b. If I can practice this system, but others can't, or at the very least, many if not most if not the overwhelming majority of halakhic Jews don't. What are my obligations and options with regard to spreading the halakhah that expresses my moral outlook?

Let me begin by offering this general formulation of the proper role of moral vision in halakhic interpretation: **Moral claims have a role in halakhic interpretation directly proportional to the strength and certainty of the claim and the ambiguity of the relevant texts.** In cases with clear controlling precedent, the moral claim plays little role absent great strength and certainty. This means that in such cases it is entirely likely that current halakhah will diverge from the moral intuition of the contemporary rabbinate and community in such areas. This was not always so, but the absence of a social mandate for religious legislation means that arguments couched explicitly in moral terms have far less entree into halakhic discourse.

Here let me also note Professor David Halivni-Weiss's insight that it is easier to change laws perceived as immoral (especially when interpretation is the available mode of change) before the issue is explicitly presented as moral. Until then the authority of law is not at stake, but a challenge explicitly grounded in an alternate moral vision necessarily poses an implicit challenge to that authority.

The importance of legal stability is independent of the formal legal authority of precedent. Plato speaks of the 'noble lie' that law comes from the gods. Within halakhah I would say that the claim that the authority of Halakhah comes from G-d is a noble truth, but the perception that each detail of the halakhah comes from G-d it is at the least a useful misperception. The modern record does not provide much reassurance to those who would believe that the authority of Halakhah can be sustained in a community that has consciously witnessed rapid change in its halakhah, especially when that change is seen to have resulted from moral duress.

Furthermore, the previous discussion has assumed unity of moral perspective between the lay community and the halakhic authorities. The halakhic rabbinate, whatever its formal legal authority, does not have the practical ability to effect change in the halakhic community unless that community grants it the authority to make such changes. This does not absolve rabbis of the obligation to try, but Halakhah is rarely in favor of fighting losing battles.

So what should be done?

In the intellectual realm I encourage the moral challenges, I encourage the collection and tracking of these moral challenges, and I see it as a moral imperative for those who see such dissonances to investigate methods of changing them. And I would urge the dissemination of discoveries in this regard throughout the scholarly community. I am more hesitant to encourage their dissemination in the non-scholarly community, but I think brutal honesty a necessary policy in just about all public discourse once the questions are raised.

The above relates to value questions, not to specific legal mechanisms and interpretations. For both pragmatic and philosophic reasons, I would discourage efforts at

persuading the public of the possibility of specific halakhic changes (as opposed to of the need for specific halakhic results, which faces some but not all of the same objections, and has more upside) prior to the existence of significant rabbinic support. Pragmatically, my sense is that such campaigns tend to backfire, as rabbis have the normal human reaction to pressure, i.e. they become rigidly attached to their positions. When such campaigns work, in other words when the pressure is so great that it overcomes the initially stiffened resistance, the result is a loss of respect for the integrity of the process even among those pleased with the outcome. This in turn diminishes rabbinic authority and either makes the next change harder, in that the rabbis no longer have the gravitas to carry changes through serious communal opposition, or meaningless, in that no one cares what the rabbis say anyway, as they are viewed as mere post facto ratifiers of the popular will.

Let me concretize the above, again using the field of women's role in Judaism, which I presume is a major subtext of your question.

If one believes in strict identitarianism, that men and women should have homogenized halakhic roles, one is welcome to provide interpretations of Torah compatible with this perspective, but one should not expect them to have any practical impact, at least not for a very long time. Incidentally, arguments of this sort must for good reason be accompanied by frequent and convincing professions and demonstrations of loyalty to existing halakhah if they are to be allowed any entree into the discourse at all. I would suggest an engagement with the ambiguous but suggestive rabbinic phrase, "megaleh panim baTorah shelo kaHalakhah" as well.

If one's agenda is less comprehensive - if one, for example, would like to remove distinctions with regard to divorce but has no interest in obligating women to wear tefillin. I think one would be best served pragmatically by defining the goal in terms independently sufficient, i.e. saying that one would like to enable women to initiate divorce rather than saying that one wishes to remove the distinction between man and women in that regard. Formulated that way, I think one is entitled and encouraged to make the argument as forcefully as possible, and I chose this example because it enables me to showcase the ongoing (but still far from complete) success of the halakhic prenuptial agreement.

I think it is important to keep a long-term perspective on all these issues, and accordingly that in many cases a better strategy than persuading the existing rabbinate is to encourage people sharing one's moral perspective to gain the abilities, knowledge and experience necessary to be full and influential participants in halakhic discourse. Here I'll plug The Center for Modern Torah Leadership again, but I think this is an issue which the Modern Orthodox community in general needs to take seriously, with the proviso that taking it seriously should not lead to demands that the standards for influential scholarly participation be lowered.

In sum: I encourage moral critiques, but urge that they be formulated so as to pose the least threat to the authority of Halakhah. I think that the development of creative mechanisms for halakhic change, or even the identification of possible avenues of change, and the dissemination of this knowledge, is at the least a fulfillment of the mitzvah of Talmud Torah, and likely of more concrete positive social and religious significance.

All the above, however, is within the framework of absolute obedience to a legitimate version of Halakhah as it stands now.

Two points in conclusion:

One) I noted above the possibility that something could be an intellectual option within Halakhah as it stands but not socially practicable. There is room for discussion as to what the attitude of the halakhic rabbinate and community should be toward people, or splinter communities, who follow such options.

Two) I ignored above the question of whether an overwhelming demand of conscience could religiously, although by definition not legally, legitimate disobedience to Halakhah as it stands. I think there is room for much discussion of that issue (what rabbinic literature terms *aveirah lishmah*), but it is almost completely irrelevant in a voluntaristic community, as civil disobedience gains its moral force from its practitioners' willingness to accept the penalties imposed by the system being disobeyed, and is far less justifiable in a community in which the law as such is under attack. In any case, practitioners of civil disobedience must of course understand that they have influence only to the extent that civil authorities and obedient accept their critique, and that they are under no obligation to do so.

Thanks so much for this stimulating exchange, which I look forward to continuing in a less formal context.

**Aryeh Klapper, after conversation with Deborah Klapper:**

My wife Deborah, having read the preceding, suggests that it is insufficiently forthcoming about the extent to which my positions are themselves idiosyncratic within Orthodoxy, and that I court danger by

discussing the role of moral argument within Halakhah without making clear that it is radically different for poskim and non-poskim. With regard to her first point, I concede that I grant considerably more influence to moral perspectives not derived exclusively from Torah sources than is generally granted explicitly in traditional sources. I further grant that this position has autobiographical roots in my deep moral disappointment in some of those who educated me in Torah. My claim is that my position is in principle compelling within halakhah, and that my idiosyncrasies are matters of emphasis or of *hasbarah*. The educated reader can make his/her own judgment.

Herewith a response to my wife's second point.

Critiquing Halakhah requires quite a bit of hubris, and it is not unreasonable for Halakhah to demand of its critics as a bare minimum that they have mastered Halakhah as it is. For one thing, Halakhah is to some degree organic, and critiques of specific components absent a holistic perspective are frequently outright silly. See for example critiques of Halakhah on gender issues that do not take into account the differing religious roles that stem intrinsically from gendered physicalities such as menstruation and ejaculation.

Furthermore, the demand that Halakhah conform to one's own moral vision eliminates the capacity of Halakhah to morally educate. At least the premise of observant Jews should be that Halakhah in particular, and the Masoret as a whole, is the foundation of their morality. Any critique, to be useful, will have to persuasively and truthfully present itself as deeply grounded in and an organic continuation of the Masoret.

For these reasons moral arguments advanced by those who are not great scholars, whose own moral perspective has likely not been profoundly shaped by deep engagement with Halakhah, are likely to be met with skepticism by scholars, and scholars and non-scholars alike should have the humility to recognize the likelihood that their moral critiques are in error. Note, though, that the religious intuition of the observant community as a whole carries serious halakhic weight.

There is a further point, one I intuitively believe to be critical but have not yet analyzed with anything close to the depth necessary to make a serious statement about. This is the role of the *sh'eilah*, or halakhic query, in Jewish religious life. To some degree, the *sh'eilah* necessarily and legitimately involves the surrender of moral sensibility to a representative of the tradition. I'm not sure whether poskim ask more or fewer *sh'eilot* than non-poskim, or how their *sh'eilot* differ, but I am sure that the experience is different in important ways.

In other words, in many cases the role of one's moral vision in Halakhah is to influence one's choice of posek. The extent to which one needs to use the same posek consistently is a very broad issue, but clearly asking each question to multiple rabbis until one receives the answer one wants is inconsistent with the spirit of law. Those serving as poskim are unique in that they have at least psychologically significant occasions on which they are the unmediated voice of Masoret. However, non-poskim do greatly impact the relative authority of various scholars by choosing whom to ask important questions of and whose opinions to follow on issues of public controversy.

I do not have a principled problem with the idea that the impact of non-scholars on Halakhah will always be mediated through scholars. I recognize that this can lead to unfortunate consequences - for instance, to the continued marginalization of women in halakhic discourse - but firmly believe that the solution is to train women who are first-rate scholars rather than to lower the standards for participation. I do however believe that until such women are trained in sufficient number, scholars have a special obligation to listen for the moral voices of non-scholarly women.