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INTO THE HALAKHIC MULTIVERSE Rabbi Aryeh Klapper, Dean

When there's a fifty percent chance of rain, half an umbrella won't keep you dry, as Jackie Mason noted. Having a whole umbrella half the time is also not a sensible response. Probability and reality don't interact smoothly.

For that matter, what are the odds that probability is usefully predictive? This sort of puzzle twists some of usinto epistemological pretzels. Our friends wonder why we care, since they're one hundred percent sure that it works well in our reality. Great mathematicians, physicists, and fantasy writers wonder what it would be like to live in a different kind of reality.

Also Talmudists. On Chullin 11a, the Talmud asks: "From whence cometh that thing the rabbis say: "*zil batar ruba*" = "Follow the majority?" Not in the context of voting, the Talmud clarifies, nor in bounded sets, such as which of 32 ping-pong balls will emerge first from a cage. Such cases derive from the verse "*acharei rabom l'hatot*" (*=after the plurality to incline*). The question relates to contexts which require us to predict the future on the basis of past experience. For example: Can we assume that minors will become fertile adults?

The practical consequence of that specific question is esoteric. On Yebamot 61a, Rabbi Meir is cited as holding that prepubescents are forbidden to engage in either *yibum* (levirate marriage) or *chalitzah* (rejection of levirate marriage). He has a verse to prove *chalitzah*, but none for *yibum*. Why then forbid *yibum*? Because if either party grows up to be sterile (as defined by halakhah), *yibum* becomes incest. Rabbi Meir's colleagues dismiss this concern on the grounds that most adults are not sterile, and therefore most minors will not be sterile as adults. The Talmud generalizes this dispute. Rabbi Meir consistently "is concerned for the minority," whereas the Rabbis are not, saying "*zil batar ruba*." What justifies the Rabbis?

A host of Amoraim suggest sources. Their shared approach is to find a Torah law that could never be implemented if not for "*zil batar ruba*." For example: the Torah forbids us not to break any of the Pesach sacrifice's bones even after it is slaughtered. Yet a sacrifice is invalid and may not be eaten if the brain membrane was punctured, and the only way to know for certain whether it was intact is to fracture the skull and look! Or: How can the Torah establish penalties for incest, when paternity cannot be proven? Here the Talmudic imagination falters. No one suggests that the law would become enforceable only in the future, after the discovery of DNA.

Rav Ashi is the last to suggest a source. We eat meat even though an animal with a punctured trachea or esophagus is not kosher. How can we know for certain that the slaughterer's knife did not erase all evidence of such a puncture?

Rav Ashi proudly presents this source to Rav Kehana, who upends everything. Maybe we rely on probability **only when we have no choice**? Maybe even Rabbi Meir agrees that we rely on probability when absolutely necessary, for example in order to eat meat. And if you say that Rabbi Meir was vegetarian, surely he agreed that it is possible and necessary to fulfill the command of eating from the Passover sacrifice! The upshot seems to be that where halakhah cannot function without accepting probability, we don't need a source to justify using it. Sources are needed only where probability is a convenience or luxury.

The 13th century commentator RASHBA (Rabbi Shlomoh ben Aderet) challenged the Talmud's claim of necessity. We all agree that the animal's trachea and esophagus may **or may not** have been punctured before slaughter. Why can't we reject probability and still eat meat on the ground that it might not have been punctured? Why not say that everything is permitted unless it is certainly prohibited?

RASHBA's answer is to introduce a second rule: The Torah itself forbids us to perform actions that might or might not be forbidden, unless they are **more likely** permitted than not.

By contrast, RAMBAM held that the Torah **permits** us to perform actions that might or might not be forbidden, unless they are **more likely forbidden** than not. It is the Rabbis who forbid such actions unless they are more likely permitted; or in many cases, much more likely permitted, or in some cases, much, much more likely permitted. RASHBA argues that if RAMBAM is correct, the Talmud's proofs fail.

The basis of RASHBA's argument seems to be that if we reject probability, **everything possible must be treated as equally likely.** So every piece of meat might or might not be from an animal whose trachea was punctured before slaughter; every sexual partner might or might not be your sibling. But why should it be forbidden to eat a Passover sacrifice just because it **might** not be kosher, when it might be kosher?

RASHBA's attack on RAMBAM is therefore really an attack on the Talmud's apparent assumption that the default is prohibition, and probability is necessary to permit cases that are in any way ambiguous. Let's say instead that everything is permitted until it is absolutely, demonstrably, one hundred percent forbidden!

There are areas of halakhah where this may be the case. For example: on the Biblical level, Rav Mosheh Feinstein understood this to be the rule about *mamzerut*, and on the Rabbinic level, Rav Shimon Shkop may understand this to be the case about *orlah* (fruit produced in a tree's first three years) outside the Land of Israel.

However, Rav Shkop finds Rambam's apparent position intolerable on different grounds than RASHBA. How could the Torah leave it acceptable to take spiritual chances, to trust to the odds when it comes to the safety of one's soul?

Rav Shkop draws the analogy to physical safety. Yoma 84b and Ketubot 16b record Rav Yehuda quoting Rav stating that we must act to save a life regardless of the odds, even if that entails violating Shabbat; it follows that we cannot act in ways that put a life at risk. Shouldn't it be at least as prohibited to put a soul at risk? Shulchan Arukh OC 306:14 in fact rules that one must violate Shabbat to save someone from apostasizing.

We can quibble with the analogy. Perhaps committing a single sin is not quite risking one's spiritual life. (Though who is to say which sins are deadly and which merely flesh wounds?) Halakhah permits taking reasonable physical risks for the sake of earning a living, and to participate in what one's society considers normal life. Perhaps that is also true with regard to spiritual risks.

But Rav Shkop's underlying point stands. In most circumstances, Torah doesn't permit eating foods that probably aren't deadly poisons, but might be, so why would it permit meat that probably isn't treif, but might be?

R. Shkop's fascinating solution is to posit that according to Rambam, the Torah does not need to prohibit taking such risks; we will naturally avoid them in the same way that we avoid pointless physical risks.

(Here I need to express my appreciation for Rabbi Alex Ozar's marvelously clear article <u>"These are matters that shatter roofs": R.</u> Shimon Shkop on Law and Normativity More Broadly" (Dinei Yisrael 20), which sent me running to R. Shkop's <u>Shaarei Yosher</u>. R. Ozar argues that R. Shkop sees avoidance of spiritualrisk as an ought, not merely an is, even according to Rambam, even though it is not a formal halakhic obligation. I hope to engage more fully with that understanding in a future installment. For now, I note only that halakhah certainly prohibits taking excessive physical risk, with "excessive" coming into play long before the odds of death and life are even. Former Soviet Roulette is forbidden, period.)

R. Shkop then says something much more radical. He suggests that even according to Rambam, the Torah prohibits actions that might be sinful. But the Torah gave halakhists the discretion to define "might." He draws the analogy to explanations that give the Rabbis discretion over which forms of labor are Biblically prohibited on Chol Hamoed, or which forms of "affliction" are Biblically mandated on Yom Kippur, and in general to the mechanism of "mesaran hakatuv lachakhamim," roughly "Scripture delegated its authority to the Sages."

This position is at least compatible with the idea that every possibility is equally likely, and probability is a human imposition on the world. In this reading, our Talmud passage is not asking where the Rabbis derived *zil batar ruba* from, but rather how we know that they derived it. The answer is: We can know this because they never banned eating meat, or declared the mitzvah of eating the Passover sacrifice to be purely hypothetical.

Another way of thinking about it is this: every possibility exists. There are universes where the animal is kosher, and universes where its esophagus really was punctured just where the knife went through.

Or maybe these universes exist only until halakhah chooses. But here, halakhah delegates its authority to halakhists. When they decide that we can rely on the odds that the food is kosher, it really is kosher, because they make our world one where the animal's throat was whole. Hashem looks at our interpretations of Torah and creates the world. (A similar position can be found in the introduction to <u>Shiurei Da'at</u>.)

The problem is that reality sometimes bites; we find out that we were wrong. Unbeknownst to us, x-rays at the Pesach sacrifice's last checkup revealed a hole in the esophagus. How can this be, if our Torah choices determined that there was no hole?

Maybe the Rabbis chose not to fully determine reality, to allow themselves to be wrong on occasion. Follow them, and you will live in a matching universe **almost** every time. But not every time.

Why would the rabbis choose that way? Because in a world where following the rules always works, it is too easy to think that the point of living is to follow the rules, like paint-by-numbers artists perfectly painting within the lines without ever seeing the overall picture. A truly perfect halakhah would make us think of moral development as superfluous.

Deborah Klapper suggests a different reason. Not everything is subject to probability; sometimes reality just is. If halakhah and reality always corresponded in probabilistic cases, we might mistakenly conclude that they always corresponded, period, and refuse to correct even the most egregious factual errors.

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