

CMTL Shavuot Reader 2020 Edition

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"Taking Responsibility for Torah"

Unless otherwise noted, all pieces are by Rabbi Klapper and published on the CMTL website or blog.

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Which is Greater During a Pandemic, Study or Action?

May 28, 2020

The Talmud separately records two questions that were debated and decided in the attic of Nitzah in the city of Lod. On Sanhedrin 74a: “Which prohibitions must a person die rather than transgress?” and on Kiddushin 40b: “Which is greater, study or action?”

The attic of Nitzah was probably a hideout at a time when Rome had made studying Torah a capital crime. These questions were immediate life-and-death issues. What is the bare minimum needed for Judaism to survive, with integrity?

Rabbi Tarfon responded that “Action is greater”; Judaism can survive mimetically even if no one understands what they are doing, but study without practice will reach only a narrow band of intellectuals. Rabbi Akiva responded that “study is greater,” because a religion that survives only through blind ritual has no meaning. A consensus emerged that “study is greater, because it leads to action.”

But doesn't that mean that action is really greater?

This seeming paradox has puzzled intellectuals for millennia, and its implications are constantly debated by practical people. How do we allocate scarce communal and individual resources when schools and chesed organizations compete for them? Should Torah education be conceptual or practical? Why do we study the parts of Torah that don't apply in our day, and how should we study them? What do we do if our experience doesn't bear out the hypothesis that more Torah study leads to more Torah action?

The pandemic made action harder. Many interpersonal and ritual mitzvot became harder or impossible to perform. The cause was pandemic not persecution, but the result was the same: many of us ended up isolated in our own attics of Nitzah, trying to figure out how to maintain our religion without physical community and the reinforcement and satisfactions it provides. I hope we'll find ways to share with each other all the insights we developed.

Focusing on study often satisfies me. An essay by Rav Aharon Lichtenstein argues that a life of pure study may be the ideal, at least for Rambam; it's just that study which fails to generate action in the situations it applies to is impure, unfinished, maybe even corrupted. Genuine study naturally brings us to action, but action is not the purpose of study. Rabbi Shimon bar Yochai's cave is a form of Eden. (The story of Rabbi Shimon bar Yochai's isolation, in addition to paralleling the stories of Mosheh and Eliyahu's isolations, ironically reverses Plato's Allegory of the Caves. In Plato, philosophers who have seen sunlight/truth are nevertheless compelled to return to the dark cave of society and take up political responsibility. Rabbi Shimon bar Yochai and his son see pure truth in their cave, but G-d compels them to return to the society that lives in daylight.)

This essay sometimes holds great appeal to me. But with the community in crisis, and so many people making contributions that made the difference between life and death, it was extraordinarily hard to justify engaging primarily in Torah study purely *lishmoh*, for its own sake. So I became enormously grateful for opportunities to make Torah ideas matter practically to people, on issues such as caring for the isolated on yom tov, or whether arranging for faster and more efficient distribution of healthcare resources is considered lifesaving and permits working on Shabbat. Some of those opportunities are reflected in the essay on *pikuach nefesh* in this Reader.

But as time passed, I also realized how much learning with the “regulars” at my online shiurim mattered, to me and to them, regardless of its immediate practical implications. Torah study is itself an action. Some of our learning together is contained in the essay on Bathtub Mikvaot in this Reader, but I still owe a full presentation of Halakhic triage ethics that participates authentically in contemporary moral discourse, and enables Orthodox healthcare workers to work with integrity within the outcomes of that discourse.

We should also acknowledge that so much of what we hope for medically is rooted in ideas that began as “pure science.” The things we need to get through a crisis often come from the things we see as luxuries during a crisis. This is also true in Torah.

Can a Bathtub be a Mikveh?

May 28, 2020

INTRODUCTION

Many observant women are currently avoiding public mikvahs out of fear of contagion. Until a reliable and accountable system develops for certifying compliance with health regulations, such fears are reasonable and legitimate, as the RCA has acknowledged. Moreover, women in high-risk categories (or who live with people in high-risk categories) are medically and halakhically discouraged from immersing even where stringent safeguards are in place. Ad hoc solutions such as taking contraceptive pills or immersing in natural bodies of water are helpful to some but not all of these women. Every possible halakhic effort must be made to enable these women to immerse.

This *sh'at hadchak* (time of pressing circumstances) has generated a polemical debate about whether immersion in tapwater-filled home tubs can be halakhically validated. My goal is to move the discussion away from broad-brush polemics toward halakhic nuance. Whether home immersion is valid depends on many practical variables that have not yet been adequately researched, and may differ from city to city, house to house, and even tub to tub.

FROM RESERVOIR TO TAP

1.

Can a mikvah be filled completely with tapwater?

Vayikra 11:36¹ establishes two categories of valid mikvah: the *maayan*, which is a flowing stream of groundwater, and the *mikveh*, which is a pool of “still” water, meaning that it has no noticeable outflow (*zochalin*). The standard public “mikvah” is a *mikveh*, meaning that it is a pool of water that must not be *zochalin*.

Municipal water supplies draw their water from a wide variety of sources, including groundwater, snowmelt, rain, and more. Almost all of these are valid sources for *mikveh* water. The relevant question is whether anything happens between source and tap to invalidate the water. Two halakhic requirements might be relevant.

A.

The first requirement, found on Talmud Zevachim 25b², establishes that water for a *mikveh* must not be made to flow over or through (*hamshakhah*) anything that is able to contract ritual impurity (*mekabel tum'ah*). Most useful metal or wood objects are *mekabel tum'ah*, and so one might think that flowing through pipes invalidates the water.

But this is not so. Objects which are permanently attached to the ground are not *mekabel tum'ah*, nor are objects permanently attached to objects that are permanently attached, and so on. The pipes and other elements of a municipal water system can be presumed to fit this description. Therefore, none of them are *mekabel tum'ah*, and tapwater has no problem of invalid *hamshakhah*.

B.

¹ אך מעין ובור מקוה-מים יהיה טהור ונגע בנגבלתם יטמא:
² תנן התם:

”נתן ידו או רגלו או עלי ירקות כדי שיעברו מים לחבית – פסולין; עלי קנים ועלי אגוזים – כשירה.
זה הכלל: דבר המקבל טומאה – פסולין; דבר שאינו מקבל טומאה – כשירין.”
מנא הני מילי?

דאמר רבי יוחנן משום רבי יוסי בר אבא: ”אמר קרא: אך מעין ובור מקוה מים יהיה טהור – הויתן על ידי טהרה תהא.”

See also Teshuvot haRosh 31:7.

The second requirement is more likely to be problematic.

The Talmud assumes in many places that *mikveh*-water must not be drawn (*sheuvin*).³ The classic and universally agreed case of *sheuvin* is when a person draws water in a bucket and then pours the bucket out into a *mikveh*. We can generalize this by saying that to become *sheuvin*, water must be contained in a utensil (*keli*) that was humanly made or purposed. But the definition of *keli* is complex.

A metal or wood object can be *mekabel tum'ah* only if it is considered a *keli*. However, Mishnah Mikvaot 4:1⁴ states that stone and dung containers make water *sheuvin* even though stone and dung are not *mekabel tum'ah*. This demonstrates that not all *kelim* are *mekabel tum'ah*. However, one might still argue that all metal or wood *kelim* are *mekabel tum'ah*. If that were the case, any metal or wood object that is not *mekabel tum'ah* could not create *sheuvin*.

Mishnah Mikvaot 4:5⁵ seems to support this position. It states that a stone container made in-ground does not create *sheuvin*. Since stone cannot be *mekabel tum'ah* anyway, why does being in-ground matter? The simplest answer is that objects connected to the ground (*mechubar lakarka*) are not *mekabel tum'ah*. But then why can detached stone containers create *sheuvin*? We can answer with the following distinction: Detached stone and dung containers are not *mekabel tum'ah* **even though** they are *kelim*, whereas *mechubar lakarka* objects are not *mekabel tum'ah* **because** they are not *kelim*.

If this distinction is correct, then because the components of a permanent water system are generally considered *mechubar lakarka*, the system between source and tap almost certainly would not create *sheuvin*.

However, sugyot on Talmud Bava Kamma 67a⁶ and Bava Batra 65b-66b⁷ undermine this distinction. The sugyot cite a beraita stating that if a person carves a depression into a (metal or wood) pipe (so that gravel will settle out of the water flowing through it, thereby making it a container) **while** the pipe is attached to the ground, then the pipe does not create *sheuvin*. However, if the person carves the depression **before** the pipe is attached, then the pipe creates *sheuvin* even after it is attached.

³ See e.g. Bava Kamma 67a and Bava Batra 65b-66b below.

⁴ המניח כלים תחת הצנור אחד כלים גדולים ואחד כלים קטנים אפילו כלי גללים כלי אבנים כלי אדמה פוסלין את המקוה
⁵ שוקת שבסלע אין ממלאין ממנה ואין מקדשין בה ואין מזין ממנה ואינה צריכה צמיד פתיל ואינה פוסלת את המקוה
היתה כלי וחברה בסיד ממלאין בה ומקדשין בה ומזין ממנה וצריכה צמיד פתיל ופוסלת את המקוה
ניקבה מלמטה או מן הצד ואינה יכולה לקבל מים כל שהם כשירה וכמה יהיה בנקב כשפופרת הנוד
אמר רבי יהודה בן בתירא מעשה בשוקת יהוא שהיתה בירושלים והיתה נקובה כשפופרת הנוד והיו כל הטהרות שבירושלים נעשות על גבה ושלחו בית שמאי
ופחתוה שבית שמאי אומרים עד שיפחת רובה:

See also Tosefta Parah 1:9

החוקק אמת המים ועשה בהן בית קבלה אף על פי שתלשוה מים וחיברוה אין ממלאין בה ואין מקדשין בה ואין מזין הימנה ואינה צריכה צמיד פתיל ואין נותנין
ממנה לידיים
תלשה וחיברה וחישב עליה אחר תלישתה ממלין בה ומקדשין בה ומזין הימנה וצריכה צמיד פתיל ונותנין הימנה לידיים:
⁶ ושינוי השם שאינו חוזר לברייתו מי הוי שינוי? והרי צינור, דמעיקרא קציצתא והשתא צינורא, ותניא:
"צינור שחקקו ולבסוף קבעו - פוסל את המקוה; קבעו ולבסוף חקקו - אינו פוסל את המקוה,"
ואי אמרת שינוי השם מילתא היא, אפי' קבעו ולבסוף חקקו נמי ליפסול?
שאיני שאיבה, דמדרבנן היא.
אי הכי, אפילו דרישא נמי!
התם איכא תורת כלי עליו בתלוש, הכא אין תורת כלי עליו בתלוש.
ת"ר:
⁷ "צינור שחקקו ולבסוף קבעו - פוסל את המקוה; קבעו ולבסוף חקקו - אינו פוסל את המקוה."
מני? לא ר' אליעזר ולא רבנן?! . . . אלא ר"א דדף, דתנן:
"דף של נחתומין שקבעו בכותל - ר"א מטהר, וחכמים מטמאין"
מני? אי רבי אליעזר, אפי' חקקו ולבסוף קבעו?! אי רבנן, אפילו קבעו ולבסוף חקקו נמי!
לעולם רבי אליעזר היא, ושאיני פשוטי כלי עץ, דטומאה דרבנן.
מכלל דשאיבה דאורייתא?! הא קיימא לן: דרבנן!
ועוד, האמר ר' יוסי בן ר' חנינא: "בדף של מתכת מחלוקת!?"
לעולם רבנן היא, ושאיני שאיבה, דרבנן.
אי הכי, אפי' חקקו ולבסוף קבעו נמי!
שאיני התם, דאיכא תורת כלי עליו בתלוש.

If the pipe in the end is *mechubar lakarka* either way, and therefore not *mekabel tum'ah*, why should it matter whether it became a container before being attached?

The Talmud first answers that the issue of *shevin* is only *derabanan*. This may mean that the issue of *shevin* is never *deoraita*, but that the rabbis decreed against immersing in *shevin* lest one come to immerse **in** a *keli*, which would be invalid *deoraita*. Alternatively, it may mean that *shevin* is *derabanan* in some cases but *deoraita* in others, and that the *beraita's* rule applies only to the *derabanan* cases. (See Appendix B for whether the distinction between *derabanan* and *deoraita* cases is practically relevant to our discussion.)

Still, the Talmud asks, if an attached pipe is not a *keli*, why would the rabbis include it in the decree against *shevin*? It *answers* that the pipe **had been** a *keli* before it was attached.

The problem with this answer is that Mishnah Kelim 11:2⁸ and many Tosefot⁹ teach that objects **intended** to be used only when *mechubar lakarka* are not *mekabel tum'ah* even before they are attached.¹⁰ Almost all commentators read the *beraita* above as discussing pipes that were intended to be used only when *mechubar lakarka*. So how can the *beraita* claim that it was ever a *keli*? The solution is that a metal container can be a *keli* without being *mekabel tum'ah*. (For more proofs of this proposition see Appendix A.)

Still, why should it matter that the pipe **had been** a *keli*, if it is now attached? The solution is that if it was a *keli* before being attached (whether or not it was *mekabel tum'ah*), it remains a *keli* even after becoming *mechubar lakarka* (and certainly not *mekabel tum'ah*).

This means that water becomes invalid as *shevin* if at any point it is contained in something that **had been** a *keli* before becoming *mechubar lakarka*. So we cannot validate tapwater solely because all the components of the water system are currently *mechubar lakarka*.

The Secret of the Jews by Rabbi David Miller, a fervent proponent of the validity of home immersion, explains this issue clearly. He states that the components of a system are not a problem so long as “*each and any of these apparati is not capable of holding water in its regular position before being connected or attached, and is made originally for that purpose; and is properly and permanently connected with the regular water system and with the building.*” Similarly, storage tanks are not a problem so long as “*such tanks were originally made for that purpose, to be connected to the ground or building, and are in fact connected thereto and permanently installed; and provided, of course, that they have a hole in the very bottom (which is usually the case) as an outlet.*” The requirements to not be “capable of holding water in its regular position before being installed,” or specifically to “have a hole in the very bottom as an outlet” are ways of saying that the water cannot be in anything that was a container, and therefore a *keli*, before it became *mechubar lakarka*. Rabbi Miller believed that most municipal and home water systems met this requirement, for example stating that an outlet hole at the very bottom “is usually the case.”

Rabbi Nissan Telushkin, in his 1947 work Mikveh Israel (2nd expanded edition 1950), accepts Rabbi Miller's halakhic principles. After studying the New York City water system, he ruled that NYC tapwater was valid for mikvaot except in three neighborhoods where the water passes through pressurized storage tanks. Since these tanks were attached to the ground, and were always intended to be attached to the ground, they are not *mekabel tum'ah*. The basis for invalidating water that passed through them must be

⁸ כל כלי מתכות שיש לו שם בפני עצמו – טמא,

חוץ מן הדלת ומן הנגר ומן המנועול והפוחה שתחת הציר והציר והקורה והצינור, שנעשו לקרקע:

See however Chatam Sofer 198, who argues that utensils made to be attached are *mekabel tum'ah* before being attached. He agrees however that after being attached they are not *mekabel tum'ah* but still create *shevin*.

⁹ See for example Tosefta Mikvaot 5:7

הנוגע באבק טהור שלא נעשה אלא לשמש עם הקרקע

¹⁰ The standard position is that this relates to the specific object; Beit Yitzchak YD 2:30 contends that the object must belong to a class of objects that are never used other than *mechubar lakarka* (see Appendix A). Note also the position of Avnei Nezer that requires not only intention to be attached, but also to “serve the ground.” He contends that the pipes “serve the water” by filtering it, rather than serving the ground (see Appendix A).

that they were capable of holding water before they were installed, and that they are considered to contain the water that flows through them, because their outlets are on the side rather than on the bottom.

Rabbi Telushkin then points out that rooftop storage tanks in individual houses pose a problem even in other neighborhoods. Under NYC fire regulations, such tanks were required to have two outlets, one on the side and one on the bottom, and under ordinary conditions, to open only the outlet on the side. This ensured that the tank would always contain water for firefighting purposes, even if the fire prevented water from being pumped up to it. So these tanks as well were capable of holding water before being connected to the system, and of containing the water that flowed through them.

Both of Rabbi Telushkin's concerns apply to any tapwater whose progress from source to tap is not fully understood. For example, Cleveland's water department [website](#) shows its supply passing through a series of tanks, each of which have outlets on the side rather than on the bottom. Cleveland may be different from New York because all its water is pumped up from Lake Erie, whereas New York's supply is brought down by gravity from the Catskill Mountains. But it is also possible that requirements for filtration, fluoridation, etc. have changed since Rabbi Telushkin's day, and that nowadays all NYC water passes through such tanks. Certainly the issue must be thoroughly researched before even NYC tapwater can be validated.

Similarly, Rabbi Telushkin's concern may apply nowadays to more than rooftop tanks. For example, standard hot water heaters have outlets on the side rather than on the bottom. Therefore, the water system of each house must be examined before validating water coming from its taps.

THE TUB ITSELF

Let us assume that all this research has been done, and the water coming out of this specific tap is not *shewin*. The tap opens directly into a tub. What are the requirements for the tub to be a valid *mikveh*?

a. SIZE

The Talmud (Eruvin 14a-b¹¹) provides three ways of calculating the minimum size of a valid *mikveh*:

- a. Sufficient to fully immerse
- b. 3 cubic cubits (*amot*)
- c. Sufficient to contain 40 sa'ah.

Some claim that "sufficient to fully immerse" is a subjective measure, and the *deoraita* standard, while the other measurements are objective and *derabanan*. If that is the case, a small person could presumably immerse *deoraita* in less than 40 *saah*. Similarly, a person could fully immerse and yet fail to satisfy the *derabanan* standard.

Scholars in other halakhic contexts have given values ranging from 18 to 24 inches for the *amah*. A 24 inch *amah* yields a minimum mikvah value of 24 cubic feet, or approximately 180 gallons. An 18 inch *amah* yields 10.25 cubic feet, or approximately 77 gallons.

Rabbi Miller initially required private mikvahs to be 24 cubic feet. In his final edition however, he required only 80.57 gallons. He acknowledged that he could find no one else willing to support him on this, and publishing this position may have damaged his reputational legacy (see my upcoming article on the topic in *The Lehrhaus*).

But let us assume that the situation we find ourselves in justifies relying on his position. The mikveh must be able to retain its full measure during the immersion. A person displaces approximately a gallon of

¹¹ כדתניא:

"ורחץ מים - במי מקוה; כל בשרו - מים שכל גופו עולה בהן.
וכמה הן? אמה על אמה ברום שלש אמות.
ושיערו חכמים מי מקוה - ארבעים סאה.

water for every 8 pounds they weigh. So even Rabbi Miller's minimum shiur actually requires a tub with a capacity of 90-110 gallons, depending on the person.

What sort of tubs would then be large enough?

The inside of my home's ordinary five-foot bathtub measures 53 x 22 inches at its very top, and 48 x 18 at its floor. It is 11 inches high to the overflow valve, with another inch above that. Even if we took the top measurements as if the tub's walls were straight, and plugged the overflow (which is necessary in any case to prevent the problem of *zochalin*), the tub's volume would be slightly over 8 cubic feet, or around 60 gallons. So it seems clear that ordinary tubs cannot meet the objective *derabanan* standard. Furthermore, such tubs are not big enough for ordinary-sized adults to fully immerse themselves in. However, some higher end tubs or jacuzzis certainly are big enough, and perhaps some older clawfoot tubs are also big enough.

b. *keli*

We learned above that even if the problem of *shevin* is *derabanan*, immersing in a *keli* is invalid *deoraita*. We also learned that if something is a *keli* before being *mechubar lekarka*, it remains so even after being attached, and that being able to hold water in its ordinary position defines something as a *keli*. This would mean that a tub can only be a valid *mikveh* if it was unable to hold water at the moment before it was installed.

Rabbi Miller titled a subchapter in Secret of the Jews (all editions) "A Bathtub is Not a Mikvah," and declares that this was obvious based on the rules given above. Why? Bathtubs have an outlet hole at their very bottom! The explanation I favor is that in the 1930s, bathtub drains were stopped by rubber inserts. Those inserts came with the tub, had no purpose other than stopping the drain, and sometimes were even chained to the tub. They were, in short, part of the tub. Therefore, the tub was able to contain water even before being installed.

If this explanation is correct, Rabbi Miller would not have the same issue with my home tub. The stopper for my tub's drain is built into the pipe running from the overflow valve to the drain. That pipe is attached to the tub after the tub is in place and attached to the plumbing. So my tub was built with a hole in its very bottom and did not become a container until it was *mechubar lekarka*, and furthermore its hole was plugged by something that is itself *mechubar lekarka* (which is currently failing to plug it, but that is another story).

But my tub is too small to be a *mikveh*. The question is whether high-end tubs are built and installed the same way. (Note: Outdoor hot tubs are not connected to plumbing, and obviously hold water, so they are certainly *kelim* and invalid).

One obvious difference is that my tub is made of enameled cast-iron, whereas Jacuzzis and other ready-made high-end tubs tend to be made of fiberglass-reinforced acrylic. Several internet videos purport to show the construction and design of acrylic bathtubs. (See e.g. <https://m.youtube.com/watch?v=5dXMGDRWpqq>). These videos show that acrylic bathtubs are formed out of a single solid sheet, with no holes in the bottom or anywhere else. Holes for the drain etc. are drilled afterward. So there is no question that they begin their existence as *keilim*. Moreover, each tub is tested before shipping by being filled with water!

However, it is possible to "break *kelim*." One way to break a container is to drill a hole in its bottom with a diameter of (taking the smallest possible measurement for "two fingers") an inch and then plugging the hole after connecting it to the ground. (Rabbi Miller and most authorities believe that one has to plug the hole **by** connecting it to the ground.) Drainholes certainly have a large enough diameter. If acrylic tubs have their drainholes plugged in the same way as my cast-iron tub, they would meet this requirement.

I initially suggested that the fact of the water-test was sufficient to invalidate acrylic tubs, because they held water even after the holes were drilled. However, Deborah Klapper argued that they were plugged with a stopper that is intended to be temporary and does not travel with the tub, and therefore cannot be considered part of it. Preliminary halakhic research indicates that her position is tenable.

However, as confirmed to me by an Orthodox contractor, the same video shows that acrylic tubs are not plugged in the same way as metal tubs. Rather, acrylic tubs are “fully plumbed” before installation, including the pipe leading from the overflow valve to the drain, and then lowered onto a drainpipe in the floor. In other words, they are capable of holding water at the moment before they become *mechubar lekarka*.

This means that an acrylic tub is presumptively a *keli* and an invalid *mikveh* unless one knows for certain that for whatever reason its drainpipe with stopper was attached only **after** it was connected to the plumbing,

CONCLUSION

There is no precedent or plausible argument for regarding an ordinary bathtub as a valid *mikveh*. Rabbi David Miller, often cited as validating bathtub immersions, actually denounced them out of hand. However, Rabbi Miller did support building home mikvaot and filling them with tapwater. In the last edition of his book, he radically shrank the required size of a *mikveh*, although an ordinary bathtub would still not be close to big enough.

Rabbi Miller’s arguments for the validity of tapwater remain halakhically sound, and they were endorsed by Rabbi Nissan Telushkin. However, as Rabbi Telushkin demonstrated, these arguments do not apply to **all** public water supplies. It seems likely that many fewer cities meet the criteria than used to, and so each area requires thorough investigation.

Rabbi Miller himself noted that the water supply system in individual houses can be halakhically problematic. Rabbi Telushkin showed that the problems were more widespread than Rabbi Miller indicated, and it seems likely that they have become yet more so. Therefore, each house requires thorough investigation.

Rabbi Miller rejected all bathtubs out of hand, regardless of size. I suggest that changes in plumbing have made his objection obsolete with regard to cast iron bathtubs. However, cast iron bathtubs are almost never large enough. Acrylic tubs, which may be large enough, are generally invalid on the same ground invalidated cast iron tubs in Rabbi Miller’s time.

Outdoor hot tubs that are not connected to plumbing are obviously invalid.

Several possibilities for valid home immersion remain. Inground pools (indoor or outdoor) made of poured concrete, or custom bathtubs that are built in place rather than prefabricated, may be large enough and valid *mikvehs*. However, one would have to investigate the municipal and house water supplies before allowing such *mikvehs* to be filled directly with tapwater. A pool’s filter system also requires investigation, as well as systems for whirlpool massage and the like.

If the available tapwater is invalid, such *mikvehs* could in principle be filled from other sources, such as rainwater, or melting ice, or possibly by conducting the water from the tap to the *mikveh* over a sluice that is not *mekabel tum’ah*. Such methods pose their own practical and halakhic challenges, which are beyond the scope of this article.

APPENDIX A

Proofs that metal containers which are not *mekabel tum’ah* nevertheless are *kelim* for the purpose of invalidating a *mikveh*:

Several colleagues initially argued to me that a container constructed to be used exclusively while *mechubar lekarka* is not a *keli* even before it is attached. It therefore seems worthwhile to catalog some more of the evidence and authority against this argument.

1. Rabbeinu Gershom's text of the beraita apparently read חקקו כדי לקבעו, he carved (the depression in) the pipe **in order** to attach it. However, this text is not supported by any ms. of either sugya (Friedberg).

2. שו"ת נודע ביהודה מהדורא תניינא - יורה דעה סימן קט responds to a student/colleague's critique of Rabbi Landau's position that anything made to be attached to the ground is not *mekabel tum'ah* even before it is attached. The critic argues this position contradicts the beraita, which says that the pipes create *sheuvin* even before being attached. How can that be if the pipes are not *mekabel tum'ah*? Rabbi Landau responds that he is astonished at the critic's conflation *sheuvin* with *kabbalat tum'ah*, since *sheuvin* depends entirely on whether the relevant object is a *keli* regardless of whether it is *mekabel tum'ah*. Both Rabbi Landau and his interlocutor assume that detached containers are *kelim* regardless of why they were made.

ומה שהוקשה לך על מ"ש שם בחיבורי דכל שתחלת עשייתו ע"מ לחבר בקרקע - אינו מקבל טומאה,

והקשית: א"כ, בצינור שחקקו, שיש חילוק בין חקקו ולבסוף קבעו ובין קבעו ולבסוף חקקו,

נפלוג בחקקו ולבסוף קבעו בין חקקו תיכף ע"מ לקבעו ובין נמלך אח"כ לקבעו!?

אני תמה

מה ענין שאיבה, שתלוי רק בשם כלי, ואף שאינו מקבל טומאה, ובזה לא מהני אפילו חקקו ע"מ לקבעו, שאף שאינו מקבל טומאה - מ"מ שם כלי עליו בתלוש,

ועיין בפ' המוכר את הבית דף ס"ו ע"ב ד"ה דאיכא תורת כלי עליו בתלוש,

אבל לענין קבלת הטומאה, אפילו בכלים המקבלים טומאה מן התורה, אם עשאו ע"מ לקבעם בקרקע - אינן מקבלים טומאה:

3. Tosefta Yadayim 1:9 states that if a container formed naturally in groundrock, and then was naturally separated and reconnected, it does not create *sheuvin*. However, if a person "reconnected it ו thought about using it," it creates *sheuvin*. This text seems out of order, as presumably the thought is relevant only if it precedes the reconnection. The GRA accordingly translates "reconnected it **or** thought about using it." The Chazon Ish derives that "thought about using it" makes it a *keli* even if the thought was to use it only after reconnecting it, in which case it is not *mekabel tum'ah*. He cites our beraita about the pipes as evidence.

4. Talmud Shabbat 52b states that a new metal object which one intends to polish is not *mekabel tum'ah*, because it is unfinished. If one changes one's mind about polishing it, it becomes *mekabel tum'ah*, and if one changes one's mind again, it ceases to be *mekabel tum'ah*. However, if it actually becomes *tamei*, then it remains *tamei* even if one decides again to polish it.

Rav Elchonon Wasserman in קובץ שעורים קובץ שמועות חולין אות לב wonders: A broken *keli* does not retain previous *tum'ah*. If an unfinished metal object is not *mekabel tum'ah* because it is not yet a *keli*, and its status is changed by thought, then why isn't deciding to polish it the equivalent of breaking it, so that it is no longer a *keli*? He responds that an unfinished but useful metal object **is** a *keli*, just not one that is *mekabel tum'ah*. Changing its status to unfinished prevents it from becoming *tamei*, because unfinished metal objects are not *mekabel tum'ah*, but does not remove its existing *tum'ah*, because it is still a *keli*.

Rabbi Wasserman cites as parallel a case from Shabbat 52. A needle which has not yet had its eye pierced is not *mekabel tum'ah*, because it is unfinished. However, it is not *muktzah* on Shabbat as useless, since some people use needle blanks for other purposes. Rashi explains that the Torah declares objects to be *mekabel tum'ah* only if they are a *keli maaseh*. Rabbi Wasserman understands this to imply that a useful unfinished object is a *keli*, just not a *keli maaseh*. He then equates the Rabbinic standard of *keli* for

muktzah with the Biblical standard for *mikveh*, specifically citing as examples containers made of stone or dung and containers that were made to be used only while attached.

והנה ברש"י קידושין נ"ט כתב, דאם חישוב שלא לשופ ולשבץ - דנעשה כלי במחשבתו.

אם אח"כ נמלך לשופ ולשבץ, דנעשה גולמי כלי ע"י מעשה - מ"מ לא הוא שבירה אם היה טמא.

ולכאורה כיון דגולמי כלי אינו כלי לקבל טומאה, אין לך שבירה גדולה מזו!?

ועמ"ש בזה בקובץ שעורים פסחים אות קנ"ה.

וי"ל עוד עפ"מ ש"ש רש"י שבת נ"ב ד"ה בגלמי

דכל זמן שלא ניקבה - אינה מקבלת טומאה, דהא לא נגמרה מלאכתה, ולענין טומאה - כלי מעשה כתיב -

משמע דכלי מיהא הוי,

וה"ז דומה לכלי גללים ולדקין שבכ"ח, שאע"פ שאין מקבלין טומאה - פוסלין את המקוה, דשם כלי עליהן, שבת ט"ז.

וכן כלי העשוי לשמש את הקרקע - פוסל את המקוה אף על פי שאינו מקבל טומאה, ואפילו עדיין לא חיברו, כמ"ש הרמב"ם רפ"ט מהל' כלים.

ומעתה אפשר לומר עוד

דאף לענין טומאה, אין דין כלי מעשה אלא תנאי בקבלת הטומאה,

אבל כלי שכבר נטמא, אף על פי שחזר להיות גולם - לא פקעה טומאתו, כיון דאכתי שם כלי עליו.

5. Rabbi A. Y. Kuk in **שו"ת דעת כהן (ענייני יורה דעה) סימן קא** provides another example of a container that is considered a *keli* for *mikveh* purposes despite not being *mekabel tum'ah*. Talmud Bavli Pesachim 109b and Talmud Yerushalmi Yoma 3:8 each declare that the giant Temple basin known as Yam Shel Shlomoh was used as a mikvah; the Bavli adds that it was large enough to contain the water for 150 mikvehs, or 6000 sa'ah, minimally 12,000 gallons. Containers that cannot be moved when full are not *mekabel tum'ah*. Nonetheless, the Yerushalmi challenges the claim that the basin was used as a mikveh on the basis that it was used as a *keli*? Tosafot Pesachim 109b explain that while it was not *mekabel tum'ah*, it was nonetheless a *keli* for the purpose of *shevin*. Rav Yoel HaLevi cited in Mordekhai Hilkhhot Mikvaot 45 uses this logic to explain why immersion in a huge barrel that has been buried in the earth (i.e. *mechubar lekarka*) is invalid, even though it was always intended to be buried.

(RAK: See also Agudah Pesachim. Raavyah Teshuvot uBeiurei Sugyot 990 also quotes Rav Yoel haLevi's position. Note that some contend that the rule about containers that cannot be moved applies only to wooden containers.)

שו"ת דעת כהן (ענייני יורה דעה) סימן קא

ב"ה, ה' תמוז תער"ב, פעה"ק יפו ת"ו,

לכבוד הרב המאוה"ג אוצר תו"ר מוה"ר זילבער שליט"א, רב דק' וואוסטער יצ"ו. ד' יברכהו בכ"ט.

הנני בזה להשיב לכת"ר בקצרה, ע"ד המקוה דבדק לן מר בגוה.

מפשט הסוגיא דבב"ת ס"ה דצינור שחקקו ולבסוף קבעו משמע דאפילו נעשה לשמש את הקרקע, שאינו פוסל משום קבלת טומאה לגבי דין דהויה ע"י טהרה בעינן, מ"מ פוסל הוא משום שאובין, דמ"מ שם כלי עליו.

חדא, דצינור זה בפשוטו משמע שנעשה לשמש את הקרקע, א"כ אפילו חקקו ולבסוף קבעו לא היה ראוי לפסול, א"ו אף על גב דאינו מקב"ט - מ"מ פסול שאיבה יש כאן,

וצריך לומר דמיירי בצינור שהוא כלי, כד' תוס' שם ד"ה צינור, דמיירי שחטטו באמצע לקבל צרורות.

ומדברי התוס' הללו עצמם ג"כ מוכח דלגבי שאיבה לא מהני נעשה לשמש את הקרקע,

משום דיש להקשות: מאי דוחקיהו לאוקמי הך דצינור בחטטו לקבל צרורות כדי שתהי' לו תורת כלי, הא אפשר לאוקמי בצינור של מתכת, ומטעם הוייתו ע"י טומאה, ואז פוסל ג"כ כשלא חטטו כלל, דמ"מ הוא מקבל טומאה כדין פשוטי כלי מתכת!?

מיהו יש לדחות משום דמסקנת הגמרא היא שאיבה דרבנן ומוכח דמטעם שאובין אתינן עלה.

אך מדברי הגמ' גופא יש להוכיח,

מדפשיטא להו דמיירי לענין שאובין ולא לענין הוי' ע"י טהרה, והיינו משום דמשמע להו דמיירי בעשוי לשמש את הקרקע. א"ו דאי בכלי מתכת מוקים לה ומשום קב"ט, תקשה איך הוא מק"ט בכל גווי, הא בפשיטות מיירי שעשוי לשמש את הקרקע, ובלא"ה אינו מקב"ט כלל!?! אלא ודאי לאו משום טומאה עסקינן כאן,

אלא משום כלי, ומטעם שאובין, וש"מ שגם בעשוי לשמש את הקרקע ג"כ יש בו משום שאובין, ולא פקע שם כלי מיניה אלא כשקבעו ולבסוף חקקו.

ובפירוש רבנו גרשום כ' מפורש:

ת"ר צינור שחקקו כדי לקובעו מן המעיין ועד המקוה, שילכו המים למקוה דרך הצינור.

משמע שהיתה החקיקה ע"ד לקובעו,

א"כ הויא עשייתו לשמש את הקרקע, דטומאה בכה"ג ליכא אפילו בשל מתכת, או בכלי עץ שיש בו חטיטה לקבלה, - ומ"מ משום שאובין יש כאן.

וכן משמע מהא דפריך שם מברייאת דבית אצינור, מני לא ר"א, והיינו משום דר"א ס"ל דבמתכת, בין חקוקה ובין קבועה, אמרינן כל המחובר לקרקע הרי הוא כקרקע, וכאן אמרינן דבחקוקו ולבסוף קבעו הוי כמטלטלין. ואם נאמר, שכאן לא הוי כמטלטלין לגבי שאיבה, כ"א כשלא עשאו לשמש את הקרקע, לא קשיא כלל, דבפשיטות יש לאוקמי דמכתשת עשויה היא לשמש את הקרקע, ותחילת חקיקתה י"ל שהיא לכך.

ויותר מוכח זה מפ"י רבינו גרשום, דלא מפרש כפי' רשב"ם בחילוק שבין מכתשת קבועה לחקוקה, דקבועה מיירי שהיתה חקוקה ועשויה ואח"כ קבעה בקרקע, אלא דגם קבועה פירש שהיתה תלושה מעיקרה והדר קבעה וחקקה. א"כ מיירי בחקקה אחר הקביעות, דכה"ג ודאי לשמש הקרקע נעשית, וא"כ בצינור, דמקשה מיניה, צריך לומר דמיירי נמי בעשוי לשמש את הקרקע, דאם באין עשוי לשמש את הקרקע מיירי כאן, אין כאן שום קושיא כלל לר"א.

ובמרדכי למס' שבועות בהלכות מקואות שם (בד"ה כתב רבינו יואל הלוי) **בטר דמסיק לפסול בגיגית גדולה יותר מארבעים סאה, שמפני שהיא כלי עץ, אינה מקבלת טומאה מאחר שהיא באה במדה, שמ"מ לענין דין שאובין לא מהני, ומביא ראה מבור שבספינה, שפסול משום שאובין, כדאמרינן בספרא, ושם מחזיק הוא יותר מארבעים סאה, ש"מ שאע"פ שאינו מקבל טומאה מ"מ יש בו משום שאובין.**

והדין בזה פשוט הוא, משום דלא עדיף כלי עץ הבא במדה, מכלי אבנים וכלי אדמה, שאינם מקבלים טומאה ופוסלים משום שאובין.

אמנם מסיק שם במרדכי: וקשיא לן ים שעשה שלמה, האיך הוי מטבילין בו, הלא כלי הוא ומוכח מזה דגם במחובר לקרקע, ועשוי לשמש את הקרקע, ג"כ פשיטא ליה דפוסל משום שאובין, דאי לא תימא הכי פשוט הוא לתרץ, דים של שלמה קבוע הוי בקרקע, ולכתחילה נעשה לקובעו בקרקע, וא"כ עשוי הוא לשמש את הקרקע. ומתוך קשר הלשון, שכתב שם וקשיא לן, בטר דמסיק לפסול גיגית גדולה שקבעה בקרקע, משמע דאם היינו אומרים שמה שמועיל להפקיע טומאה מהני ג"כ לגבי שאיבה, אז לא הוה קשיא ליה כלל, - והיינו, משום דהי' פשוט ליה לומר, דים ש"ש הוא נעשה לשמש את הקרקע, אבל בטר דמסיק דביטול הטומאה לא מהני לגבי שאובין, מקשה שפיר מים שעשה שלמה. א"כ מוכרחים אנו לומר, שכבר ידע דים שעשה שלמה הי' מחובר והי' עשוי לשמש את הקרקע, דאי לאו הכי אין לו קישור כלל עם הא דגיגית, שהרי הגיגית היא של עץ, והוי דומיא דשק, דאינה מקבלת טומאה כ"א במיטלטלת מלא וריקן, שפיר בגדולה בטל ממנה טומאה, אבל ים ש"ש, שהיה של נחושת, מצד גדלותו לא תפקע טומאתו. וא"כ איך עלה על דעתנו לומר, שהיה מקום לומר, שלא יהיה בו דין טומאה, עד שמסמיכו להא דגיגית, אלא ודאי משום דכמו שגיגית אפשר להפקיע טומאתה ע"י גדלה, ה"נ אפשר להפקיע טומאת הים ע"י עשוי לשמש את הקרקע.

ומ"מ אמר דבתר דמסקינן, דבגיגית לא מהני טהרה לענין שאובין, ה"נ לא יועיל לזה מה שעשוי לשמש את הקרקע, וש"מ דפשיטא ל' דעשוי לשמש את הקרקע אינו מבטל מדין כלי. ולכן הוצרך לטעמא, דרגלי השוורים נקובים היו כמוציא רימון.

וכ"מ יותר מלשון התוס' פסחים ק"ט ב', ד"ה בים שעשה שלמה, דמסיק שם מדהירו"ש, שרגלי השוורים היו מנוקבים כרימונים והיו מחוברים למעין שתחתיים, משמע ודאי שהיו מחוברים לקרקע, והים ודאי מסתמא ה' מחובר לשוורים, ומתחילה לכך נעשו, א"כ הוי ממש לשמש את הקרקע, ומ"מ צריכים אנו לנקיבה של רגלי השוורים. מכ"ז מוכח, דעשיית הכלי לשמש את הקרקע לא מפקא לה מדין שאובין, אף על גב דמפקא לה מדין טומאה.

ובירושלמי, יומא, פ"ג ה"ח, לפנינו הגירסא היא: ולא כלי הוא, בקושיא על ים שעשה שלמה, ומשני: אמת המים היתה מושכת לו מעיטם, והיו רגליו שבדרום (או רגלי השוורים) פחותים כרימונים. ולכאורה י"ל, דאע"ג דיועיל שימוש הקרקע לענין שאובין, היינו לטבול במקוה, אף על פי שנשאבו המים בכלי כזה שעשוי לשמש את הקרקע, אבל לטבול בו י"ל שהוא איסור תורה ממש וחמור משאובין, וי"ל דל"מ שימוש הקרקע. ולפ"ז י"ל, שזוהי כוונת הקושיא ולא כלי הוא, ולעולם בשימוש הקרקע לענין שאובין י"ל, דכמו דהוא בטל לגבי קרקע לענין טומאה, הרי הוא בטל לענין שאיבה. וכ"פ בעל קה"ע, דקושיית הירושלמי ולא כלי הוא היא מצד שאין טובלים בתוך הכלים, ולא מצד איסור שאובין. רק בעל פ"מ פ"א מטעם שאובין, והיינו כד' התוס' פסחים הנ"ל, דהי' גירסתם כן, או דס"ל שזוהי כוונת הקושיא. ובאמת בלא"ה קשיא, למה פריך משאובין, דהוא דרבנן אליבא דכמה מרבנותא, וביחוד דעת ר"י בעהתו"ס בב"ת ס"ו, ד"ה מכלל, דכולו שאוב ג"כ מדרבנן הוי, ויותר הו"ל להקשות מדין אין טובלין בתוך הכלים. ואולי י"ל דלדעת תוס' ל"ה הים עשוי לשמש את הקרקע, ולא הוי' מחובר כלל לקרקע, אלא הוי' מונח על הבקר. והכי משמע יותר בקרא, מלכים א' ז' ומלכים ב' כ"ה, דכליל ליה בשם כלים, ואם הוי' עשוי לשמש את הקרקע אינו בכלל כלים, אלא בנין, משו"ה ס"ל שפחתוהו, כדי שיבטל מדין קב"ט, ומ"מ כלי הוי, דמטלטל הוא, ומ"מ דוחק הוא לומר כן, ופשט הענין משמע דל"מ שימוש קרקע לגבי שאובין, ופשיטא דל"מ לענין אין טובלין בתוך הכלים.

וברבנו ירוחם נתיב כ"ו חלק ה', לענין דין צינור, כתב וז"ל לענינינו:

אבל קבעו ולבסוף חקקו אינו פוסל את המקוה, דהו"ל כחוקק בקרקע, ומותר להמשיך בו מים ע"י צינור, להשלים המקוה לארבעים סאה, ובלבד שיהי' במקוה רוב מים כשרים, שהם כ"א סאה, וכ"ש אם היה בו יותר,

וזהו המשכה שמותרת ברוב מים כשרים, אף ע"פ שלא נתערבו חוץ למקוה, כו'.

ולכאורה הדבר תמוה, למה הוצרך לצייר את דין ההכשר של קבעו ולבסוף חקקו, במקוה שיש בו כ"א סאה מים כשרים, ולענין המשכה, ה' לו לומר לענין שאובין ממש, דאם קבעו ולבסוף חקקו אין לו דין שאובין, ומותר למלאות את כל המקוה על ידו, כמו שהיא פשוטות הגמ' דבב"ת דעסיק בדין שאיבה.

א"ו דס"ל דכשהרוב הם מים כשרים, שאז השאובין אינם פוסלין כשהם באים בהמשכה, רק מצד דין הוייתו ע"י דבר המקבל טומאה, אבל מצד דין שאובין אין כאן פסול, ומשו"ה מהני קבעו ולבסוף חקקו. אבל אם נבא להכשיר כשמלא כל המקוה ע"י זה הצינור, כשחקקו ולבסוף קבעו, לא מהני לנו מה שאינו מקבל טומאה, כי סוף כל סוף כלי הוי, ודינו כשאוב ע"י כלי גללים כ"א וכלי אדמה.

וכן סיים שם בדקדוק לישונו, בטעם ההכשר משום דבר המקבל טומאה: כיון שקבעו בתחילה . . .

6. Tosafot Chadashim to Mishneh Mikvaot 6:10 offers an original Biblical basis for the distinction between *kabbalat tum'ah* and *shevin*.

[תוי"ט] סד"ה בזמן כו' עם הקרקע טהור.

ואפי' עדיין אינו משמש לקרקע, אלא דנעשה לשמש עם הקרקע - טהור.

וכבר הקשה כן בכלים פ"ח מ"ט.

אבל אפשר לומר

דיש לחלק בין שאוב לטומאה,

דדוקא לענין טומאה, דכתיב ביה יונת, דמשמע כל היכא ששייך נתיצה, וזה אינו אלא בתלוש לגמרי,

משא"כ אם חברים לקרקע, אף שהיה מתחלתו תלוש, כיון דעכשיו מחוברת היא לקרקע;

אבל גבי שאובין, דכתיב ביה כלי, וכיון דחל עליה שם כלי בתלוש. לא מיבטל תו שם כלי מינה.
וכ"מ בר"ש וברמב"ם לעיל רפ"ד גבי צינור שחקקו ולבסוף קבעו, דהוי שאובים משום דהוי כלי בתלוש.
וכ"כ הר"ב שם מ"ב.
וכ"מ בתוספתא שהביא הר"ש כאן ע"ש.
ועיין ברשב"ם בב"ב דס"ה ע"ב:

The list of names and citations can be greatly extended.

At one point, I wrote (perhaps hubristically) to a colleague expert in Taharot that so far as I could tell, my position was supported by all rishonim and acharonim who address the issue. He responded by citing Avnei Nezer YD:271 and Beit Yitzchak YD 2:30. I therefore present them here as the most likely basis for any conflicting position.

a.

Beit Yitzchak cites גידולי טהרה and לחם ושמלה as disagreeing with NbY's blanket claim that all useful containers create *sheuvin* before being attached. Each adds an additional qualification for being not *mekabel tum'ah* which explain why the pipe is *mekabel tum'ah* despite always being intended for attachment, e.g. that the pipe was useful even before it was a container. Beit Yitzchak rejects all these with regard to *deoraita* issues such as immersing in the container; he is willing to rely on them post facto in cases where the only possible invalidation is derabanan. He himself offers a qualification that adds a stringency to NbY, arguing that objects which are not of a **kind** used exclusively while *mechubar lekarka* are *mekabel tum'ah* on a rabbinic level even if the specific object was always intended to be used while *mechubar*. Note also that Lechem v'Simlah himself rules that one should in practice be stringent in accordance with the position of Noda b'Yehudah.

Each of the proposed qualifications in theory would need to be evaluated for their application to contemporary circumstances. However, since immersion in the container itself is a *deoraita* issue, in practice Beit Yitzchak simply supports my position regarding bathtubs and jacuzzis.

b.

Avnei Nezer argues, with a literary basis, that intention to use something only while it is *mechubar lekarka* is not the relevant standard. The relevant standard is "intention to use something only for the sake of the ground." The depression in the pipe, he argues, serves the **water** (as a filter), not the ground, and therefore the pipe is *mekabel tum'ah*. His example of "serving the ground" is a pipe intended to divert water away from a house.

It is not clear to me what Avnei Nezer's standard means, and therefore how to apply it to cases where the object contains the water, such as a bathtub, rather than having the water pass through it.

Moreover, in my humble opinion Avnei Nezer's ground for disagreeing with Noda b'Yehuda is a very weak reed:

קושיית האבני נזר היא:

לפי דברי הנב"י שדבר נעשה לשמש את הקרקע אינו מקבל טומאה אפילו בתלוש, יתכן שלשיתת הר"ש, שכולו שאוב בכלי גללים פוסל מקוה רק מדרבנן, דעדיין נקרא הוייתן ע"י טהרה,

א"כ אפילו כולו שאוב בכלי תלוש שנעשה לשמש את הקרקע פוסל רק מדרבנן,

וא"כ קשה, שהר"ש מוכיח ממה שמקשה הש"ס "מכלל דשאיבה דאורייתא" בתמיה שאין שום פסול שאיבה דאורייתא,

אמנם קושיית הש"ס נובע מברייתא ד"חקקו ולבסוף קבעו פסול", ולדברי הנב"י היינו אפילו עשאו ע"מ לקבעו שאינו מקבל טומאה, שלשיטת הר"ש אינו פסול אלא מדרבנן אפילו כולו שאוב, וא"כ עדיין היה אפשר לומר שכולו שאוב בכלי המקבל טומאה פסול מדאורייתא, ומה היתה ראיית הר"ש?!

ע"פ זה מסיק האבני נזר שבתלוש אפילו נעשה לשמש את הקרקע מקבל טומאה, ושאיני צינור שנעשה לשמש את המים.

אמנם במח"כ נלע"ד שיש ליישב בפשיטות, שהר"ש סבר שלא רצה הש"ס לאוקים את הברייתא דוקא בנעשה ע"מ לקובעו, דסתמא קתני ואח"כ קבעו, וכעין מה שתירץ בעצמו דסתמא קתני משמע אפילו רק ג' לוגין.

c.

Regardless, the positions of Avnei Nezer and Gidulei Taharah compel me to withdraw my assertion of unanimity. I am still very comfortable saying "overwhelming consensus and preponderance of evidence."

APPENDIX B

RABBI CHAIM AMSALLEM

Rabbi Chaim Amsallem (ובחרת בחיים), published at <https://zera-israel.org/digital-library/>, offers what seems like an argument for validating bathtub immersions. He contends that when all mikvaot are closed by government order, and therefore no women can immerse in accordance with the *derabanan* standard for a valid mikvah, it is necessary and proper for poskim to publicly legitimate immersions that meet *deoraita* but not *derabanan* standards.

Many of his arguments about the halakhic process are stimulating. However, as Rabbi Dr. Michael Avraham points out in a critique-cum-haskomoh that Rav Amsallem publishes as part of his work, the psak addresses a fictional situation, because the mikvaot were never closed. We don't know what Rabbi Amsallem would say in the real world.

Secondly, Rabbi Amsallem's *deoraita* standard includes the requirement that the whole body be immersed at once. As we have seen, it would take the confluence of an extraordinarily large bathtub and an extraordinarily small women to make this leniency of any practical use. This is likely why his work continually says "or maybe Jacuzzi."

Finally, while Rabbi Amsallem sides with those who hold that *shevin* is never more than a *derabanan* issue, he does not address the consensus position that immersion in a *keli* is a *deoraita* issue. He therefore never addresses the issue of the validity of the tub itself. I can only speculate that he is unaware of the ways in which acrylic tubs are plumbed.

A Teshuvah Regarding Pikuach Nefesh in a Time of Pandemic

May 28, 2020

Dear Rabbi Klapper,

I have always taken great pride in the way that halakhic Judaism celebrates life. I celebrate my friends who are doctors and nurses as doing the work of Heaven. One of the reasons I so look up to them, and don't envy them, is that they willingly sacrifice their Shabbat experience to save lives. I could never imagine being on-call for work over Shabbat, or having to answer my phone for work.

Until this week. When it became known that healthcare workers and first responders were dying for lack of masks, I turned my high-end tailoring shop into a mask factory, and my workers have all volunteered to come in for free on Shabbat and Sunday to continue production. I'd feel terrible if all my workers were working for free while I was relaxing with my family, and besides, what is pikuach nefesh if not this? And wouldn't it be a terrible chillul Hashem if I didn't go?

But I will also feel terrible violating Shabbat. So please tell me what I should do.

Sincerely,
Ralph L. Schneider

Dear Ralph:

Thank you for your beautiful question. I am humbled by the depth of both your religious and your moral commitments. Words can't express how grateful and impressed I am by your and your workers' willingness to give your time for this purpose – certainly everything about this is a *kiddush Hashem*. It's hard for me to think of telling you what to do. But I'll tell you how I'm thinking about the question, and then we can discuss further how to make the actual decision.

There is no doubt that the Torah gives enormous value to pikuach nefesh. "And you shall live by them" teaches us that all the mitzvot except for three must be violated to save a life. Your volunteering is an enormous mitzvah. But the exceptions for *avodah zarah* and *gilui arayot* teach us that life is not the only Torah value.

All three exceptions are *mitzvot lo taaseh*, DO NOTs. That's because not doing something can be more important than life even in the moment, whereas good things can generally be postponed. For example: There is no need to give up one's life for the sake of studying in the moment, but the martyrdoms of Rabbi Akiva and Rabbi Chanina ben Tradyon suggest that the same might not be true if the price of living meant never learning Torah again.

Moreover, halakhic decisions among competing goods may not rest on which is "more important."

For example: *Shomer petaim Hashem* allows people to engage in at least some forms of dangerous but remunerative employment, so long as the risks involved are considered negligible by one's society. Similarly, Rav Aharon Lichtenstein zt"l would ask when teaching Bava Kamma, which assigns compensation for all the various destructive things that bulls can do: Why didn't the Torah just ban owning bulls? Rabbi Dr. Moshe Tendler asks the same question on the societal level in his article "בעיות הרב ספר כבוד הרב 167-169 בקדימה בהצלה: התקציב הציבורי ודיחוי נפש מפני נפש" If pikuach nefesh overrides everything, why is it permitted for a state to build parks, rather than spending its entire GDP on healthcare?

The answer is not that jobs, bulls and parks are more important than pikuach nefesh. Rather, we need to recognize that "most important" values should not become "exclusive values." Preserving life is an enormous value, but other values are what makes life worth preserving. *Shomer petaim* is just one of the

principles halakhah used to hedge pikuach nefesh about and ensure that it does not utterly dominate the halakhic scene.

The halakhic discussion around autopsies beautifully illustrates this complex halakhic calculus.

In the late 18th century, Rabbi Yechezkel Landau (Responsa Noda B'Yehuda 2:YD210) was forwarded a three-way rabbinic exchange about whether to permit autopsying a patient who had died of bladder-stone surgery in order to improve surgical knowledge for future such operations. Rabbi Landau pointed out that all sides of the previous discussion had ignored the elephant in the room: if knowledge gained from autopsies saved lives, shouldn't that justify any prohibition conceivably involved in conducting autopsies?

One might respond *in hakhi nami*, sure - if dissecting every Jewish corpse would save even one life, then that's what halakhah requires. But Rabbi Landau did not see this as a plausible outcome.

Rabbi Landau further noted that if performing an autopsy to gain medical knowledge constitutes pikuach nefesh, then they may be performed on Shabbat. And if so, then shouldn't anyone working in life-and-death healthcare be permitted to work on Shabbat! One might allow drug manufacturers to run their plants only if there is a chance of a shortage that couldn't be made up after Shabbat. But what about research labs working on cures of cancer, or new vaccine development? Isn't every moment lost from pikuach nefesh inexcusable?

One might respond again *in hakhi nami*, we do whatever halakhah requires. Rabbi Landau instead developed a new halakhic standard for *pikuach nefesh*. That standard was "*choleh lefaneinu*," meaning that *pikuach nefesh* applies only to a concrete, identifiable, physically present patient. One can autopsy Patient A only if Patient B with the same illness is already in one's care.

Rabbi Landau's standard has essentially disappeared as a matter of practice, although it is often paid lip-service. For example, responsa often cite Chazon Ish YD 208:7 for the proposition that *lefaneinu* is only an example, and "the matter is common" suffices. Or one might cite Rav Yechiel Weinberg's opinion (כתבי הרב וינברג א:כב) that in an age of instantaneous communication, every presently ill person in the world is considered *lefaneinu*. Responding to the present crisis, Rav Osher Weiss and Rav Herschel Schachter each ruled that patients whose near-term arrival in hospital is statistically likely are considered *lefaneinu*.

Rabbi Landau's original formulation had no precedent, so I am not overly concerned about whether these rulings hew to his standard. Rather, my question is how, with his standard obsolesced, we respond to Rabbi Landau's concern that *pikuach nefesh* would take up too much space in halakhah, with Shabbat as the specific example.

One last time, one might respond *in hakhi nami*. Doctors and EMTs already carry their cell phones everywhere on Shabbat, and many doctors go in for their regular rotations, and ambulance crews stand by for Hatzolah, and we are glad and admiring of them, and yet Shabbat survives. But maybe the slope is slipping, and we need to draw new lines to hedge in *pikuach nefesh*. Yet at the same time, we must be extraordinarily careful not to draw those lines too tightly.

Poskim tried to draw two new lines in the discussion about ZOOM sedarim and check-in phone calls during the first "3 day Yom Tov" in isolation. The first was between medical professionals and the rest of us. Pulpit rabbis were reclassified as triage therapists, who were therefore **obligated** to check their messages on Yom Tov, while doing so remained completely forbidden to the rest of us. The second is better illustrated than explained. Amudim and then the RCA allowed check-in calls, but insisted that the call be initiated via a *shinui*, e.g. tapping the screen of a smartphone with one's nondominant hand. (Whether or not this actually constitutes a *shinui* is beyond my scope here.)

An effective *shinui* turns a *deoraita* violation into a *derabanan*. But Rabbi Landau explicitly stated that *pikuach nefesh* is a binary switch halakhically; either it permits both *deoraitas* and *derabananans*, or it

permits neither. Moreover, everyone understood that cellphones are not static, so that the *shinui* would not be maintained for all actions during the call, and no one suggested that ambidextrous people could not make the calls. The call for a *shinui* was a *heker*, a marker that this kind of *pikuach nefesh* was different, even if we hadn't yet figured out exactly how.

Here's what I think was the key felt if not yet formulated difference. The phone calls were needed because we were confident that some members of a given group would be in danger of suicide, but not because we knew that any specific person was in danger. So the case did not meet the meaning of the *lefaneinu* standard, even though we could point to a class of people we were treating as endangered. Until we formulate a new standard, demanding a *heker* makes a lot of sense.

Your question similarly fits in the breach where *lefaneinu* used to hold the halakhic line. That means we probably need to think creatively rather than just answering yes and no.

We also need to think about what precedents we'll be setting, positive or negative, and try to be as clear as possible to everyone about why you're making the decisions you are. For example: Would we be fine if all Jews spent their Shabbat afternoons sewing masks, which absent *pikuach nefesh* would certainly involve several capital violations of Shabbat? Do we think that bureaucrats responsible for distributing funds for purchasing or manufacturing PPEs can work on Shabbat, if that means that more equipment will be made available faster?

So here are a few of the questions I think we should be asking in your specific case, but that I think might be relevant in many cases:

- 1) Is working on Shabbat the only option you have for achieving this result? Could you, for example, achieve the same result by telling your workers that you'll come in Saturday night in addition to Sunday?
- 2) Are you giving up all your free time for this, or are you still working 9-6 during the week? Would you cancel a long-planned vacation (if such things were still possible)?
- 3) Is what you are doing personally essential for the work to be done, or do you just think that you're better at the work?
- 4) How confident are you that your masks are going places where they save lives, as opposed to letting people engage more safely in activities not strictly necessary to save lives?

I'm sure you've already thought of other questions along these lines.

Here is what I am thinking of as the halakhic calculus we should use.

1. Halakhah has two models for permitting prohibitions in time of necessity, *hutrah* and *dechuyah*. *Hutrah* means that once the necessity of accomplishing something is established, we don't look to minimize the degree or number of prohibitions you violate. *Dechuyah*, by contrast, means that we permit only the absolute minimum and degree of violations necessary.

The conventional standard for *pikuach nefesh* on Shabbat is an odd hybrid: we formally rule *dechuyah*, but tell people to act as if the ruling was *hutrah*, because we're afraid that thinking about how to observe a *dechuyah* standard will cause delay and hesitation and eventually cost lives.

2. Halakhah doesn't distinguish between definite risk-to-life and non-trivial-chance of risk-to-life in terms of overriding prohibitions.

3. In cases like this, however, I think we should revert to an actual *dechuyah* standard, and permit only what is absolutely necessary. Moreover, I think that what we should be willing to permit should be directly proportional to the strength of the answers to your questions. For example, if you and your workers are living your ordinary hours during the week, and choosing to work on Shabbat when you could accomplish

the same thing by double-shifting during the week, I would see no basis for permitting any formal Shabbat violations on your part. Maybe you could walk by and give them a thumbs-up, despite the risk that observers will think that you're benefiting economically from their work. If you're working to exhaustion, and no other schedule is feasible, but you're not sure where your masks are going, I might allow more, but certainly not *deoraita* violations. If you know that these masks are going straight to frontline healthcare workers, and that any choice you make other than working on Shabbat will lead to such workers having to do without masks, then I would let you do whatever was necessary, but with a *shinui* where possible without impeding either the masks' or your efficiency.

Thank you again.

With great appreciation,

Rabbi Aryeh Klapper

Kavod HaBeryiot (Human Dignity): Psak and Pedagogy

January 24, 2020

What role should broad moral, ethical, or spiritual principles play in the development of halakhah and the halakhic decisionmaking process?

What role should such principles play in the lives of halakhically observant Jews?

Are the above questions fundamentally the same as each other, or very different?

The Talmud sometimes derives legal details in specific cases from meta-principles that seem rooted in values rather than in formal law. Take for example דרכיה דרכי נעם (*Her ways are ways of pleasantness*), הרחק מן הכיעור ומן הדומה לה (*Distance yourself from ugly acts and from anything similar to them*), or לעולם יעסוק אדם בתורה ובמצוות שלא לשמה, שמתוך שלא לשמה בא לשמה (A person should certainly engage in Torah and mitzvot not for the sake of Heaven, since out of not-for-the-sake he will come to “for the sake.”) Sometimes the relationship between law and values is embodied in a formal legal equation, such as גדול כבוד הבריות שדוחה את לא תעשה שבתורה (Great is human dignity, for it pushes aside a Biblical DON’T), or כל מקום שיש חילול השם אין חולקין כבוד לרב (One must not apportion dignity to rabbis wherever doing so would enable desecration of G-d’s Name). In other cases, we are given little or no explicit guidance as to how that relationship should play out in practice.

I recently heard a shiur from a wonderful young Talmid Chakham that I understood to be making the following claim. Scholars must take broad principles into account even where halakhah already has something to say. Laypeople, by contrast, should make decisions on the basis of their knowledge of the law, and incorporate broad principles only where they have no governing legal evidence.

Here’s a model case. John Buck is walking to shul Shabbat morning in his non-eruv community. Jane Doe, an elderly woman wearing a headscarf, is a block in front of him. A sudden gust of wind tears the scarf off her head and blows it into the street, in his direction. If he does nothing, it will be blown into traffic and destroyed. If he runs to catch it, he’ll have to carry it back to the sidewalk, and it will be awkward if he doesn’t carry it all the way to the lady. But what will she think of him if he makes no effort? He could feign an effort. But will she be humiliated by having to walk home bareheaded? His (securely clipped-on) kippah probably isn’t big enough for her purposes.

There are a lot of practical, factual, and legal issues in play here. Is the street a Biblical public domain, or is carrying four amot within it only a Rabbinic violation? Will it be more than 4 amot from where he reaches the scarf to the safety of the sidewalk? Will it be possible then to ask her to come get it from him, or to give it to a non-Jew to bring it to her? Is it plain that the headscarf was worn for modesty, rather than for comfort? And so on and so forth.

Scholars will presumably have a more sophisticated set of legal tools for analyzing some of these questions, and a more extensive set of precedents. Scholars who are also experienced and competent poskim will also have a set of experiences that generate a nuanced intuition. If John Buck is a scholar, he will bring all those tools to bear on the question of whether this is a case in which concern for human dignity, desecration of G-d’s Name, or the risk of inciting anti-Semitism justifies acting in violation of ordinary Shabbat rules, or not.

But what if John is fifteen years old and a mediocre Jewish Studies student? (Or a brilliant Tanakh student uninterested in sophisticated Halakhah?)

Rav Aharon Lichtenstein zt”l famously constructed a case contrasting the reactions of Modern Orthodox and Charedi teenagers to a car owned by a non-Jew breaking down in their neighborhood. The Charedim begin arguing about whether helping was a violation of *lo techaneim* (= *lo titein lahem matnat chinam* =

do not give them free gifts) – the MOs help without any awareness of the sugya. Rav Lichtenstein preferred helping to arguing, but wished the MO kids knew the sugya.

But there is a sense in which Rav Lichtenstein's case is too easy. Modern Orthodox teens should have heard of *lo techaneim*, yes, but in the context of being told that it has no application to contemporary Gentiles in any case they are likely to encounter. Talmud Torah is a goal in itself, but Rav Lichtenstein did not want or need them to deliberate before acting, nor would he himself have hesitated.

The same is true in cases that implicate *pikuach nefesh*. Yeshivishe legends even suggest that the greater the *talmid chakham*, the less hesitation in such matters. We do not encourage nuanced reasoning in genuine-life-and-death situations. The principle *ein holkhin b'pikuach nefesh achar harov* (= we don't need greater than 50% risk to treat a case as involving a threat to life) is understood as license to avoid nuance.

I don't think we educate the same way about *kavod haberiyot*. Why not? (Why) Do we want John Buck to hesitate before helping?

I can think of two possibilities offhand. The first is that we are much more concerned that *kavod haberiyot* will be massively misused. The second is that *kavod haberiyot* is inherently more complicated than either *lo techaneim* or *pikuach nefesh*.

The first possibility to some extent involves a circularity – people who are worried about misuse likely think it has already been badly misused, while those who support e.g. recent attempts to invoke *kavod haberiyot* with regard to issues of halakhah and gender or sexual orientation will not see much risk.

I think it's fair to point out that this has at times also been true of *pikuach nefesh*. The Noda B'Yehuda's responsum about autopsies recognizes that in principle it can justify allowing all medical researchers and manufacturers to work through Shabbat; to prevent this, he contends that *pikuach nefesh* is halakhically significant only for a *choleh lefaneinu* (a patient who is before us). The jury is out on whether any version of that formulation is practically relevant in the age of the internet. Rav Chaim Hirschensohn used it as at least a *limmud zekhut* (post-facto extenuation) for people who worked on Shabbat rather than lose their jobs during the Great Depression, arguing that unemployment carried with it a significant risk of starvation. Moreover, contemporary halakhic arguments about LGBT issues often cite suicide statistics. So it's not obvious to me that *pikuach nefesh* and *kavod haberiyot* have radically different risk profiles.

It is true that *kavod haberiyot* carries a more complicated prima facie halakhic profile. *Pikuach nefesh* overrides everything except “the big three” sins, whereas according to Berakhot 19b-20a, *kavod haberiyot* overrides only Rabbinic laws, Biblical laws categorized as monetary, and Biblical violations committed passively. (Possibly there are only two categories, and even monetary laws can only be overridden passively.) It is certainly possible to complicate the issue even further. Many rishonim argue that *kavod haberiyot* overrides some but not all Rabbinic laws; many others argue that it overrides additional categories of Biblical law not mentioned in the Berakhot text. Finally, while Noda B'Yehuda successfully made *pikuach nefesh* a binary category, many rishonim argue that *kavod haberiyot* should be paskened on a sliding scale, so that more serious dignity issues justify overriding more serious prohibitions.

But it is a mistake to conflate underlying complexity with the question of whether pedagogic simplicity is possible. I suspect that we could find a way to teach our student John a fairly simple protocol. The core issue is recognizing that we fail when our students are “too frum” to take human dignity into account in their decisions. It would not necessarily be the worst thing in the world if our students decided to see themselves as being machmir on *kavod haberiyot* rather than being meikil on Shabbat.

So – I suspect the real issue is that we worry not about our students' capacity for nuance, or their ability to apply the law, but rather that we don't trust that they share a core understanding of human dignity with those who have primary halakhic authority in their communities. This I think is a real issue, and justifies

caution. But in the long run, we have to address that issue directly, rather than having its gravitational pull distort our whole system.

The Decalogue in Rabbinic Literature

by Dr. Malka Simkovich (SBM 2006)

February 16, 2017

This week's parsha features a passage that in many ways, is the most central document in Israelite history. This passage, Exodus 20:1–13, is known as the Decalogue, or The Ten Commandments (although some of these commandments are actually statements). In the centuries following the dramatic moment of divine revelation at Sinai, the Decalogue took hold as the central articulation of Israelite theology. Its contents, along with the ethical injunctions in Vayikra 19, were paraphrased and referenced in many passages preserved in biblical prophetic literature. And by the Second Temple period, the Decalogue was not only a central idea, but a liturgical document. Despite its importance in the biblical and late Second Temple periods, the Decalogue is not preserved in rabbinic liturgy. Nor is it of central theological interest in rabbinic literature. While its verses have retained an important place in Jewish tradition, they have also been eclipsed by a different statement, one uttered not by God, but by Moshe. This passage is, of course, the Shema (Deut 6:4–9). In order to understand why the Shema came to replace the Decalogue, it is helpful to explore how Jews and early Christians living during this period related to this text.

In the Second Temple period, the Decalogue had pride of place in Jewish thought and liturgy. *Tefillen* discovered at Qumran, the archaeological site adjacent to the caves where the Dead Sea Scrolls were discovered, contain parchment that records both the Shema and the Decalogue. These *tefillen* were likely used in the first century BCE or first century CE, when the Qumran sect flourished. Other Jewish documents written during these two centuries also mention the Decalogue. The Sentences of Pseudo-Phocylides, a wisdom text that was written in Greek by a Jew who probably lived in Alexandria, Egypt, opens with a paraphrasing of the Decalogue: the writer mentions every injunction of the ten commandments except the proscription to keep the Sabbath (Pseudo-Phocylides, 1–18). A second document, which is part of a twelve-book collection probably written and assembled by Jews in the late Second Temple period called The Testaments of the Twelve Patriarchs, also paraphrases the Decalogue (Testament of Issachar 5:1-5). Even the great first century CE Jewish Philosopher Philo of Alexandria was fascinated with the Decalogue: he wrote an entire treatise devoted to interpreting it.

Early Christian documents whose authors had not fully severed their ties to Judaism referred to the Decalogue as an authoritative text that was foundational to their faith. The early Christian text written in Greek known as the Didache, was written in the late first or second century, cites the twelve apostles of Jesus as paraphrasing the Decalogue to their students. Likewise, the third century Christian document called the Didascalia, which also purports to record the teachings of the apostles, does the same (Didache 2:1–3; Didascalia 26:9–10).

But by the early rabbinic period, the Decalogue was falling out of favor in some Jewish circles. Even as Christians were making reference to the Decalogue, Jews were disputing whether to recite it regularly in their synagogues.

The decision to stop reciting the Decalogue after the Shema is well documented. The Bavli explains that the daily liturgy used to comprise the Decalogue, the Shema, and the Amidah, but the recitation of the Decalogue was abolished because of the heretics (*minim*) (b. Berakhot 12a). Perhaps the concern was that the heretics would argue that the recitation of the Decalogue proved that only the portions of the Torah that the Israelites heard directly from God were true (Rashi on Berakhot 12a). Or perhaps the rabbinic concern was that reading the Decalogue would affirm sectarian claims that only the Written Law was authoritative, whereas the Oral Law was not. But these explanations do not explain why the Shema continued to be recited. After all, the Shema is part of the Written Law as well.

Perhaps the reason why the Decalogue fell out of favor in lieu of the Shema is that for the most part, the Decalogue comprises ethical instructions that, with the exception of the injunction to keep the Sabbath, all of humankind are expected to observe, whereas the Shema is a theological statement that affirms the election of Israel by God. By the early rabbinic period, the seven Noahide laws had taken form which

included some of the statements of the Decalogue (t.Abodah Zara 9:4; b.Sanhedrin 56a; earlier articulations of these laws in the second century BCE document Jubilees 7:20–21, as well as Sibylline Oracle 4:24–39, a document probably composed in the late Second Temple period). This led towards a sense that the Decalogue had universalist elements in it.

Even the mention of the Sabbath in the Decalogue would not have necessarily been viewed by the rabbis as particularistic. In the Roman period, many Gentiles observed the Sabbath without converting to Judaism. These people were called God-fearers (see, for instance, Juvenal, *Satires*, 14.96–106). The Decalogue, then, may have been viewed as potentially applicable to all of humankind from start to finish.

A second difference between the Decalogue and the Shema is that the Decalogue is a document that was spoken by God, whereas the Shema was spoken by Moshe. The Shema, then, represents the affirmation of all Israelites to commit themselves to a covenantal relationship, whereas the Decalogue represents the divine injunction to do so.

Given the fact that the Decalogue has been subjugated to the Shema, how might we appreciate its importance in our tradition today?

I believe that both the Decalogue and the Shema are foundational to Jewish thought. At the moment that the Israelites were leaving Egypt and making the transition from slavery to freedom, they needed to hear a universalist message: a message that while they were chosen by the One True God to be His elect people, this same God that had just chosen them had jurisdiction over the entire world. Indeed, the major trope of the Exodus story is that God controls the entire earth (see, among others, Exodus 8:6, 8:18, 9:14, 9:29, 10:2, 14:1, 14:18). Forty years later, a new generation of Israelites on the cusp of entering into Israel needed to hear a different message: As they entered the an unknown land, aware that they were embarking on inevitable military conflicts and the loss of their main conduit to God, Moshe, the Israelites needed to hear that God was committed to a relationship with them that, while it could include suffering as punishment for sins, would endure for perpetuity.

The community of Israelites who entered the land of Israel and their descendants held fast to the idea that God was committed to an eternal relationship with them. This relationship was reflected in the relational text of the Shema, in which the Israelites affirmed that God was *our God*, rather than the Decalogue, which affirmed that God was *the God*—the God who had taken the Israelites out of Egypt. Since the Decalogue was spoken by God and the Shema was spoken by Moshe, the Shema represented the *Israelite* side of the covenantal relationship—the side that required the Israelites to continually affirm their identities in light of their connection to God.

The rabbis understood that the Decalogue and the Shema were given at different turning points in Israelite history, bore different theological messages, and reflected two different voices. Aware that non-rabbinic communities were espousing views that they regarded as heretical, and that these same communities were laying claim to their holy texts, the rabbis turned to the document that they believed represented their own voice, and their own commitment to serving God, rather than the voice of God that proscribed them to do so.

Brit Ha'Aganot: The Story of the Super Bowls

By Ezra Newman (SBM 2013)

February 1, 2019

Parshat Mishpatim ends with a peculiar 11-verse story colloquially referred to as “Brit HaAganot.” In this story, Moshe is commanded to go up to God, while Aharon, Nadav, Avihu and the Elders bow from a distance. Moshe ascends, returns, and tells Bnei Yisrael “kol divrei Hashem,” to which they respond “Naaseh.” Moshe then writes down “kol divrei Hashem.” He makes an altar and 12 “Matzeivot,” one for each tribe, and has sacrifices brought on the altars. He throws half the blood from these sacrifices on the altar. He then reads Bnei Yisrael the “Sefer HaBrit,” to which they respond “Naaseh viNishmah.” He takes the rest of the blood and throws it on Bnei Yisrael, exclaiming that “this is the blood of the covenant between them and God over these *devarim*.” Then Moshe, Aharon, Nadan, Avihu and the Elders go up to God, where they see God, and God does not harm them. They eat and drink.

This is an unusual story, presented without context or explanation. The commentators ask: Did this story happen before or after Matan Torah? Why can the non-Moshe leaders go up to God at the end but not at the beginning? Why do Bnei Yisrael respond to being told “kol divrei Hashem” by saying “Nishma,” but to Moshe reading them the “Sefer HaBrit” by saying “Naaseh viNishmah?”

The best way to answer these specific questions involves focusing on a broader question: what is the purpose or message of this narrative?

Most commentators explain that this is the narrative of God establishing a covenant between God-self and Bnei Yisrael. Rabbi Chanoch Waxman of Yeshivat Har Etzion notes that the narrative ends with two classic tropes of covenant stories, the appearance of God to people and the sharing of a meal. But what is the content of this covenant? We are not given any details from “kol divrei Hashem!” Abarbanel writes that this is a covenant built around the Torah, which is established through the dual actions of Moshe reading the “Sefer HaBrit” for Bnei Yisrael and the throwing of the blood partly on the Mizbeach, representing God, and partly on the Matzeivot, representing the nation. Chizkuni adds that the splitting of the blood evokes the Brit Bein-HaBetarim, a covenant between God and Avraham. Rashi explains that this is a sort of conversion ritual for Bnei Yisrael, as the Talmud derives from here that conversion requires Hartzat Damim, a sacrificial blood ritual (when the Temple is standing).

According to Rashi, this narrative actually happened before Matan Torah, and is out of place in the Torah. The standard covenant answer similarly supposes that this narrative is placed out of order in the Torah, as it actually describes a part of Matan Torah itself or an event that occurred directly after Matan Torah.

Ramban, however, *kidarko bakodesh*, explains that this narrative is appropriately chronologically placed in the Torah, and happened well after Matan Torah. I believe that Ramban’s reading is compelling, and that this narrative is not about God establishing a covenant with Bnei Yisrael or of them engaging in some sort of conversion ritual.

The purpose of this narrative is to illustrate the transition and dispersion of power within Bnei Yisrael after Matan Torah. Before Matan Torah, Moshe was the sole leader, but after this narrative, his leadership is dispersed among other members of Bnei Yisrael, namely Aharon, Nadav, Avihu and the Elders.

It is clear at first glance that this narrative revolves around the actions of Moshe. The word Moshe is the *milah manchah* (leitmotif) of this 11-verse narrative, appearing 7 times. Yet it is not immediately clear why Moshe is central here.

The message is gleaned through investigating the structure of this narrative. The unit has almost a perfect chiasmic structure, but with each section containing a twist to demonstrate the shifting of power from Moshe to the other leaders.

1. At the outset, Moshe is told to go up to God alone, while Aharon, Nadav, Avihu and the Elders bow from a distance. At the end of, , they all go up to God and see God.
2. Moshe is described by name as teaching the people the law and writing the Sefer HaBrit, but when he subsequently reads the Sefer HaBrit, his name is conspicuously absent.
3. Moshe is in charge of bringing the sacrifices, but at the end of the narrative, all the leaders eat and drink together.
4. In the first part of the narrative, Moshe alone throws the blood on the altar, signifying his special relationship with God, while in the second part of the narrative Moshe throws the blood on the nation, and in fact not necessarily on all of them; Ibn Ezra writes that Moshe only threw the blood on the Elders, as they represented the entire nation.

(י) ויראו את אלהי ישראל ותחת רגליו כמעשה לבנת הספיר וכעצם השמים לטהר: (יא) ואל אצילי בני ישראל לא שלח ידו ויחזו את האלהים...	(א) ואל משה אמר עלה אל יקוק אתה ואהרן נדב ואביהוא ושבעים מזקני ישראל והשתחויתם מרחק:
(ט) ויעל משה ואהרן נדב ואביהוא ושבעים מזקני ישראל:	(ב) ונגש משה לבדו אל יקוק והם לא יגשו והעם לא יעלו עמו:
(ז) ויקח ספר הברית ויקרא באזני העם ויאמרו העם קול אחד ויאמרו כל הדברים אשר דבר יקוק נעשה: (ד) ויכתב משה כל אשר דבר יקוק נעשה ונשמע:	(ג) ויבא משה ויספר לעם את כל דברי יקוק ואת כל המשפטים ויען כל העם קול אחד ויאמרו כל הדברים אשר דבר יקוק נעשה: (ד) ויכתב משה את כל דברי יקוק...
...ויאכלו וישתו:	...ויבן מזבח תחת ההר ושתים עשרה מצבה לשנים עשר שבטי ישראל: (ה) וישלח את נערי בני ישראל ויעלו עלת ויזבחו זבחים שלמים ליקוק פרים:
(ח) ויקח משה את הדם ויזרק על העם ויאמר הנה דם הברית אשר כרת יקוק עמכם על כל הדברים האלה:	(ו) ויקח משה חצי הדם וישם באגנת וחצי הדם זרק על המזבח:

There is still one unanswered question from among those raised at the beginning of this dvar torah: how do we explain the change in Bnei Yisrael's response from "Naaseh" when they were told of "Kol Divrei Hashem," to "Naaseh ViNishma" when they are read the "Sefer HaBrit?"

I think that our understanding of the purpose of the narrative can shed new light unto this question. Traditionally, the word "ViNishma" is interpreted here to refer to the word of God, "we will heed the word of God." But I think that it's more appropriately interpreted to refer here to the other leaders of Bnei Yisrael. The people have not changed their attitude to the word of God – they said "Naaseh" to that before, and they say "Naaseh" to that again. But now, they are recognizing that they must also heed not only Moshe relaying the word of God, but also the teachings and leadership of Aharon, Nadav, Avihu and the Elders, and to this they are saying "ViNishma."

Taking Initiative: Rut's Place Among the Mothers of Tanach

by Dina Kritz (SBM 2015)

May 26, 2017

Towards the end of Megillat Rut, the people of Bet Lechem bless Boaz that his new wife should be like some of the women at the beginning of Jewish history.

וַיֹּאמְרוּ כָל-הָעָם אֲשֶׁר-בְּשַׁעַר הַדְּזִקְנִים עֵדִים יִתֵּן ה' אֶת-הָאִשָּׁה הַבָּאָה אֶל-בֵּיתְךָ כְּרַחֵל וְכִלְאָה אֲשֶׁר בָּנוּ שְׂתֵיהֶם אֶת-בַּיִת יִשְׂרָאֵל...
וְיִהְיֶה בֵּיתְךָ כְּבַיִת פְּרִצַּי אֲשֶׁר-יִלְדָה תָמָר לַיהוּדָה מִן-הַזָּרַע אֲשֶׁר יִתֵּן ה' לְךָ מִן-הַנְּעָרָה הַזֹּאת:
All the people at the gate and the elders answered, "We are witnesses. May G-d make the woman who is coming into your house like Rachel and Leah, both of whom built up the House of Israel. And may your house be like the house of Perez whom Tamar bore to Judah—through the offspring which G-d will give you by this young woman."

What's so special about these three women, Rachel, Leah, and Tamar, that the city hoped Rut would be like them? Further, is it a blessing to be compared to three women who faced trying times?

Perhaps the people saw something in Rut's actions and journey which reminded them of their foremothers. After all, they too left their father's home in another land. When Yaacov informed them that he wanted to return to Canaan, both because he felt a growing distance between himself and Lavan and because he had received a vision from G-d telling him to return, they readily agreed, stating that they too felt unwanted in Lavan's home, and ended their response, "Now, do everything that G-d has told you to do." They wanted Yaacov to listen his deity and they were simultaneously done with living in a home in which they barely counted. They packed up and left their father, their people, and their culture (and, presumably, their religious beliefs) to follow a person they loved to a foreign land, just as Rut would do hundreds of years later.

The Iggeret Shmuel writes that because the elders recognized a similarity between Rut and the two mothers, they blessed Boaz that "all that Rachel and Leah had built, Rut should also merit to build," i.e., the Jewish people. They blessed Boaz that Rut's entire life and legacy should echo Rachel and Leah's, not only her entry into the land and nation.

Here is an explanation for the first part of the blessing. Additionally, it's wonderful to tell a woman who has just become Jewish that she will hopefully become just like the matriarchs. But why does the Megillah mention Tamar? There is no reason for the blessing not to read "may your house be like the house of Peretz the son of Yehuda." And it seems strange to hope that the birth of Boaz and Rut's children will be like the birth of Yehuda and Tamar's children, who were conceived under very uncomfortable circumstances.

However, the commentators suggest that Tamar's actions are the very reason for her appearance here. The previous night, Rut had come to Boaz's threshing floor, laid at his feet, and asked him to fulfill his role as the family redeemer (and give her a child). Several commentators even propose that the elders mentioned Tamar to a worried Boaz as proof that Rut's actions were praiseworthy, and not shameful or improper. As the Gishmei Bracha writes:

“אשר ילדה תמר ליהודה”:
יתכן דהעלו עתה לפני בועז את זיכרון תמר ויהודה
כדי לחזק רוחו,
כי אולי צר לו על האופן הבלתי נימוסי שנתקרבה רות אליו.
זכרו לו את תמר, שגם היא נתקרבה ליהודה באופן בלתי נימוסי,
אך מפני שהיתה כוונתה לשמים היה זרעה קודש וברכה לבית ישראל,
וכן יעלה ברות.

“Whom Tamar bore to Yehuda”:

It's possible that [the witnesses and the elders] reminded Boaz of Tamar and Yehuda at this moment to encourage him [literally, to strengthen his spirit],

*because perhaps he was concerned about the manner in which Rut had come to him.
They reminded him of Tamar, who had also come to Yehuda in unusual/irreligious manner,
but because she had had proper intentions, her descendants brought holiness and blessing to Israel,
and so too should Rut's descendants.*

Perhaps, as Ralbag writes, they saw a similarity between Tamar's and Rut's lives, just as they had seen a similarity between Rut's journey and Rachel and Leah's journey.

“ויהי ביתך כבית פרץ”
ברכוהו בברכת אביהם פרץ
שבא מתמר לסבה מתדמה לזו:
“*May your house be like the house of Peretz*”:
*They blessed him with the blessing of their father Peretz,
who had been born from Tamar for a similar reason.*

I'm not certain whether Ralbag means a similar situation or a similar reason when he uses the word סבה. I would like to interpret his interpretation as a sign that the people of Bet Lechem saw what Tamar and Rut both believed they had to do. In each case, a woman who was stuck, without a husband or child, took initiative. Tamar decided to stop waiting for the day Yehuda might marry her to Shelah, and Rut decided to go to the field to glean, and then carefully chose her words when she followed Naomi's advice and went to ask Boaz to marry her.

Rachel and Leah also took initiative; albeit in a less problematic manner. In addition to actively choosing to follow Yaacov, Rachel tried to become pregnant and Leah strove to build a relationship with her husband (and her call to Yaacov to come into her tent one night seems to have produced her three youngest children). Perhaps the people thought it appropriate to compare Rut to Rachel, Leah, and Tamar because they had created Bnei Yisrael through active decisions: Rachel and Leah left their home to allow Yaacov and his sons to start off in Canaan, and Tamar acted (and risked her life) to give birth to the David's ancestor, and Rut continued Peretz's line.

I do not believe that the point of Megillat Rut or the point of reading it on Shavuot is to portray active women in Jewish history, but I do believe that it's an important point to keep in mind. As we read the Megillah, and as we accept the Torah once again, we should follow the example of these four women and choose to take initiative, not only in marriage but in all aspects of life. Judaism is a religion which requires active participation, and we should be like Rut, who actively brought about her marriage to Boaz but also actively chose to leave the past behind and become part of our nation.