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SURVIVING ENVIRONMENTAL CHANGE: WHICH HALAKHOT MUST WE BRING ABOARD THE ARK?

By Rabbi Aryeh Klapper

"A fundamental failing of the evolutionary analogy may be that halakhic change is not, cannot be, and ought not be blind. Modern Orthodox halakha should be seen instead as the product of an expertly supervised breeding program." I wrote that some years ago in "Does Halakhah Evolve? Thoughts on Speciation and Sectarianism" (see https://www.jewishideas.org/node/2632/pdf). This week I'll try to broaden the modified analogy. My opening contention is that Halakhah is in regular danger of extinction.

The threat I have in mind is not from anti-Semitism, horrible as that can be, nor from the assuring temptations of modernity. Rather, it is from ordinary legal climate and environmental change. Please allow me to explain.

Law becomes real when rules are applied to facts. But "fact" is a tricky term here; for the purposes of law, the facts generally are what the law says they are. "Legal fictions" are actually legal facts, although they do not conform to real-world facts.

So, for example: The law says that the child of a woman's adulterous sexual relationship is a *mamzer*, and the science of DNA identification may tend to indicate that person X is the child of a woman's adulterous relationship. But the halakhah may use its own epistemology to determine that person X is actually the child of his mother's husband. That becomes a legal fact, and the law is then applied to rule that X is not a mamzer. The halakhah of mamzerut can choose to make itself extinct by developing an epistemology that invariably concludes that the child of a married woman is her husband's.

Now imagine a world in which reproduction is completely separated from the heterosexual act, so that all pregnancies carried to term occur via in vitro fertilization. At that point hilkhot mamzerut go extinct **unless we choose to extend the laws of mamzerut to children conceived in vitro, even if there is little or no precedent for such a claim, or else choose to establish a legal fiction which defines some real-world children as conceived via a heterosexual act.** The extinction would be caused by a change in the real-word environment of halakhah.

To make my point plainer: In such a world, a person without consciousness of historical change could declare that "The mamzer never was and never will be". That statement would not reflect an active choice to make the law extinct, but rather a failure to make an active choice that could sustain the law's practical applicability.

In the case of mamzerut, I think most of us would morally celebrate the law's real-world demise. We would not have fast days praying for its resurrection, any more than we do for the Rebellious Son or Idolatrous City.

We might also celebrate poskim who succeeded in making a presumption of nonsexual conception a part of contemporary halakhic epistemology even before we fully entered Brave New World. But my point is that halakhah can become extinct by inaction as well as action.

Outside of mamzerut, I think it's fair to say that halakhah has a bias toward treating real-world facts as legal facts. So, when the real-world facts change, whether because of actual physical changes or because of new evidence, halakhah is often in danger of extinction.

One clear contemporary example is the kashrut of metal vessels. It's well-accepted at this point as a real-world fact that metal does not absorb flavor in the manner that seems to be assumed by past halakhah. This has the potential to make many separating and koshering practices extinct. One counterweight is that many other, and perhaps more fundamental, kashrut practices depend on legal facts that may no longer seen as real-world facts, e.g., the origin of anisakis worms in fish or the effect of salting on the blood in freshly slaughtered meat. So, kashrut as a whole may instead become more resistant to the pressure of reality on Torah.

These reflections were prompted by cases related to the *chatzer* that came up in the course of the 2022 Summer Beit Midrash. A *chatzer* is perhaps best translated into English as "courtyard". In Talmudic times, it appears to have been an

enclosed space that more than one dwelling opened onto and shared exclusive use of. *Chatzer*s in turn opened onto *mavui*s, or alleyways, which were exclusive to the residents of those *chatzers*. *Mavui*s might open onto larger alleyways, but eventually they would reach a street or plaza that was seen as in the public domain, meaning that its use was given equally to all residents of the city, no matter how close or distant their *chatzer* might be from it, or how many alleyways they would have to traverse in order to reach it.

A reasonable Hebrew translation of "public domain" is *reshut harabim*, which is the term for spaces in which it is Biblically prohibited to carry an object more than 4 amot on Shabbat. In spaces where the prohibition is Rabbinic, it is sufficient to put up walls consisting of giant, horizontal, imaginary doorways (*tzurot hapetach*). The space is then considered enclosed, and most such spaces revert to being considered private domains = *reshut hayachid*. A Biblical *reshut harabim* requires the enclosure to conform much more closely to real-world facts, e.g., to have actual doors in its doorways, and that they actually be closed on occasion.

However - the Rabbis also prohibited carrying between spaces with different ownerships. Thus, one may not carry from a house into the *chatzer* it shares with neighbors, or from a *chatzer* into a *mavui* it shares with other *chatzer*s. However – the rabbis also provided a solution. The members of a *chatzer* can join together to create an *eruv*/blending. This is a legal fiction by which the existence of a nominal amount of shared food designated for the purpose declares the entire space to have unified ownership. A similar practice called "alleyway partnerships" = *shitufei mavo'ot* enables the same thing one level up.

In the Jewish communities of Medieval Europe, or at least those around the Raavyah, it seems that houses opened in front directly onto at the least alleyways. This could have radically altered the Shabbat experience – nothing could be carried outside the front of the house. In response, the rabbis declared that the spaces the houses opened onto would be treated as *chatzer*s. The effect of this was to preserve a perhaps crucial aspect of the Shabbat experience, but at the same time, to make the laws of *shitufei mavo'ot* practically extinct, since these *chatzers* opened onto public streets. Moreover, in our days, almost all houses open directly onto streets that are open equally to all city residents (I'm not clear on whether this was already so in Raavyah's time.) So, the capacity to carry out of front doors might be eliminated if we pierced this legal veil (although "eiruvs" nowadays tend to rely on communal purchases of all outdoor and indoor space "for Shabbat-carrying purposes" from a governmental entity, which seems to automatically create single ownership, so I'm not clear on the extent to which the communal food has legal effect.)

In a few contexts, some Tannaim and Amoraim also treat the house-*chatzer* combination as having a unique legal impact. For example, the definition of a walled city is that it must have three *chatzers* each containing at least two dwellings. One can argue for treating this as defining a city generally, even when there is no wall. For example: A person's Shabbat techum is defined as 2000 amot beyond their city. If they are in a space that is inhabited but not walled, is it a city? A standard answer is that it depends on whether their space (how their space is delimited is a topic for another day) contains three *chatzeirs* each containing at least two dwellings.

But – for this purpose, I have not found anyone who considers treating our streets as *chatzeirot*. The gap between legal and real-world fact would apparently be too great. Chazon Ish even actively opposed treating multi-dwelling buildings as having indoor *chatzer*s. Since few contemporary cities have a solid boundary such as a wall, it might follow that the standard *techum* for a contemporary city dweller is 2000 amot from their own door, since the "city" does not match what halakhah requires. Yet I am not aware of any posek who treats this possibility as more than a straw man. Instead, they actively seek definitions that allow the halakhic city to map onto today's actual cities. Here again, inaction might lead to the practical extinction of aspects of *hilkhot techumin*.

An ongoing conversation in this summer's wonderful SBM was whether halakhic choices could be made with the intent of maintaining the practical existence of hilkhot techumin, both generally and for specific people or areas. For example: would a halakhic position be considered disproven if it led to the entire Eastern Seaboard being one large techum, since that would make it practically irrelevant for millions of Jews? If yes, what is the maximum size? (Noting that the rabbis already permitted traversing a city "as large as Antioch"!). I noted that the Book of Jonah describes Nineveh as a three-day's journey, but they noted that archeology has not yet found evidence of it being anywhere near that large.

I encourage you to think of other areas in which we need to make choices in order to continue the practical existence of specific halakhot or areas of halakhah, and thoughts about how we should go about deciding how to make those choices.

Shabbat shalom! Please watch this week for a special email announcing my new book, an associated podcast from the 2022 SBM Fellows, and more.