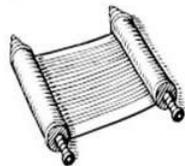


CMTL Sukkot & Shabbat Bereishit Reader 2019 Edition

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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.

Table of Contents

Sukkot

This is the Dvar Torah that Never Ends, Never Ends...	3
Seven Wanderers <i>(by Matthew Kritz)</i>	6

Bereishit

The Architecture of Creation: A Blueprint for Thinking About Midrash	8
Reading Bereshit Metaphorically and Meaningfully <i>(by Joshua Skootsky)</i>	10
Asking Good Questions <i>(by Rabbi Levi Mastrangelo)</i>	12
Should We Care How Long Creation Took?	14
Are We Not Worse Than Angels? Reflections on Human Complexity <i>(by Eliana Yashgur)</i>	17
Why Are Women Exempt from the Command to Procreate?	20
Are Adam and Eve Modern Orthodox Role Models?	23
Bare Cunning: Cognitive Desire in Eden <i>(by Ben Kaplan)</i>	26

Why Didn't the Rabbis Eliminate Mamzerut?

Why Didn't the Rabbis Eliminate Mamzerut? Part 5	29
Why Didn't the Rabbis Eliminate Mamzerut? Part 6	32

This is the Dvar Torah that Never Ends, Never Ends...

September 28, 2018

Irony is a complicated thing. It can be difficult to distinguish broad irony from obvious contradiction, or oxymoron. As with sarcasm, our willingness to see it is often based on our presuppositions about a text, and those presuppositions often say more about ourselves than about that text.

For example: Do you think G-d appreciates sarcasm? Then you probably think that Kayin said to Him in Genesis 4:13: “Is my sin too great for You to bear, i.e. to forgive? (After all, You control the whole universe, and what is man that Thou art mindful of him?)” But if you conceive of G-d as above that kind of humor, you probably think Kayin said “My sin is too great to be borne”, and was utterly contrite.

Which brings us to King Solomon. Proverbs can seem pedantic, but Song of Songs brims with the joy of linguistic play (e.g., swearing by the gazelles and the does, which just so happen to be (near-)homonyms for names of G-d.). Kohelet is famously dour, and contradictory. Yet our understanding of the book may be significantly affected by whether we are willing to see its author as capable of empathetic self-mockery (making genuine and deep fun of yourself without losing your sense of self-worth).

My focus here is Kohelet 12:12.

וְיִתֵּר מִהֵמָּה בְּנִי
הַזֵּהָר
עֲשׂוֹת סְפָרִים הַרְבֵּה אֵין קֵץ
וְלִהְיוֹת הַרְבֵּה יְגַעַת בְּשָׂר

Chabad.org has a fairly standard translation:

*And more than they, my son,
beware;
making many books has no end,
and studying much is a weariness of the flesh.*

The problem is that “more than they” has no antecedent: more than what? There are no obvious objects of wariness in the preceding verses. This drives the Jerusalem Bible to translate

And furthermore, my son,

even though “furthermore” seems to me an impossible translation of וְיִתֵּר מִהֵמָּה.

Koren’s “The Israel Bible” even more creatively translates:

*A further word:
Against them, my son, beware!*

This seems to be an effort to have the “them” refer forward rather than back, but it’s not clear to me that there is a plausible postcedent either.

Some Rabbinic readers have the “them” refer to the 24 books of Tanakh, the Written Torah. Everything else is Oral Torah, which it was forbidden to commit to writing, and so

More than those (books), my son, beware of making books

One problem with this is that at the time Kohelet was written, the Written Torah was not yet complete. Another is that the verse seems to warn against “making books without end”, rather than against Book 25.

This second problem can be resolved by making infinity a reason not to publish. The Written Torah can be bounded, but the Oral Torah has no bounds, so it cannot be contained in books.

I don't find this convincing – why not write down as much as we can, as it develops (as we are in fact doing)? But here we have our first flash of humor, glinting from the crevices. This interpretation is of course Oral Torah, and yet we find it in printed books!

We can seal this crack in our armor. In the ideal world, Oral Torah would never be written. That we find this interpretation in a book reflects only a concession to our weaknesses, and the strain of a seemingly endless Exile (may Hashem be *mechasev et haketz!*).

But this seems to me to miss the point. Let us concede that the interpretation should never have been written down. The verse itself, by contrast, is unquestionably Written Torah. Shouldn't we be nonplussed by a written book that warns against the writing of books?

For this reason, Rav Shlomo Kluger joyously inverts the verse, and the concession. One Rabbinic position suggests that the purpose of the world is to allow all possible souls to be incarnated; when the last soul has experienced (what we call) life, the world as we know it will end. So too, perhaps the Exile will continue until and only until all potential interpretations of Torah have been given existence in our world. It is only through the publication of infinite books that the endtime (*ketz*) can be brought. So

*More than those, my son,
Be careful to make (infinite) books so long as there has been no End!*

By making the overall thrust of the verse positive, this interpretation goes some way toward providing an antecedent for “those”. Verse 12:11 speaks of the “words of the sages”, so we can say that even more than heeding the words of our predecessors, we are commanded to write down our own creative thoughts. (Netziv argues that the prohibition against writing down Oral Torah never applied to private notebooks anyway.)

Rava, however, goes further (Eruvin 21a).

דרש רבא
מאי דכתיב ויתר מהמה בני הזהר עשות ספרים הרבה וגו'
בני הזהר בדברי סופרים יותר מדברי תורה
שדברי תורה יש בהן עשה ולא תעשה
ודברי סופרים כל העובר על דברי סופרים חייב מיתה
שמא תאמר אם יש בהן ממש מפני מה לא נכתבו
אמר קרא עשות ספרים הרבה אין קץ ולהג הרבה יגעת בשר
Rava expounded

*What is the meaning of Kohelet 12:12?
My son! Be more wary of Rabbinic decrees (divrei Soferim) than of Torah law
as Torah law includes both positive and negative commandments
whereas anyone who transgresses Rabbinic law deserves death
Lest you say: If Rabbinic laws have substance, why weren't they Written?
Scripture says: the making of books has no end...*

There can be no greater demonstration of Rabbinic superiority than the transformation of *sefarim*=books into *soferim*=rabbis. And to top it off, Rava's answer as to why Rabbinic law was not written cheerfully reverts to *sefarim*!

Rashi thinks this goes too far. While everything about Rava's statement seems to me to indicate one should be **more** wary of the words of rabbis than those of Torah, Rashi translates Rava as saying:

and in addition to those (of Torah, which are primary), my son,

be wary of the word of the Rabbis (as well)

The danger of celebrating infinitely creative interpreters is that they may eventually overwhelm the text they interpret.

Maharshal, however, may offer a reading that validates the enterprise. The *sefarim* produced by the *soferim* must never see themselves as the end of the process, as a definitive reading which subsequent scholars and generations cannot argue with and even reject on the basis of first principles. Thus he rejects the Shulchan Arukh and all other works which present themselves as self-sufficient and self-justifying.

This reading incorporates many levels of irony. The *sefer* in the (theoretically finite, but not yet complete) written Torah commands the *soferim* to produce (infinite) *sefarim* of Oral Torah, which because it is infinite cannot ever be contained in *sefarim*. But that is fine, so long as those *sefarim* acknowledge that they are continuing a conversation rather than ending it.

I need to acknowledge that I'm far from certain that Maharshal actually suggests this reading; I may be projecting my love of irony onto him. Readers are encouraged to look at any of Maharshal's many introductions to volumes of Yam Shel Shlomoh and draw their own conclusions, and I would appreciate if you shared them with me.

In any case, it would be ironic to use this reading as the ending of this essay. So I will conclude instead by acknowledging that Alshikh reads the verse simply as recommending brevity; one should not make books – or divrei Torah – that *seem* endless.

Seven Wanderers

by Matthew Kritz (SBM 2018)

September 28, 2018

I invite to my Sukkah seven esteemed guests: Avraham, Yitzchak, Yaakov, Yosef, Moshe, Aharon, and David.

וַיֵּצֵא אֹתוֹ הַחַיִּיצָה וַיֹּאמֶר הַבְּטֹנָא הַשְּׂמִי יְמֵהּ וּסְפֹר הַכּוֹכָבִים אִם-תּוֹכַל לְסַפֵּר אֹתָם וַיֹּאמֶר לוֹ כֹּה יִהְיֶה זְרַעְךָ:

Avraham our father, why do we wander?

Break out of foolish ways of thinking, my child. Going outside your physical space is the first step to entering new mental spaces, by not being bound to the familiar. To be an iconoclast calls for stepping outside, risking being different, being ready to learn and discover. Look beyond the four walls given to you; truth is waiting for you outside. (Rashi ad. loc. Breishit Raba 42:8)

וַיֵּצֵא יֶחֱזֶק לְשׁוֹחַ בְּשָׂדֵה לַפְּנוֹת עָרֵב וַיֵּשֶׂא עֵינָיו וַיֵּרָא וְהִנֵּה גְמִלִים בְּאֵיִם:

Yitzchak our father, why do we wander?

My child, how can you find G-d in the midst of the bustle of life? How can you pray when surrounded by distractions? To speak to the Almighty, you'll need to go far away, to a place where no one will find you. There, freed from the noise of the world, you will begin to hear your own breathing and your own thoughts. Alone, you will not be ashamed to pour out your heart to G-d, remembering that you and G-d are both lonely, eager to find one another. (Seforno, ad. loc.)

וַיֵּצֵא יַעֲקֹב מִבְּאֵר שֶׁבַע וַיֵּלֶךְ חֲרָנָה:

Yaakov our father, why do we wander?

In wandering, our trust in G-d is put to the test, my child. Whether we will return home safely, whether we will have bread to eat and clothing to wear, is in the hands of G-d. On the road, we cannot rely on familiar surroundings; our only choice is to foster within ourselves an awareness of our dependence on G-d, which, in reality, is present even when we feel self-confident. (Breishit Raba 79, Mechilta 16:20)

וַתִּתְפָּשֶׂהוּ בַּבְּגָדוֹ לֵאמֹר שִׁכְבָּה עִמִּי וַיַּעֲזֹב בְּגָדוֹ בַּיָּדָה וַיֵּנֶס וַיֵּצֵא הַחַיִּיצָה:

Righteous Yosef, why do we wander?

As you wander, you will encounter worlds foreign to you, cultures that look different from your own. In wandering, you will be forced to discover within yourself a commitment to your own values, to know when you must run away. To flee from evil is the ultimate test, to be ready to leave everything behind in the name of what you believe. In wandering, you demonstrate where you refuse to go, no matter the cost; you show that your true home is not the place you are from, but the people you are from. (Sotah 36b, Ramban Breishit 39:8, Introduction to Mesilat Yesharim)

וַיְהִי אִ בְּיָמֵים הָהֵם וַיִּגְדַּל מֹשֶׁה וַיֵּצֵא אֶל-אֶחָיו וַיֵּרָא בְּסִבְלֵתָם וַיֵּרָא אִישׁ מִצָּרֵי מִכָּה אִישׁ-עֲבָרֵי מֵאֶחָיו:

Moshe, our teacher, why do we wander?

From within the walls of your own home, you cannot see the suffering that surrounds you. Security lays the groundwork for complacency; wandering out allows us to see what others take for granted. Wander in order to gain an outsider's perspective, to remove the mask of the normal from what is, in truth, injustice. Doing so will make you more aware of what others do not notice, be that the suffering of the innocent, or a peculiar, unburnt bush. (Midrash Tanchuma, Shemot 9)

וַיַּחֲרֹאֲף ה' בְּמִשְׁפַּחַת אַהֲרֹן אֶחָיו הַלֵּלִי יְדַעְתִּי כִּי־דָבַר יְדַבֵּר הוּא וְגַם הִנֵּה־הוּא יֵצֵא לִקְרֹאתְךָ וְרֹאֶךָ וְשָׂמַח בְּלִבּוֹ:

Aharon, righteous priest, why do we wander?

Our desires, and our responsibilities, are not always easily within reach. Those goals we truly care to accomplish, we must journey for, to show we are ready to go the distance. Some wandering is aimless, but other wandering is better termed journeying, setting our goals high and pursuing them. To take the long way is an act of love; it shows we cared enough to travel. (Midrash Agada Shemot 4:14)

וַיֵּצֵא חֹטֵר מִגִּזְעֵי יִשְׂרָאֵל וְנִצָּר מִשְׂרָשְׁיָיו יִפְרָה:

King David, why do we wander?

Do not think that all is settled, for even as you sit in a house of cedars, the ark of the covenant remains in a tent. Keep wandering, to remember that your story is unfinished, that the exile goes on, that the Messiah has not yet come. Continue wandering, for you mustn't think you've reached your destination. There is still work to be done in the wilderness before the next generation can build a permanent home for G-d. (Midrash Agada Shemot 4:14)

The Architecture of Creation: A Blueprint for Thinking About Midrash

October 12, 2012

בראשית רבה) וילנא) פרשת בראשית פרשה א רבי הושעיה רבה פתח (משלי ח) ואהיה אצלו אמון ואהיה שעשועים יום יום וגו' ... ד"א אמון = אמון, התורה אומרת אני הייתי כלי אומנתו של הקדוש ברוך הוא, בנוהג שבעולם מלך בשר ודם בונה פלטין, אינו בונה אותה מדעת עצמו אלא מדעת אמון, והאומן אינו בונה אותה מדעת עצמו, אלא דיפתראות ופינקסאות יש לו לדעת היאך הוא עושה חדרים היאך הוא עושה פשפושין, כך היה הקדוש ברוך הוא מביט בתורה, ובורא את העולם, והתורה אמרה בראשית ברא אלהים, ואין ראשית אלא תורה, היאך מה דאת אמר (משלי ח) ה' קנני ראשית דרכו.

Rabbi Hoshayah the Elder opened . . .

The Torah says: "I was the craft-tool of the Holy Blessed One.

The practice of the world is that when a flesh and blood king builds a palace, he does not built it based on his own mind but rather relying on a craftsman, and the craftsman does not build it out of his own mind, but rather has blueprints and checklists to know where he should make rooms and where ...

So too the Holy Blessed One would look in the Torah and create the world.

I often introduce my sophomore courses at Gann with the following citation from Douglas Adams' Dirk Gently's Holistic Detective Agency.

"St. Cedd's," he pronounced, the college of Coleridge, and the college of Sir Isaac Newton, renowned inventor of the milled-edge coin and the catflap!"

"The what?" said Richard.

"The catflap! A device of the utmost cunning, perspicuity, and invention. It is a door within a door, you see, a . . ."

"Yes," said Richard, "there was also the small matter of gravity."

"Gravity", said Dirk with a slightly dismissive shrug, "yes, there was that as well, I suppose. Though that, of course, was merely a discovery. It was there to be discovered." He took a penny out of his pocket and tossed it casually onto the pebbles that ran along the paved pathway.

"You see?" he said. "They even keep it on at weekends. Somebody was bound to notice sooner or later. But the catflap ...ah, there is a very different matter. Invention, pure creative invention."

"I would have thought it was quite obvious. Anyone could have thought of it."

"Ah," said Dirk, "it is a rare mind indeed that can render the hitherto nonexistent blindingly obvious."

My purpose is to challenge students to consider what kind of creativity we value within Torah, and why. Are chiddushei Torah best conceived of as creations, or rather as discoveries?¹

An important parallel question was brought home to me by Rabbi Seth Farber, channeling T. S. Eliot's "Tradition and the Individual Talent". Rabbi Farber warned me before I began teaching at Maimonides that the students would not appreciate my chiddushim "because they won't know what you were supposed to say" – and indeed, it took me almost a year to realize that students were not evaluating my philosophic positions against those of the Rav, because they had never learned the Rav's philosophy.

The moral of the story is that we experience ideas as creative because we've been taught otherwise, and therefore, we may experience a work, idea, or interpretation as highly creative which to its author was simply a paint-by-numbers production, or an accurate portrayal of a cultural consensus.

¹ In Modern Orthodoxy, we tend to address this question by embracing paradox – "Everything that a veteran student will in the future be *mechadesh* was already said to Mosheh at Sinai" (note that this consciously paradoxical version of that Rabbinic statement, as cited by Netziv in the introduction to Haamek Sh'eilah, seems to come from an emendation by the Vilna Gaon; however, it can also be found in earlier commentaries). This tension between tradition and originality inheres in the concept of MO; but it's not clear to me that affirming dialectic remains an emotionally satisfying approach without the Rav's living presence as a creative Hegelian philosopher.

This seems to me often the case when day school graduates study midrash. For better or worse (see <http://www.torahleadership.org/categories/peshatderash.mp3>) they have been taught to interpret Chumash in the manner of a particular set of medieval exegetes, and therefore they often experience Rabbinic readings as wildly creative when their authors were reading mechanically, finding textual hooks for conventional assumptions, or both.

Here is one brief example, which arose in a conversation with my colleague Ms. Karyn Spero. Bereishit Rabbah records a reading of the Torah's opening word "Bereishit" as meaning "By means of Reishit". Another version translates "By means of me, Reishit, he created the world", in first person. Either way, the meaning is that the Torah was the blueprint of the world: "He looked in the Torah and created the world".

Now this may seem both exegetically and theologically creative, but I contend it was likely neither. Rather, for the Rabbinic consensus Mishlei Chapter 8 – here cited as the proof-text for the claim that reishit = Torah) – made it perfectly clear that wisdom antedated the universe, and was consulted during Creation. Furthermore, the Rabbis were well aware that "bereishit" is grammatically improper if the intended meaning was "in the beginning", and so offered a variety of alternative translations, including "for the sake of". They generally also understood Biblical words as having their meaning created by their usage elsewhere in Tanakh, and so naturally responded to this problem by considering alternative identifications for the "Reishit" grammatically necessitated by these translations – here Torah was an obvious contender, especially as the tradition identified the Chokhmah of Mishlei as Torah.

I suspect a much deeper theological tradition is reflected here as well. The rabbis noted that the three terms for intellectual comprehension used in Mishlei 8 for Creation parallel the attributes of Bezalel, architect of the Mishkan, and of course the Mishkan was a microcosm. On Berakhot 55a Rav Yehudah in the name of Rav says that Bezalel knew how to be metzaref otiot, to combine the letters used in Creation. This assumes as background that Creation was a literary endeavor, that the universe was fashioned via Biblical interpretation, and therefore of course presupposes that the Torah antedated Creation.

To me, the genuinely creative endeavor in this midrash is the architectural metaphor. Why must G-d have blueprints to look at when creating, rather than freeforming? Note how this metaphor has the Torah describe itself as a craftsman, rather than as a set of plans, so that it appears to play a volitional part in Creation.

Finally, the mashal has three levels – the king, the craftsman, and the plans. The nimshal has only two – The Holy Blessed One and the Torah. How, then, do nimshal and mashal match up? Your answers are welcome as always.

Reading Bereshit Metaphorically and Meaningfully

by Joshua Skootsky (SBM 2012, 2015)

September 27, 2015

Each year, we return to the story of G-d's Creation of the world, and the surrounding universe, a cosmic event mediated by the power of speech. These events are referenced each week as part of Shabbat, when we "remember" or recognize the active role that G-d took as the author of Creation. These events are both general and specific.

Perhaps, in the absence of other knowledge, we would attempt to understand this passage literally. But traditional commentators have noted the immense difficulty of sustaining even an internally consistent understanding of Creation, especially on the basis of a "simple" understanding of the verses.

Rashi to Bereshit 1:1, at the end of "**bereshit bara**," comments that if we understand the first verse as "In the beginning, G-d created the heavens and the earth," we ought to immediately be puzzled by verse 1:2, which describes the spirit of G-d hovering over the waters. When were the waters created? And if the "heavens" are a mixture of fire and water, as Rashi understands they are, when were the fires created? "Against your will, the verses do not teach what was created earlier and what was created later."

Similarly, Ramban notes that the creation of the world is a "deep secret" that "cannot be understood from the verses themselves" without the traditional Kabbalistic knowledge taught to Moshe. "It is enough for Torah people to get by without these verses, and to believe in the general principle taught later (*Shemot*20:11) "For in six days G-d made the Heavens and the Earth, the ocean and all that is in it, and on the seventh day He rested."

The Ramban emphasizes the impossibility of verses alone, without a tradition, providing a detailed understanding of Creation. Rashi even suggests that we cannot learn from the creation story the "order" in which things were created. These insights suggest a few guidelines for reading the creation story "metaphorically."

1. Some teachings ascribe significance to the order in which the Torah speaks about creation occurring. For example, "Humans were created last, to remind us that even a mere insect preceded our existence," (*Sanhedrin* 38a) teaches humility, and perhaps ecological awareness. But this in no way commits us to understanding literally the order of the Torah's verses as absolute or binding.
2. A metaphorical understanding should be more than the absence of knowledge. Our baseline ought to be that a sustained "literal" understanding is impossible, and that therefore we are forced to engage in metaphorical readings. But these readings should not just be the absence of literalism, but rather a sustained attempt to "read for meaning" from the verses. The *ba'araita* on *Sanhedrin* 38a is one example of this. Rav Soloveitchik's *The Emergence of Ethical Man* is another.
3. Scientific truths should not be squared with the written text of the Torah. For quite some time in mathematics, attempts to "square the circle" – to construct with straightedge and compass a square with the same area as a circle – was viewed not as an impossibility, but rather as a goal. Now, with our more sophisticated understanding of mathematics, we understand that this is impossible. Similarly, with our sophisticated understanding of Torah, we ought to not try to read the creation of the light into the evolution of a quark-gluon plasma in the Plank seconds that followed the Big Bang.

There is much work left to be done. I believe it is quite critical that we eventually understand the main themes of Bereshit, with G-d the Author of Creation. Here is a simple goal: maybe we could eventually understand why the metaphor of working in six days was used. We talk about this every week on Shabbat repeatedly in the liturgy, and in the 10 Commandments in *Parshat Yitro*, which the Ramban referenced. Perhaps most poignantly, our lives are patterned on the same work cycle. I look forward to a new year,

and a Modern Orthodox discussion of what a meaningful metaphorical understanding of Bereshit would be.

Asking Good Questions

by Levi Mastrangelo (SBM 2016)

October 26, 2016

Rashi begins his commentary on the Torah by making famous a question asked by R. Yitzchak:

”לא הִיָּה צְרִיךְ לְהַתְחִיל אֶת הַתּוֹרָה אֶלָּא מִ”הַחֹדֶשׁ הַזֶּה לָכֶם”
שְׁהִיא מִצְוָה רִאשׁוֹנָה שְׁנִצְטוּ בָּהּ יִשְׂרָאֵל,
”וּמָה טַעַם פָּתַח בְּ”בְרֵאשִׁית”?

The Torah should have commenced with the verse (Exodus 12:1) “This month shall be unto you the first of the months”

which is the first commandment given to Israel.

What is the reason, then, that it commences with the account of the Creation?

R. Yitzchak answers by quoting a pasuk from tehillim:

כָּח מַעֲשָׂיו הִגִּיד לְעַמּוֹ
לְתֵת לָהֶם נַחֲלַת גּוֹיִם

*He hath declared to His people the power of His works,
in giving them the heritage of the nations*

R. Yitzchak goes on to explain that, should the other nations accuse us of being land-stealers (in Israel), we will be able to point to Bereishit as evidence of God’s ultimate ownership of the land.

We should answer, “It was God’s will to give the land to [the Seven Nations] and it was God’s will to take it from them and give it to us.”

On the surface, R. Yitzchak’s answer isn’t particularly compelling. As anyone who has engaged in Israel advocacy—formal or informal—can tell you, it’s not an argument that people tend to find convincing, particularly those who criticize us as “land-stealers.”

There are ways of dismissing this concern: we could say that R. Yitzchak’s argument would have been convincing to his interlocutors even though it isn’t convincing to ours. Alternatively, we could answer that the argument serves the purpose of reinforcing a truth for ourselves, despite the fact that it won’t be accepted by others.

Still, we’re left with a problem: R. Yitzchak’s answer is only partial. While his question applies to everything that precedes “hachodesh hazeh lachem”—all of sefer Bereishit plus the first two and a half parshiot of Shemot, and perhaps applies even to subsequent narrative sections of the Chumash—his answer applies maximally to the first perek of Bereishit. Why, even according to R. Yitzchak’s answer, should the Torah not have skipped from the end of maasei bereishit (the Creation narrative) to “hachodesh hazeh lachem?”

The solution is to amend our understanding of the intent behind R. Yitzchak’s question and answer. The issues raised above stem from our understanding of R. Yitzchak as bringing a genuine question that was bothering him in the abstract, and then answering that question comprehensively. Instead, we should see R’ Yitzchak as introducing his question for the purpose of stimulating intellectual engagement in Torah and then modeling a rigorous answer.

R. Yitzchak wants us to ask at every turn, “Why not just skip to the laws? For what purpose were God’s rest on the seventh day and the events of the flood and the chronology of the patriarchs’ lives included in the Torah?” And he wants us to engage in the exercise of finding the answers, of scouring Tanach for the right pasuk to contextualize these events and tease out theological truths.

As we embark once again on our year-long journey through the Chumash, may we be zocheh to engage in the kind of rigorous, meaningful talmud Torah that R. Yitzchak meant to stimulate.

Should We Care How Long Creation Took?

October 5, 2018

Some people care a great deal about whether G-d created the earth and the heavens in literally seven days, meaning, 168 hours, or 10,080 minutes, etc.

By “some people,” I don’t mean specifically or primarily Orthodox Jews or members of other conservative religious denominations that venerate the Bible. The people who care most are generally those who dislike such religions. They believe very strongly that the “fundamentalism” they define themselves by opposing is utterly dependent on this belief. They believe that demonstrating that creation took longer or shorter, or didn’t follow the order laid out in the first chapter of Genesis, relieves them of the burden of taking traditional religion seriously.

Some people care a great deal about whether G-d created the earth and the heavens in literally seven days, meaning in seven more-or-less defined periods of indeterminate length that can be conceptualized as having sequential segments of darkness and lightness. These people will spend much time looking for electromagnetic wavelengths that could have functioned as timekeepers before the creation of the sun and planets, or for sub-sub-subatomic particles (tohu and bohu) that could be the building blocks of all matter.

These people may be brilliant, with superb scientific educations and scientific research experience. They may as often be innumerate who fall for crude hoaxes.

Some people wonder a great deal about why other people care so much about whether the first chapter of Genesis is literally or literally true. After all, they reason, the mere fact that creation took place one way, or rather another way, has no moral significance. All that matters is what values we can learn from the fiction of G-d having created the world in seven days. We can learn those morals regardless of the story’s facticity, just as (*lehavdil!*) we can learn about parenting from King Lear even though Shakespeare was not attempting to portray a historical character with historical accuracy.

Is Lear a fair analogy, even with all due disclaimers? It is easy to spot the flaw. Lear does not teach morality directly. It holds up an image of human nature, or of the nature of some human relationships, or of the consequences of certain kinds of decisions, that many of us find compelling. We make moral judgments under the influence of those images, but we do not derive our morality from them. Torah, however, is presumably intended to be a source of moral judgment, and not (just) a touchstone for evaluating the factual or causal claims of moral principles derived from other sources.

Unless one believes in some form of “Natural Law.” But natural law has long been in disrepute in Western circles. Hume wrote scathingly that “from is to ought there is no inference,” and this is now seen as common sensical.

There are lots of good moral and logical reasons to buy deeply into Hume, among them:

To paraphrase Rav Aharon Lichtenstein zt”l, one can learn industry from ants, but also ruthless wars of extermination, or the insignificance of individual identity; modesty from cats, or how to play with prey.

We do not want to think that children born with profound medical challenges, or into awful social settings, deserve their suffering.

But we must understand that Hume is a deep problem religiously. Leibnitz had a good point when he argues that believers in G-d must conclude that we live in the best of all possible worlds – so we should be able to figure out why this world is better, and apply that principle. If the world is an expression of the Will of G-d, how can it not be an expression of His moral as well as His creative will?

Which brings us back to the first chapter of Genesis. One reason that so many of us resist putting any kind of factual content into that chapter is that we have bought fully into Hume. Therefore, there is nothing that Genesis can teach us about the material world that **matters**, since the material world contains no moral instruction. “If they tell you there is Torah in nature – don’t believe them!

Yet it seems to me that there is no way to read that chapter in a way that generates direct moral instruction. Whether or not it teaches us science, it teaches us some way of conceptualizing the material world, and it teaches us that in significantly more detail than can be reasonably explained as just being intended to teach the fact of creation ex nihilo. Moreover, it doesn’t even do a good job of teaching that fact! Most rishonim understand the first word of the Torah as describing a process that took place after some things, such as *tohu*, *bohu*, and *mayim*, already existed. So the chapter must make more specific claims about the world. But what claims about the world can **matter**, if there are no legitimate inferences from is to ought?

One possibility is to modify Hume, and say that “there is not always an inference from is to ought, and there is no perfectly reliable way of knowing when such an inference is valid, and when invalid.” This seems to me a reasonably accurate account of much relevant rabbinic thought, and a productive avenue, although I’m not sure anyone today will find it psychologically satisfying.

It’s fair and necessary to note that there are specific issues where the is-to-ought movement has significant influence specifically in modernity. The clearest example is homosexuality, where many people find ascribe to a version of “G-d could not create a very significant percentage of the population with a sexual orientation that was morally wrong.”

Rabbinic literature has many poetic ways of capturing these difficulties. I like using the question of anesthesia during childbirth as an illustration. Clearly G-d intended women to experience childbirth as painful, and yet no one sees it as a violation of G-d’s will for us to ameliorate or eliminate that pain.

One further problem with using is-to-ought as a basis for religious interpretation of Scripture is that it makes the truth of our value claims depend on the truth of our fact claims. If we learn the superiority of humans over animals because humans are created last, what happens if it turns out that dolphins emerge later? And note that the argument seems to make a claim that goes beyond the text. If it doesn’t matter whether something was **really** created later, then why does a text’s claim that something was created later have any values significance? It seems unsatisfying to say that the lessons of Torah depend on the temporary suspension not only of historical belief, but also of philosophic argument.

On reflection, though, it’s not clear why the possibility that our premise is wrong should constrain us specifically here. All values claims grounded in Torah are based on interpretations of the text, and interpretations are not infallible either (unless one resorts to radical pluralism, in which interpretations, or at least those offered by recognized scholars, are definitionally true). I may reach a wrong moral conclusion if I decide that the light of the first few days was actually a special form of gamma radiation. I may err just as greatly if I base my morals on the claim that night came before day (as opposed to Rashbam, who argues that day must come before night because *evening/erev* and *morning/boker* are *gerunds*, so that it “evens” after day and “morns” after night).

Perhaps what nonetheless bothers me about contemporary efforts to mesh Biblical interpretation with cutting-edge science is that they seem to want to put many of our eggs in a basket that preserves them only so long as both our science and our technical textual arguments are correct. Moreover, I think that the temptation to go from is-to-ought is properly omnipresent, and I don’t like making such improbabilities the basis for anything beyond themselves.

At the same time, I am not willing to cede the realm of facts to science, and be content to live exclusively in the House of the Values of Hashem all my days. Claims about morality and the good cannot be wholly separated from questions of human psychology, and such questions are more and more claimed as the province of science. And so much of halakhah depends on claims about human nature! If Torah can only

talk about values, it will become a “Torah of the gaps,” forced back and back into narrower and narrower spaces by each advance in neuroscience and psychogenetics.

The underlying question is whether Torah scholars can participate openmindedly in an epistemically diverse conversation. Can we admit that we might be wrong, or acknowledge that we have in the past been wrong, and that someone else got it more right? Or does our authority depend on belief in our infallibility?

Are We Not Worse Than Angels? Reflections on Human Complexity

By Eliana Yashgur (SBM 2017,2019)

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The *malakhei hasharet*, the ministering angels, play a primary role in Chazal's depiction of the mystery and irony of human creation. By contrasting the the deference of the *malakhei hasharet* to G-d and His human creation in Talmud Chagigah 12b with their attempts at "interfering" with His creation of humanity in Bereishit Rabbah, we learn that G-d intended the struggle and strife associated with being human.

Resh Lakish on Chagiga 12b describes seven heavenly firmaments: *Vilon, Rakia, Shehakim, Zevul, Ma'on, Makhon*, and *Aravot*. These firmaments are described with majestic and ethereal language, and angelic behavior matches this aura.

מעון – שבו כיתות של מלאכי השרת שאומרות שירה בלילה וחשות ביום מפני כבודן של ישראל
שנאמר (תהלים מב, ט) יומם יצוה ה' חסדו ובלילה שירה עמי (מס' חגיגה יב):
Ma'on, habitation, is where groups of ministering angels recite song at night but are silent during the day out of respect for Israel, (in order not to compete with their songs) as it is stated: "By day the Lord will command His kindness, and in the night His song with me" (Psalms 42:9).

It is as if angels step back from the world when G-d declares that their purpose is elsewhere. In reverence to G-d they do not seek to interfere in the dealings of Israel in the physical.

Similarly, the *malakhei hasharet* of *Rakia* are described as dwelling in their proper place under the supernal G-d, delighted in their spiritual role residing in the Skies serving G-d.

רקיע – שם אופנים ושרפים וחיות הקדש ומלאכי השרת וכסא הכבוד.
מלך א-ל חי רם ונשא שוכן עליהם בערבות, שנאמר (תהלים סח, ה) סולו לרוכב בערבות ביה שמו.
*Rakia – There are the ofanim, the seraphim, the holy divine creatures, and the ministering angels, and the Throne of Glory.
The King, God, the living, lofty, exalted One dwells above them in Aravot, as it is stated: "Extol Him Who rides upon the skies [Aravot], Whose name is God" (Psalms 68:5).*

The role of the *malakhei hasharet* is to praise G-d and not to challenge Him in any way.

דאמר ר' שמואל בר נחמני אמר ר' יונתן: כל דיבור ודיבור שיוצא מפי הקב"ה – נברא ממנו מלאך אחד,
שנאמר (תהלים לג, ו) בדבר ה' שמים נעשו וברוח פיו כל צבאם (מס' חגיגה יב):
As Rabbi Shmuel bar Nahmani said that Rabbi Yonatan said: With each and every word that emerges from the mouth of the Holy One, Blessed be He, an angel is created, as it is stated: "By the word of the Lord the heavens were made, and by the breath of His mouth all their hosts" (Psalms 33:6).

Angels are described as being created by the breath of G-d's mouth, as if to say that angels are created as a corollary to G-d's speech. Humans are created by G-d breathing "ruach" into their nostrils. Angels are described using the language of G-d, Who is referenced through the mouth that breathes. Humans are described in their own language, as beings into whose nostrils G-d's mouth breathes.

These differences collide in Bereshit Rabbah's description of angels in the context of their "participation" in human creation.

אמר רבי הושעיא: בשעה שברא הקדוש ברוך הוא אדם הראשון טעו מלאכי השרת ובקשו לומר לפניו קדוש.
משל למלך ואפרכוס שהיו בקרוכין, והיו בני המדינה מבקשין לומר למלך דומינו, ולא היו יודעין איזהו/ מה עשה
המלך? דחפו והוציאו חוץ לקרוכין, וידעו הכל שהוא אפרכוס.

כך בשעה שברא הקדוש ברוך הוא את אדם הראשון, טעו בו מלאכי השרת ובקשו לומר לפניו קדוש. מה עשה הקדוש ברוך הוא, הפיל עליו תרדמה, וידעו הכל שהוא אדם. הדא הוא דכתיב (ישעיה ב, כב): חדלו לכם מן האדם אשר נשמה באפו כי במה נחשב הוא. (בראשית רבה ח:י)

Said R' Hosha `ya: In the moment that the Holy One created Adam Harishon, the first Human, the ministering angels erred and sought to say 'Holy/Qadosh' before him (to worship him). This resembles a king and a governor who sat in a chariot, and the people of the land wanted to call the king "Sovereign" but weren't sure which he was. What did the king do? He pushed the governor out of the chariot, and everyone knew then that he was king. So too when The Holy Blessed One created Adam, the ministering angels erred and wanted to say Qadosh before him. What did the Holy One do? 'He cast upon him deep sleep' [Gn 2:21] and all knew that he was Adam. As it says, "Cease from man in whose nostrils is breath, as what makes him significant?"

The angels do not have a concept of humanity to prepare them for his creation. The angels experience so much tension upon the mere creation of the human being that they begin fighting with G-d to Whom they are beholden. They begin to worship the human being, until G-d puts the mortal human being in his place and shows angels how lowly the human being is.

רבי שמואל בר נחמן בשם רבי יונתן אמר: בשעה שהיה משה כותב את התורה, היה כותב מעשה כל יום ויום. כיון שהגיע לפסוק הזה, שנאמר, ויאמר אלקים נעשה אדם בצלמנו כדמותנו, אמר לפניו: רבון העולמים, מה אתה נותן פתחון פה למינים?! אתמהא.
אמר לו: כתב, והרצה לטעות יטעה.

אמר לו הקדוש ברוך הוא: משה, האדם הזה שבראתי, לא גדולים וקטנים אני מעמיד ממנו? שאם יבוא הגדול לטל רשות מן הקטן ממנו, והוא אומר מה אני צריך לטל רשות מן הקטן ממני, והן אומרים לו למד מבוראך, שהוא ברא את העליונים ואת התחתונים, כיון שבא לבראת את האדם נמלך במלאכי השרת.
(בראשית רבה ח:ח)

Rabbi Shmuel ben Nachman said in the name of Rabbi Yonatan: When Moses was writing the Torah, he wrote the happenings of every day. When he got to the verse of "and G-d said: 'Let us make man in our image in our likeness'", he said, "Sovereign of the Universe! Why are you giving an excuse to heretics?" G-d responded, "Write, and he who wishes to err may err." G-d said to Moses, this man which I have created, do I not cause both large and small men to be born from him? If a great person goes to ask permission for something from some inferior to him, and the great man says, "Why do I need to take permission from one lesser than me?", they will say to him: Learn from your Creator, for He created upper ones and lower ones, and when He came to create the human, He consulted with the ministering angels."

Seemingly ironically, G-d consults with the angels are consulted with regard to creation of the human being. The notion that the angels were given room to assist in the creation of humans, while openly acknowledging the heretical appearance of such an idea, illustrates that the angels were meant to engage in a unequal partnership to create the human being. The human being, the product of such an unusual partnership, must be an ethically and existentially challenging construction.

אמר רבי סימון, בשעה שברא הקדוש ברוך הוא לבראת את אדם הראשון, נעשו מלאכי השרת כתיים כתיים, וחבורות חבורות, מהם אומרים אל יברא, ומהם אומרים יברא, הדא הוא דכתיב (תהלים פה, יא): חסד ואמת נפגשו צדק ושלום נשקו. חסד אומר יברא, שהוא גומל חסדים. ואמת אומר אל יברא, שכלו שקרים. צדק אומר יברא, שהוא עושה צדקות. שלום אומר אל יברא, דכוליה קטטה. מה עשה הקדוש ברוך הוא נטל אמת והשליכו לארץ, הדא הוא דכתיב (דניאל ח, יב): ותשלך אמת ארצה, אמרו מלאכי השרת לפני הקדוש ברוך הוא, רבון העולמים מה אתה מבזה תכסי אלטיבסיה שלך, תעלה אמת מן הארץ, הדא הוא דכתיב (תהלים פה, יב): אמת מארץ תצמח. רבון אמרי לה בשם רבי חנינא בר אידי ורבי פינחס ורבי חלקיה בשם רבי סימון אמר, מאד, הוא אדם. הדא הוא דכתיב (בראשית א, לא): וירא אלהים את כל אשר עשה והנה טוב מאד, והנה טוב אדם. רב הונא רבה של צפורין אמר עד שמלאכי השרת מדיבין אלו עם אלו ומתעסקין אלו עם אלו בראו הקדוש ברוך הוא. אמר להן מה אתם מדיבין כבר נעשה אדם. (ח:ה)

R. Simon said: When the Holy One, blessed be God, came to create Adam, the ministering angels formed themselves into groups and parties. Some of them said, "Don't create him," while others urged, "create him," as it is written, "Lovingkindness and truth met, justice and peace kissed"

(Psalms 85:11). Lovingkindness said, "Create him because he will do acts of loving kindness." Truth said, "Don't create him, because he is full of lies." Justice said, "Create him because he will perform acts of justice." Peace said, "Don't create him, because he is full of conflict." So what did God do? God held Truth and cast it to the ground, as it is written, "And truth will be sent to the earth" (Daniel 8:12). The ministering angels said before the Holy One, "Sovereign of the Universe! Why do you despise Your seal [truth]? Let Truth arise from the earth!" Hence it is written, "Let truth spring up from the earth." (Psalms 85:12)...While the ministering angels were arguing with each other and disputing with each other, the Holy One created the first human. God said to them, "Why are you arguing? Adam has already been made!"

Human life is necessarily complicated and challenging. For this reason, human beings were entrusted with the Torah, whose values they can actualize through the choices they make on the physical earth. In Bereishit Rabba, we see how G-d acknowledges that "Truth" is in fact seen in the existence of human beings, with all of the challenges and complexities of reality that brings about. Rather than a strict proper truth of Heaven, the physical world contains its own Truth defined by the ability of Divine life to translate to mortal life.

The foreword to the Ketzos HaChoshen sums up what our role is as human beings rather than angels.

אך לא נתנה התורה למלאכי השרת, ואל האדם נתנה, אשר לו שכל האנושי. ונתן לנו הקדוש ברוך הוא התורה ברוב רחמיו וחסדיו כפי הכרעת שכל האנושי, גם כי אינו אמת בערך השכלים הנבדלים.

The Torah was not given to ministering angels, but rather it was given to humans, who possess human intelligence. The Holy One, blessed be He, in His great kindness and mercy, gave us the Torah to be determined according to the discernment of the human mind, even though [that determination] does not reflect Ultimate Truth at the level of the disembodied intellects.

Why Are Women Exempt from the Command to Procreate?

September 29, 2010

בראשית פרק א:כז-כח

ויברא א-להים את האדם בצלמו בצלם א-להים ברא אתם: ויברך אתם א-להים ויאמר להם א-להים פרו
ורבו ומלאו את הארץ וכבשה ורדו בדגת הים ובעוף השמים ובכל חיה הרמשת על הארץ:

Genesis 1:27-28

G-d created the human in His image

In His image He created him

Male and female He created them

G-d blessed them

G-d said to them: Be fruitful and multiply; fill the land and subdue it; dominate the fish of the sea and the birds of the heavens, and every wild thing that swarms on the land².

How can the anonymous Mishnah, and eventually the Halakhah, contend that the obligation of procreation applies to men and not to women? Rabbi Yochanan ben Berokah's incredulous response to the anonymous Mishnah: "Scripture says about both of them "G-d blessed them, saying to them: 'Be fruitful and multiply . . . '!?" seems compelling. This question has generated extensive discussion for at least 2000 years, including at least one contemporary book. Explanations of the Halakhah take two essential forms: literary and ideological. That is to say, some try to demonstrate that the Halakhah really fits well into the verse, whereas others seek to find a rationale for the Halakhah that justifies reading the verse implausibly.

Our focus this week is on the approach of the 19th Century Rabbi Meir Simkhah of Dvinsk in his Biblical commentary Meshekh Chokhmah (hereafter MC). He offers a reading and two rationales, all of which are noteworthy. We'll discuss the reading first and then the rationales.

MC notes that human beings are blessed/commanded to procreate three separate times in Genesis: 1:28, 9:1 and 9:7, and 35:11. Of these, the first two are grammatically plural, whereas the third is singular. This by itself is not at all troubling, as the third is spoken directly to an individual Yaakov.

Rav Yosef (Yebamot 65b) claims that 35:11 is the source for the exclusion of women; he does not tell us how to reconcile this with 1:28 or 9:1-7. Meshekh Chokhmah reasonably assumes that Rav Yosef sees 35:11 as superseding 1:28. The remaining difficulty is 9:1-7, and here MC makes the sharp observation that the addressees there are "Noach and his sons", specifically, with no mention of their wives, even though the wives have appeared in the previous lists of humans leaving the ark. MC therefore concludes that between 1 and 9 the commandment was narrowed to males. 35:11 is singular because it addresses a single male, Yaakov, whereas 9:1-7 remains plural since it is addressing multiple males, Noach and his sons.

I have a few points that may advance this analysis. Genesis 1:22 also contains a command "(you plural) be fruitful and multiply", to various creatures, but at that point no mention has been made of creature genders. Moreover, the plural of that command likely refers to only some of the nouns included in the antecedent; the command is to be "fruitful and multiply" in the water, whereas the antecedent nouns include both water creatures and birds. Indeed, the following phrase specifically instructs birds to multiply in the land³. Similarly, then, the command to human beings may refer to the species, without taking cognizance of gender, and the antecedent of the plural pronoun in 1:28 may be "adam-human" alone, not "zakhar unekevah – male and female".

² In my series "Divine Fantasy", available [here](#), I address at length the question of the shift from singular to plural, which must be compared with Genesis 5:1-2.

³ Although not to be fruitful

If this argument is reasonable, MC can argue that 1:28 is deliberately ambiguous; while in immediate context it most likely applied to both genders, it was written so as to allow for a later understanding as limited only to males.

Having established that the halakhic reading is reasonable if one assumes a progression, we are left to explain why the progression happened. MC's two suggestions are:

1. Childbirth was originally painless, and therefore the commandment applied to men and women equally. Chavah's sin generated as punishment the pain of childbirth, with accompanying risk to life. G-d does not impose unreasonable demands on His creatures, and demanding that women experience that pain, and take that risk, would be unreasonable. Therefore He removed the obligation from women.
2. It is against human nature to reject the beloved in favor of the unloved, and humans generally marry the ones they love. If women were obligated in procreation, then Halakhah would require them to divorce their husbands after ten years of childless marriage. This would be unreasonable. Since polygamy is permitted, this argument does not apply to men, who can marry an additional wife after ten childless years. MC here is building on the halakhic tradition's decision not to make men divorce their childless wives and marry a more fertile woman when polygamy is impossible or, as in our day, halakhically proscribed by the decree of Rabbeinu Gershom.

The second suggestion leaves open the question of why polygamy is permitted and polyandry forbidden; Deborah Klapper notes that one might argue in reverse that polygamy is permitted only because of the command to procreate, so as to avoid forcing men to divorce their childless wives⁴. We can also ask whether we are using a cannon to shoot a flea; why not maintain the commandment but eliminate the consequence, in other words allow childless women to remain married to the men they love and simply pray for a better outcome?

It is the first suggestion that we will focus on, however. Let's begin by noticing that this is not an offhand exegetical insight, but rather takes on the character of an extended halakhic argument. MC marshals a large set of halakhic materials to establish that a proposed Halakhah must meet the standard "Her ways are ways of Pleasantness", and that imposing childbearing would fail that standard. It seems to me that he is not arguing that the text compels his reading, but rather that the standard requires the adoption of such a reading.

MC also seems to shift back and forth as to whether it is the pain, the risk, or the combination of pain and risk that generates the conclusion that procreation cannot be mandatory for women. In our day the risk is much less, and anesthetics often have significant impact – should that affect the halakhah? In practice it is very difficult to move halakhah that dramatically, from one side of a Tannaitic dispute to another⁵.

Another halakhic challenge to MC's suggestion is that some medieval authorities suggested that women are in fact rabbinically obligated to procreate⁶.

⁴ There might also be an economic concern for the wife here, as childless divorced women would have no family to support them in their old age.

⁵ Perhaps MC also factored the experience of pregnancy as such into his suggestion. Regardless, we must be very careful, when making this argument, to be pellucid that it does not generate a right of abortion. The principle "her ways are ways of pleasantness" does not prevent G-d from demanding that we surrender our lives on occasion; demands that are unreasonable in one context are reasonable in another., and preventing fertilization is not the same issue as terminating a fetus.

⁶ I discuss the question of women's rabbinic obligation, which remains a contentious halakhic issue, in my series on *Kibbud Av VaEim*.

I want here to play out what I see as a reasonable halakhic implication of MC's position, in the area of birth control⁷.

If G-d cannot demand that women have children, kal vachomer men cannot demand this of them. Indeed, no one suggests that a woman is obligated to marry a man so as to enable the man to fulfill his obligation of procreation.

Therefore, it cannot be prohibited for women to use birth control⁸.

When engaged couples come to ask rabbis "the birth control question", then, it is proper to frame the issue as follows: Of course the woman can use (some types of) birth control. The real question is whether the man can marry her in the knowledge that she will practice contraception⁹. In this perspective, the proper halakhic calculation is whether not marrying her, or divorcing her, is likely to improve his chances of being in a procreative marriage over time. Generally, I suspect, the answer is no.

Of course, this discussion only addresses the question of coercion. MC makes clear that procreation is a good, and rabbinic literature is replete with gender-neutral encomia to procreation. Furthermore, some rishonim believe that women are rabbinically obligated to procreate¹⁰, and others construct a quasi-obligation to participate in the mitzvah, recognizing that men cannot (or at least in their time could not) fulfill it without women's participation. In other words, saying that a woman may use (some types of) contraception – even saying that she has the right to such use – does not imply that she ought to. Furthermore, I tend to adopt the pastoral maxim that "If you're not ready to greet children with joy, don't have sex", as no means of contraception is perfectly reliable.

⁷ My approach here owes much to the broad approach of Rabbi Yehudah Herzl Henkin to issues of gender, but does not to the best of my knowledge follow his specific halakhic prescriptions on this issue.

⁸ So long as they use means that do not violate prohibitions, such as one against self-castration.

⁹ The question of whether, once married, he can have marital relations with her, is one of means rather than of principle. He has an obligation of *onah* regardless, and so cannot even use her lack of fertility as an excuse for avoiding marital relations. Some barrier methods raise issues of hashchatat zera for him, but there are certainly methods that are unproblematic in this regard.

¹⁰ MC is of course aware of this. This obligation is offered to explain why we might coerce men to enable women to marry; I suspect that MC would argue that the standard for excusing women from the obligation should be low.

Are Adam and Eve Modern Orthodox Role Models?

October 27, 2016

A healthy religious culture teaches its foundational stories to its children with confidence and without embarrassment. This is a problem for Modern Orthodoxy, which has discomfort teaching the story of Creation. The most immediate and important reason for this is gender. We do not have a shared communal interpretation of the story that squares with how we want our boys and girls to think of themselves, to relate to each other, and to grow up as men and women.

To put this in perspective, think for a moment about the first Rashi on Chumash. He explains that the Torah tells us that G-d created the world in order to secure our right to Eretz Yisroel. For all the moral challenges of Israeli-Palestinian relationships, this remains a powerful and important touchstone for Religious Zionism – G-d gave us this land, and He had a right to do so, because He created it. I myself am very fond of Ramban's caveat that He gave it to us on condition that we deserve it, but the point stands.

Can we find a reading of human creation that plays the same role for our community?

An enormous contribution to that end was made by Rabbi Yehuda Herzl Henkin in the title essay of his book Equality Lost.

Rabbi Henkin begins from my favorite example of bitingly humble Chazalic wit. Mishnah Avot 1:1 reports that

The Men of the Great Assembly said three things: One should be patient in judgment, stand many students up (as independent thinkers), and build a hedge around the Torah.

“Building a hedge around the Torah” is the justification for most of Rabbinic law, and lesser men would have felt it necessary to guard the source of their authority against mockery. Instead, Chazal (Avot of Rabbi Natan 1:1) engage in preemptive self-deprecation. Which human being made the first hedge? Adam. What was it? He told Eve that G-d had capitally prohibited not just consumption of the Tree of Knowledge of Good and Evil, but even contact with it. What happened as a result? The Snake proved to Eve that contact did not result in death, and she therefore decided that Adam must have lied about consumption as well.

In other words: The first attempt to build a hedge around the Torah led to original sin. But we rabbis go on building them anyway, hopefully having learned from experience how to build them better. What should we have learned?

Rav Henkin notes that this story assumes that Eve had no direct access to G-d's command, which was given to Adam before she came into being. Adam did not legislate together with Eve. He did not discuss with her whether it would be better to avoid all contact with the tree, even though G-d had prohibited only eating its fruit. Instead, he legislated for her. His lack of trust made her vulnerable to the (male) snake. This lack of trust was the true original sin.

In other words: The story of Eden teaches us that men must never seek to impose themselves as necessary intermediaries between G-d and women. The Torah is not in Heaven, nor over the sea, such that women must ask men to go fetch it for them.

The original temptation was that Adam saw knowledge, and especially knowledge of Torah, as a source of power rather than as a gift to be shared. This is a yetzer hora that remains profoundly human, and rabbinic.

Yet in this version of the story, why did Adam eat the fruit? He knew that G-d had not forbidden contact, and should have corrected Eve – perhaps with a supercilious smile – when she came to him with her story.

A romantic answer is that Adam had no interest in immortality without Eve.

A tragic answer is that Adam took responsibility for his error by deliberately sharing her fate.

But neither of these answers fits well with another element of the text. When G-d confronts Adam, he does not express love or atonement. Instead, he blames Eve.

וַיֹּאמֶר הָאָדָם
הָאִשָּׁה אֲשֶׁר נָתַתָּה עִמָּדִי –
הִוא נָתַתְּהָ לִּי מִן־הָעֵץ וְאָכַל:
The man said:

*The woman whom You gave to be with me –
she gave me from the tree, and I ate.*

How can this reaction fit with Rav Henkin's reading?

Or HaChayyim provides what I think is a very productive approach.

ונראה שכוונת האדם היא שלא ידע דבר
כי אם האשה הביאה לפניו המזומן ואכל
ואינו חייב לשאול על המוגש לפניו – דבר זה מניין?
כי הלא כל הארץ לפניו היא מלאה מעדנים אשר נטע ה'
ודקדק לומר "אשר נתת עמדי" –
שלא לחייבו לחפש ולדקדק אחריה לדעת המובא לפניו
כיון שהאשה הלז נתנה ה' עמו לעזר ולהועיל
ואין רע יורד מהשמים
ואין לו לבדוק אחריה, כי מן הסתם מעשיה נאים.

*It seems correct that the intent of the man is that he knew nothing of the matter
other than that the woman brought before him something ready to eat, and he ate.
He was not obligated to ask about what was set before him – where did this come from?
All the land is before him filled with the delights which Hashem had planted!
He was precise in saying "whom You gave to be with me" –
not to obligate him to search and be precise after her to know what was brought before him.
Since this woman was given by Hashem to be with him to help and be effective,
and no evil descends from Heaven,
and he should not have investigated her deeds, since the default was that her deeds were fitting.*

The fruit, Or HaChayyim suggests, was not visually distinguishable. Adam had no idea what he was eating! When G-d confronts him, he responds that Eve was vouched for by G-d, and thus surely there was no reason to mistrust her testimony.

So what should Adam have done? One witness is sufficient with regard to prohibitions, such as kashrut. This is true regardless of gender. Indeed, many rishonim say that the basis for the principle that one witness is believed in such matters is that people should be able to trust the kashrut of their spouses and hosts without resorting to halakhic detective agencies.

I suggest that the proper frame for this story is poetic justice. Adam was correct to trust Eve's kashrut; he was wrong to mistrust her maturity and judgment. By refusing to treat her as an equal when conveying the law, he taught her to mistrust him. Once she no longer trusted him, she saw no reason to live up to his trust in her. He was punished not because he trusted her, but because he had mistrusted her.

We should think long and hard about whether that narrative is playing out again today in communal conversations about women and halakhah.

I submit that young men and women who internalize this reading of human creation will seek to build a society in which Torah is always a shared resource, and in which Torah decisions are made collaboratively

and transparently to the extent possible. If you agree, and think that this describes the Torah society that you want your children to live in, please share, print, and otherwise disseminate this essay as widely as you can.

Bare Cunning: Cognitive Desire in Eden

October 10, 2017

by Ben Kaplan (SBM 2017)

The story of the “original sin” is embedded into both the Jewish and non-Jewish consciousness. While many of us take this story for granted, looking into it on a deeper level can help us understand deep truths about the human condition. In particular, analyzing the linguistic nuances of the original Hebrew can provide deep insight into two distinct types of human desire.

Seemingly identical words lie on each side of the border between the second and third chapters of B'reishit:

וַיְהִי שְׁנֵיהֶם עֲרוּמִים, הָאָדָם וְאִשְׁתּוֹ; וְלֹא, יִתְבָּשֶׁשׁוּ.

וְהַנְחָשׁ, הָיָה עֲרוּם, מִכֹּל חַיַּת הַשָּׂדֶה, אֲשֶׁר עָשָׂה ה' אֱ-לֹהִים; וַיֹּאמֶר, אֶל-הָאִשָּׁה, אַף כִּי-אָמַר אֱ-לֹהִים, לֹא תֹאכְלוּ מִכֹּל עֵץ הַגֶּן.

In the second perek, the root ערם clearly means that the humans were “naked”, while in the third perek, since presumably none of the animals in the garden were clothed, it is instead translated as “clever.”

Rav Shimshon Raphael Hirsch, a proponent of the idea of the deep and interconnected nature of the Hebrew language, separates the two instances of ערם into two distinct linguistic roots. He connects the root's definition as “clever” to the Hebrew word ערמה, heap, since a clever person takes many seemingly small actions which are “heaped” together to great effect. Rav Hirsch concludes that the form of ערם meaning naked comes from the root עור, meaning skin. So too, a blind person is called an עור (vowelized differently) since the primary sense he uses to find his way around is touch, which is sensed through skin.

Even if we assume with Rav Hirsch that the two words come from unrelated roots, the use of the same letters to describe humans and animals seems intended to draw a parallel between the naked man and woman and the cunning snake. The deliberate nature of the juxtaposition grows more evident with the acknowledgement that the chapter separation between the two verses is not intrinsic to the Torah itself, but was added by later (by a Christian archbishop in the 13th century). The Masoretic notes make neither a p'tuchah nor s'tumah separation between the two verses.

Some hints from the language of the Torah, as well as from a (somewhat baffling) midrash, may yield a unified definition for the two instances of the root. Rashi on verse 3:1 quotes B'reishit Rabbah as saying that the snake wanted to cause Adam and Chavah to sin due to the desire he felt at seeing them being publicly intimate with each other. This is a reasonable implication of 2:25. The Torah then describes the serpent tempting Chavah to eat from the Tree of Knowledge of Good and Evil. At first, Chavah seems to have no desire to eat from the tree, simply answering the serpent's questions about which trees she may eat from and which one she may not, citing the danger of death. The serpent rejects her concerns, informing Chavah that God does not wish her and her husband to eat from the tree because then “their eyes will open” and they will become like gods. Only after this speech is it stated that Chavah desired the tree.

וַיִּתְּרָא הָאִשָּׁה כִּי טוֹב הָעֵץ לְמֹאכָל וְכִי תֹאנֶה-הוּא לְעֵינַיִם, וְנִחְמַד לְהַשְׂכִּיל, וְתִקַּח מִפְּרִיּוֹ, וַתֹּאכַל; וַתֵּתֵן גַּם-לְאִישָׁהּ עִמָּהּ, וַיֹּאכְלוּ.

It should be noted that the verse refers to eyes and seeing twice, “Chavah saw... that the tree was temptation for the eyes.” Noticing the oddity that Chavah is only seeing these aspects of the tree now, Rashi comments that it was not the tree that Chavah is seeing, rather she is “seeing” i.e. agreeing with, the argument of the serpent. After Adam and Chavah eat from the fruit of the tree, they begin to feel its effects.

ז וַתִּפְקְחֶנָּה, עֵינֵי שְׁנֵיהֶם, וַיֵּדְעוּ, כִּי עֵרְוָם הֵם; וַיִּתְּפְרוּ עָלֶיהָ תֹאנֶה, וַיַּעֲשׂוּ לָהֶם חֲגֹרֹת.

Interestingly, the serpent's promise is partially fulfilled, as the verse testifies that "their eyes opened and they realized that they were naked." What exactly was the nature of the change wrought by the forbidden fruit? What does it mean that it opened their eyes?

Eyes and vision play a prominent role in the story, as has already been demonstrated. Additionally, seeing and desire seem to be closely related. Chavah "sees" and desires the tree, which "desirable for the eyes." Additionally, the "opening of the eyes" caused by the fruit of the tree seems to have awakened some form of desire for evil in Adam and Chavah, as is stated explicitly by Rashi in 2:25. However, it seems odd to take this at face value, since the desire to deviate from God's command clearly existed before eating from the tree. After all, the very act of eating from the tree was an evil act!

A possible reconciliation of this contradiction is that there was a form of desire that existed before eating from the Eitz HaDaa and a form of desire that only entered the human consciousness afterward. Base, physical desires were absent from the human consciousness until after they ate the forbidden fruit. However, cognitive desires of the mind still existed. This is why the serpent was able to persuade Chavah to eat the fruit and why she only desired the fruit after the serpent gave her an intellectual argument of why she should. The "opening of the eyes" caused by eating the fruit was the human consciousness awakening to the existence of this physical type of desire. As is pointed out by the S'forno (on 3:1), the distinction between cognitive and physical temptation is explicated in Bamidbar 15:39.

ולא-תתורו אַחֲרֵי לְבַבְכֶם, וְאַחֲרֵי עֵינֵיכֶם, אֲשֶׁר-אַתֶּם זֹנִים, אַחֲרֵיהֶם

The Torah here warns both not to follow the temptations of the eyes (physical temptations) as well as the temptations of the heart (cognitive temptations). The new awareness of physical temptation is what causes Adam and Chavah to be ashamed of their nakedness after they eat the fruit. The knowledge that they are displaying the parts of themselves that ignite temptation in others is shameful.

If sight is symbolic of the ability to desire that which is external, then nakedness is symbolic of one's internal existence as an object of desire. As was indicated by the midrash, Adam's and Chavah's nakedness ignited temptation in the serpent. If this is true, then a unified definition of ערום can be proposed; namely, an object of desire. While Adam and Chavah ignited physical desire in others, the serpent was ערום in the sense that he ignited cognitive desire in others. His "cleverness" is what allowed him to tempt Chavah to sin. It then makes sense why Rashi connects Chavah's act of "seeing" to the words of the snake rather than the tree itself. Since physical desire was only awakened by eating the forbidden fruit, the temptation that Chavah "saw" must have been that of the snake's words.

The idea of a snake being harmful to look at is not only present in our parshah, but in secular sources as well. In Greek myth, the Medusa was a creature with snakes for hair; those who gazed upon her would turn to stone. Likewise, the basilisk featured in *Harry Potter and the Chamber of Secrets* (inspired by the creature of European myth) causes death to those who look into its eyes. In the Disney films *The Jungle Book* and *Aladdin* looking into the eyes of a snake (or in the latter case, a snake-shaped staff, which conjures other biblical parallels) causes the gazer to come under its thrall.

Rav Hirsch's idea of ערום stemming from עור, skin, fits well into this concept as well. The Gemara in Arachin (15b) draws a parallel between a snake who bites and does not eat his prey to one who speaks lashon hara (evil speech). One who speaks lashon hara is inherently making himself into an object of cognitive desire, as it is forbidden to listen to lashon hara as well as to speak it. Since the snake in B'reishit misuses his faculty of speech to tempt others to sin, one who speaks lashon hara is compared to the snake. As is stated on the same amud, the punishment for speaking lashon hara is tzaraat, an affliction of the skin, the עור. This connection is seen strikingly when Moshe is given signs to prove to B'nei Yisrael that God has sent him. The first two signs he is given are his staff turning into a snake and the skin of his hand being covered with tzaraat. Rashi comments on Sh'mot 4:3 and 4:6 that these signs hinted to Moshe that he spoke lashon hara about Israel by saying they would not believe him.

While certain ascetic streams of thought would have us focus on rooting out physical temptation from our society, B'reishit indicates that the "original sin" had nothing to do with physical desire. Rather, promises of power and glory as well as clever schemes designed to harm others caused the first ever sin. Chazal draw the parallel of such cognitive sins to lashon hara, often spoken in an attempt to increase one's own place in the social pecking order. In order to truly correct humanity's most fundamental flaw, our focus must be on treating our fellows well and using our knowledge and cunning to assist our brothers and sisters, rather than using them as stepping stones for our own material gain.

Why Didn't the Rabbis Eliminate Mamzerut? Part 5

October 11, 2019

Sanhedrin 71a cites a beraita which declares that three Biblical laws “never were and never will be,” rather are purely hypothetical. The Talmud associates the declaration with beraitot conveying a specific legal position about each law.

In Parts 1-4 of this series, I showed that regarding the Rebellious Son and the Idolatrous City, those legal positions are not radical **reinterpretations** of the laws in response to moral concerns. Rather, the declarations of hypotheticality are **reactions** to those preexisting legal positions.

A fair counterquestion is: What motivated these extreme legal positions, if not moral discomfort with the law as it would otherwise be understood?

This seemingly powerful question rests on a false premise. It assumes that these legal positions could only have been produced by extreme interpretations, i.e. interpretations arrived at by methods that the interpreter would dismiss in other circumstances. But this is not so.

Let's turn for example to the third law, that of the Leprous House. Mishnah Negaim 12:3 records a Tannaitic dispute:

. . . שהיה ר' ישמעאל אומר:
עד שיראה בשני גריסין על שתי אבנים או על אבן אחת;
ר"ע אומר:
עד שיראה כשני גריסין על שתי אבנים, לא על אבן אחת;
רבי אלעזר בר"ש אומר:
עד שיראה כשני גריסין על שתי אבנים בשני כתלים בזויות, ארכו כשני גריסין ורחבו כגריס.
. . . as Rabbi Yishmael would say:
*(The lesion does not make a house leprous) until it appears in the size of two beans on two stones,
or on one stone;
Rabbi Akiva says:
Until it appears the size of two beans on two stones,
not on one stone;
Rabbi Elazar beRabbi Shimon says:
Until it appears the size of two beans on two stones
on two walls in a corner.*

It is the legal position of Rabbi Elazar beRabbi Shimon that the Talmud associates with hypotheticality. How is his position arrived at? Vayikra 14:36 first speaks of the lesion appearing on the קיר(ו)ת/**walls** of the house, and then of its appearance on the קיר/**wall**. Rabbi Elazar beRabbi Shimon therefore requires a wall that is also walls, i.e. a corner. There is nothing unusual about this mode of legal reading; if anything, it is not clear why the resulting requirement is so unlikely to be met.

Note that roughly the same mode of reading generates Rabbi Yehudah's requirement for the parents of the Rebellious Son to have identical voices; in Devarim 21:18; the mother and father say that their son “does not heed our **voice**” – singular. Moreover, an anonymous Mishnah on Yoma 62a, identified by the Talmud with the same Rabbi Yehudah, requires the two goats of Yom Kippur to be identical in appearance, height, and value. The reason no one declares that the goats never happened is that it is easier for human beings to overlook minor physical differences among goats than among people, especially when the people are of different genders.

In other words: the legal positions that the Talmud associates with hypotheticality are extreme only in their effect on the likelihood of the law being applied in practice. There is nothing extraordinary about the interpretations that generate them.

A further proof that these interpretations are not generated by moral concerns is that the third case, the Leprous House, is not morally bothersome to the extent that a reader might feel compelled to eliminate its practical application. (This argument is also made by Rabbi Ethan Tucker [here](#).)

Rabbi Dan Margulies (WBM '16) disagreed with this proof when I published it on Facebook some months ago. He argued that destroying someone's house is a uniquely demoralizing punishment, especially when it results from a secondary event rather than directly from a specifically identified sin. Destroying a house can also be a form of collective punishment. The ongoing public conversation about whether destroying the homes of terrorists is a legitimate punishment suggests that my initial dismissal of the moral issue was too facile.

Rabbi Tuvy Miller (SBM '13) in his [CMTL alumni DT "The House That Was?"](#) took a diametrically opposite approach to constructing a moral issue. Rabbi Miller begins from Rashi (based on midrashim), who notices that the Torah introduces the 'leprous house' with language that sounds more like a promise than a threat.

ונתתי נגע צרעת –

בשורה היא להם שהנגעים באים עליהם,
לפי שהטמינו אמוריים מטמוניות של זהב בקירות בתיהם
כל ארבעים שנה שהיו ישראל במדבר,
ועל ידי הנגע נותץ הבית ומוצאן

*This was an announcement to them that these 'afflictions' would come upon them,
because the Amorites concealed gold treasures in the walls of their houses
during the Jews' forty year sojourn in the wilderness,
and via the 'affliction' they would tear down the house and find them (the treasures).*

I had always assumed that this interpretation **rejects** the position that the Leprous House is purely hypothetical: promises of wealth that depend on an unrealizable condition are simply cruel. Rabbi Miller argued, however, that the "never was and never will be" position might be a moral **reaction** to this interpretation. Since the Torah in several contexts recognizes that despoiling a defeated enemy undermines the morality of war, how could the Torah promise financial benefits from the destruction of the Seven Nations?

These critiques are wonderful contributions to Torah, and I am grateful for them. Nonetheless, I don't see them as plausible drivers for extreme reinterpretations.

With regard to Rabbi Miller's suggestion, Tanakh doesn't always ban spoils – sometimes it seems to strongly encourage spoiling – and the bans seem clearly unusual, beyond-the-ordinary gestures. Even those bans might not apply to abandoned safe deposit boxes discovered years later.

With regard to Rabbi Margulies' suggestion, I am not convinced that destroying a dwelling raises moral challenges as serious as execution. Moreover, since the Torah does not explicate the cause of house-plagues, perhaps they occur only when every inhabitant of the house has sinned, and so there is no issue of the innocent suffering together with the guilty.

The true underlying issue, then, is: Must we assume that Torah laws are intended to have real-world application, and therefore reject interpretations which make them hypothetical?

Maimonides presumed that we must, That's why with regard to all three of the Leprous House, the Idolatrous City and the Rebellious Son, he ruled against the positions that the Talmud associates with hypotheticality. The Amora Rabbi Yonatan also rejected hypotheticality on ideological grounds, declaring that he was as certain of the actuality of the Idolatrous City and the Rebellious Sin as if he had sat on their tell/grave. The only reason Rabbi Yonatan doesn't make a parallel statement about the Leprous House is

that he doesn't need to; Sanhedrin 73a records a beraita in which two Tannaim report actually seeing ruins that were identified as those of Leprous Houses.

I contend, however, that the author of the "never was and never will be" beraita rejects this assumption. Like Rabbi Joseph B, Soloveitchik's Halakhic Man, he is not bothered if an ideal structure of Halakhah has no precise real-world correlate.

I suspect that many readers will immediately accuse me of anachronism. Halakhic Man is a product of NeoKantian philosophy and Brisk, and his positions cannot reasonably be assigned to a member of Chazal. Surely it is beyond reason to think that the Rav and the Chazon Ish were simply recreating a Tannaitic dispute.

This argument is powerful, but it is also demonstrably false. The Tannaitic dispute about this issue is explicit in Mishnah Zavim 2:2. The Mishnah discusses which sorts of emissions make a man a *zav*, and which are considered the product of ordinary processes. Rabbi Yehudah holds that one is not a *zav* if he even experienced any sort of visual sexual stimulus. Rabbi Akiva holds that one is not a *zav* even if he merely ate or drank anything.

אמר לו:

אין כאן זבין מעתה!?

אמר להם:

אין אחריות זבים עליכם

They said to (Rabbi Akiva):

Now there will be no zavim!?

He replied:

The responsibility for (the existence of) zavim is not yours.

It seems unavoidable to me that Rabbi Akiva held like Halakhic Man, and his interlocutors like Maimonides.

Why Didn't the Rabbis Eliminate Mamzerut? Part 6

October 17, 2019

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 eternity 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 Azaruah 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 הוה, דלמא במקום סייף נקב הוה?
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.