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HOW DOES HALAKHAH CHANGE WHEN TECHNOLOGY CHANGES?
GOSES AS AN ILLUSTRATIVE EXAMPLE

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Wallace Stevens wrote that poetry results from "the pressure of reality on the imagination." Similarly, practical halakhah results from the pressure of reality on Torah. The practice of halakhah inevitably changes when reality does. But the **way** in which it changes is often badly misunderstood.

Let's take the halakhic category "*goses*" (roughly: "dying person") as an illustration. Specifically, I want to examine my teacher Rabbi J. David Bleich's baroque contention in Tradition 30:3 that "It appears that any patient who may reasonably be deemed capable of potential survival for a period of seventy two hours cannot be considered a *goses*."

Medical prognosis is affected by medical technology. Under Rabbi Bleich's definition, many conditions categorized as *goses* in past centuries would not be *goses* nowadays, for example because mechanical ventilation might extend their lives. So the practical halakhah of *goses* might change in response to technological change. By contrast, if we adopted a definition of *goses* based purely on symptoms, halakhah on this issue might be static.

Please recognize that neither approach makes today's halakhah dependent on yesterday's science. Neither suggested definition of *goses* binds us to what past medical or halakhic authorities determined to be the life-expectancy of patients with specific medical conditions.

The Talmud asks two basic questions about the *goses*.

The first is one of definition: Is the *goses* alive? The answer to that question is an unequivocal yes. For example, a *goses* can issue a bill of divorce, and killing a *goses* is capital murder. The geonic *Masekhet Semakhot* formulates the rule clearly: "The *goses* is treated the same as a living person for all matters."

The second question is about probability: Is the *goses* **still** alive? Ordinary people have a *chezkat chayyim*, a presumption of continued life. Therefore, for example, a husband's agent may deliver a bill of divorce to a wife without checking whether the husband is still alive, and thereby free her from the obligation of *yibum*. What if the husband was a *goses* at the time of appointment? Rava is cited on Gittin 28a as saying that because "Most *gosesin* (progress) to death," one cannot deliver a divorce from a goses, but his position is refuted by Abbayay. Shavuot 37b and Arakhin 18a cite "Most *gosesin* etc." as the position rejected by an authoritative text. The result again is that status as a *goses* has no legal implications. The known *goses* is alive, and the unknown *goses* is presumptively alive.

Geonic halakhah introduces a new issue. Does the condition of *goses* introduce additional stringencies because of life's fragility? The answer in Masekhet Semakhot (1:1-6) is yes. Actions that are perfectly permissible with regard to healthy people are prohibited as possible murder with regard to a *goses*.

The sixteenth century work Shiltei Gibborim, citing the 13th century Sefer Chasidim, suggests a radical fourth question. Is there an obligation to keep a *goses* alive? Shiltei Gibborim is cited by Rav Moshe Isserles in Darkei Mosheh and then in his HaMappah supplement to Rav Yosef Caro's Shulchan Arukh,

The answer based on the Talmud and geonim should be "yes," since "The *goses* is treated the same as a living person for all matters." Nonetheless, many authorities understand Rabbi Isserles as saying that the answer is "no." For the purposes of this article only, I will assume the position of those authorities. According to this position, one may withhold life-extending treatment from a *goses*. (Please see http://www.torahleadership.org/categories/angelendlife8_21__4__1_.pdf for my own understanding of Rav Isserles.) None of these discussions offers an explicit definition or description of "*goses*."

The great 13th century posek R. Meir of Rothenburg (MAHARAM) may provide one data point. In a responsum that exists in several variants, he orders a woman to begin mourning her husband on the basis of witnesses to the husband having been *goses* at least three days earlier. (Some understand: "on the basis of witnesses that he had already been *goses* for three days." But this is very difficult to square with MAHARAM's language.) In other words, MAHARAM allowed and required the woman to assume her husband's death at least for the purposes of mourning.

MAHARAM's ruling is apparently endorsed by R. Caro in Shulchan Arukh YD 339:2, and R. Isserles appends the gloss "because he has certainly died already."

The second edition of the 17th century Beit Shmuel (to Shulchan Arukh Even HaEzer 17, n. 94) seems to understand MAHARAM as allowing the woman to remarry on the basis of the same testimony. This leniency has been widely criticized and rejected by subsequent authorities such as Shaagat Aryeh and Noda b'Yehuda.

Beit Shmuel's critics ask an apparently devastating question. We have seen that the Talmud rejects using "Most *gosesin* (progess) to death" as a legal source! MAHARAM's ruling must therefore apply only to mourning, which is a special case in Halakhah because "the law follows the lenient position with regard to mourning." (Tosafot to Yebamot 120b cites an unknown Tannaitic text, perhaps a variant of one found in the Talmud, as explicitly stating "One does not testify regarding someone who was *goses* that he is

dead and his wife may remarry." But MAHARAM may not have or accept that variant.)

Beit Shmuel's defenders respond that Rav Isserles in his gloss to Shulchan Arukh Even HaEzer 17:5 rules that a woman is forbidden to mourn a husband's death on the basis of evidence insufficient to allow her remarriage. It follows that by endorsing MAHARAM's permission to mourn, Rav Isserles was permitting her to remarry.

Beit Shmuel's critics respond that R. Caro's formulation endorsed by Rav Isserles in YD 339:2 does not say husband, but rather "relative" – perhaps it does not include wives. They note that Tur YD 339 cites MAHARAM with regard to "a father or brother" rather than a husband.

Defenders respond that Beit Yosef cites MAHARAM from other sources that in all extant versions refer to a wife, and that even his citation of Tur leaves out the reference to "father and brother."

In my humble opinion, while there is room to discuss Rav Caro's position, Beit Shmuel is almost certainly the correct explanation of Rav Isserles. My evidence is that in his commentary Darkei Moshe to Tur YD 339's citation of MAHARAM, Rav Isserles cites Shiltei Gibborim's position that there is no obligation to keep a goses alive. This proves that he saw MAHARAM's position as extending well beyond the realm of mourning. Coupled with his use of the term *"vadai,"* this seems to me conclusive evidence that Beit Shmuel understood him correctly.

We must still explain how this understanding of Maharam fits with the Talmud's rejection of "Most *gosesin* (progress) to death" as a legal source.

The simplest explanation is that the Talmud's rejection applies only to periods shorter than three days. This is supported by Rav Isserles' comment that "he has **certainly** died by then," which seems intended to distinguish this case from the "**Most** *gosesin*" rule.

It is vital to understand that even Rav Isserles does not mean by **certainly** that there are no exceptions. "Certainly," *vadai*, is a legal term of art; it means that the exceptions are rare enough that the law does not need to account for them. Beit Shmuel contends that this legal certainty is sufficient not only to mandate mourning, but also to permit remarriage.

On what basis did MAHARAM, as understood by Beit Shmuel, limit the Talmud's rejection of ""Most *gosesin* (progress) to death" to periods shorter than three days, and assert legal certainty of death for periods longer than that?

I see two basic possibilities.

The first is that MAHARAM had a clear and sufficient medical definition of *goses*. He then determined that in his time and place, such *gosesin* died within three days at a rate sufficient to create legal certainty.

The second possibility is that MAHARAM had a clear and sufficient legal definition of *goses*. One element of that definition was that the person must be legally certain to die within three days.

Either way, the halakhah in MAHARAM's case would change if the availability of ventilation changed a person's prognosis. Suppose for example that witnesses reported nowadays that a husband had the exact same condition as was reported to MAHARAM, but that medical technology had improved to the point that one could not be legally certain of death until after seven days. According to the first possibility, the wife could not begin mourning until the eighth day, because that was now the law for a *goses*. According to the second possibility, the wife could not begin mourning until the eighth day, because her husband was no longer considered to have been a *goses*.

However, the halakhah in Shiltei Gibborim's case would change only according to the second possibility. Shiltei Gibborim is the only case I can think of where the legal category *goses* affects the law directly, rather than serving as a proxy for a claim about medical prognosis. According to the first possibility, it would be permitted to withhold life-extending treatment from the husband; according to the second, it would not be.

Rabbi Bleich adopts the second possibility. Thus "It appears that any patient who may reasonably be deemed capable of potential survival for a period of seventy two hours cannot be considered a *goses."*

Which possibility is more likely correct? We can't know what MAHARAM thought, because his case comes out the same either way; and we can't know what Shiltei Gibborim thought, because he does not mention a specific time limit. However, I think Rabbi Isserles held the second possibility. Here's why.

MAHARAM's case applies the *goses* category post facto – three days later, one can assume the husband is dead. Shiltei Gibborim (according to the position we are assuming) applies it prospectively – one can withhold treatment from someone the moment they become a *goses*. If so, why does Rav Isserles cite it with regard to MAHARAM, who adds nothing but the time limit? The most likely answer is that the time limit is part of the definition, and one can only withhold treatment now from someone who will with legal certainty die within three days.

One can accept this argument while rejecting Beit Shmuel's position allowing remarriage. Many authorities have explained that remarriage is subject to uniquely high standards of certainty, especially ab initio. So there is no reason to assume that Noda b'Yehuda and Shaagat Aryeh etc. disagree with Rav Isserles' definition of *goses*.

Reality can put other relevant pressures on halakhah. We might for instance argue that medical progress has created a new class of people whom it is ethical not to provide life-extending treatment, **even though** they do not fit the category of *goses* as defined by our precedents. Or we might argue that MAHARAM defined *goses* by **quality-of-life-expectancy**, so that the possibility of prolonging unconscious life on a ventilator would not affect MAHARAM's definition, even though it would have affected his ruling about remarriage. But we must acknowledge that rejecting these arguments does not entail ignoring reality or precedent.

It is tempting to assume that poskim who reach results we dislike on issues of technological change must be ignoring the science or distorting the sources. The truth is that sometimes they are expressing very in-the moment moral opinions that disagree with ours.