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DID AVRAHAM EXPERIENCE A GRATIFYING FRISSON AT THE AKEIDAH?

by Rabbi Aryeh Klapper

In the opening essay of his 2026 collection "So Ordered", Supreme Court Justice Samuel Alito critiques an approach he calls "insecure originalism". I recognized a younger version of myself in his portrait of the insecure, and I suspect that many of my friends don't see much change.

Alito describes 'insecure originalists' as worrying

> "that they are subconsciously engaged in 'results-oriented' decision-making and 'judicial activism' in the service of their own policy preferences".

A wonderful friend and colleague recently asked how confident I was that my recent essays on Torah political theory weren't exactly that. I wasn't bothered by the question, which suggests that I have in fact changed.

I'm presenting Alito's critique here for three reasons. First, it may help me explain aspects of my own approach to halakhic decisionmaking. Second, maybe he's correct! (in which case I should probably change more than I have). Third, maybe those who dislike Alito's rulings will question whether they **should** agree with the critique (and maybe it's a good thing I haven't changed that much).

Alito asserts that this worry has a psychological impact that he clearly sees as perverse:

> they may actually welcome occasions when their originalist analysis leads to results they dislike, When that occurs, they experience a gratifying frisson, a brief catharsis in which their anxiety about having unconsciously succumbed to the temptation of results-oriented decision-making is released."

In contemporary Jewish discourse, Alito's "gratifying frissons" occur in "Akeidah moments". These moments, when poskim make decisions (or layfolk perform actions) that violate principles they otherwise hold dear, let them be confident that their lives in general reflect a genuine sense of being bound by Torah rather than a happy coincidence in which Torah lets them attribute transcendent meaning to self-expression. But poskim in this metaphor are Avraham, not Yitzchak, and it's not ok to sacrifice someone else for your own frissons.

Alito grounds his position in faith that our Constitution was not written by idiots and generally makes sense. Therefore,

> "Twenty-first century originalists should shed this insecure mindset. When originalist analysis seems at first to lead to a result that makes no sense, sound originalist judges should go back and check their work."

Poskim can argue similarly that since G-d is good, and halakhah is the will of G-d, any interpretation of halakhah that yields ethically wrong results is presumptively wrong. I strongly agree that poskim should go back and check their work when that happens. But what if the answer comes out the same way after many rechecks?

Alito himself of course belongs to the originalist school of Constitutional interpretation, albeit to the secure branch. Originalism has no direct counterpart in contemporary Halakhah. The reason for this is simple: Rabbinic Judaism defined itself a millennium ago in opposition to Karaism, which was a form of originalism.

Now we might have argued that the Karaites were wrong because they did originalism the wrong way, or because they did it badly, but instead we argued that that the boundaries of the practical legal meaning of the Written Torah are determined by our Tradition/Oral Torah. With regard to halakhah, we are Catholics, not Lutherans. We do not pretend to interpret the Written Torah in a cultural vacuum.

It's crucial to understand that originalism can yield more change over time than anti-originalism. An originalist methodology has no constraint on change other than the intellectual constancy of its interpreters. An originalist is committed only to language, whereas a traditionalist is committed to content.

Consider for example Rashbam's famous report that his grandfather Rashi admitted that his commentary on Chumash would benefit from rewriting in light of the "*peshatim hamitchadshim bekhol yom*", the new interpretations arising every day. Those interpretations arose in his time because scholars were applying an originalist methodology of interpretations to Torah. It's no accident that these scholars quoted Karaite interpretations, sometimes even with approval. The law remained stable only because these originalists/*pashtanim* agreed that the outputs of their method were not relevant to law.

A hypothetical originalist *posek* nowadays might consider an argument on philological grounds that the term "*mamzer*" in the Torah refers to an ethnicity rather than to children born of adultery/incest, or on sociohistorical grounds that the

prohibitions against male-male homosexual relations in Vayikra apply only to relationships of dominance and submission. These would certainly be radical changes. But in practice, regardless of the intrinsic intellectual merits of those arguments within their own disciplines, or of whether one considers them "*pshat*", these interpretations have no direct relevance to actual poskim once it is conceded that the Rabbinic tradition rejected them.

However, originalists about Constitutional interpretation need not take the same approach to statutory interpretation. Conversely, poskim may have strong originalist tendencies with regard to one or more layer of the Rabbinic tradition. It may also be possible to find poskim who are originalists about the Torah when legal questions come up for which there is no direct authoritative traditional precedent in Chazal.

A core advantage and motivation of originalism is to limit the effect of subjective moral and political commitments on the law, in other words to generate precisely the conflicts about which "insecure originalists" are insecure. Originalist judges/*poskim* therefore inevitably confront situations in which their personal moral or ethical intuition conflicts with what they see as any plausible account of the law. What should they do in such cases?

Consider Lot in Sodom. Despite the mob scene at Lot's house, Chazal understand the evil of Sodom to be a function of the law rather than of lawlessness. They present the mob as protesting Lot's hypocrisy in serving as a judge while breaking the law against treating guests well.

Because Chazal say that Lot had just been appointed judge that very day, however, we can't know whether he in fact intended to be a hypocrite. Perhaps Lot planned to use his position to subvert the city's evil laws.

Would he have been justified in using his position that way? How should Lot have ruled in cases where Sodom's law, as he understood its intent, violated ethical or moral principles (perhaps learned from Avraham) that he held dear?

An easy answer is: He should have resigned. But absent a revolution, resigning would have left all the good people in Sodom, or (since that might have been a null set) at least all the guests in Sodom, defenseless against the law.

So perhaps Lot should have done what was best from a utilitarian perspective, without regard to whether he was interpreting the law with intellectual integrity.

That approach makes sense to us because we know that Sodom's legal system was absolutely evil. But Lot may have perceived Sodom as a generally excellent place to live with some moral issues to be worked out (perhaps specifically in the areas of immigration and economic inequality). Maybe that is the most that can reasonably be expected from ordinary people living in evil societies, until they are directly harmed or threatened by that evil.

Chazal's depiction of Sodom is an attempt to remind themselves and us that the rule of law/halakhah per se does not make a society good. Most of us do not perceive our society as fundamentally evil, and hopefully we are correct – it's hard to know in an age without prophecy. But inevitably, some legal outcomes grate against our moral or ethical sensibilities, and at least some of those should grate against the moral and ethical sensibilities of our poskim as well. How do we want our poskim to rule in such cases?

I am to a significant extent an originalist about post-Biblical layers of halakhic precedent. So I'm interested in how Constitutional originalists address these conflicts.

The most doctrinaire among the Constitutional originalists take the approach that halakhists call *yikov hadin et hahar* = "let the law pierce the mountain", meaning that interpretation must ignore any considerations other than the correct meaning of the text. Moral conflicts can be resolved by amendment or legislation, as the case requires. This is a hard sell with regard to Constitutional issues, because amendments are rare and procedurally very challenging; and similarly for halakhic issues. Halakhists may have the additional option of listening for angelic voices, but such voices are rare and difficult to authenticate.

The extreme alternative to originalism is "living Constitutionalism", which argues that the Constitution necessarily changes meaning over time in response to the changing manners, mores, and material experience of the American people.

One might refer to this approach as "American law as a civilization", and connect it to Mordechai Kaplan's theory of Reconstructionism (regardless of the extent to which one sees the contemporary denomination as related to that theory). A critique of that approach is that its judges will inevitably end up imposing their subjective morality on the citizenry, even if in principle they should be constrained by consensus, or alternatively, that they have no religious or political basis for resisting legal interpretations supported by an evil consensus.

The crucial insight of that critique – parallel to my claim above that originalism does not mean less change – is that over time, living Constitionalism is no more likely than originalism to produce results that liberals find congenial. This is a mistake made within halakhah as well, although an obvious difference is that living Chazalists in theory have the option of seceding from the existing halakhic community and form their own denomination when the originalists frustrate them. (Whether/when that is practical or wise is a crucial issue irrespective of the method's legitimacy.)

In contemporary halakhic culture(s), this kind of insecurity seems vastly more common on the "left", whereas Alito suggests that in Constitutional interpretation, the problem occurs mostly on the "right". This suggests to me that it is a mistake to believe that a method can be reliably associated with outcomes. Perhaps moderate insecurity would be a good thing all round. I want Justice Lot to resist in Sodom, but not by sacrificing his daughters.

Shabbat shalom!

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