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WHY DIDN'T THE RABBIS ELIMINATE MAMZERUT? PART 3

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Moral critics of contemporary Orthodoxy often make the following argument:

Chazal interpreted Torah laws out of existence when they found them immoral.

We find Law X immoral.

Contemporary rabbis (should) agree with us that Law X is immoral. They should act like Chazal and interpret Law X out of existence.

This series of essays challenges that argument.

Let me be clear that I am a strong advocate for the role of morality in halakhic interpretation, and for seeking whenever possible to interpret halakhah so as to avoid causing other people pain. My discussion is about the extreme limits of such interpretation.

I will also note that in my experience and evaluation, attempts at such extreme interpretation tend to cause lasting harm and only the illusion of progress, for two reasons:

First, such interpretations galvanize reactionaries who seek *davka* to implement the law, and who seek to tar all creative interpretations with humane implications as founded in moral critiques of the Torah. The result is that people who might otherwise have been easily helped become political footballs; arguments that might have drawn consensus support are excluded from the discourse; and no one is actually helped to flourish in the community of their choice. This state of affairs is itself ethically lamentable, and must be fought; but it must also be acknowledged, and the battle is pointless if it destroys the very people it is meant to help.

Second, at least outside the State of Israel, the people who suffer from halakhic restrictions are generally those who most strongly believe that halakhah is the will of G-d and in the necessity of Orthodox community; otherwise, they would just leave. They will generally refuse to accept help that, within their own plausibility structures, is inconsistent with those beliefs.

However, truth is a value in and of itself. So if the argument that opens this essay is correct, I would acknowledge it even if I thought using it in practice was unwise. But I do not think it is correct.

My primary countercase is the law banning *mamzerim* from marrying within the community. Part 1 of this series showed that Rabbinic literature acknowledges that this law violates the fundamental moral sensibility that children should not suffer for their parents' sins, and yet records no effort to interpret it out of existence. Part 2 noted that normative halakhah nonetheless encourages poskim to **try** to interpret every individual case out of the category of *mamzerut*, and showed how Rav Moshe Feinstein's position allowed one to accomplish this with integrity.

Let's now begin looking at the evidence for the assertion that Chazal interpreted Torah laws out of existence for moral reasons. Sanhedrin 71a cites anonymous *beraitot* stating that three Torah laws "never were and never will be," and there are several statements elsewhere that seem to make similar claims about other laws. Part 3 begins from the second case discussed on Sanhedrin 71a, the Law of the Idolatrous City.

Which position does this beraita follow:

"The seduced-into-idolatry city never was and never will be, so why is it in Scripture? Expound and receive reward."?

Which position? That of Rabbi Eliezer, as we learned in a beraita:

Rabbi Eliezer says:

Any city that has within it even one mezuzah – cannot be made a seduced-into-idolatry city.

Why?

Scripture says: "All its loot you must gather into its public square, and burn it in fire,"

and since if there were a mezuzah this (burning) would not be possible, as Scripture says: "Do not do thus (destruction) to Hashem your G-d."

Said Rabbi Yonatan:

I saw it, and I sat on its tell.

For this passage to instantiate the thesis that *Chazal interpreted Torah laws out of existence when they found them immoral*, we need to establish at least three things:

- 1) That Rabbi Eliezer interpreted the Law of the Idolatrous City out of existence
- 2) That he did so in the service of a moral agenda
- 3) That his position is a viable precedent

Careful reading of the passage shows that Rabbi Eliezer himself never states that the law is purely theoretical. Rather, that position is found in a *beraita* (also cited in the Tosefta). The Talmud argues only that this position is compatible with, or grounded on, the position of Rabbi Eliezer. We cannot tell from this whether Rabbi Eliezer's position is **intended** to make the law purely theoretical.

Here it is important to consider in what way Rabbi Eliezer's position can be understood as making the law purely theoretical. The argument (careful of the double negatives) is that no Jewish city would ever not have a single sacred object with G-d's Name. This is not a logical impossibility. Rather, like Rabbi Shimon's claim that no parent would bring their child to be punished as Rebellious, it is a claim of **practical impossibility**. Not "this could never happen," but rather "this would never happen." Why? because Jews would never behave in such a way as to trigger this law. If they ever did, the law would be just. (Note that Rabbi Shimon himself does not seem to have qualms about the Idolatrous City. Mishnah Sanhedrin 111b cites him interpreting a verse as G-d's assurance that carrying out that Law will be regarded by Him as the equivalent of bringing an *olah* sacrifice.)

Perhaps a useful contrast is this dispute recorded in Sifrei Devarim 94.

*The inhabitants of that city –
Based on this they said:
One does not keep alive the children (of an Idolatrous City);
Abba Chanan says:
"Fathers must not die for children (and children must not die for fathers) –
Scripture is discussing the Idolatrous City."*

Here Abba Chanan explicitly rejects a legal position regarding the Idolatrous City on the basis of a moral principle! The Biblical verse he cites has no specific textual connection to the Idolatrous City; it simply drives him to reinterpret *inhabitants* as excluding children. Abba Chanan had no qualms about openly basing his legal interpretation on moral principles. The burden of proof is therefore on the claim that Rabbi Eliezer could do so only covertly.

In any case, Rabbi Eliezer's position is not consensus. By asking "Which position," the Talmud tells us that the answer will be one side of a dispute. On Sanhedrin 113a, the Talmud identifies the other side of the disputant as the anonymous Mishnah on 111b.

*Its loot – and not the loot of Heaven.
From here they said:
The 'sanctified' objects in it – must be redeemed;
the priestly portions – must rot;
the second tithe (and the Holy Writings) – must be secreted.
This Mishnah is against Rabbi Eliezer,
as we learned in a beraita:
Rabbi Eliezer says:
Any city that has within it even one mezuzah – cannot be made a
seduced-into-idolatry city.
as Scripture says:*

*All its loot you must gather into its public square, and burn it in fire entirely,
and where there is a mezuzah, this (burning) is not possible,
since Scripture says:
Do not do thus (destruction) to Hashem your G-d.*

Maimonides Laws of Idolatry 4:16 rules like the anonymous Mishnah, against Rabbi Eliezer.

We must also note the odd statement of Rabbi Yonatan that "I saw it and sat on its tell." Firstly, Rabbi Yonatan is an Amora, and Amoraim generally do not take such direct issue with a Tanna! (Perhaps Rabbi Yonatan was only taking sides with the Anonymous Mishnah.) Second, Rabbi Yonatan made the identical comment about the Rebellious Son: "I saw him, and I sat on his grave." Perhaps Rabbi Yonatan, who as an Amora lived long after halakhic courts had the power to inflict capital punishment, led an archaeological tour of great halakhic execution sites? But many acharonim point out that Rabbi Yonatan was a kohen, and therefore could not have sat on the grave and tell. But then why did he say that he did?

The answer, I suggest, is that Rabbi Yonatan's statement should not be understood as literal. Rather, when kohanim swore, they liked to do so with a reference to their status, and one strong form was "I am as sure this happened as if I had become *tamei* to a corpse." Another example of this, if I am correct, is the statement of the kohen Rabbi Elazar bar Tzadok cited on Berakhot 19b that "We used to leap over coffins to greet Jewish kings." In what universe would the only path to greet a king require one to leap over coffins, regularly? Rather, Rabbi Elazar was as certain of the halakhah as if he had done it himself. So too, Rabbi Yonatan.

Rabbi Yonatan is not providing eyewitness testimony. We might have rejected that by saying that he had misidentified the gravesite, or that the executions in question had been rooted in legal error. Rather, he is staking out an ideological position **against** the claim that a Biblical law can be interpreted as purely theoretical.

Bottom line, the case of the Idolatrous City provides no evidence that Chazal deliberately reinterpreted a Biblical law out of existence, and no precedent for doing so ourselves. There is no evidence that the position "never was and never will be" generated a halakhic interpretation, rather than building off an independently arrived at plausible interpretation. The "never was and never will be" position is based on a practical rather than a moral claim. The halakhic interpretation associated with the "never was and never will be" position is one side of a Tannaitic dispute, and Rambam rules like the other side. Finally, the Amora Rabbi Yonatan appears to reject such a position in principle, not only in this specific case.

In Part 4, we'll discuss the Rebellious Son, the second of the celebrated trio on Sanhedrin 111a. Part 5 will discuss the Leprous House, the third member. We'll also discuss the position of Rabbi Akiva and Rabbi Tarfon about the death penalty in general. Finally, we'll turn to a much less known Mishnah in Negaim that may prove a more useful precedent than any of those usually cited.