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Center for Modern Torah Leadership



חרות ואחריות

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"Taking Responsibility for Torah"

WHY DIDN'T THE RABBIS ELIMINATE MAMZERUT? PART 6

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Vayikra 15:2 tells us that a man become *tamei* (=ritually impure) if he is *zav* (has an emission) from his flesh. *Zav* is distinguished from ordinary emissions in a variety of ways, including that the emission must not be attributable to a non-*zav* cause. Mishnah Zavim 2:2 lists eating and drinking as non-*zav* causes. Rabbi Akiva declares that "eating and drinking" includes consumption of any food or drink whatsoever.

אמרו לו:

אין כאן זבין מעתה?

אמר להם:

אין אחריות זבים עליכם.

*They said to him:**Now there can be no zavs?**He said to them:**The responsibility for (the existence of) zavs does not rest upon you.*

The disagreement between Rabbi Akiva and his anonymous interlocutor here mirrors the dispute on Sanhedrin 73a regarding whether three Biblical laws "never were and never will be" (see Part 5). Neither side offers a rationale for their position.

We can speculate that with so many mitzvot gone dormant after the Second Temple's destruction, it became clear to Rabbi Akiva that studying these mitzvot must have value independent of preparation for performance; and it was only a small step from there to conclude that the value of study is **essentially** independent of preparation for performance; and finally that the eternality of Torah is enhanced rather than harmed by asserting that some mitzvot exist **solely** because there is value in studying them.

Rabbi Soloveitchik in **Halakhic Man** essentially identifies the methodology of Brisk with Rabbi Akiva's ideology. We can accordingly identify Rabbi Akiva's interlocutors with a matter-of-fact Telzer critique of Brisk; so much of the Torah's legislation bears such marked similarity to the content and methods of practically intended legal systems, that it seems absurd to understand it as having no practical aims. Briskers respond that Torah criminal law covers the same ground as other systems of criminal law, but plainly would be ineffective at deterring crime. They cite the contention of Rabbi Nissim Gironi (Derashot HaRAN #11) that Torah criminal law is intended to "bring the Divine effluence down into the world," while a parallel system of "the king's justice" – to which halakhah gives almost unfettered discretion – deals with the practical issue of deterrence.

Derashot HaRAN's contention seems incompatible with Mishnah Makkot 1:10.

סנהדרין ההורגת אחד בשבוע נקראת חובלנית

רבי אלעזר בן עזריה אומר:

אחד לשבעים שנה;

רבי טרפון ורבי עקיבא אומרים:

אילו היינו בסנהדרין - לא נהרג אדם מעולם;

רבן שמעון בן גמליאל אומר: אף הן מרבין שופכי דמים בישראל.

*A Sanhedrin that kills once in seven years is called "Brutal."**Rabbi Elazar ben Azariah says:**Once every seventy years.**Rabbi Tarfon and Rabbi Akiva says:**Had we been on the Sanhedrin – no person would ever have been killed.**Rabban Shimon ben Gamliel says:**They would have multiplied bloodshedders in Israel.*

If deterrence is accomplished by a parallel legal system, why is Rabban Shimon ben Gamliel's critique relevant to the Sanhedrin?!

We might answer for RAN that he concedes that in the absence of a king (or perhaps if the king fails in his responsibility), the Sanhedrin assumes responsibility for the parallel system as well. In that case, Rabbi Akiva and Rabbi Tarfon were taking an absolute position against the death penalty. Alternatively, perhaps RAN thought that this was the issue in dispute. Rabban Shimon ben Gamliel believed (incorrectly) that halakhic criminal justice had a deterrent function, whereas Rabbi Akiva and Rabbi Tarfon believed (correctly) that it did not.

Even according to RAN, however, the criminal law has a **practical** function, namely "bringing the Divine effluence down into the world." Must the law be implemented to accomplish this purpose? Perhaps the trial is a sufficient implementation, regardless of the verdict.

Talmud Makkot 7a explains the position of Rabbi Akiva and Rabbi Tarfon as follows:

היכי הוּו עבדי?

רבי יוחנן ורבי אלעזר דאמרי תרוייהו:

ראיתם טריפה הרג? שלם הרג?

אמר רב אשי:

אם תמצא לומר שלם הוּו, דלמא במקום סייף נקב הוּו?

בבועל את הערוה היכי הוּו עבדי?

אביי ורבא דאמרי תרוייהו:

ראיתם כמכחול בשפופרת?

ורבנן היכי דיינו?

כשמואל, דאמר שמואל: במנאפיים = משיראו כמנאפיים.

How would Rabbi Akiva and Rabbi Tarfon have acted to prevent executions?

R. Yochanan and R. Elazar both said:

"Did you see whether the victim was a tereifah or rather whole?"

Said Rav Ashi:

"And if he appeared whole, perhaps there was already a hole where the sword cut him?"

How did they prevent execution in cases of sexual transgressions?

Abbayei and Rava both said:

"Did you see the act of penetration?"

So how would the Rabbis have acted to enable executions in cases of sexual transgressions?

They would have followed Shmuel, for Shmuel said:

The rule regarding adulterers is that only the appearance of adultery is necessary.

It seems likely that Rabbi Akiva and Rabbi Tarfon would have insisted on the trial, even though they would always have questioned the witnesses until they found a point ambiguity sufficient to acquit.

However, various commentators connect Rabbi Akiva's position here with his position in Zavim. For our purposes, perhaps the most interesting is Rabbi Eliezer Berkovits in his Halakhah: Kocha veTafkidah (published in translation as Not in Heaven, but the translation here is mine).

תשובתו של ר' עקיבא היתה: "אין אחריות זבים עליכם", היינו –

ר' עקיבא לא חש לכך שלפי שיטתו נעקרה פרשת זבים מהתורה.

האחריות על הפוסק היא להכריע על פי הבנתו את הענין.

ולמה לא נאמר איפוא כי גם בפרשת הרוצח חכמים

לא קיבלו אחריות על עצמם

לפסוק דין באופן שיהיו רוצחים?

ועל כן, אם לפי ראות עיניהם יש לחוש למיעוטא

של שמא במקום נקב סייף הוה –

הם אינם יכולים לדון את האדם למיתה.

Rabbi Akiva's response was: "You do not have responsibility for the existence of zavim."

meaning:

Rabbi Akiva was not concerned that his position uprooted the chapter dealing with zavim from the Torah.

The responsibility of the posek is to decide the issue in accordance with his understanding.

Why, therefore, shouldn't we say that with regard to the chapter on murders as well,

the Sages did not accept upon themselves the responsibility to rule in a way that would lead to the existence of legally identifiable murderers?

Therefore, if in their judgment one should take into consideration the unlikely possibility

that there was a wound where the sword cut him - they cannot judge the man liable for execution.

Rabbi Berkovits suggests that the position of Rabbi Akiva and Rabbi Tarfon regarding the death penalty is dependent on the position he articulated in the context of, namely, on his belief that an interpretation of Torah is not false just because it leads to the practical elimination of a Torah law.

What generates or motivates Rabbi Akiva and Rabbi Tarfon's position? Rabbi Berkovits appears to frame it within their technical claim – they thought execution required the elimination of even the slightest doubt of innocence.

One can make this a purely technical question, addressed in other sugyot, of whether there is a compelling Biblical source for relying on probability in capital cases. This would require sugyot elsewhere that provide such a source to be following Rabban Shimon ben Gamliel.

However, one can also make this a moral claim. Rabbi Akiva and Rabbi Tarfon thought that human knowledge could never be certain enough to permit executing a person.

On this second understanding, does the position of Rabbi Akiva and Rabbi Tarfon provide a precedent for morally reinterpreting Torah laws out of existence?

The answer may be yes, with certain conditions. We will discuss those conditions in subsequent essays. For now, though, I conclude by noting that Rabbi Berkovits correctly recognizes that Ramban to Makkot 7a utterly rejects the claim that Rabbi Akiva and Rabbi Tarfon relegated Torah capital jurisprudence to the realm of hypothetical law.

איכא למידק:

אי הכי, עקרת פרשת רוצחין ופרשת עדים זוממין . . . ?
איכא למימר

הא דאמר ר"ע לא נהרג בה אדם מעולם - לאו דוקא,
אלא על הרוב וגוזמא בעלמא,

שהרי אתה מוצא שיהרג בנואף ונואפת כשיראו כמכחול בשפופרת, וכל שכן באיסור שבת וע"ז . . .

We can ask against the position of Rabbi Akiva and Rabbi Tarfon:

If so, you have uprooted the chapters of murderers and of perjured witnesses . . . !?

But we can say in response that

When Rabbi Akiva said "No man would have been killed" – he was not being literal,

but rather speaking generally and exaggerating,

as you would find adulterers killed if the witnesses saw the actual penetration and all the more so it would be possible to execute in cases of Shabbat violation and idolatry.

Ramban's understanding of Rabbi Akiva here can be extended to Zavim as well. Rabbi Akiva is generally understood to mean only that one is not a zav if one has eaten or drunk **in the previous 24 hours** – this means that the case of zav is possible after a fast such as Yom Kippur, for example. This interpretation is explicitly adopted by Tiferet Yisroel. Others extend this approach even to the cases of the Rebellious Son, the Idolatrous City, and the Leprous House.

If we follow this approach, it turns out that there is no precedent anywhere in halakahah for interpretations that makes a Torah law genuinely impossible. Can one limit Torah law to extremely rare cases? Rabbi Akiva holds yes, but his position is disputed. What about creating a loophole that enables the evasion of the Torah law in all cases? In Part 7, we'll look at a 20th century iteration of this discussion.

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