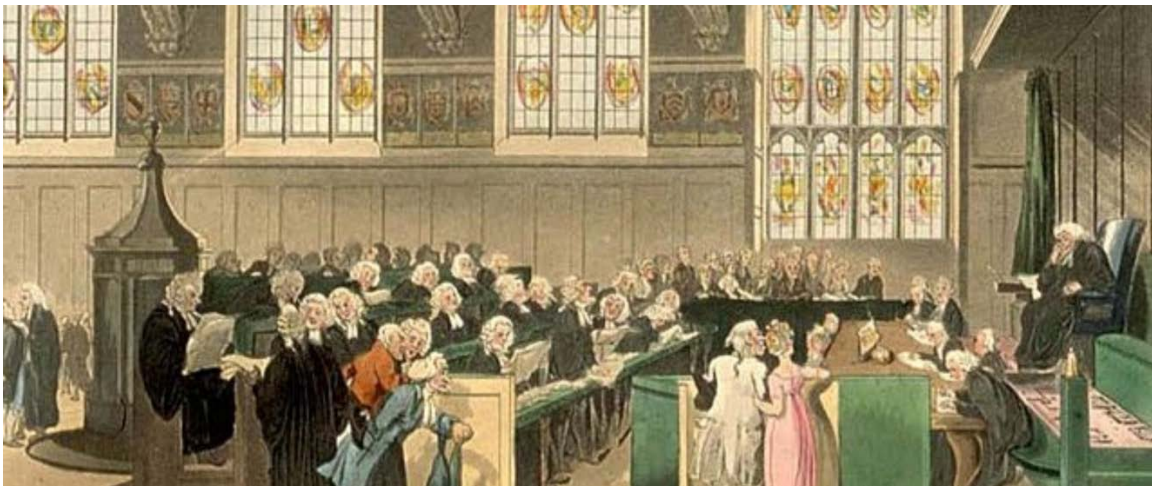
Daf Ditty Yevamot 90: שֵׁב וְאַל תַּעֲשֶׂה



אמר ליה בעאי לאותובך ערל הואה ואזמל
סדין בציצית וכבש עצרה ושפר ולולב
השתא דשנית לן שב ואל תעשה לא מיעקר
הוא כולהו נמי שב ואל תעשה נינהו ת"ש
°אליו תשמעון "אפילו אומר לך עבור על
אחת מכל מצות שבתורה כנון אליהו בהר
הכרמל הבל לפי שעה שמע לו שאני התם
דכתיב אליו תשמעון וליגמר מיניה מיגרד
מילתא שאני : ת"ש *בטלו מבוטל דברי

Whether the Chachamim possess the authority to enact a גזירה that will override a דאורייתא

סוֹף סוֹף קָמִתְעַקְּרָא אֲכִילַת בָּשָׂר, וּכְתִיב: ״וְאָכְלוּ אֹתָם אֲשֶׁר כֻּפַּר בָּהֶם״, מְלַמֵּד שֶׁהַכֹּהֲנִים אוֹכְלִים וּבְעָלִים מִתְכַּפְּרִים! אֱמַר לֵיהּ: שֵׁב וְאַל תַּעֲשֶׂה שָׁאנֵי.

The Gemara raises a difficulty: **Ultimately,** the Torah mitzva of **eating** the **meat** of this offering **is uprooted, and it is written:**

לג וְאָכְלוּ אֹתָם אֲשֶׁר כֻּפַּר בָּהֶם, לְמַלֵּא אֶת-יָדָם לְקַדֵּשׁ אֹתָם; וְזָר לֹא-יֹאכַל, כִּי-קֹדֶשׁ הֵם.	**33 And they shall eat those things wherewith atonement was made, to consecrate and to sanctify them; but a stranger shall not eat thereof, because they are holy.**

Ex 29:33

"And they shall eat those things with which atonement was made"

This verse **teaches that the priests eat** the offering, **and** the **owner** thereby **gains atonement. He said to him:** The case of **sit and refrain from action [*shev ve'al ta'aseh*] is different.**

In other words, the Sages can uproot a Torah mitzva by instructing one to sit and **refrain from action,** i.e., to remain passive and do nothing. They cannot, however, uproot a mitzva by telling him to perform an action.

RASHI

שב ואל תעשה - לאו עקירה היא כגון אכילת בשר עשה היא ואמור רבנן שב ואל תאכל לאו עקירה בידים הוא אלא ממילא היא מיעקרא אבל תרומה דקאמר לא עשה ולא כלום ומפקת לה לחולין עקירה ממש היא:

Steinzaltz

[לו]: **שב ואל תעשה שאני** [שונה]. שיש לומר כי בידי חכמים רשות לעקור מצוה מן התורה על ידי ״שב ואל תעשה״, כלומר, על ידי מניעה מלעשות דבר, אבל אין בכוחם לעקור מצוה בעשיית מעשה בפועל.

Tosafos

תוספות ד"ה כולהו נמי שב ואל תעשה הוא

Tosfos explains why Sadin is Shev v'Al Ta'aseh.

וא"ת סדין בציצית היכי הוי שב ואל תעשה דכי מכסה בטלית דבת חיובא היא ואין בו ציצית הרי עובר בידים

Tzitzis on a linen garment is not Shev v'Al Ta'aseh! If one covers himself with a Talis that is obligated, and it has no Tzitzis, he overtly transgresses!

וי"ל דבשעת עיטוף אכתי לא מיחייב עד אחר שנתעטף

At the time he puts it on, he is still not obligated until he is wrapped in it.

דכסותך משמע שאתה מכוסה בה כבר ואשר תכסה בה אתא לדרשא אחרינא כדאמרינן במנחות (דף מא. ושם)

"Kesuscha" connotes that you are already covered in it. "Asher Techaseh Bah" comes for a different Drashah, like we say in Menachos (41a);

ולאחר שנתעטף דמתחייב שב ואל תעשה הוא

After he is covered, and is obligated, it is Shev v'Al Ta'aseh [not to affix Tzitzis].

וא"ת בפרק מי שמתו (ברכות כ. ושם) משמע כשהוא לבוש כלאים ואין פושטן לא חשיב שב ואל תעשה אלא עמוד ועשה

In Berachos (20a), it connotes that when he is wearing Sha'atnez and does not remove it, this is not considered Shev v'Al Ta'aseh, rather, an overt act!

וא"י דשאני כלאים דעיקר האיסור בשעת לבישה שלבש באיסור

Sha'atnez is different, for the primary Isur is when he puts it on. He put it on b'Isur;

אבל כאן לא מתחייב עד אחר שנתעטף כדפרישית

Here, there is no Chiyuv until after he is covered, like I explained.

ומיהו קשה מדמברכינן להתעטף בציצית משמע דבשעת העיטוף עביד מצוה

We bless Lehis'atef b'Tzitzis. This connotes that at the time of covering himself, he does the Mitzvah!

ומלשון להתעטף מוכיחות נמי [בה"ג] (הגהה בגליון) דקיימא לן בציצית דחובת גברא הוא.

Also, from the word Lehis'atef, Bahag proved that we hold that Tzitzis is an obligation on the person [wearing the garment. There is no Mitzvah on the garment, i.e. one need not put Tzitzis on a garment he is not wearing.

עקירה occurs only with a מעשה, performing an action contrary to the Torah. However there is no עקירה with שב ואל תעשה, when abstaining from performing an action.
Therefore, in an instance in which מדאורייתא there is a לא תעשה, a prohibition to do a certain action,
אין כח ביד חכמים לעקור דבר מן התורה
The Chachomim are NOT authorized to initiate a גזירה for תעשה, to perform the action contrary to the Torah.
However in an instance where מדאורייתא there is a עשה, an obligation to perform an action,
יש כח ביד חכמים לעקור דבר מן התורה
The Chachomim ARE authorized to initiate a גזירה for שב ואל תעשה, to abstain from performing that action of the Mitzvah.
Therefore, the Chachomim said אסור באכילה, which is a שב ואל תעשה, to abstain from eating the בשר
However, in the original case of רב חסדא, in the previous Daf, where the Chachamim voided the קדושת תרומה and the זר will eat it, that would be an עקירה בקום ועשה, an active uprooting of a דאורייתא.
The Chachamin cannot do that.

אֲמַר לֵיהּ, בְּעַאי לְאוֹתוֹבָךְ: עֲרֵל, הַזָּאָה.

Rav Ḥisda **said to** Rabba: **I wanted to raise a difficulty against you** from the *halakha* of **an uncircumcised man.** The Sages decreed that one who converts on the eve of Passover may not partake of the Paschal lamb, due to his ritual impurity.

According to Beit Hillel, one who separates from the foreskin by being circumcised is ritually impure like one who separates from the grave (*Pesaḥim* 92a). This is the *halakha* despite the fact that by Torah law he is obligated to bring the offering. Rav Ḥisda continued: And I also thought of asking from the case of **sprinkling** the waters of a purification offering for one who became ritually impure through contact with a corpse, as the Sages rendered it prohibited for one who is impure to receive the sprinkling on the eve of Passover that occurred on Shabbat, although this prevents him from partaking of the Paschal lamb.

וְאִזְמֵל, סָדִין, בְּצִיצִית.

And I was likewise going to raise a question from the case of a circumcision **knife,** which the Sages decreed may not be carried on Shabbat, despite the fact that this entails the neglect of a Torah mitzva.

And I also wanted to raise a question from the case of a linen **cloak, on** which the Sages did not allow one to place **ritual fringes** made of wool. This is a decree that was issued lest he do the same with a garment worn only at night, which is exempt from fringes, and therefore this would be a mixture of wool and linen that is forbidden, although this means that he is unable to fulfill the mitzva of ritual fringes.

וְכִבְשֵׂי עֲצֶרֶת, וְשׁוֹפָר,

And likewise I wanted to mention a difficulty from the case of **the lambs sacrificed on *Shavuot*.** When the festival of *Shavuot* occurs on Shabbat, the Sages rendered it prohibited to sprinkle the blood of its sacrificial lambs if the offerings had not been slaughtered with the proper intention, despite the fact that the sprinkling itself is not prohibited by Torah law.

And similarly, there is a difficulty with regard to the *halakha* of the ***shofar*,** which is sounded on Rosh HaShana, and yet the Sages rendered it prohibited for it to be blown on Shabbat, lest one carry it four cubits in the public domain.

וְלוּלָב. הַשְׁתָּא דְּשַׁנְּית לַן ״שֵׁב וְאַל תַּעֲשֶׂה״ לָא מִיעֲקַר הוּא, כּוּלְּהוּ נָמֵי ״שֵׁב וְאַל תַּעֲשֶׂה״ נִינְהוּ.

And finally I wished to raise a difficulty from the case of **a *lulav*,** which may not be carried on the first day of *Sukkot* that occurred on Shabbat, for the same reason the Sages rendered it prohibited to sound the *shofar* on Rosh HaShana that occurs on Shabbat.

However, **now that you have resolved for us** that an action defined as a case of: **Sit and refrain from action, is not** considered **uprooting, all these are also** cases of **sit and refrain from action.**

One is required to heed the words of a Navi
אפילו אומר לך עבור על אחת מכל מצות שבתורה
He is authorized even to transgress one of the Mitzvos momentarily
כגון אליהו בהר הכרמל הכל לפי שעה
As in the instance of אליהו בהר הכרמל, who authorized bringing Korbanos בחוץ
שמע לו
His orders must be heeded in this instance as well.

תָּא שְׁמַע: ״אֵלָיו תִּשְׁמָעוּן״ — אֲפִילּוּ אוֹמֵר לְךָ: עֲבוֹר עַל אַחַת מִכָּל מִצְוֹת שֶׁבַּתּוֹרָה, כְּגוֹן אֵלִיָּהוּ בְּהַר הַכַּרְמֶל, הַכֹּל לְפִי שָׁעָה — שְׁמַע לוֹ.

The Gemara suggests: **Come** and **hear** another proof. The verse states with regard to a true prophet:

טו נָבִיא מִקִּרְבְּךָ מֵאַחֶיךָ כָּמֹנִי, יָקִים לְךָ יְהוָה אֱלֹהֶיךָ: אֵלָיו, תִּשְׁמָעוּן.	**15** A prophet will the LORD thy God raise up unto thee, from the midst of thee, of thy brethren, like unto me; unto him ye shall hearken;

Deut 18:15

"To him you shall listen" From here it is derived that **even** if the prophet **says to you: Transgress one of the mitzvot of the Torah, for example,** as in the case of **Elijah at Mount Carmel,** who brought an offering to God on that mountain during a period when it was forbidden on pain of *karet* to sacrifice offerings outside the Temple, with regard to **everything** that he permits **for** the requirement of the **hour,** you must **listen to him.** This indicates that a Torah mitzva can indeed be uprooted in an active manner.

RASHI

כגון אליהו בהר הכרמל - שהקריב בבמה ושעת איסור הבמות היתה ואיכא כרת דשחוטי חוץ וכרת דהעלאה:

Steinzaltz

שבתורה, כגון אליהו בהר הכרמל שהקריב קרבן לה' בזמן שיש איסור כרת להקריב קרבנות מחוץ לבית המקדש, **הכל** אם מתיר **לפי שעה — שמע לו.** משמע שעוקרים דבר מן התורה על ידי מעשה!

TOSAFOS

תוספות ד"ה וליגמר מיניה

Tosfos discusses how we could have learned from Eliyahu

וא"ת שאני התם דעל פי הדבור היה מתנבא לעבור והיכי נגמר מיניה לעבור משום תקנתא דרבנן שלא על פי הדבור

There is different, for Hash-m told [Eliyahu] through prophecy to transgress. How can we learn from there to transgress due to an enactment of Rabanan, not based on Hash-m's word?!

ונראה דכיון דעל פי הדבור שרי משום צורך שעה הוא הדין שלא על פי הדבור שהרי אין נביא רשאי לחדש דבר מעתה כדנפקא לן במגילה (דף ב:) מקראי

Since through prophecy it is permitted for a current need, the same applies not through prophecy, for now [after Moshe], a prophet cannot change [Torah law], like we learn in Megilah (2b) from verses.

וא"ת דאמר בפרק אלו הן הנחנקים (סנהדרין פט: ושם) היכא דמוחזק שאני

It says in Sanhedrin (89b) that an established prophet is different.

דאי לא תימא הכי אברהם היכי שמע ליה יצחק בהר המוריה אליהו בהר הכרמל היכי סמכי עליה ועבדי שחוטי חוץ אלא היכא דמוחזק שאני

If you would not say so, how did Yitzchak heed Avraham [to consent to be a Korban] on Har ha'Moriyah? [And] how did others rely on Eliyahu and slaughter a Korban outside the Mikdash? (Aruch l'Ner - the verses say that Eliyahu offered it. The Gemara understands that others slaughtered it.)

ובאליהו למה לן משום דמוחזק הא משמע דאפילו בלא נביא שרי נמי לבית דין לעבור משום מיגדר מילתא

Why must we say that Eliyahu was an established prophet? [The conclusion of our Sugya] connotes that also Beis Din may transgress to fence a matter (prevent greater transgressions)!

ואר"י משום דאיתחזק בנביאות היו סומכים עליו במה שהיה מבטיח בירידת אש

Because he was established to be a prophet, they relied on his promise that fire will come down;

ושוחטים על הבטחתו קדשים בחוץ שבזכותו ותפלתו תרד אש מן השמים ויהיה מיגדר מילתא שיתקדש שמו של הקב"ה ברבים וע"י כך יחזרו ישראל למוטב.

They slaughtered Kodshim b'Chutz based on his promise that in his merit and Tefilah fire will descend from Shamayim, and this will fence a matter; Hash-m's name will be sanctified in public, and through this Yisrael will change their ways for the better.

Although the Korbanos of אליהו בהר הכרמל involved performing a מעשה contrary to the Torah, which is in fact a עקירה בקום ועשה?
We cannot learn from אליו תשמעון, because
מיגדר מילתא שאני
That was a unique temporary need to stem the tide of people being lax in Avodah Zarah. So too, only when there is this specific need of מיגדר מילתא, do we say
יש כח ביד חכמים לעקור דבר מן התורה
But in a general גזירה we say
אין כח ביד חכמים לעקור דבר מן התורה

שָׁאנֵי הָתָם, דִּכְתִיב: "אֵלָיו תִּשְׁמָעוּן". וְלִיגְמַר מִינֵּיהּ! מִיגְּדַר מִילְּתָא שָׁאנֵי.

The Gemara answers: **There it is different, as it is written: "To him you shall listen,"** which means that it is a positive mitzva to obey a prophet, and a positive mitzva overrides a prohibition. The Gemara asks: **And let him derive from** this case a principle that the Sages have the same power as a prophet.

The Gemara answers: **Safeguarding a matter is different.** Since Elijah acted with the aim of preventing the Jewish people from worshipping idols, it was temporarily permitted for him to override a mitzva, in order to strengthen Torah observance with regard to a particular matter in which the people are lax.

The Chachomim may authorize punishments which are
not מדאורייתא
ולא לעבור על דברי תורה
אלא לעשות סייג לתורה
Since their intentions are not to violate the Torah, but
rather לעשות סייג לתורה, to fortify the Torah.

Summary

Rabbinic Halacha Over Torah Law: When and Why?[1]

Can rabbinical law uproot Torah law? The rabbis continue to argue this question.

Today they begin with a case where one provides payment in teruma to a kohen. The teruma is ritually impure. The rabbis consider intentionality: did he mean to give ritually impure (ie. forbidden) teruma to the priest? Or was it an accident? The rabbis are stringent in their rulings: the teruma must be replaced by ritually pure teruma. Torah law is more lenient. A kohen is even allowed to marry a woman using this ritually impure payment! And so, the rabbis argue, this is a case where rabbinical halacha uproots Torah halacha.

The Gemara presents a second case where blood that has been intentionally sprinkled on the altar is ritually impure. What should be done to amend for this transgression? Again, the rabbis consider whether or not intentionality is of importance. Does sprinkling blood on the breastplate of the High Priest offer acceptance? They walk us through the power of the breastplate according

[1] http://dafyomibeginner.blogspot.com/2015/01/yevamot-ii-90-rabbinic-halacha-over.html

to Torah law. It can offer acceptance for transgressions concerning blood, meat, fat; unwitting, accidental and intentional sins; individual or community transgressions. And yet the Sages teach that the breastplate cannot offer acceptance for this case (but the offering cannot be eaten). Perhaps atonement, but not acceptance. This is because one is asked to *shev v'al ta'aseh*, to sit and refrain from action, rather than to complete the actions specified in the Torah.

Rav Chisda raises four questions that challenge the idea that 'sitting and doing nothing' continues to follow Torah law. He believes that the rabbis are uprooting Torah law with some of their interpretations. This must have been a particularly difficult argument, as the rabbis were attempting to establish their undisputed authority over Jewish law. They were in direct conflict with groups like the Kutim, who followed Torah law without the rabbinical methods of interpretation. Could Rabbi Chisda's comments have put him into conflict with his own colleagues?

The Gemara offers proofs to address Rabbi Chisda's arguments. The proofs address issues including temporary halachot and whether or not a get, divorce contract, offered by a rabbinical court has any meaning since the Torah stipulates exactly when a get should be issued. The most difficult proof, in my eyes, is the proof that demands we build fences around Torah law. We safeguard the Torah.

The two examples that follow demonstrate instances where Torah law is followed but people are punished because *sh'hasha'ah tzricha*, the hour required it. Our notes teach us that this is thought of as amputating a limb to save the body. The first example is of the punishment of a man who rode a horse on Shabbat. The second is of a man who cohabited with his wife in full view. In both cases, the rabbis administered physical punishment to deter others in the community from participating in these actions.

This tradition is alive and well in the larger Jewish community. One of the reasons that my husband does not wear a kippa is that he does not comply with Jewish dietary laws. He does not want to give the impression that his behaviour is "Jewish" behaviour when he eats non-kosher meat, for example. And so he does not wear a kippa at work or on the street. Is this version of Judaism healthy for our religion because it 'keeps the body alive'? Or are we preserving a 'body' that is not, in fact, representative of 'authentic' Judaism?

I know that I am very deeply Jewish in just about every sense even though I am not compliant with orthodox halacha. At the same time, I still have within me that idea that the orthodox have some sort of monopoly on proper Jewish practice.

We end ***our daf*** with quick explanations of our Mishna. The comments teach us that

- men are allowed to defile themselves for their FIT wives;
- sometimes the rabbis encourage men to dislike their wives or nullify her vows to encourage him to divorce her;
- a wife's wages are her own unless she has no rights to her husband's food, for example, and thus she must be allowed to pay for her sustenance.

PROOF THAT THE CHACHAMIM ARE EMPOWERED TO UPROOT A TORAH LAW

Rav Mordechai Kornfeld writes:[2]

The Gemara continues its attempt to prove that the Rabanan have the authority to uproot a law written in the Torah. The Gemara cites a Beraisa which discusses Tashlumei Terumah -- compensation paid by a Zar for deriving personal benefit from Terumah. In the case of the Beraisa, a Zar ate Terumah Tehorah and intentionally paid Terumah Teme'ah to the Kohen as compensation. Rebbi Meir maintains that his payment is not valid, "Ein Tashlumav Tashlumin." The Chachamim disagree and rule that his payment is accepted, but he must pay a second time with Terumah Tehorah.

The Gemara proves from Rebbi Meir's opinion that the Rabanan have the authority to uproot a law written in the Torah because, mid'Oraisa, a payment of Terumah Teme'ah is a valid payment, and yet the Rabanan disqualified it. The enactment of the Rabanan goes so far as to invalidate a Kidushin which the Kohen performed with the payment, and the woman whom he betrothed is *not* Mekudeshes (and she may marry another man and does not need a Get from the Kohen).
TOSFOS (DH Azil) questions this proof:

(a) Why does the Gemara infer that the Rabanan have the authority to uproot a Torah law from the fact that the Kidushin which the Kohen performed with the Terumah Teme'ah does not take effect? There is a far more obvious proof that the Rabanan may uproot a Torah law. Normally, the fruit paid as compensation by a Zar for inadvertently eating Terumah becomes Terumah mid'Oraisa itself. Here, Rebbi Meir states that mid'Rabanan the payment is not valid, and thus the decree of the Rabanan prevents it from becoming Terumah. That is, the Rabanan removed the status of Terumah from the payment even though mid'Oraisa it is Terumah! (This case is the same as the case cited by the Gemara in the beginning of the Sugya on 89a.)

[2] https://www.dafyomi.co.il/yevamos/insites/ye-dt-090.htm

(b) The Gemara's proof from the fact that the Kidushin does not take effect is problematic. In cases of monetary matters, the principle of "Hefker Beis Din Hefker" applies; even if the Rabanan are *not* authorized to uproot Torah law, they *do* have the power to render a person's property ownerless, as the Gemara earlier teaches. Why does the Gemara prove from the fact that the Rabanan took away the payment from the recipient (the Kohen) that the Rabanan have the power to uproot a Torah law? "Hefker Beis Din Hefker" is different and does not involve uprooting a Torah law!

(a) **TOSFOS** answers that the Gemara cannot prove that the Rabanan have the authority to uproot a Torah law from the fact that the payment does not become Terumah according to Rebbi Meir, because Rebbi Meir does not say outright that it does not become Terumah. He says merely that the payment is not a valid payment, which means that the payment is returned to the payer, in contrast to the view of the Rabanan that the payment is kept by the recipient (and the payer must pay a second time). When the payment is returned to the payer, however, perhaps it retains the status of Terumah; the fact that it is not a valid payment and is returned does not mean that it loses the status of Terumah which it obtained at the moment it was given to the Kohen.

(b) **TOSFOS** answers the second question by explaining that the principle of "Hefker Beis Din Hefker" does not apply in this case. The Rabanan do not utilize their power of "Hefker Beis Din Hefker" to take away money from a recipient (in this case, the Kohen) which legally belongs to him, and he did nothing to deserve losing it. In this case, it was the payer, and not the recipient, who did something wrong. Hence, the Rabanan did not apply "Hefker Beis Din Hefker," and the only reason why they took away the payment from the Kohen must be that their enactment has the ability to uproot the Torah law.

This answer of Tosfos is problematic for several reasons.

1. The **MAHARSHA** (in **MAHADURA BASRA**) asks that taking away the payment of Terumah Teme'ah from the Kohen in no way harms the Kohen or causes him a loss. On the contrary, taking it away is to his advantage. In order to give him a payment of a higher quality (Terumah Tehorah), the Rabanan took away the Terumah Teme'ah which he received originally so that the Zar will pay again with Terumah Tehorah. Since it is to the Kohen's benefit to have the Rabanan take away the Terumah Teme'ah from his possession, why did the Rabanan not apply "Hefker Beis Din Hefker" in this case? (See **ARUCH LA'NER**.)

2. **REBBI AKIVA EIGER** points out that the Gemara seeks to prove that Rebbi Meir maintains that the payment is not valid, and that the Rabanan maintain that the money is taken away from the Kohen. If "Hefker Beis Din Hefker" is not the reason for why the payment is taken away from the Kohen, then it must be that it is taken away because of the Rabanan's authority to uproot a Torah law. However, the same reason why the Rabanan do not utilize "Hefker Beis Din Hefker" in this case should apply to their authority to uproot a Torah law: just as they do not apply "Hefker Beis Din Hefker" so as not to harm the Kohen, they also should not take away his payment by uprooting the Torah law which says that the payment is valid! Conversely, if they have grounds to uproot a Torah law and revoke the payment even though they thereby harm the Kohen, they should also be able to take away the payment from him by applying "Hefker Beis Din Hefker"!

3. The Gemara earlier contradicts the assertion of Tosfos that the principle of "Hefker Beis Din Hefker" does not apply when it would involve taking away something from a person who did nothing wrong. The Gemara earlier says that in the case of a married Ketanah who dies, the Rabanan apply "Hefker Beis Din Hefker" to take away her estate from the father and give it to her husband even though the father did nothing wrong in that case.

Perhaps these questions may be answered as follows.

1.If the intent of the Rabanan was to make the Zar pay the Kohen the full amount with Tahor fruit, they did not need to take away the fruit that he already paid to the Kohen. They could have required merely that the Zar continue to pay the Kohen more until his payment equals the value of the Terumah Tehorah that he ate. There was no need to take away the Terumah Teme'ah that was already paid to the Kohen, and thus they did not apply "Hefker Beis Din Hefker" in this case.

(One might ask that in the case of a person who separates Terumah from Tamei produce to exempt Tahor produce (89a), the Gemara suggests that the Rabanan uprooted the status of Terumah to remind its owner to separate Terumah a second time from Tahor produce, and they did not merely require him to separate additional Terumah to make up for the loss in value. However, that logic cannot be applied here, because making the Kohen return the payment to the Zar will not ensure that the Zar will pay the Tashlumei Terumah in full, since returning the payment causes no harm to the Zar. Uprooting the status of Terumah in the case of one who separates Terumah from Tamei produce for Tahor produce ensures that the owner will separate Terumah again, because he cannot eat the rest of his produce until he does so (for it is Tevel mid'Oraisa). Moreover, uprooting the Terumah in that case ("Min ha'Tahor Al ha'Tamei") is done for the sake of enforcing the laws of Terumah and not for the benefit of the Kohen, as will be explained below.)

2.Perhaps Rebbi Akiva Eiger's question may be addressed as follows. Tosfos does not mean that Rebbi Meir maintains that the Rabanan required only that the Kohen return the Terumah Teme'ah and they did not rescind its status as Terumah. Rather, Tosfos means that *one might have thought* that this is what Rebbi Meir means (in the words of Tosfos, "Havah Matzi l'Meimar").

The Gemara proves that this is not the intention of Rebbi Meir from the fact that he says "Ein Tashlumav Tashlumin," the payment is not valid, which implies that the fruits paid to the Kohen *cannot* be used for Kidushin. Why should the Kohen not be able to use the money? The enactment of the Rabanan is for his benefit, so that he will receive the full value of the Terumah that the Zar ate. What point is there in taking away the money from him, either through "Hefker Beis Din Hefker" *or* through uprooting a Torah law?

The Gemara teaches that it must be that Rebbi Meir means something else when he says that the payment is not valid. He must mean that the Rabanan indeed revoked the status of Terumah from the payment such that the Tamei fruit which the Zar gave to the Kohen does *not* become Terumah in the first place. Consequently, the Kohen must give it back because it was given to him by mistake. It is not a valid Tashlumei Terumah; the Zar gave it to him only because he *thought* it was Tashlumei Terumah. Since, if the status of Terumah is uprooted, the payment was not the Kohen's in the first place, the Rabanan are not directly taking away anything directly from the Kohen by uprooting the status of Terumah from the Tashlumim.

In this sense, uprooting the status of the Tashlumei Terumah is identical to the case in which the Rabanan uprooted the status of Terumah that was taken from Tamei produce to exempt Tahor produce (89a). In that case, too, if the owner gives the Kohen the invalid Terumah the Kohen must return it. He indirectly loses Terumah as a result of the enactment because what was separated improperly remains Tevel and does not have the status of Terumah at all.

(This idea may also be expressed as follows: If the enactment of the Rabanan was that the fruit does not become Terumah in the first place, this indicates that it was not enacted simply for the benefit of the Kohen (so that he should receive the full value of what the Zar ate). Rather, it was enacted to protect the honor of Terumah. By paying Tashlumei Terumah with fruits that are Tamei (and thus less valuable than the fruit he ate), the Zar degrades the honor of the Terumah that he ate, and that is why the Rabanan enacted that the payment is not valid. If this enactment would cause the Kohen to lose money indirectly (and perhaps even directly), the loss would not stop the Rabanan from enacting such an enactment since they deemed it important to ensure that proper respect is given to Terumah.)

3.The reason why the Rabanan applied "Hefker Beis Din Hefker" and took away the Ketanah's inheritance from the father was because he willingly married off his daughter to a man while she was a Ketanah. He freely chose to give her away, knowing that he would thereby lose the right to inherit her. Therefore, the Rabanan applied "Hefker Beis Din Hefker" to take away the money that he otherwise would have been entitled to receive. In the case of the Tashlumei Terumah, however, the Kohen has no choice in the matter, and thus the Rabanan do not take away his money through "Hefker Beis Din Hefker." (*Moreover, the Gemara assumes at this stage that the enactment was made only for the Kohen's own benefit, and thus the Rabanan certainly are not interested in causing harm to the Kohen through their enactment.)*

DONNING A FOUR-CORNERED GARMENT WITHOUT TZITZIS

The Gemara states that the Rabanan may override the Mitzvah of Tzitzis in a garment made of linen through a "Shev v'Al Ta'aseh" -- a passive infraction (by requiring that a person *not* do something), and not through a "Kum v'Aseh," a positive action.

Why is donning a four-cornered garment that has no Tzitzis considered a case of "Shev v'Al Ta'aseh"? When the person dons a four-cornered garment that has no Tzitzis, he does an *act* ("Kum v'Aseh") of donning a garment without Tzitzis.

(a) **TOSFOS** (DH Kulhu) and other Rishonim explain that the Torah's commandment to wear Tzitzis entails placing Tzitzis on a garment which one is *already wearing*. Before he dons the garment, there is no Mitzvah to put Tzitzis on it (according to the opinion that the Mitzvah of Tzitzis is a "Chovas Gavra" and applies only to a garment which is worn and not to a garment which is stored in a box). Therefore, when one places upon his body a four-cornered garment that has no Tzitzis, he transgresses no Mitzvah. He transgresses the Mitzvah only after the garment is upon him and he still refrains from tying Tzitzis onto it. This transgression, however, is through "Shev v'Al Ta'aseh," since the Mitzvah obligates him to tie Tzitzis to the garment and he passively

refrains from doing so. (If he would don a four-cornered garment with no Tzitzis and then immediately begin to tie Tzitzis onto it, he would transgress no Mitzvah at all.)

The **TOSFOS HA'ROSH** quotes the **RITZBA** who says that according to this understanding, if one of the four Tzitziyos falls off of the garment on Shabbos, one is permitted to wear the garment even l'Chatchilah. Donning the four-cornered garment without Tzitzis is not a transgression of the Mitzvah, and after he dons it he is unable to tie Tzitzis to it because of the Melachah of tying on Shabbos.

(*He is not permitted to walk into a Reshus ha'Rabim or Karmelis while wearing the garment, because he is considered to be carrying the other three Tzitzis since they do not qualify as the Mitzvah without the fourth Tzitzis. Nevertheless, he is permitted to wear the garment inside his house, and even to don it l'Chatchilah. See also **SHITAH MEKUBETZES** to Menachos 37b, #4.)*

(b) The **SHA'AGAS ARYEH** (#32) challenges the explanation of Tosfos and his ruling.

1. As Tosfos himself points out, the blessing which one recites upon donning a garment with Tzitzis -- "l'His'atef ba'Tzitzis" -- implies that the Mitzvah is to actively wrap oneself in a garment with Tzitzis, and not merely to place Tzitzis on the garment once it is already being worn.

2. The Gemara in Shabbos (132b) teaches that a Mitzvas Aseh overrides a Lo Ta'aseh only in a manner "similar to the way Tzitzis overrides the Lo Ta'aseh of Kil'ayim." This general rule includes the condition that the Mitzvas Aseh must be fulfilled at the very moment the Lo Ta'aseh is transgressed in order for it to override the Lo Ta'aseh. According to Tosfos, however, the Lo Ta'aseh of Kil'ayim is transgressed *before* the Mitzvah of Tzitzis is fulfilled. Kil'ayim is transgressed through an act of "Kum v'Aseh," by actively donning a garment of Kil'ayim (as Tosfos proves from the Gemara in Berachos 20a). The Mitzvah of Tzitzis is fulfilled only *after* one has already donned the garment. Consequently, one transgresses the Isur of Kil'ayim *before* he fulfills the Mitzvah of Tzitzis, and thus the Mitzvas Aseh of Tzitzis should not override the Lo Ta'aseh of Kil'ayim.

3.The Sha'agas Aryeh suggests further that any transgression which must be *preceded* by an initial action is considered a transgression of "Kum v'Aseh" even though no action is done at the time the actual transgression is committed. Accordingly, even if the Mitzvah of Tzitzis does not take effect until the garment is upon the person, wearing a four-cornered garment without Tzitzis still should be considered uprooting a Mitzvah through "Kum v'Aseh," since the transgression must be preceded by an initial action of donning the garment. He proves this from examples of Torah prohibitions which are transgressed passively (with no action), but for which Malkus nevertheless is administered (even though Malkus is administered only for *actively* transgressing a prohibition -- "Lav she'Yesh Bo Ma'aseh").

For example, the Gemara in Nazir (40a) relates that if a Nazir sat in a closed box and was carried into a cemetery (according to the opinion that a box effectively separates between him and the Tum'ah), and another person came and removed the cover of the box, the Nazir transgresses the prohibition against becoming Tamei *and he receives Malkus* if he does not leave immediately. In that case, the initial action of entering the cemetery -- even though done in a permissible manner -

- renders the act a "Lav she'Yesh Bo Ma'aseh." Similarly, the donning of a four-cornered garment should render the transgression one which is accomplished through a "Kum v'Aseh."

The Sha'agas Aryeh therefore suggests a different answer to the question of Tosfos. He writes that any time an act is forbidden not because of what *is* done, but because of what is *not* done, it is called a "Shev v'Al Ta'aseh."

In the case of one who wears a four-cornered garment without Tzitzis, the wrongful act is not that the person *is wearing* a garment without Tzitzis, but that he *has not tied* Tzitzis to the garment. Although the act of donning the four-cornered garment without Tzitzis is forbidden, what causes the prohibition is the fact that he did not tie Tzitzis to the garment. This is in contrast to the Isur of Kil'ayim, which one is considered to transgress through "Kum v'Aseh" when he dons a garment that contains a forbidden mixture of Kil'ayim *not* because he fails to remove the garment from upon him, but because he has actively donned a garment of Kil'ayim.

Similarly, the Isur which prohibits a Nazir from entering a cemetery states that a Nazir may not *be* in a cemetery (as that is how the Torah describes the Isur) and not that a Nazir *must stay outside* of a cemetery. For this reason, the Isur which prohibits a Nazir from entering a cemetery is considered a "Kum v'Aseh" and Malkus may be administered.

(According to this reasoning, one certainly is prohibited from donning a four-cornered garment without Tzitzis, even on Shabbos.)

You Must Listen To Him

Steinzaltz (OBM) writes:[3]

As we learned on yesterday's *daf,* our Gemara is concerned with the question of whether *yesh ko'ah be-yad hakhamim la-akor davar min ha-torah* – do the Sages of the Talmud have the ability to uproot a Torah law? The discussion continues on ***our daf*****,** with a series of examples presented.

One source that the Gemara brings in an attempt to prove that such power is in the hands of the Sages is from a story that appears in *Sefer Melakhim* (see I Melakhim chapter 18). There we find that the prophet Eliyahu brings a sacrifice on an altar outside of the Temple at a time when it was forbidden to do so. This sacrifice was permitted according to the Gemara based on the passage in Devarim (18:15) that says *elav tishma'un* – "you must listen to him (i.e. to the prophet)" – even if his instructions require you, on occasion, to transgress a Biblical commandment.

The Gemara responds that the only reason that the prophet can be listened to in that situation is because of the unique command of *elav tishma'un* – a passage that applies specifically to a *navi,* and not to the Sages. To the suggestion that we should try to derive a more general application from that passage, the Gemara responds that it is limited to cases where the prophet

[3] https://steinsaltz.org/daf/yevamot90/

can immediately limit the people from transgressing and cannot be applied to a general concern of the Sages about a given act.

A basic question is raised by the commentators – both *rishonim* and *aharonim* – regarding this discussion. How can the Sages assume that a Biblical command that allows a prophet to transgress a commandment might be applied to the Sages themselves?

According to the *Talmud Yerushalmi* it appears that the suggestion is based on the Talmudic statement *hakham adif mi-navi* – a Sage is superior to a prophet (see Bava Batra 12a). This teaching implies that anything a *navi* can accomplish with his prophecy, the Sages can do through their methods of study and analysis. Furthermore, while a prophet is limited in his ability to establish *halakhot* beyond the immediate instance, the Sages have the ability to institute rules and regulations that will remain in effect for generations.

Passive lack of fulfillment of the mitzvah of tzitzis

השתא דשנית לן שב ואל תעשה לא מיעקר הוא כולהו נמי שב ואל תעשה

Our Daf is in the midst of the discussion whether the rabbis have the power to negate a Torah law to support a rabbinic ruling. For example, if the blood of an offering became טמא ,it becomes invalid for the service.[4]

If a kohen takes it and knowingly sprinkles it (מזיד) the Torah law is that the **ציץ** atones for its being used while impure. The rabbis, however, declared that this offering is not valid. We see that the rabbis can nullify the Torah law, here in order to penalize the kohen for unauthorized use of the impure blood. Rabbi Yossi bar Chanina answers that the rabbis do not have the authority to require another offering to be brought, as the first one was technically acceptable.

When we deemed the first offering invalid it was only in terms of eating the meat. Although eating the meat is fulfillment of a Torah law, the rabbis have the ability in this case to declare that we remain being passive and not eat it **שב ואל תעשה**.

Therefore, by declaring that the intentional act of the kohen has ruined the offering, the rabbis thereby instruct us to be passive and not fulfill the mitzvah of eating its meat.

At this point, Rav Chida admits to Rabba that he was ready to ask many more questions, but this approach answers all of them. The rabbis can stop a Torah law by telling us to be passive. Tosafos (ד"ה כולהו נמי) asks how the rabbis can rule not to place wool tzitzis (סדי) on a linen garment, due to their concern that one might inadvertently place tzitzis which are shaatnez on a nighttime garment. As a result of this rule, a person would wear a garment without

[4] https://dafdigest.org/masechtos/Yevamos%20090.pdf

tzitzis, which is an active situation of noncompliance with the Torah's requirement to place tzitzis upon one's garments. In his answer, Tosafos establishes a tremendous fundamental understanding of the halacha of tzitzis. At the moment one is actually wrapping himself in a four-cornered garment, he is not yet obligated in tzitzis.

Once the garment is wrapped around him, he is passive in his being clothed. If the rabbis exempted him from placing tzitzis in a four-cornered (סדין),this is in the realm of שב ואל תעשה. While this approach helps to explain how the rabbis can rule not to place tzitzis on a linen garment, Tosafos notes that the mitzvah does, however, seem to begin at the mo ment we begin to wrap ourselves, as the bracha we recite when performing the mitzvah of tzitzis is להתעטף בציצית .

Shaagas Aryeh (#32) resolves the question of Tosafos from a different angle. He explains that wearing a four cornered garment without tzitzis is not a violation of a prohibition, but it is rather the neglect of an עשה .This is certainly a case of being passive.

Punishing when not mandated by the Torah

שמעתי שבית דין מכין ועונשין שלא מן התורה

I heard that Beis Din can administer lashes and punish when not mandated by the Torah

A community appointed a group of people to oversee the conduct of its members and included in their agreement they granted authority for this group to punish people, physically and monetarily, for transgressions.

A member of the community violated an oath and was deserving of punishment but the only witnesses in the case were his relatives. These relatives were reliable, but the community was uncertain whether the testimony of relatives is acceptable for these cases since Biblically relatives are disqualified witnesses.

Rabbeinu Shlomo ben Aderes (1), the Rashba, answered that this oversight committee is empowered to decide as they see fit on all matters. The restrictions concerning witnesses apply only to cases adjudicated in Beis Din that is deciding matters according to Biblical law, but a case that is being adjudicated outside of that context is not bound by the same rules and decisions can be rendered based on what their present conditions require. This must be so, argues Rashba, because otherwise, we would be faced with the untenable circumstance that transgressors would never face a consequence for their actions.

Nowadays, Beis Din is not authorized to adjudicate cases involving a fine –דיני קנסות,and in order to administer lashes Biblical law requires two valid witnesses who gave a proper warning to the transgressor before he committed his transgression, which is rare. There must be, asserts Rashba, some mechanism to punish transgressors even though Biblically they are exempt.

Rabbeinu Yehudah the son of Rosh (2) also addressed this issue in a case of a litigant who attacked and inflicted bodily harm to one of the dayanim who ruled against him. Rabbeinu Yehudah

responded that our Gemara teaches that Beis Din is authorized to punish perpetrators even more severely than the Torah would in order to create a deterrent to prevent others from repeating the same crime.

Therefore, although he expressed hesitation about putting this person to death, he did support a very severe punishment for this assailant. This halacha is cited in Shulchan Aruch (3) and he even allows Beis Din to administer lashes to a person who has a reputation of violating prohibitions of עריות as long as the rumor continues uninterrupted.

1. שו"ת הרשב"א ח"ד סי' שי"א
2. שו"ת זכרון יהודה לרבינו יהודה בן הרא"ש סי' ע"ט
3. שו"ע חו"מ סי' ב' ע"ש ■

Annulment and Mamzeirus
ואפקעינהו רבנן לקדושין

There was a woman whose husband went abroad. Two witnesses testified that they had seen her husband die. Within a year she remarried and subsequently had a son. Tragically, after several years, her husband returned. The witnesses admitted their mistake, but this was no comfort to the poor woman who needed to divorce and whose child was a mamzer.

The gedolim of the generation tried in vain to somehow invalidate the mamzerus of the unfortunate child. The Maharsham, zt"l, raised the possibility of Rabbinically annulling the first marriage. However, since he was not certain of permissibility of this, he concluded with the statement, "לא למעשה"—not to be relied upon practically."

In Israel, there were certain dayanim that served on the Rabbinate's official court that wished to actually permit such children based on the above Maharsham. When Rav Shlomo Zalman Auerbach, zt"l, heard this from certain other dayanim who wished to garner his support, he protested vehemently. "Why do we never find mention of annulment in similar cases? If this is really a viable option, why didn't the Chachamim have mercy on the poor women and children by annulling the original marriage?"

He concluded, "We see, then, that annulment is not an option unless there was an attack on a Jewish community which created many such cases at once. (See Darkei Moshe, Even HaEzer #7) This is despite the terrible pain which, from a moral viewpoint, seems to indicate that annulment would be a very great mitzvah indeed.

However, the Chachamim were Divinely inspired and understood that using annulment as a regular recourse would prove disastrous. It would degrade the sanctity of marriage in the eyes of the people. The moment they see annulments for such cases, they will feel that relationships outside of marriage are not so bad. After all, they will say, 'So-and-so was a mamzer, and the marriage was annulled…'

The Shitah Mekubetses (Kesuvos 3a) writes this quite clearly: 'There has never been a way to purify a mamzer himself, and there never will be!'

Dr. Sara Ronis writes:[5]

The Talmud is tough because it assumes holistic knowledge of the whole Talmud, referencing texts and rulings that come much earlier or much later without stopping to really explain what the rabbis are talking about. The Talmud was not meant for beginners. We see this very clearly on ***our daf.***

The Talmud is discussing whether one can "uproot" a mitzvah found in the Torah. By uproot, the Talmud means to annul it or to otherwise make it inoperative. Given the rabbis' reverence for Torah, on its face this is quite surprising: Can the rabbis uproot a mitzvah?

One rabbi says that most of the time, it is forbidden to change a mitzvah, but:

Sit and refrain from action is different.

According to this sage, the rabbis can tell someone to *not* perform a mitzvah, but they cannot tell someone to violate the law. Action, no; inaction, yes.

At this point, Rav Hisda chimes in with some serious holistic Talmud knowledge. He says to Rava:

I wanted to raise a difficulty against you from the *halakhah* of an uncircumcised man, sprinkling, a knife, a cloak and *tzitzit*, the lambs offered on Shavuot, shofar, and lulav. Now that you have resolved for us that "sit and refrain from action" is not uprooting, these are also cases of sit and refrain from action.

Rav Hisda names seven other halakhot in which the rabbis teach that one is forbidden from doing something that the Torah commands them to do. And when I say he names them, I mean he literally just names them and moves on. To know what he is talking about, you have to either know the entire Talmud or read one of the many helpful medieval or modern commentaries on the tractate.

Rava's teaching on today's daf allows Rav Hisda to extrapolate and understand rabbinic rulings found all across the Talmud. Rav Hisda's point is that at first glance, these look like they are attempts to uproot or override Torah law, but given Rava's teaching, he now understands that the rabbis are permitted to tell people not to observe these laws at particular times.

Let's look at one of these seven cases in more depth: the cloak and tzitzit. According to Torah in Deuteronomy 22:12, one is obligated to put ritual fringes on clothing items that have four corners. However, the rabbis insist on one exception: no tzitzit can be placed on linen clothing.

[5] Myjeiwhslearning.com

Why not? Their prohibition is rooted one verse earlier in Deuteronomy 22:11, which states: "*You shall not wear cloth combining wool and linen,"* a prohibition called *shatnez* in Hebrew. Tzitzit are made of wool, and combining them together with a linen cloak would be a case of shatnez.

But how could the rabbis prohibit something (putting fringes on a cloak) that is required by the Torah?! Rav Hisda now comes to understand that it is because, to harmonize the Torah obligations, they are commanding an *inaction,* not an active violation of Torah law. That kind of command is not technically uprooting.

To understand the two Aramaic words in the Talmud that translate to "cloak and tzitzit," you need to know the two relevant Torah laws, that cloaks are made of linen, that fringes are made of wool, and that the rabbis prohibit putting tzitzit on a linen cloak. That's a lot. We won't actually learn the laws of tzitzit in depth until we get to Tractate Menahot in 3.5 years.

Rav Hisda's statement is a reminder to us that the Talmud's ideas are all connected in ways that can at times be hard to track but can also shed light on each other. The more we continue to learn, the more we will understand not only what we are currently reading but also what we have already learned. And that's pretty exciting.

Tzitzis on Bedsheets

Rabbi Yonason Johnson writes:[6]

[6] http://www.kollelmenachem.com.au/tzitzis-on-sheets.html

In the third passage of the Shema which speaks about the Mitzvah of Tzitzis, we read [1] וראיתם אותו - and you shall see it (i.e. the Tzitzis). From this posuk, the Talmud [2] derives that a כסות לילה - a night-time garment is exempt from Tzitzis since night is not the time of seeing.

The application of this exemption is subject to debate by the Rishonim:

The Rosh [3], learns that the obligation to place Tzitzis into a garment will depend on what type of garment it is. A night-time garment is a garment made for wearing at night, for example pyjamas. Such a garment is exempt from Tzitzis even when worn during the day. Conversely, day-time clothing would be obligated in Tzitzis even when worn at night.

The Rambam [4] explains that the type of garment is not of consequence. What matters is when the garment is being worn. Any garment worn at night is exempt from Tzitzis. Any garment worn during the day is obligated in Tzitzis.

The Shulchan Aruch [5] brings both opinions without issuing a ruling. As such, we take the stringencies of both opinions. Therefore, Tzitzis should be placed in any 4-cornered garment worn during the day and also in day-time clothing even when worn at night.

Concerning the Brocha however, we follow the principle of ruling leniently in cases of doubt. Therefore a Brocha is only recited when both opinions would agree on the obligation of Tzitzis i.e. a day-time garment worn during the day.

Two halachos later, the Shulchan Aruch rules that we do not put Tzitzis into sheets, even though they are worn in the morning.

Both the Shulchan Aruch Harav and the Mishna Berura observe that this ruling is in accordance with the opinion of the Rosh. According to the Rambam, since the sheet is worn during the daytime, it should be obligated in Tzitzis [6].

Eliah Rabbah [7] explains that the Shulchan Aruch's ruling is compatible even with the Rambam's opinion; Since the beginning of (and primary) 'wearing' of a sheet is at night, it is treated as purely a night-time use. The few hours into the morning are merely incidental. This would explain the language of the Shulchan Aruch "even though a person sleeps in them in the morning". It would also explain why the Shulchan Aruch who earlier brings both opinions do not distinguish in this halocha.

This explanation takes care of the few hours we sleep in after sunrise. But what about the Shabbos afternoon *Shluff* when the entire sleep is during daylight hours?

In the Siddur [8], the Alter Rebbe appears to agree with this distinction. In his Shulchan Aruch the Alter Rebbe discusses a cover with which one sleeps also *in the morning*. But in the Siddur, the Alter Rebbe refers to a cover with which one covers them-selves when they sleep in the *daytime*.

There is another dispute among the Rishonim on this topic:

The Mordechai [9] exempts all sheets and blankets. He distinguishes be-tween a garment with which one covers themselves in a manner of wearing and a sheet/blanket with which is merely covering oneself with or spreading over themselves. However Tosfos [10] rules that there is no such distinction.

The Alter Rebbe, based on the Magen Avraham [11] rules that if the sheet or blanket is made of wool, one of the corners should be rounded to exempt it from Tzitzis according to all opinions. This is also the ruling of the Mishna Berura.

The rationale of this ruling to be strict with woollen blankets but lenient with other fabrics is based on a combination of leniencies and doubtful cases. Whilst we generally do not act leniently in each individual case, we do so when they act in combination:

1. The view of the Rosh that a night-time garment is exempt from Tzitzis even if worn in the day.
2. The Mordechai rules that since sheets and blankets are not 'worn' they are exempt from Tzitzis.
3. The Rif and Rambam rule that only a woollen or linen garment is obligated in Tzitzis Min Hatorah (other materials are only obligated Rabbinically).

In the Siddur, the Alter Rebbe rules that one should round a corner of the blanket (Koldra) which one uses to cover themselves during the day. Here the Alter Rebbe does not seem to distinguish between wool and other types of materials.

Despite the rulings of the Shulchan Aruch Harav and Mishna Berura, there are Poskim who rule that common practice does not follow the Magen Avraham [12]. This is also the ruling of Aruch Hashulchan who is lenient even with woollen sheets.

There are Poskim [13] who rule that even according to the stricter opinion, there is no question of having to require Tzitzis (or to round-off of a corner) on a puffy blanket such as an eiderdown or doona. They argue that due to the thickness of the stuffing, the corner is already considered

’rounded’. Even though the quilt cover itself is flat and has 4 corners, it too would be exempt. This is because the quilt cover is *batel* to the doona which it covers [14].

It should also be noted that even the stringent opinions refer to sheets with which one covers themselves. Sheets which a person lies on top of are exempt according to all opinions.

Neither of these leniencies would apply to flat top-sheets or blankets.

Whilst common practice even amongst G-d-fearing individuals is not to round the corners of blankets which are used also during the day, scrupulous individuals would do so. There is strong basis, especially for those who follow the rulings of the Alter Rebbe to be stringent, especially for blankets which are made of wool. But before taking out your scissors, please check with your local halachic authority [15].

[1] Bamidbar 15:39
[2] Menachos 43a
[3] Hilchos Tzitzis Simon 1
[4] Hilchos Tzitzis 3:7-8
[5] OC 18:1
[6] See Hagahos Maimonios in the name of R’ Eliah.
[7] 18:4
[8] Hilchos Tzitzis ד"ה מלבושים שלנו
[9 Hilchos Tzitzis Simon 941
[10] Menachos 41a ד"ה תכלת
[11 OC 18:3
[12] Mor Uketzia 18, Bris Kehuna (מערכת צ אות יד), Eishel Avraham Butshash 18. The chazon Ish was personally stringent but wrote that those who are lenient have on what to rely.
[13] Eshel Avrahm Butshash 18
[14] Shu”t Hisorrerus Teshuvah 1:9
[15] See Siddur Rabbeinu Hazakein (Raskin) Miluim Simon 7 for a possible justification for the general lenient approach on this issue.

Portrait Of A Married Couple By Sir Anthony Van Dyck

Can the Sages change the Torah?

Mark Kerzner writes:[7]

On the previous page we saw a situation where the Sages declared a child of a woman a mamzer. How can this be done? Not only it is a punishment, for he now cannot marry a regular Jewish woman, but that perhaps even means that as a mamzer he can marry a woman who is a mamzer. If in truth he is kosher, and only the Sages declared him a mamzer as a penalty, then by this punishment they allowed him to transgress the law of the Torah. If that is so, the Sages would be allowed to change the law for the policy reasons. Is that possible?

Consider all the situations where the Sages take away person's property as a penalty. Are they changing the property laws of the Torah? - No, since the Torah itself gave the Court the authority to declare someone's property ownerless.

Another situation: the shofar is not blown on Shabbat of Rosh Hashanah. Did the Sages change the Torah here? - Not really, they told not to do something (literally, to sit and do nothing), and this is different from actively transgressing.

[7] https://talmudilluminated.com/yevamot/yevamot90.html

Yet another attempt: if a husband gives a Get to his wife, but then annuls it, the annulments is valid - even though this creates terrible consequences for his divorcee who may not be aware of it. Rabbi Shimon says that the annulment is not valid, due to the power of the Court. So to strengthen the power of the Court, the Sages changed the Torah law and permitted a married woman to another man? Not true either, since every marriage contract has the phrase "with the agreement of the Sages," and if they later disagree, they annul the marriage retroactively, so that the Get is not even needed. But tell me, this is where there was a marriage contract. What if one performed engagement by cohabitation - which is valid?! - Here the Sages changed the meaning of his cohabitation from engagement to pure pleasure.

The conclusion is that the Sages cannot change the Torah.

Rabbi Mordechai Papoff writes:[8]

[8] https://res.cloudinary.com/ouinternal/image/upload/v1594990793/outorah%20pdf/Yevamos_090_EnglishTopicsonChoveres.pdf

Parameters of MitzvasTzitzis

One example in the Gemara of a takanas Chazal to annul a mitzvah dioraisa is "tzitzis on a sheet." Rashi explains that it really needs tzitzis, being a four-cornered garment, but Chazal said not to put them on out of concern that one would do the same for a sheet used only at night. Such a garment is exempt from tzitzis, so if the sheet were to contain linen and the tzitzis wool, it would be a problem of shatnez.

The Gemara responds that this is a case of "shev v'al taaseh," a passive violation, which the Rabbis have power to institute.

The problem is that donning such a sheet is an active violation! How could it be considered shev v'al taaseh? Tosfos asks this, and answers with a fine distinction. We need not have tzitzis on our clothes until we already have them on. Thus, at the precise moment of covering ourselves with the sheet, we are not yet obligated in tzitzis. Only after it's on are we obligated – and by that time we're not doing an action. So it's shev v'al taaseh!

Tosfos is not so comfortable with this answer, though, since the beracha we make on a tallis is "l'hisateif" – to don the tallis. Doesn't this imply that the mitzvah begins right away? Tosfos HaRosh offers that it refers to the state of "being covered with the tallis;" the beracha is made beforehand like by all mitzvos.

The Shaagas Aryeh (Siman 32) is puzzled by Tosfos' answer. In the sugya of asei docheh lo sasei, the Gemara established that the asei must be performed at the same time the lo sasei is being violated, not afterwards. We know that shatnez is permitted in tzitzis. But according to Tosfos, it should not be – shatnez is transgressed immediately when such a garment is put on, yet the mitzvah of tzitzis is not accomplished until afterwards?

Additionally, he challenges Tosfos' idea that it can be called a passive violation since at the precise moment of obligation he isn't moving. But, we find many other instances in which a process or situation is initiated by an action and so the entire thing is considered active. For example, the Gemara in Makkos (21a) says that if someone is wearing shatnez and is warned that it's forbidden, he will be punished with malkus (lashes) for each time he's duly warned. He's liable for each span of time he continues wearing it such that he could have taken it off and put it back on. He didn't move a muscle – and we don't give malkus for passive aveiros! It must be that the initial donning of the garment suffices for it to be considered an active aveira for the duration of his keeping it on. So too here – even if mitzvas tzitzis begins only afterwards, the original action should carry over through the entire time he wears it?

Rather, says the Shaagas Aryeh, there's a fundamental difference between lacking tzitzis and other aveiros such as shatnez. Shatnez is a forbidden article, and can be considered an active aveira due to the earlier action. A garment lacking tzitzis, on the other hand, is not an overtly forbidden item. Putting it on is just a negligence to fulfill the Torah's command.

He compares it to the halacha of reiyah, that every Jewish male must appear in the Beis Hamikdash on the Yomim Tovim and bring a korbon. What if someone comes without a korbon – does he get malkus for violating the mitzvah? The Rambam says no, because it's a passive aveira. But, didn't he walk in – isn't that an action? Explains the Shaagas Aryeh, since the point of violation is the absence of a korbon, it's considered a passive aveira even though he did an action.

A practical application of this concept is if someone does not have kosher tzitzis on his tallis: can he put it on anyway? We mean that he has no way of getting it, or if it's Shabbos, when he cannot tie on new tzitzis. He quotes the Mordechai (Hilchos Ketanos 1044) that it is indeed permitted! It's simply an obligation to cast tzitzis onto your garment, but it is not forbidden to don a garment lacking them. "Is it forbidden to enter your house if you didn't put up a mezuzah?" the Mordechai asks rhetorically. Clearly, it is a mitzvah incumbent upon the person, but its lack does not render the garment a forbidden article.

What inherently is the difference between kum v'asei and shev v'al taaseh, active and passive aveiros? Rav Elchonon Wasserman (Kovetz Hearos Siman 69) explores this topic and offers two options. Perhaps an active aveira is more stringent than a passive one, so Chazal are empowered to override only passive ones.

If we look at it another way, when Chazal tell us to passively evade a Torah commandment, it does not directly uproot it. It is merely a limited, indirect bypass of the mitzvah, enacted for appropriate reasons. The difference would be if the mitzvah still exists after the Rabbis said not to do it. According to the first perspective, it's nullified; in the second way it still remains.

If we analyze our Tosfos, it is clear that he understands the second way. The very question that donning a tallis without tzitzis is an aveira indicates that the dioraisa mitzvah did not vanish. Furthermore – to defend him from the Shaagas Aryeh's objections – Tosfos deems it an active aveira simply because it involves an action, no matter that it's not overtly forbidden. Therefore, he needs to answer that mitzvas tzitzis is relevant only later. Malkus has a different set of prerequisites, and whenever the aveira is inherently non-active, it's considered shev. And tzitzis could be docheh the lo sasei of shatnez because the action of putting it on occurs simultaneously with the issur.

We mentioned earlier the halacha that if someone cannot get kosher tzirtzis, he may nonetheless wear the garment. The Mordechai quotes this in the name of the R"i, who is also the Baal HaTosfos in our Tosfos. The Shaagas Aryeh saw this as a contradiction: Our Tosfos assumes that if one dons a tallis without tzitzis, he is doing an active aveira. So how would it ever be permitted to put on a four-cornered garment without tzitzis? Rav Reuven Grozovsky feels that this is no contradiction. Once Tosfos answered that chiyuv tzitzis begins only after he puts it on, we can permit a possul tallis to be put on. There was no obligation to have tzitzis when he donned it, and when it would become relevant, the extenuating

circumstances allow him to leave it on (Chiddushei R' Reuven, Sukka Siman 4).

The Mishnah Berura holds like the Mordechai, but not to go outside with it if there is no eruv (M.B. 13:9 – see there for more details).

Changing with the Times

Rabbi Jay Kelman writes:[9]

"Rav Elazar ben Yaakov said: I heard that the* beit din *may hit and punish not according to the [laws of the] Torah, not to violate the words of the Torah, but to make a fence around the Torah" (Yevamot 90b).

In our last post, we discussed on what basis the rabbis accepted the testimony of one witness that a man had died, thereby freeing his widow from the status of an *agunah* and allowing her to remarry. The Mishnah (Yevamot 87b) records a second law that also appears to go against the Torah. If it turns out the husband was not really dead, not only are any children from the second husband *mamzerim*, but any subsequent children she might have with her first husband--to whom she may not return--are also *mamzerim (*rabbinically). While we generally think of the declaration of *mamzerut* as a stringency--and it is--it does include a leniency, as a *mamzer* may marry other *mamzerim*[1].

The Mishnah thus serves as the basis for a detailed discussion of when the Rabbis may have the right to uproot laws of the Torah. We will highlight some of the discussion.

A key principle discussed is that of *hefker beit din hefker*, that the court has the right to declare property ownerless or perhaps even to transfer ownership from one person to another. This is similar (but not the same) to the concept of eminent domain, where governments have the right to expropriate private property for public use. This concept, the Gemara asserts, is rooted in Biblical law. As such, this principle explains why rabbinic amendments to the laws of inheritance do not

[9] https://torahinmotion.org/discussions-and-blogs/yevamot-90-changing-with-the-times

necessarily demonstrate that the "rabbis have the power to uproot something from the Torah"--rather, they may be an application of *hefker beit din hefker*.

To cite one of many other examples of this principle, the Gemara (Pesachim 7a) rules that in the case of one who betroths a woman using *chametz* (as opposed to a ring) on *erev* Pesach in the sixth hour of the day, "there is no fear that they are betrothed". While *chametz* is only biblically forbidden at midday, the rabbis prohibited eating such two hours prior, and benefitting from *chametz* one hour prior to mid-day. So, even though, biblically speaking, this woman should be married, the principle of *hefker beit din hefker* declares the *chametz* ownerless and worthless. Hence, nothing of value was transferred to the woman, who remains single.

Probably the best-known examples of the Rabbis' "uprooting laws of the Torah" is when Rosh Hashanah and hence, the first day of Sukkot fall on Shabbat. While the Torah obligates blowing the *shofar* both on Shabbat and on weekdays, the rabbis forbade the blowing of *shofar* on Shabbat in keeping with the dictum of Rava that "all are obligated in the blowing of the *shofar* but not all are expert in such, a decree least one will take it in his hand to learn and he will carry four cubits in a public domain, and such is the reason [we do not take] a *lulav* [on Shabbat], and such is the reason [we do not read] the Megillah [on Shabbat]" (Rosh Hashanah 29b). The Gemara explains that such is allowed, as "sit and do not is different". It is one thing to passively tell people not to do a mitzvah, but it is altogether different to allow one to actively violate a law of the Torah.

While *shofar* and *lulav* are the most famous examples of this principle (the way our calendar is set up, the 14th of Adar never falls on Shabbat, though the 15th does), it is invoked in a number of other cases. One interesting example is the case of one who converts on *erev* Pesach - a most appropriate (if busy) day for such. Beit Hillel, in disagreeing with Beit Shammai, rules that this convert may not eat of the *korban pesach* lest he become *tameh,* impure, next year and not realize that as a Jew, he must wait seven days before going to *mikvah*. Such was not true in the previous year, as the laws of impurity do not apply to a non-Jew, allowing for immediate purity after conversion even if the "non-Jew" had just come in contact with a dead body[1].

The Gemara does give one set of circumstances that allow the rabbis to uproot the laws of the Torah even in an active fashion. "*Eilav tishmaun*, to him [the prophet] you shall listen (Devarim 18:15), even if he tells you to violate one of the laws of the Torah; for example, Eliyahu on Mount Carmel; everything according to the hour [needs of the time], you shall listen to him" (Yevamot 90b). Eliyahu violated a fundamental law of the Torah, one punishable with *karet*, excision, by offering sacrifices outside the Mishkan; but such was necessary "to repair the breach", in this case, to demonstrate to the Jewish people the futility of idol worship.

And hence, a Jewish court may--if the need is great--"hit and punish not according the [laws of] the Torah". At times, the courts must be very strict - the example given by the Gemara in applying this principle is giving the death penalty to one "who rode a horse on Shabbat during the time of the Greeks...not because he was deserving of such [a harsh punishment], but the time required it".

But at times we must be lenient--not necessarily by uprooting the laws of the Torah, but by reexamining *halachic* assumptions in light of changing realities[3]. In 1851, Rav Yaakov Ettlinger (*Binyan Tzion Hachadashot*, 23), in a groundbreaking responsum, suggested that we relax our harsh attitudes to Shabbat violators of "today". No longer did Shabbat violators reject Judaism, as many Jews have demonstrated much gray; violating many laws but deeply committed to

others. More recently, the Chazon Ish ruled that non-observance of today is often a result of society at large, and even those brought up in religious homes who leave a life of observance are to be embraced, with the Talmudic strictures against sinners being no longer applicable.

While the goal of maximizing Jewish observance remains the same, the methods of doing such are subject to great change.

[1] The Gemara cites views that in fact, such a child is given only the stringencies of being a *mamzer* and would only be allowed to marry another rabbinically declared *mamzer.* If such is the case, this would not be a case of uprooting a law of the Torah.

[2] One can infer from here that one could convert despite being ignorant of what in Temple times would have been some of the basic laws of day-to-day life.

[3] Modern-day authorities have not shied away from "uprooting" the Torah where necessary. For example, Rav Moshe Feinstein (Yoreh Deah 2, #116) invoked the verse, "a time has come to do for G-d, they have nullified your Torah" in explaining why one may receive money for studying Torah even if such violates a clear ruling of the Rambam. I thank Rabbi Jonathan Ziring for pointing out this source.

Formulating Responses in an Egalitarian Age: An Overview

Harav Aharon Lichtenstein writes:[10]

This year's Orthodox Forum, convened under the rubric, "Formulating Responses in an Egalitarian Age," stands in marked contrast to its recent predecessors. They generally dealt with

[10] https://etzion.org.il/en/halakha/studies-halakha/philosophy-halakha/formulating-responses-egalitarian-age-overview

phenomena whose value and whose place in the world of tradition is clearly acknowledged, but whose specific Jewish character as well as their relation to other elements, required analysis and definition. No one questions the importance of spirituality as a universal category or its concomitant position within yahadut. Similarly, we all recognize the immanent character of toleration and its limits as an issue to be confronted and explored. Discussion of the conceptual approach to Jewish learning, more of an "insider topic," focused upon an area which is not only relevant to Jewish life but stands at its epicenter. Elucidation of the perception and parameters of authority is endemic to our understanding of any religious community. In all of these instances, we found ourselves coping with spiritual and intellectual problems whose resolution, inherently and a priori, would be part of any agenda to formulate a serious and comprehensive hashkafah.

If my antennae do not deceive me, I sense that this is not quite our situation this year. Both the heading proper and some of the accompanying material convey the impression that we are confronted by a phenomenon, ideology and movement both, which somehow casts a pall over our world and its values; which is inimical to the traditional order and constitutes a potential threat to its stability and viability; which has a subversive and corrosive impact upon the ideational content and the institutional fabric of Orthodox Jewish life.

Conjoined to the first, one notes a second difference. Forum discussion has, generally, been just that – the exchange of knowledge and ideas related to selected major themes, governed and coordinated in accordance with a freely chosen agenda. "Response" takes some of the edge off the internal dynamic and largely presupposes a stance vis-a-vis some external stimulus. That stance may of course be positive or negative, affirmative appreciation or heated rejoinder; but it

is, in either case, somewhat imposed. And what is most to our purpose, it may be manifested in two distinct areas: discourse and action. At the theoretical plane, we shall forge an ideological response by engaging in familiar intellectual dialogue. In addition, however, we shall evidently strive to suggest and develop a pragmatic and possibly programmatic response, as we assess the present impact of egalitarianism upon Jewish life and seek to influence their prospective interaction. Response at that plane may of course vary markedly, and may include condescendingly benign stonewalling, vehemently combative opposition, or empathetic openness on the road to reorientation and reappraisal. Whatever one's position, however, whether adamant rejection or progressive adaptation, we shall find ourselves entering the lists more than is our wont. The "free play of the mind," so admired by Arnold, will, in all likelihood, be conjoined to the formulation of policy as well as the mapping of strategy.

Personally, together with Professor Stone, I have been charged with focusing upon two questions. The first reads: "How do we distinguish between ordinary halakhic processes responding to new stimuli; and calls for direct revision of a divinely inspired, permanently fixed, Torah?" This question can conceivably be understood in two distinct senses. We may distinguish between two entities, creatively, by establishing difference and relating variously to them, whether through the innovation of whole categories or through the introduction of nuanced criteria which transmute superficial similarity into a distinction with a difference. Where others see no reason for differentiation, even when they note disparate characteristics, a fertile mind will seize upon previously unappreciated dissimilarity as a basis for apprehending contrast and for acting on that apprehension.

Alternatively, we may distinguish, passively, when categories and parameters are already well-defined, but we must yet address ourselves to the task of recognizing under which rubric to classify a given entity – and this, not by drawing the conceptual lines of the class but, rather, by examining the content and contours of the unit. Here, we engage primarily in observation and perception, as we strive to discern the character of a phenomenon and to fasten upon its definitive qualities.

Distinguishing, in both senses is, of course, standard intellectual fare, the bread-and-butter of denizens of the beit hamidrash – and not only of the Brisker strain. They are, however, clearly different, and I should presumably clarify which is the mandate which has been thrust upon me – or, whether, perhaps, both are included. I do not pretend to plumb the depths of authorial intent, but I hazard the assumption that the question posed relates to distinguishing in the latter sense. Presumably, a committed Jew understands how to relate differentially, in attitude and in practice, to initiatives which seek to implement Torah, on the one hand, or to eviscerate it, on the other. He may not be familiar with the wording of the ninth of the Rambam's thirteen ikkarim:

ויסוד התשיעי הבטול, והוא שזו תורת משה לא תבטל ולא תבוא תורה מאת ה' זולתה ולא יתוסף בה ולא יגרע ממנה לא בכתוב ולא בפירוש אמר לא תוסף עליו ולא תגרע ממנו[1] -

or its equivalent in Mishneh Torah;[2] and he may not have a catechetical mindset altogether. But his ignorance of theology notwithstanding, he knows in his guts what has been the backbone of Jewish faith.

That faith in the abiding character of Torah as binding is the core of emunah, simple or sophisticated. There is, of course, discussion in Hazal as to whether any element of Torah can be

preempted, whether יש כח ביד חכמים לעקור דבר מן התורה. This should mislead no one, however. At no point does the gemara, Bavli or Yerushalmi,[3] entertain the possibility that whole sections of the Torah can be nullified – in order to relieve societal needs, to conform to the Zeitgeist, or even to stimulate religious experience. Such a contention does not even qualify, Halakhically, as error, worthy of requiring an expiatory sacrifice:

אין בית דין חייבין עד שיורו בדבר שאין הצדוקין מודין בו אבל בדבר שהצדוקין מודין בו פטורין מאי טעמא ז"ל קרי בי רב הוא.[4]

The discussion rather centers upon the limited authority to prescribe regulations with respect to detail which, in certain circumstances, will lead to practical conclusions different from those mandated by primal Torah regulations. At a theoretical plane, the situation is different with respect to interpretations of Hazal and, a fortiori, of later links in the mesorah. The Rambam held that, in this area, direct revision by properly constituted authority was indeed a legitimate and viable possibility:

בית דין גדול שדרשו באחת מן המדות כפי מה שנראה בעיניהם שהדין כך ודנו דין ועמד אחריהם בית דין אחר ונראה לו טעם אחר לסתור אותו הרי זה מותר ודן כפי מה שנראה בעיניו שנאמר אל השופט אשר יהיה בימים ההם אינך חייב ללכת אלא אחר בית דין שבדורך.[5]

But the committed Jew, instinctively and intuitively, knows how steadfast the historical fealty of knesset Israel to Hazal has been; and, if he knows of this pesak of the Rambam at all, rightly senses that, inasmuch as the right to revise is restricted to a later sanhedrin, its exercise is of millennial moment, of no immediate practical application.

Distinction in the first sense, seems, therefore, fairly clear. Questions will obviously arise with respect to detail, but the broad outlines should be almost self-evident; and I doubt that it is to

this task that we have assembled to address ourselves. Perceiving difference is, however, a subtler and trickier undertaking. While grosser contrasts pose no challenge, nicer nuances very often do. I know of no litmus test, simple or comprehensive, which could invariably give us satisfactory guidance, nor can I conceive of one. Primary general directions can, however, be pointed; and this, by analogy to a similar dilemma.

With respect to problematic prophecy, the Torah itself hypothesizes a quandary:

וכי תאמר בלבבך איכה נדע את הדבר אשר לא דברו ה'?

And it goes on to posit a definitive criterion:

אשר ידבר הנביא בשם ה' ולא יהיה הדבר ולא יבא הוא הדבר אשר לא דברו ה' בזדון דברו הנביא לא תגור ממנו.[6]

This test relates to the substance of the prophecy. That being the case, however, it only covers a limited class of situations. As Rashi noted:

ואם תאמר זו במתנבא על העתידות הרי שבא ואמר עשו כך וכך ומפי הקדוש ברוך הוא אני אומר כבר נצטוו שאם בא להדיחך מאחת מכל המצות לא תשמע לו אלא אם כן מומחה הוא לך שהוא צדיק גמור כגון אליהו בהר הכרמל שהקריב בבמה בשעת איסור הבמות כדי לגדור את ישראל הכל לפי צורך שעה וסייג הפרצה לכך נאמר אליו תשמעון.[7]

The solution which Rashi offers, focused upon the personality of the prophet, is grounded upon the conclusion of a brief discussion in the gemara:

היכא דמוחזק שאני דאי לא תימא הכי אברהם בהר המוריה היהי שמע ליה יצחק אליהו בהר הכרמל היכי סמכי עליה ועבדי שחוטי חוץ אלא היכא דמוחזק שאני.[8]

The gemara does not specify with regard to which qualities one is to be validated as muhzak. As we saw, Rashi's comment on the pasuk singles out piety – שהוא צדיק גמור. The Ramban is critical of this emphasis:

וזה איננו נכון בעיני שאין ההמחאה שהוא צדיק גמור אלא שהוא נביא אמת מוחזק לכל במה שהקדים לאמר עתידות יבאו והוא האות שלו כמו שהזכיר בפרשה הזו או המופת שעשה לפנינו וזאת חזקת הנביאים.[9]

On his view, it is the veracity of past prophecy which is crucial. And indeed, in his perush on the gemara, Rashi cites two areas: שהוא צדיק ונביא אמת.[10] The individual upon whom one relies to the point of accepting his authoritative decision to deviate temporarily from a Halakhic norm must both be marked, generally, by saintly religious character and, specifically, have a track record as a prophet.

This dual focus is distinctively relevant for the Rambam. Given his view that a prophet cannot merely be a vehicle for conveying messages, and his insistence upon the highest standards of moral rectitude, intellectual excellence, and religious intensity and depth as preconditions for prophecy, there is great coincidence between the personal and the functional aspects of the muhzak. Signs and wonders are not a sufficient condition to establish one's status as a prophet or to require others to heed his message:

ולא כל העושה אות ומופת מאמינים לו שהוא נביא אלא אדם שהיינו יודעים בו מתחלתו שהוא ראוי לנבואה בחכמתו ובמעשיו שנתעלה בהן על כל בני גילו והיה מהלך בדרכי הנבואה בקדושתה ובפרישותה ואחר כך בא ועשה אות ומופת ואמר שהא-ל שלחו מצוה לשמוע ממנו שנאמר אליו תשמעון ואפשר שיעשה אות ומופת ואינו נביא וזה האות יש לו דברים בגו ואף על פי כן מצוה לשמוע לו הואיל ואדם גדול וחכם וראוי לנבואה הוא מעמידים אותו על חזקתו ובדברים האלו וכיוצא בהן נאמר הנסתרות לה' א-להינו והנגלות לנו ולבנינו ונאמר כי האדם יראה לעינים וה' יראה ללבב.[11]

The acceptance of nevu'ah is grounded upon recognition of the navi.

For the Rambam, this is true of response to all claims to prophecy; but it is doubly crucial when, as in the instances cited in the gemara in Sanhedrin, one is confronted by prophecy which is innovative and, in a sense, even deviationist. The same may be posited with regard to our question. "How do we distinguish between ordinary Halakhic processes responding to new stimuli, and calls for direct revision of a divinely inspired, permanently fixed Torah?" In two ways. At one plane, we test the substance of suggested innovations. The Halakhic universe was not created yesterday. It has a long history, in the course of which methodology was refined, canons of interpretation established, modes of evidence limned, a corpus of relevant sources and their hierarchy defined. Some of these were set down formally, as, for instance the thirteen middot of the Torat Kohanim or the thirty-two of Rabbi Eliezer ben Rabbi Yossi Hagelili. Other elements, more fluid in nature, evolved more flexibly; but these, too, within certain parameters. Knowledge of where the frontiers lie and sensitivity to their violation is, partly, acquired through theoretical formulation and analysis. Primarily, however, it is imbibed through reverential immersion in the tradition, whether through existential relation to its texts or, better still, through immediate exposure to its current masters. The aphorism, גדולה שימושה יותר מלימודה[12], is not confined to pesak. It is, however, surely crucial with respect to that sensitive area – as regards the examination of pesakim no less than their formulation.

The second test concerns the posek – and this, with reference to both his learning and his spiritual persona. Unquestionably, some pesakim of Rav Mosheh Feinstein or Rav Shlomo Zalman Auerbach z.t.l. (not all of which found their way into print), had they come from Rabbi X

or Y, would have raised eyebrows and possibly incited protest. Is this discriminatory? Superficially, yes; in a deeper sense, categorically not. With regard to such giants, one knows that a decision issues out of a mastery of the Halakhic corpus, imbedded in their bones no less than in their heads; that is anchored in a nuanced intuition of the Halakhic process and of how it balances normative mandates with human needs. Primarily, one knows that it issues from a person of profound faith and abiding belief in the absolute truth of Torah; one of overriding responsibility to the Halakhic tradition and its texts; one in whom the interpretation of Halakhah and its implementation unfolds within a context of pure submissive קבלת עול מלכות שמיםand קבלת עול מצוות. One can securely respond affirmatively, אליו תשמעון, when one is fully confident of both the modality and the motivation of any innovative initiative.

Without casting any personal aspersions, this dual test is not met by promulgators of clarion calls for "direct revision" of basic Halakhic norms. Substantively, these often do not spring out of the tradition and its processes but contravene them – at times, in the name of progressive revelation, explicitly pressing for a drastic restructuring of the whole Halakhic order, and not just for rescinding particular directives. Moreover, their impact is not cushioned by assuaging reassurance about the motivation. The calls, while at times issuing from persons fundamentally committed to the truth of Torah, and whose sincerity I have no desire to challenge, are nevertheless often fuelled by extraneous concerns and the felt need – admittedly, perhaps moral and religious, no less than societal – to conform to current philosophic vogue. At the very least, one is left with unease about the ideological and axiological basis of the balance between the permanent and the contemporary. Indeed, מוחזק שאני - שהוא צדיק ונביא אמת.

At this juncture, the reader may very well ask: All well and good, but what has this to do with egalitarianism? The modality of evaluation is presumably relevant to any problematic phenomenon. Indeed, I confess I am slightly perplexed myself. Could not the litmus tests suggested for distinguishing between varied responses in an egalitarian age be equally applicable to responses formulated in an agnostic or hedonistic age? Perhaps, I answer, what is anticipated is not a set of guidelines for distinguishing between others' responses, but, rather, a response of my own to egalitarianism which should, in some way, allow for adopting some of its contentions, through the modus operandi of ordinary Halakhic processes, while yet steering clear of heresy. And yet, the question persists. Could not the same criteria, to be presumably postulated on this score – consistency with acknowledged methodology, consonance with the authoritative corpus, concern for values as well as norms – likewise direct any traditional response to hedonism?

They certainly could. If, nonetheless, our assignment confronts us as it does, I suspect it is because we are, collectively, attracted, philosophically and pragmatically, by egalitarianism while sybaritic libertinism leaves us cold. We leave carpe diem to the Latins, but in the Declaration of Human Rights we find universal moral import. Hence, in this area, the critical task of winnowing the chaff from the wheat, when we consider that here may be wheat worthy of menahot, assumes significant dimensions. We are therefore called upon to define, however briefly, our relation to contemporary egalitarianism, at the level of cardinal tenets and basic hashkafah.

As I perceive it, egalitarian thought is characterized by three major themes, although these need not appear in conjunction. The first, and most fundamental, is the metaphysical

uniformity of man. For secularists, this conception is virtually axiomatic, deriving from the nature of their total world-view. Secularism is a levelling force. Metaphysically, it regards, and must regard, all places, all times, all objects, and all persons as inherently of a piece, as there is no basis and no source for radical differentiation. Disparity can only be functional and artificial, of a purely secondary order. For the religious egalitarian, uniformity is not a priori necessary, but he assumes its existence nonetheless as an article of faith, faith in the catholic brotherhood of man under the impartial fatherhood of God.

A second, less pervasive, theme, familiar from other contexts as well, is that of moral relativism. Radically expressed, this would entail the rejection of any ethical absolute whatsoever. In a more moderate vein, it would deny the concept of natural law, reduce mores to social convention, and leave, at most, a few overarching virtues such as love or justice, as ultimate values. Closely related, third, is the assertion of personal autonomy, with the individual firmly ensconced as the primary, if not the sole, arbiter of right and wrong.

These basic philosophic premises militate, at the social and political plane, against preferential status for any person or priority for any ethos. They are the linchpins of an ideology which translates, in practice, into movement toward their implementation through pressure for social and political changes. Some of these changes are separable as independent initiatives, each with its local impetus. They are much reinforced, however, by a comprehensive systematic conceptual framework, whose adherents – over and above their concern with the pragmatic ramifications of perceived inequality and their quest for universal entitlement – regard the bare

fact of discrimination, regardless of its utilitarian consequences, as an outrageous spiritual abomination.

While egalitarianism is not exclusively, reciprocally, and inextricably bound to these premises – one could certainly conceive of an absolute, divinely revealed system which should be egalitarian in character and content – the presently prevalent strain is, I believe, very much grounded in them. If we ask ourselves where does yahadut stand with regard to them, the answer is self-evident. Recognition of the uniqueness of man is central to our religious humanism; but so is the sense of metaphysical distinction. It inheres in the concept of kedushah – of place, time, object, and, above all, of knesset Israel. That kedushat Israel is grounded in chosenness, the fusion of privilege and responsibility which underlies Jewish distinctiveness; and, it is, from our perspective, decidedly metaphysical. Even if one should side with those who contend, in the face of assorted midrashim that behirat Israel was not, ab initio, part of a providential scenario but, rather, the fruit of historical development, we nevertheless acknowledge that the choice, having been determined, broke fresh ground and created a distinctive level of intrinsic metaphysical status. Moreover, there are additional levels of kedushah within knesset Israel proper, particular chosenness having been accorded shevet Levi and kohanim; and while merit can, for certain purposes, supersede them, [13]ממזר תלמיד חכם קודם לכהן גדול עם הארץ, the categories are very much part of the Halakhic order.

Premises concerning ethical and religious relativism or ultimate personal autonomy are, if anything, even less palatable. Normative absolutes are the essence of Torah and our status as commanded spiritual beings the bedrock of our relation to the Ribbono Shel Olam.

Consequently, in relating to egalitarian ideology, there is no alternative to clearly recognizing and candidly asserting that, as a system, it is, for us, wholly untenable. However, we may view certain specific initiatives, we cannot countenance the philosophic framework. In practice, where Halakhically feasible and axiologically desirable, nuanced revisions, in the direction of either stringency or latitude, may lie in store. The frontiers of what, in this area, the Torah world regards, attitudinally and pragmatically, as acceptable or even preferable, may be tested anew, as the substantive significance of modes of conduct and our collective relation to them is altered contextually. Ideologically, however, we cannot encounter egalitarianism on its turf but, regardless of what is currently politically correct, must rather confront it with our own truth. Where it exists, we may note and even stress our own affinity with certain universal elements and egalitarian values; and we should explain the nature of behirat Israel and its demands. But we have neither the right nor the desire – nor, for that matter, the ability – to sweep cardinal tenets under the rug. Halakhah does not regard every inequality as an inequity.[14]

I believe that this account of our stance and mindset is reasonably accurate. I would, concurrently, submit, however, that it is possibly too one-sided. Unquestionably, total egalitarianism – radical and comprehensive, ideology as well as lifestyle – constitute a philosophy and an ethic we categorically abjure. It strikes at the heart of cardinal tenets regarding the given reality and the ideal desideratum of personal Torah life and of communal Jewish polity. However, as a component of our spiritual universe, the motif of אני בריה וחברי בריה, "I am a creature and my fellow is a creature," strikes a responsive chord; and this, not only because we are humanly sensitive to דמעת עשקים ואין להם מנחם, "the tears of the oppressed, lacking all comforter" – the outcry

of the disadvantaged, disenfranchised, and discriminated against – but because, at some plane, the prospect of the brotherhood of man under the fatherland of God resonates, beyond our ethical consciousness, in our religious sensibility. Hence, rather than dismiss the egalitarian impulse cavalierly, we need – striking a balance between the universal and the particularistic, between hierarchy and levelling – to assess its place within our overall hashkafah.

Still, our fundamental stance should be clear, to ourselves and to our audience. In discussions of the issue, one occasionally catches traces of an attitude which accepts egalitarianism as an ultimate desideratum and then, confronted with its apparent inconsonance and inconsistency with Halakhic data, strives to find modes of innovation or improvisation which might enable its implementation within the constraints of Torah. There may, indeed, be areas of Halakhah – the tragedy-ridden reality of mamzerut is a prime instance – which, in practice, *poskim* seek to circumscribe and even circumvent. Egalitarianism, as a whole, is not, however, among them; and our relation to its cardinal issues ought not be tainted by apologetics.

In one area, the principled hashkafic rejection of egalitarian ideology admittedly leaves us open, morally and politically, to the charge of egocentric inconsistency. Since the Emancipation, Western Jews have traditionally pressed for full civil and political rights. That pressure has, in large measure, been fuelled by egalitarian impulses and theory; and, to some, it seems palpably unfair that Jews should not seek to enlarge the bounds of others' equality. The argument is not without appeal, but it is fundamentally specious. Despite the often-aggressive claims of its proponents, equality need be neither total nor comprehensive. The rejection of one criterion does not militate for the abandonment of all. The extent to which moral standards ought to be translated into legal sanctions has of course been widely debated. In dealing with it, however, we can hardly

resolve the issue by equating the right to vote or to attend a university with the right to terminate incipient fetal life. Similarly, within the Jewish community, affinity with the civil-rights movement does not entail the social acceptance of the rupture of Jewish identity often attendant upon intermarriage.

The issue is exacerbated by a comparison of the respective American and Israeli scenes. How would we relate, we might be asked to a local equivalent of hok hashevut, which would admit Christians indiscriminately but impose barriers before Jews, Moslems, or atheists? As the answer is self-evident, we stand exposed to the sarcasm of Macaulay's lampooning representation of a particularist's assertion that others are duty-bound to tolerate him as he is right and they are wrong, while the reverse does not obtain. Some might suggest that the gap in consistency could be reduced if Diaspora Jews would forgo some of their entitlement; but as this is a most unlikely prospect, we must look to more salient considerations. Probably the most relevant is the conventional argument that weight needs to be assigned to self-definition. The United States is, socially, a predominantly Christian country but is not formally so, while Israel was conceived and founded as a Jewish state. Hence, as applied to hok hashevut, for instance, every prospective Jewish oleh, while not yet a citizen of medinat Israel, is already a member of knesset Israel; and, thus, is admitted to the national home of the Jewish polity, as a returning American expatriate need not apply for a "green card." On this reading, we presumably would not cavil at an Indonesian immigration law which would be tilted in favor of Moslems. The contention is valid, and it obviates many specific objections. I doubt, however, that it answers all; and I think we should recognize that it is entirely conceivable that the conjunction of the pursuit of certain

interests in the Diaspora with adherence to the principle of chosenness and to ethnic identity in Israel may indeed issue in a measure of disparity to which we need to be sensitive.

If we noted a mix of the theoretical and the pragmatic in dealing with our first question, it is even more marked as we relate to the second: "How should we respond to changes in society which are motivated by a combination of both positive factors of equal respect for all persons as a manifestation of zelem E-lohim and negative factors (tolerance of sexual practices beyond Halakhic norms)?" Any serious answer must take into consideration two kinds of factors. There are, first, issues of principle. To what extent are we obligated or permitted, Halakhically and morally, to stake out a position, ranging from revulsion to support, with respect to such changes? Second, there are matters of interests – not, I trust, material and personal, but spiritual and communal. What impact will a given stance, or its absence, have upon the moral climate of our environment – upon our institutions, upon our youth, upon ourselves? And of course we need to wrestle with these concerns with an eye to a more general dilemma, regarding the balance of principle and interests. To what extent do we have the right or the duty to sharpen or modify what might have been our optimal response in light of possible fallout? I am not so naive as to reject this factor entirely, but determination of how much weight should be assigned to it requires careful deliberation.

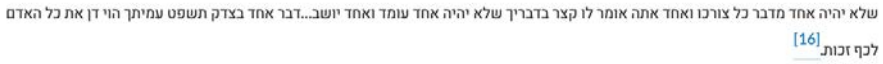
In part, these issues would obviously confront us even if we were dealing with change impelled by purely negative or wholly positive factors. With respect to them, too, we would have to weigh, apart from the content of response, whether to respond at all – and if so, in which vein. We can distinguish between at least three strains of response. There is, first, attitude and

sensibility. Even when we in no way enter the lists for or against a given phenomenon, we may still, personally and intimately, react to it, with recoil or enthusiasm. Secondly, we may engage it, verbally and forensically, with individual or collective expressions of encouragement or opposition. Finally, we may encounter it actively by seeking to direct the course of events, as regards both society and state, whether through initiatives in the private sector or by promoting governmental involvement to advance or inhibit a particular change. And all of this, again, with respect to monochromatic change. Unquestionably, however, the situation is more complex when we confront a mixed impulse, and, in answering the question posed to me, I shall try to bear this factor in mind.

Whether, confronted, by an egalitarianism twinned to a non-judgmental moral stance, we shall respond at all, will surely depend on how much we care, and on how we prioritize our energies and resources. That we ought to care can, I hope, be taken for granted – at the very least, at the level of personal reaction; and this, not only because our own community may become infected, but out of concern for the possible contamination of the broader society per se. The insularity of much of the Torah world in this respect is an educational disaster. Abortion on demand is a moral abomination, whoever the fetus may be. We have much to learn from the late Lubavitcher Rebbe, who took up the cudgels for a modicum of prayer in the public schools. Unquestionably, we shall be far more concerned if and when our own are involved – caring about Israel more than elsewhere, and about Diaspora Jewish communities more than about their ambience. We are not so universalistic as to disregard national ties; and modern history has amply demonstrated that felt ethnicism generates more concern than abstract pronouncements about global fraternity. Insouciance is, however, out of the question.

To care, morally, is, in all likelihood, to judge. I am not at all certain that those who advocate a non-judgmental stance practice what they preach. They tend to be quite intolerant of intolerance – i.e. of the violation of what they regard as a value; and if they are indeed non-judgmental about homosexuality or abortion, it is because they regard these as morally neutral. Yahadut, however, does not preach ethical distance at all. As a system, grounded in Halakhah and general morality, it rejects, as previously noted, the relativism upon which much of the abdication of judgment rests; and, hence, it clearly encourages the individual Jew or Jewess to adopt a position vis-a-vis developments in the world around them.

An attitudinal response is, then, certainly in order. One might of course question whether this should translate into personal judgment, with respect to an individual or a group. On the one hand, the pasuk enjoins, בצדק תשפט עמיתך.[15] The Torat Kohanim, cited by Rashi, offers two explanations of this charge, addressed to authorized judges or to the ordinary person, respectively:


שלא יהיה אחד מדבר כל צורכו ואחד אתה אומר לו קצר בדבריך שלא יהיה אחד עומד ואחד יושב...דבר אחד בצדק תשפט עמיתך הוי דן את כל האדם לכף זכות.[16]

The latter charge, considerably amplified in a sugya in Shabbat and Aboth d'Rabbi Nathan, and emphasized by the Sh'iltot,[17] need not relate to anything expressed to one's fellow; it may simply include private evaluation. It does, however, make allowance for judgment, even if it mandates its quality and perspective. On the other hand, Hillel's equally familiar dictum, ואל תדין את חבירך עד שתגיע למקומו,[18] appears to discourage judgment altogether. However, it should be obvious that this counsel, too, does not advocate the acceptance of alternative mores. It rather urges empathy

and humility in perceiving and interpreting how and why deviation from normative conduct has occurred. We are all familiar with the exchange between Rabbi Meir and Beruryah:

הנהו בריוני דהוו בשיבבותיה דרבי מאיר והוו קא מצערו ליה טובא הוה קא בעי רבי מאיר רחמי עלויהו כי היכי דלימותו אמרה ליה ברוריא דביתהו מאי דעתך משום דכתיב יתמו חטאים מי כתיב חוטאים חטאים כתיב.[19]

And I assume most would today be inclined to adopt her softer position, sparing personal criticism even with respect to changes we might find objectionable. That, too, however, is a far cry from what the movers of such changes seek.

As to the substance of response, we need to pay particular attention to the mixed roots of the changes under consideration. In this respect, we are confronted by a quality endemic to much of modern culture. It has often been remarked that while, in medieval and Renaissance literature, one could tell the saints from the sinners without a scorecard, the modern scene is far murkier. Shakespeare has been highly praised for the creative diversity which could humanize an Iago as well as a Desdemona, but even in his plays we are hard put to find a whisky priest or a Raskolnikov. This spiritual chiaroscuro confronts us with a challenge. The Hazon Ish is reputed to have asked, how could one expect meaningful dialogue between the secular and the religious communities when the same act is valued by the former as an expression of love and classified by the latter under hayvei keritut.

Nevertheless, at the conceptual plane, the challenge ought not be insuperable. Avoiding the genetic fallacy, we may, in the spirit of the fabled angelic missive of the Kuzari, appreciate motives while decrying results: כונתך רצויה בעיני הא-לוה אבל מעשך אינו רצוי.[20] Moreover, we may

distinguish between various strains of the motivation proper. By way of precedent, in this respect, one might cite a remarkable gemara. Addressing himself to the narrative regarding the daughters of Lot, who had intoxicated their father and then had sexual relations with him, Rabbi Hiyyah bar Abba in the name of Rabbi Yehoshua ben Korhah derives a striking moral:

לעולם יקדים אדם לדבר מצוה שבשביל לילה אחת שקדמתה בכירה לצעירה קדמתה ארבעה דורות לישראל עובד ישי דוד ושלמה ואילו צעירה עד רחבעם דכתיב ושם אמו נעמה העמונית.[21]

Whether, from a technical standpoint, this sexual liaison was, to a non-Jew, Halakhically proscribed as incest, was debated in another gemara,[22] and the Rambam and the Meiri differed as to the pesak.[23] But that the entire scenario of duped sexuality was reprehensible seems reasonably clear. Several lines earlier, the selfsame Rabbi Hiyyah bar Abba contrasts the relative modesty of the younger daughter who, unlike her elder sister, in naming her child, concealed Lot's paternity; and Rashi, analogously, castigates the latter for having initiated the zenut.[24] And yet, on the assumption that the motivation was, at least in part – there was an altruistic aspect of rehabilitating a scorched world, but, surely, a selfish moment as well – admirable, Hazal could appreciate the positive component, and speak of a devar mizvah in this context, to boot.

Even at the attitudinal plane, however, such a discriminating approach should no doubt be implemented with selective care – depending, in large measure, on the weight of the positive and negative elements, respectively. I have little difficulty in applying it to the Hazon Ish's case of a wedded couple which does not observe taharat hamishpahah. I am not only unwilling but unable, however, to react similarly to romantic love which issues in intermarriage. The magnitude of the

transgression, as both a violation of a basic Halakhic norm and as a general apostasy, בה' בגדו כי בנים זרים ילדו, is such that it effectively overshadows everything else. Yet, the basic principle of axiological discrimination should be borne in mind.

This last distinction is of relevance to the specific question confronting me. The term "changes in society" has two distinct, albeit linked, referents – one, sociological, the other, ideological; and they differ in motivation no less than in content. In practice, abortion may be impelled by convenience or distress. The theoretical claim to a right to abort, in contrast, is probably fuelled by philosophic assumptions regarding personal autonomy. The homosexual is driven by a psycho-physiological urge, his advocates by a sociocultural manifesto. And, of course, the specific gravity of the sociological trends themselves varies widely. We can hardly regard intermarriage and gay unions equally. In ferreting wheat from chaff, we need to observe which is the grain at hand and steer our course accordingly.

These considerations relate to response as attitude. To them, in dealing with verbal and with active response, must obviously be added pragmatic factors. These focus upon results – the fallout of acquiescence, of affirmation, of antagonism, or any blend of the three. Clearly, decisions regarding such responses will entail a plethora of specific judgments, but the overall thrust of planning response should, almost a priori, be manifest. We are guided by two primary concerns: a) commitment to the cause of avodat hashem and its advance; b) sensitivity to human personality and its welfare. The need to assess how best to promote each of these, separately and jointly, and what kind of balance to strike when they are in apparent conflict, is the alpha and omega of any meaningful and effective spiritual strategy – whether in private counseling, in educational endeavor, in institutional initiative, or in communal enterprise.

These twin concerns are distinct, and yet, reciprocally intertwined; and this, in several senses. First, sensitivity to those whom we challenge enhances the prospect that they will heed our message. When Hazal counseled:

לעולם תהא שמאל דוחה וימין מקרבת לא כאלישע שדחפו לגחזי בשתי ידיו ולא כיהושע בן פרחיה שדחפו לאחד מתלמידיו בשתי ידיו,[25]

they were not only concerned with the value of respecting an interlocutor's dignity, but with the prospect of enhancing his sanctity. Secondly and conversely, appreciation of zelem E-lohim – or, at another plane, of personal kedushat Israel – is itself part of the world of avodat Hashem we are striving to enhance.

And yet, divergence and even conflict there will probably be, and we need, thirdly, to give thought to optimal balance. I do not think, for a moment, that a single answer is in order. We may lean towards one orientation or another, but the exigencies of a given historical reality must always be considered. Whichever concern is in relative neglect requires special counterbalancing sustenance. This formula almost assures a kind of perennial unpopularity, but it is what spiritual responsibility demands.

How such an approach will reflect itself in a response to the current trends of egalitarianism should probably be better determined by those much closer than myself to the vortex of this ideology and its manifestations. My own assessment is that within the hard core of the Torah world, the human aspect requires greater emphasis than it is currently receiving, while the reverse is true of the broader Jewish community. But I may be wrong. With respect to both venues, however, we should be careful to embrace both values, even as the educational and tactical nuances

shift; and we should not compromise authenticity in the quest for acceptability. The maintenance of standards should take precedence over the enhancement of rating.

In determining policy in this area, axiological considerations should certainly be primary. Nevertheless, they do not stand alone. Some place in the planning of response, with an eye to particular present historical circumstances – what F.H. Bradley called, "my station and its duties" – will obviously be accorded purely tactical factors. Of these, several familiar elements may be singled out for special mention. The first – most directly related to the mizvah of reproachful tokhahah, but pregnant with far broader ramifications – concerns likely reaction to a prospective initiative. We recall Rabbi Elazar ben Rabbi Shimon's directive:

כשם שמצוה על אדם לומר דבר הנשמע כך מצוה על אדם שלא לומר דבר שאינו נשמע רבי אבא אומר חובה שנאמר אל תוכח לץ פן ישנאך הוכח לחכם יאהבך.[26]

But we also recall the qualification of many rishonim who asserted that, at the public plane, this counsel could not always be heeded, as it had to be balanced by the need to stake out Torah positions and sustain principles.

In a related vein, we will obviously need to evaluate how a given course, heeded or not, will inhibit problematic "egalitarian" trends – and at what cost. Consider the worst: intermarriage. Unquestionably, as the non-Orthodox community realized belatedly, this plague needs to be confronted, first and foremost, educationally; and this, not only by an ethnocentric appeal for Jewish continuity but by inculcating a positive sense of the meaning of chosenness and

the uniqueness of kedushat Israel. Concurrently, however, some will advocate severe social sanctions in the hope that prospective ostracism will serve as an effective deterrent. I take no issue with this, on principle. An individual who has crossed the line should not be surprised to find himself beyond the pale; and, as I have indicated, I do not view this as an issue with regard to which respect for the underlying involvement of zelem E-lohim should counterbalance the gravity of the deviation. Several years ago, a group of Orthodox rabbis floated a suggestion that, given the scope of the phenomenon, the view of those who "marry out" as pariahs should be ameliorated, so that they could continue to feel and function as members of the Jewish community, with all that this could imply for their own and their children's future. In short order, the suggestion evoked vehement protests – in part, on the grounds that its proponents were too soft on the phenomenon, and, in part, out of concern that a more understanding attitude would dilute the deterrent effect of the traditionally tougher stance. The first contention certainly deserves to be weighed on its merits; but, as to the second, both the current force of deterrence and the cost, human as well as Jewish, at which it is attained, requires assessment.

In considering the last point, a partial analogy might be helpful. Rabbenu Gershom was asked whether a kohen who, had converted to Christianity and then repented, should be stripped of his prerogatives. The discussion in his teshuvah revolves, in part, around the formal Halakhic questions – much debated by earlier geonim and subsequent rishonim, on the basis of a sugya in Menahot[27] – as to whether a person who had worshipped avodah zarah, perhaps even under duress,[28] could perform avodah for the Ribbono Shel Olam, and as to whether the sanctity of kehunah is vitiated by apostasy.[29] Rabbenu Gershom argues for leniency with regard to these issues; but then adds further elements to his decision:

הילכך אין לנו ראיה לא מן המקרא ולא מן המשנה לפוסלו אלא שיש לנו סיוע מן המקרא וממשנה שלא לפוסלו דכתיב ולא תונו איש את עמיתו בהונאת דברים הכתוב מדבר כיצד אם היה בעל תשובה לא יאמר לו זכור מעשיך הראשונים ואם תאמר לא יעלה לדוכן ולא יקרא בתורה תחילה אין לך אונאה גדולה מזו ועוד נמצאת אתה מרפה ידיהם של בעלי תשובה ולא נכון לעשות כן דאמר ר' יוחנן כל האומר מנשה חטא אין לו חלק לעולם הבא לפי שמרפה ידיהם של בעלי תשובה.[30]

This concern, lest the kohen be affronted, on the one hand, and with possibly discouraging recantation, on the other, introduces a new dimension to the discussion; and it is one which may have wider application. We should of course note that the kohen in question may have converted in a climate of intimidation, if not of outright duress, in the first place; and, most critically, that he has repented. These elements are generally absent in the contemporary case of intermarriage. Nevertheless, at least as a basis of comparison with respect to the weight assigned to deterrence, the analogy may be instructive.

Thirdly, at a totally different level, we need to consider what has popularly become known as "the slippery slope" – the concern that acceptance of certain innovations, even if they are Halakhically tenable, may invite pressures for further progressive change, resulting, incrementally, in the erosion of traditional sensibility or even outright Halakhic violation. This issue has been raised most vigorously with respect to various initiatives concerning the role of women. Within the Torah world and the rabbinic establishment, response to these has been widely divergent. Some have contended that whatever the Shulhan Arukh does not proscribe could be regarded with favor. Others have rejected this premise as a general approach; and they have further resisted any innovation, particularly if fuelled by feminist ideology, on the grounds that it might

lead to further demands or trigger a domino effect. And there are, of course, a spectrum of intermediate responses.

Here again, we need to maintain a dual watch. The concern about the slippery slope is, in principle, both legitimate and genuine. It is firmly rooted in Hazal, who anchored many gezerot upon it, as graphically illustrated in the Rambam's explanation as to the basis of the prohibition against fowl cooked with milk:

אבל אם אמר בשר העוף מותר מן התורה ואנו נאסור אותו ונודיע לעם שהיא גזרה שלא יבא מן הדבר חובה ויאמרו העוף מותר מפני שלא נתפרש כך החיה מותרת שהרי לא נתפרשה ויבא אחר לומר אף בשר בהמה מותרת חוץ מן העז ויבא אחר לומר אף בשר העז מותר בחלב פרה או הכבשה שלא נאמר אלא אמו שהיא מינו ויבא אחר לומר אף בחלב העז שאינה אמו מותר שלא נאמר אלא אמו לפיכך נאסור כל בשר בחלב אפילו בשר עוף אין זה מוסיף אלא עושה סייג לתורה וכן כל כיוצא בזה.[31]

In this case, one encounters outright d'oraitha violation early in the chain. The principle is in force, however, even when that is not the case.

Yet, in applying the principle, two factors need to be weighed. We shall have to evaluate, first, the likely course of events. How truly slippery is the slope? What innovation is likely, and how likely, to generate which kind of pressures? Second, we shall need to examine at what cost - whether in the form of possible alienation of certain constituencies or in the impairment or dilution of the quality of spiritual life - the presumed security of an ultra-conservative stance is being attained. This last factor will itself require dual consideration, as we strive both to perceive the prospects of various alternative scenarios on the ground and to determine how much weight to assign this particular concern.

As for myself, I presume that, with respect to both the women's issues, specifically, and the fear of the slippery slope, generally, I find myself somewhere in the middle – enthusiastically supportive of some changes, resistant to others, and ambivalent about many; but I take it that this is not the venue for dealing with the details of various agendas. I feel strongly, however, in conclusion, that none of us can be content with a middling position with regard to a corollary issue. If we cannot countenance egalitarianism as a total ideology, and we cannot rally behind its comprehensive platform, we need to labor to assure that its positive component, respect for zelem E-lohim, be properly internalized and inculcated.

The formulation of my question notwithstanding, that concept does not mandate, for us, "equal respect for all persons." It demands that all, equally, be regarded with respect, but its quality may differ. We subscribe to both parts of Rabbi Akiva's familiar formulation. At one plane, חביב אדם שנברא בצלם; additionally, however, [32]חביבין ישראל שנקראו בנים למקום. And what is true of affection, translates into esteem. While a balance between the ethnic and the universal is variously struck in some oa our most fundamental and familiar sources – in pesukei d'zimrah, for instance, in one sense, and, most notably, in the opening of shema, in another – that balance is often insufficiently appreciated and inculcated within our Torah community. Its neglect is, however, spiritually unconscionable and pragmatically foolhardy. We need to ascertain that, as we insist that the universal element not effectively neutralize the particularistic, we be equally insistent that the reverse not occur. If our response to the egalitarian manifesto is resistant, we are charged with the moral, religious, and educational responsibility to find compensatory means to assure that Ben Azzai's overarching principle:

זה ספר תולדות אדם, זה כלל גדול מזה,[33]

attain – in our homes, in our schools, in our hearts – the position it deserves. That we owe not just to the other – in Milton's phrase, "the human face divine." That we owe to the Ribbono Shel Olam, and to ourselves.

NOTES

[1] Perush Hamishnayot, preface to ch. 10 of Sanhedrin, tr. Rav Y.D. Kapah (Jerusalem, 1965), p. 144. In his notes, Rav Kapah addresses a parallel text from Mishneh Torah, Melakhim 11:6, which due to censorship, has been omitted from most of the printed editions.

[2] See Teshuvah 3:8.

[3] See Yebamot 89b-90b, and Gittin 4:2, respectively.

[4] Horayot 4a; cf. Sanhedrin 33b.

[5] Mamrim 2:1. Inasmuch as the Rambam does not qualify, as he does in the next halakhah, that only a greater beit din is authorized to reverse its predecessor's decision, it seems clear that even a lesser one is entitled to do so.

[6] Dev. 18:21-22.

[7] Ad locum, 18:22.

[8] Sanhedrin 89b.

[9] Dev. 18:21.

[10] Sanhedrin 89b, s.v. heikha.

[11] Yesodei Hatorah, 7:7; and cf. ch. 8, passim, and 10:1-3.

[12] Berakhot 7b; and cf. Tosafot, Ketubot 17a, s.v. mevatlin.

[13] Horayot 13a.

[14] To the trio of themes previously cited might be added: the quest for parity within relationships. This has particularly come to the fore in the context of feminism, with respect to marriage. The issue is important, but here I have largely skirted it; inasmuch as I believe that feminism is qualitatively different from other manifestations of egalitarianism cited. Conceptually, its claims are less radical and more limited in scope. Practically, despite some confrontations with the prevailing social order, generally, and the world of Halakhah, specifically, its challenge to tradition is hardly of a piece with intermarriage or abortion and should be dealt with independently. Neither the challenge nor the response to it revolves around levels of kedushah or personal autonomy,

although, admittedly, some conceptual links and certain operational alliances do exist. I am inclined to think that the linkage is greater within the broader sociological context than within our specific Jewish community. I grant, however, that this assessment – with respect to the American scene, largely the perception of an outsider – is open to challenge. In any event, the fuller treatment the issue deserves lies beyond my present scope.

[15] Vay. 19:15.

[16] Kedoshim, 4:3.

[17] Shabbat 127a-b, A.d.R.N., 8:7-8, and Sh'iltot d'Rabbi Ahai Gaon, Sh'ilta 40, respectively.

[18] Abot, 2:4.

[19] Berakhot 10a. Of course, at the level of pure peshat, the word חטאים, with the dagesh in the tet, is the nomen agentis for sinners. The derash relates to the use of this unusual form which resembles the plural of sins.

[20] "Introduction;" in Yehudah Even Shmuel's translation. Of course, as reflected in the concluding coda, part of the thrust of the work is the undermining of this thesis, by way of stressing the need for conjoined action and intention.

[21] Baba Kama 38b, Nazir 23b, Horayot 10b.

[22] See Sanhedrin 58b.

[23] Issurei Bi'ah 14:10 and Bet Habehirah, Sanhedrin 58b, respectively.

[24] See the gemarot previously cited and Rashi, Ber. 19:33, respectively. The Ramban, however, focusing upon their longing for progeny – and, probably, upon midrashic statement (ב"ר נא:י) שהיו סבורות שנתכלה העולם כדור המבול– takes a much more positive view of their motivation, and even of the initiative proper:

באולי כי אמרו נעשה אנחנו המעשה הראוי לנו כי ירחם הא-להים ונוליד זכר ונקבה ויתקיים העולם מהם כי עולם חסד יבנה ולא לחנם הצילנו ה' והנה היו צנועות ולא רצו לאמר לאביהם שישא אותן כי בן נח מותר בבתו או שהיה הדבר מכוער מאד בעיני הדורות ההם ולא נעשה כן מעולם (בראשית יט:לג).

[25] Sotah 47a.

[26] Yebamot 65b.

[27] See Menahot 109a, and Tosafot, s.v. lo; Tosafot, Sotah 39a, s.v. vekhi; Shibbolei Haleket, sec. 33; Rambam, Nessiat Kapayim, 15:3.

[28] Bet Yosef, Orah Haym, 128, assumed that the controversy was confined to a kohen who had converted willingly, but that if the conversion was coerced, all would agree that his status as a kohen remained intact; and, in Shulhan Arukh, O.H., 128:37, he decided accordingly: ואם נאנס לדברי הכל נושא כפיו. However, as noted in Bedek Habayit's comment on the Bet Yosef, the Rambam clearly appears to have disqualified even in the case of duress.

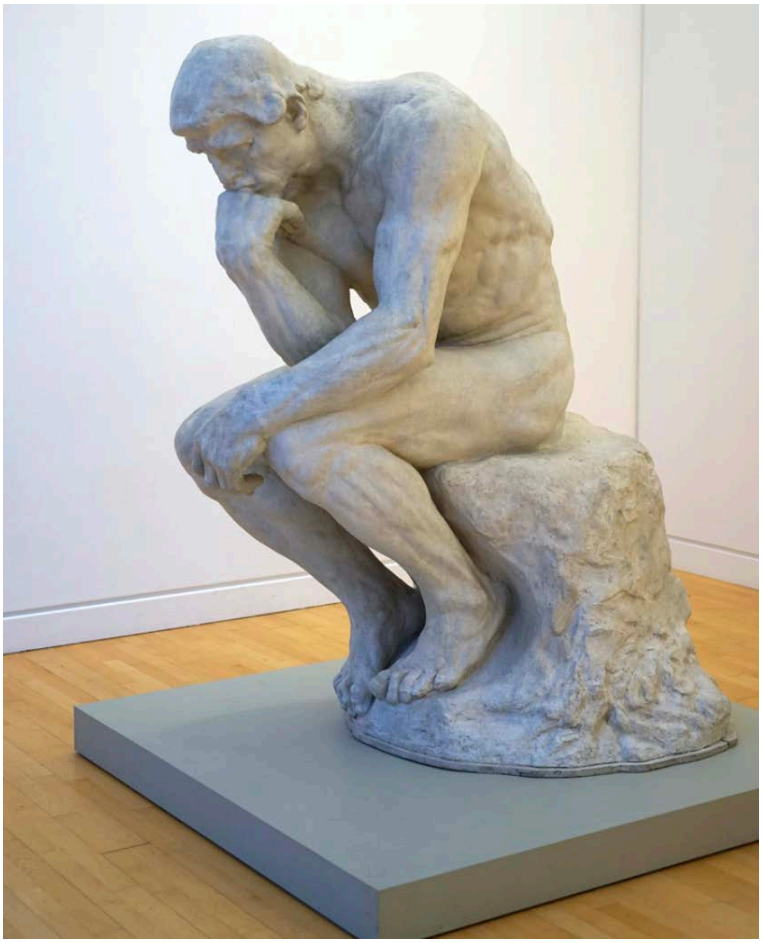
[29] These are two separate factors. The first would only disqualify the kohen from nessiat kapayim, the second from priority in keriat hatorah, as well.

[30] Cited in Mahzor Vitry, sec. 125.

[31] Mamrim 2:9.

[32] Abot 3:14.

[33] Torat Kohanim, Kedoshim 7:4:12.



Rabbinic Moral Psychology

Chaim Trachtman writes:[11]

The origins of moral thinking and behavior have been a perennial source of dispute. In these discussions, two distinct questions arise. First, one can inquire whether moral standards are universal in nature or reflect local cultural conditions. An independent issue is the source of

[11] https://thelehrhaus.com/commentary/rabbinic-moral-psychology/

morality—can it be derived in a purely intellectual manner, or does it rely on instinct/intuition? In this essay, I will focus on the second problem and argue that Rabbinic moral psychology presents a more complex picture that incorporates a feedback loop connecting reason and passion.

Expanding on this issue, there are two competing theories for the source of morality. One line of thinking asserts that human beings possess the ability to discern moral behavior through the use of their rational capacity[1][2]. The alternative is to give priority to human passions and to recognize that rational thought and justification come after nearly automatic, pre-cognitive mental processes.

An instinctive basis for moral behavior has found recent expression in two distinct but overlapping formulations. Leon Kass has emphasized the importance of feelings of repugnance as a final line of defense in defining immoral behavior in modern contexts where established rules and guidelines seem to be thinning out and provide weak defense against unethical activity[3]. The "yuck factor" is a term that Arthur Caplan has coined to viscerally describe our reaction when encountering something violating our moral sensibility[4]. Like Potter Stewart on pornography (*Jacobellis v. Ohio*, 378 U.S. 184 (1964)), neither Kass nor Caplan offer a strict definition of repugnance or the yuck factor. Instead, they appeal to a gut feeling that says something is very wrong and should prompt behavior to correct it, what we would then call moral action.

Jonathan Haidt, in *The Righteous Mind*, comes down strongly on the side of instinct driving intellectual rationalization for behavior[5]. Superimposed intellectual adaptations can overlay instinct, restrain our selfish inclinations and channeled them in ways that enable social groups to survive. However, they do not aim to alter our fundamental impulses. Haidt's extensive psychological research studies, in widely varying settings, lend strong experimental support to this conclusion. He demonstrates how a variety of moral foundations including equality, authority, and sacral notions can be mobilized to promote and support moral group behaviors that maintain community health and function. The process is depicted as unidirectional—intuitive reactions foster rationalizations that generate communal rules that support the desired group behavior. Again, the implication is that the automatic instantaneous, non-thinking reactions, while they may be dampened, are not changed by rational thought. I suggest that the legal code and moral foundations in the Torah and Rabbinic thought challenge this simple formulation. They embrace a bidirectional interaction between reason and passion, with each of these psychological components serially modulating and modifying human behavior towards a feasible moral goal.

There is always a concern for anachronistic thinking when applying terms used in the intellectual parlance of 2019 to people who lived two millennia ago. Terms like yuck factor and group selection are not in the Rabbinic lexicon. However, I would suggest that the ancient Jewish law recognized the importance of human factors—instinctive, impulsive, and emotional in nature—in defining the content and enforcement of the legal code that they considered revealed by God at Sinai. At times, the Rabbis modulated these non-rational behaviors and at other times they tried to alter and redirect them towards more intellectually sound practice.

For most people living on the planet today, child sacrifice would provoke revulsion, an instinctive reaction that it is terribly wrong and should never be done. It would violate all notions of morality.

The Torah articulates a different standard. According to most of the biblical commentators, the purpose of the *Akeida* (binding of Isaac) was not to have Abraham obey the command to sacrifice his son but rather to serve as a challenge, extreme to be sure, to his religious faith in God[6]. The angel unequivocally calls out to him to spare his son (Genesis 22:11–12). Abraham responds immediately in the next verse by spotting the ram caught in the in the underbrush and sacrificing the animal instead. The Torah explicitly prohibits the cultic practice of Moloch which centered on child sacrifice (Leviticus 20:3).

We cannot enter the minds of people living 4,000 years ago and we cannot know whether child sacrifice was thought to be a reasonable and necessary act to appease the gods and prevent greater harm to the community. Nevertheless, these texts do indicate that in ancient times, it did not trigger the same abhorrent feelings that we experience at the thought of killing a child. Today it is inconceivable to kill a child for any reason. True stories from the Holocaust, along with novels like William Styron's *Sophie's Choice*[7] portray the psychic costs of this repugnant act. The Torah mandated a new moral standard and made the rational assertion that, while obedience to divine command was the measure of religious commitment, heteronomy did not extend to killing a child. This represented an educational move to alter people's instinctive reaction and to provoke feelings of repugnance when confronted by the practice of child sacrifice.

In a similar vein, in Leviticus (Chapter 20) the Torah prohibits a long list of sexual relations, some of which are described as abominations. This choice of words sounds like the Torah is basing itself on an instinctive aversion to these acts. But according to Maimonides there was a rational purpose, namely, to force men to alter their nature, prevent abuse of women to whom they had easy access, and establish more permanent family ties to wife and children (*Guide for the Perplexed*, 3:49). In Deuteronomy, Chapter 21, the law addresses the circumstance of a soldier who becomes infatuated with a woman captured in war. The instinctive response was to take full advantage of the conqueror's status and ravage the captive. But the law mandates a separation period to defuse the urge to hurt the woman and encourage the formation of a more stable marital relationship. In this instance, this alternative is an improvement on the behavior of the time but still falls short of modern moral sensibilities. In each of these two circumstances, the Torah is providing an intellectual basis for transforming what had previously been considered normal operating procedure for men and women—no restrictions on sexual intercourse, raping women captured in war—into one that would trigger the yuck factor. In all of the cases, there is an intellectual justification upstream of an intuitive reaction that is formulated to change what is considered revolting and the altering the received passions.

Does the Rabbinic literature present a similar picture in which the law is promulgated in opposition to what would be considered the instinctive behavior? The answer is yes, and the formulation of the response occurs in two steps. To start, the Rabbis did not view their intricate legal code to be static and unresponsive to human input. In her innovative book, *What's Divine about Divine Law? Early Perspectives*, Christine Hayes compares the Greek and Rabbinic conceptions of divine law[8]. For the Greeks, what made divine law divine was its correspondence to absolute truth, its unchanging character, and its universal applicability. Hayes shows how the Rabbis challenged each of these characteristics and welcomed human partnership in the formulation and practice of divine law. Her examples include the famous confrontation between Rabban Gamliel and Rabbi Yehoshua about the date of the New Year (*Rosh Hashanah* 25a). Rabban Gamliel felt empowered

to declare the date of the sighting of the new moon and to ignore any contradictory facts. This is consistent with authorization given to the people through their judicial institutions to define the timing of *Rosh Hodesh* (the new month) (Exodus Chapter 12:1–2, a law that is brought to life in the aforementioned Gemara). Correspondence to absolute celestial truth was not the determinative factor. His word as *nasi* (leader of the Sanhedrin *ha-gadol*—Jewish High Court) was final and Rabbi Yehoshua was obliged to abide by the artificial calendar against his reasoned assessment of the astronomical facts.

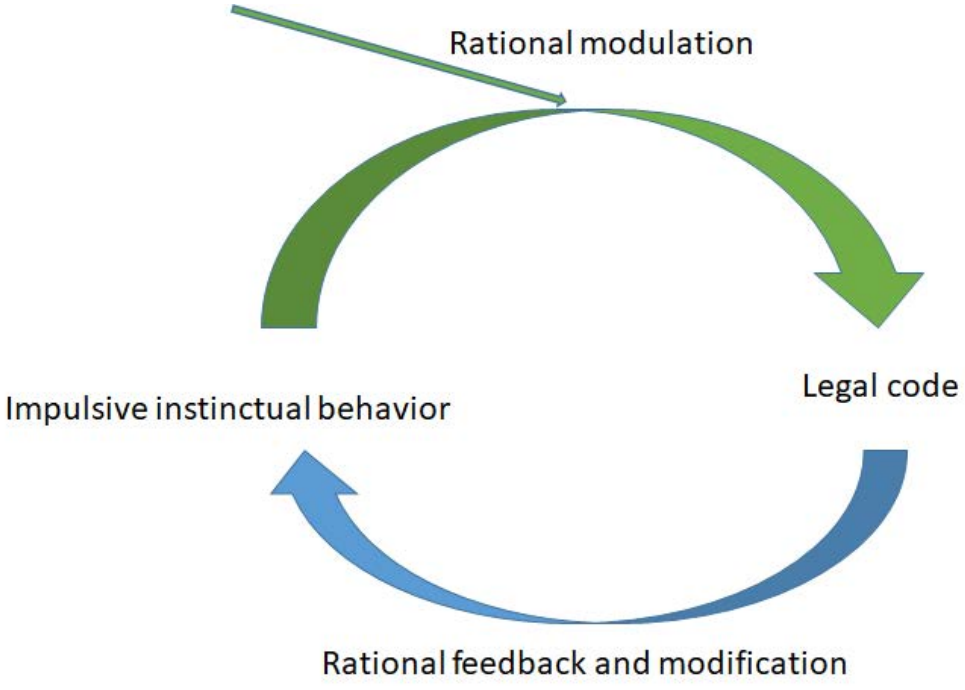
The requirement for *kavana* (knowledge that one is performing a Mitzvah) as a necessary factor for fulfilling specific mitzvot (see Rosh Ha-shana 28a–29a, Pesahim 114b, et al.) underscores, according to Hayes, Rabbinic nominalism, namely that there is no mind-independent reality for religious objects or practices. A person's mental state can convert an action or an item from secular to holy. Even recognizing that the requirement for *kavana* is debated and far from uniform for all mitzvot, and regardless of whether one goes as far as Hayes does in her assertion, the impact of *kavana* clearly introduces a human element into the formulation of legal concepts, in contrast with the Greco-Roman view of the unchanging nature of divine law.

The expressions of the uniqueness of Jewish people throughout the Talmud fly in the face of the universality of the law. Hayes asserts that the Rabbis were of the mind that there is variation in people's temperament and attitudes and that this is reflected in differences in the legal code and level of obligation between Jews and gentiles. She cites numerous cases in which the Rabbis altered the law based on what they thought was the best way to read and reify the cryptic Torah text. These amendments to Torah law were often an explicit acknowledgement that human instinctive reactions need to be taken into account to ensure stability and applicability of religious law. Not all of these points relate directly to the question at hand, namely, the source of morality. However, taken together, Hayes' evidence that the Rabbinic conception of divine law embraced human input and undermined the three aspects (correspondence to truth, unchanging nature, and universality) that defined the Greco-Roman view creates an opening for a more complex picture of the development of moral psychology. It thus provides a foundation for the unique Rabbinic formulation of moral psychology.

In a second step, Rabbinic used their divinely sanctioned human input to steer previously acceptable instinctive behavior back to a more intellectually grounded, morally reasoned plane. The plain reading of the sentence in Shemot (Chapter 21), "an eye for an eye, tooth for a tooth, hand for hand, foot for foot" indicates that this was how justice was meted out after unwanted physical injury. But the Rabbis rejected this notion (*Bava Kama* 83a–84b). After much effort to logically justify the replacement of *lex talionis* that was likely the accepted practice in courts of surrounding cultures with the financial restitution that was the standard in Jewish courts, the Rabbis conclude it is *svara*, the rational conclusion. Similarly, the impulsive reaction to the accidental murder of a family member is anger and immediate retaliation. The extensive laws outlined in the second chapter of *Masekhet Makot* are designed to convert the prevailing culture from one that supported revenge-killing to one that protected a person who committed manslaughter.

Another example is the enactment of the *prozbul*, a rabbinic response to the immediate reluctance that creditors would feel if asked to loan money close to the end of the seven-year *shemita* (sabbatical) cycle and face potential loss of repayment (Gittin 37a, Yevamot 89b–90b). A person's passionate attachment to his/her money needed to be accounted for in drafting practical legislation. But the ultimate goal was to ensure that people will not act on selfish impulses and deny credit to those in need of financial aid. Finally, all of the *takanot* (enactments) of Rabban Gamliel, detailed in *Masechet Gittin,* Chapter 4, which limit the options of husbands to inflict senseless harm on their wives during divorce proceedings, acknowledge the need to intellectually modify the destructive force of people's instinctive reaction to insult and personal affronts.

The focus of this essay has been on the processes involved in the formulation of law, a complicated, multidimensional process. In any legal code, including the *halakha*, there are clearly rational laws, as well as others that openly accommodate people's impulsive, non-rational behavior. In addition, there are some composite laws that engage both elements. For Haidt, the primary force in the construction of the vast majority of the remaining laws is instinctive behaviors coated with a modulating intellectual veneer (green lines in the figure). His view of this impulsive behavior is nuanced, and he defines six discrete domains that are foundational in people's response and delineation of moral behavior—care, fairness, loyalty, authority, sanctity and liberty. He emphasizes this in his efforts to promote greater openness to understanding the variety of responses. But instinct and non-rational thought predominate, and can only be controlled, not changed. I suggest that one formative element is missing that is prominent in Rabbinic thinking, namely a category of laws that aims not simply to control but to convert instinct to reasoned behavior (blue lines in the figure).



In conclusion, moral psychologists like Jonathan Haidt are right in their emphasis on the key role of immediate intuitive passions versus rational thought in guiding the formulation of ethical codes and religious practice. I am disinclined to place relative percentages on the contribution of these "fast and slow" mental systems to the development of human morality[9]. Instead, I would incorporate Christine Hayes' insights about the premium the Rabbis placed on the human input into the divine Torah law.

I would go farther and advocate for a view of Rabbinic jurisprudence as a comprehensive feedback loop system in which reason can frame instinctive responses which then can modify rational law and accommodate human impulses. This circular loop links reason and passion in an adaptive system that ideally would be self-correcting. This arrangement is similar to nearly all biological processes that modulate body homeostasis. It gives new meaning to the phrase, sound body and sound mind. It is a conception of moral psychology that is neither too lofty so that man is unrecognizable or too low to make him/her indistinguishable from other creatures. The Rabbinic conception of religious law and moral behavior is a servo-nulling mechanism, "an automatic device that uses error-sensing negative feedback to correct the action of a mechanism." It adjusts human passion and reason to achieve a legal code that presents human beings the best opportunity to live in accord with the divine will.

[1] Carlos Fraenkel, *Philosophical Religions from Plato to Spinoza: Reason, Religion, and Autonomy* (Cambridge: Cambridge University Press, 2012).

[2] Howard Kreisel H, *Maimonides' Political Thought: Studies in Ethics, Law and the Human Ideal*, (New York: SUNY Press, 1999).

[3] Leon Kass, "The Wisdom of Repugnance," *The New Republic,* June 2, 1997; 17–26.

[4] Charles W. Schmidt, "The Yuck Factor: When Disgust Meets Discovery," *Environmental Health Perspectives* 116 (December 2018): A524–A527.

[5] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon, 2012).

[6] See https://thetorah.com/maimonidean-akedah/.

[7] William Styron, *Sophie's Choice* (New York: Random House, 1979).

[8] Christine Hayes, *What's Divine about Divine Law? Early Perspectives* (New York: Princeton University Press, 2015).

[9] Daniel Kahneman, T*hinking, Fast and Slow* (New York: Farrar, Straus and Giroux, 2011).

Pesharah Vs. Din

Rabbi Itamar Rosensweig writes:[12]

Din and Pesharah

Jewish law prescribes two different methods for courts to resolve disputes: *din* (strict judgement according to the letter of the law) and *pesharah* (court-imposed settlement).[1] Under *din,* courts are instructed to decide cases by applying the substantive halakhot of Jewish civil law to the dispute at hand. Under *pesharah*, courts are instructed to resolve disputes by imposing a reasonable and fair settlement on the parties.[2]

What is *Pesharah*: *Pesharah Kerovah la-Din* and Pure Compromise

What considerations would the *dayanim* bring to bear on a case being decided according to *pesharah*? Rishonim note that there are different forms of *pesharah*.[3] One form of *pesharah*—sometimes referred to as *pesharah kerovah la-din*—tracks the equities as determined by the *halakhah's* conception of who acted wrongly and how egregious their action was. *Pesharah kerovah la-din* differs from pure *din* in that it lowers the formal standards of evidence; it allows a *beit din* to issue an award based on moral wrongdoings (*chiyuvim bidei shamayim* and *aveirot*) that would otherwise not be justiciable or enforced in court; and it licenses dayanim to base their decision on authoritative halakhic opinions that are not accepted by a consensus of all *poskim*. On this view, the considerations in *pesharah* are mostly tethered to the equities determined by the core principles of Choshen Mishpat.[4]

A different kind of *pesharah* takes the form of pure compromise. Pure compromise *pesharah* is motivated by considerations of civil harmony (*shalom*) and looks to impose a settlement that will extinguish the dispute (*le-hashkit ha-merivah*) in a manner that will maximize the preferences and minimize the grievances of each party, even if the settlement significantly diverges from how the case would have been decided on its halakhic merits.[5] Some commentators suggest that under this form of *pesharah* the *dayanim* are supposed to put themselves into the mindset of the parties and figure out the terms at which each party would be willing to settle.[6]

Pesharah vs. Din

The Talmud records two opposing opinions whether courts should prefer *pesharah* over *din* or *din* over *pesharah.*[7] One view maintains that it is prohibited (*asur*) for

[12] https://bethdin.org/pesharah-vs-din/

courts to do *pesharah*.[8] This is because the courts are not permitted to deprive a litigant of what he or she is entitled to under the substantive provisions of halakhah. Depriving a litigant of their halakhic due constitutes a form of theft (*gezel*).[9]

The other view holds that courts are under an obligation (*mitzvah*) to do *pesharah* rather than *din.*[10] The Rambam, Tur and Shulchan Arukh all rule that *pesharah* is preferable over *din.*[11] And they each make a point of praising a court that frequently settles cases according to *pesharah.*[12] Why should that be? Why should Jewish law be partial to resolving disputes according to court-imposed settlement rather than the letter of the law?

Three Reasons Favoring *Pesharah*

Commentators offer several reasons why Jewish law favors *pesharah* over *din*. First, a court-imposed settlement has the potential to resolve the dispute in a manner that leaves both parties satisfied with the outcome, whereas *din* would usually leave one party dissatisfied.[13] For similar reasons, *pesharah* can lead to a more stable resolution of the dispute because both parties will more likely comply with a *pesak* that has benefits for each of them, as opposed to a ruling that holds exclusively in favor of one side. These reasons underscore a *beit din's* role in maintaining civil order through resolving conflicts and helping parties move on from their disputes. Chazal praise *pesharah* as a form of justice that incorporates reconciliation and enduring peace ("*mishpat she-yeish bo shalom"*).[14]

A second reason in favor of *pesharah* is that it allows the *beit din* to utilize a greater range of remedies than would be available under *din*.[15] In certain areas of Jewish law, the remedies prescribed can be prohibitively limiting. For example, the standard for proximate cause in Jewish tort law (*gerama be-nezikin patur*) severely limits a plaintiff's ability to recover damages in a tort action.[16] Likewise, the pure principles of Jewish law do not allow a plaintiff to recover damages for libel or defamation suits.[17] These limitations restrict a *beit din's* ability to award damages as a matter of *din*, despite the fact that the defendant has acted wrongfully and even has a halakhic moral duty (*chiyuv bidei shamayim*) to compensate the plaintiff. *Pesharah* allows the *beit din* to consider such moral wrongdoings (*chiyuvim bidei shamayim* and *aveirot*) in its decision and to award damages accordingly.[18]

A third reason favoring *pesharah* over *din* is that *pesharah* can relax some of the procedural rules that govern a *din torah*. For example, under *din,* the plaintiff generally bears a heavy burden of proof. In some cases that burden requires a plaintiff to establish his claim through the testimony of two valid witnesses.[19] Under *pesharah*, however, the *dayanim* can issue an award without valid testimony, based on strong circumstantial evidence.[20]

The common denominator to the last two reasons is that *pesharah* allows the *beit din* to consider wrongdoings that would otherwise not be justiciable or enforceable in *beit din* (either because of *chiyuv bidei shamayim* or because of the difficult burden of proof). While this benefits the plaintiff in allowing him or her to be compensated for a greater range of wrongdoings and at a lower standard of proof, it also benefits the defendant because the final award constitutes a comprehensive settlement of *all matters* pertaining the suit (including grievances and moral claims).

A Beit Din's Power to Impose *Pesharah*

Notwithstanding the ruling that *pesharah* is preferable to din, a *beit din* generally does not have the power to impose a settlement through *pesharah* unless it is authorized to do so by the litigants.[21] This means that litigants would have to authorize the *beit din* to decide the case according to *pesharah* before the dayanim could impose a court-ordered settlement. One way to authorize the *beit din* is through the arbitration agreement. Indeed, many arbitration agreements are formulated so as to authorize the *beit din* to decide the case "either by din or by *pesharah*" (*hen le-din hen le-pesharah)*.[22]

There is, however, one important exception where a *beit din* can impose a settlement without having been authorized by the litigants. When the substantive *dinim* of Jewish civil law are indeterminate with respect to the case at bar—when there is no clear halakhic resolution to the dispute—a *beit din* is empowered to resolve the case according to *pesharah*, even without the authorization of the litigants.[23] This is because one of the roles of a *beit din* is to preserve civil order by resolving conflicts. It therefore has a duty to settle a case even when the substantive *dinim* of Choshen Mishpat provide no resolution. *Poskim* explain that in such instances *din* and *pesharah* converge, since *din* itself mandates that the court resolve the case according to *pesharah* when *din* is otherwise indeterminate.[24] The *din,* in such a dispute, *is* court-imposed settlement.

Brokering vs. Imposing a Settlement

How do we reconcile the fact that Jewish law prefers *pesharah* over *din* with the fact that, barring permission from the parties, a *beit din* generally does not have authority to do *pesharah*? Philosophically, the answer is that litigants have a right to *din* and are entitled to insist on it, yet *halakhah* still encourages them to waive their right in favor *pesharah*.[25]

Practically, the answer is that while a *beit din* generally cannot impose *pesharah* on the parties without the litigants' consent, it has a duty to *encourage* them to accept *pesharah.* This has two procedural applications. First, when litigants appear before a court to do *din*, the court has a duty to offer the parties the option of choosing *pesharah*.[26] According to some *poskim*, the court should even attempt to *persuade* the parties of *pesharah*'s virtues.[27]

Second, even when a court is accepted exclusively for *din*, the dayanim could propose a specific settlement to the parties and attempt to convince them of its benefits.[28] Here the court is merely proposing a settlement, not imposing it on the litigants. Ultimately, the litigants have full discretion to decide whether they want to accept it.

Conclusion

In conclusion, Jewish law favors *pesharah* over *din.* This is because *pesharah* provides for a more comprehensive resolution to the dispute. It allows the dayanim to consider wrongdoings that would otherwise not be justiciable or enforceable in court, and it allows the parties to move forward in a manner that has benefits for both sides. Although a *beit din* generally cannot impose a *pesharah* without authorization from the parties, it is supposed to offer the parties the option of pursuing *pesharah.* A *beit din* can even propose a concrete settlement in the course of a *din torah,* though ultimately it is up to the parties to decide whether they want to accept the *beit din's* proposal. One exception is when *din* is indeterminate, in which case a *beit din* is empowered to impose a settlement on the litigants even without their prior authorization.

Pesharah, Din, and *Pesharah Kerovah la-Din* at the Beth Din of America

The Beth Din of America's standard arbitration agreement provides that the dayanim "may resolve this controversy in accordance with Jewish law (*din*) or through court ordered settlement in accordance with Jewish law (*peshara kerovah la-din*)." The Beth Din's Rules and Procedures, Section 3(a), also provide that in the absence of an agreement by the parties, arbitration at the Beth Din will take the form of *pesharah kerovah la-din.*

As we noted above, *pesharah kerovah la-din* is different from the "pure compromise" conception of *pesharah*.[29] A decision pursuant to *pesharah kerovah la-din* is constrained by the equities of the case as defined by the *halakhah's* conception of right and wrong. What distinguishes "pure *din*" from *pesharah kerovah la-din* is that the latter relaxes the standards of evidence, allows the dayanim to issue an award for moral wrongdoings (*chiyuvim bidei shamayim*), and provides a framework in which dayanim can base their considerations on halakhic opinions that fall short of universal acceptance. In contrast to the "pure compromise" form of *pesharah,* the dayanim's considerations in *pesharah kerovah la-din* are tethered to the equities determined by the core principles of Choshen Mishpat.

Although the Beth Din of America encourages parties to have their disputes heard according to *pesharah kerovah la-din,* the Beth Din's Rules and Procedures, Section 3(b), provide for the Beth Din to hear cases either according to pure *din* or pure *pesharah* if that is the mandate of the parties.[30]

1. Many thanks to Rabbi Shlomo Weissmann for comments and discussions that significantly enhanced this article. Sanhedrin 32b, Mekhilta Yitro Parsha 2, Sanhedrin 6a-7a.
2. Aristotle also distinguishes between two different kinds of adjudication. He distinguishes between litigation according to the letter of the law and arbitration based on equity: "Equity bids us: to settle a dispute by negotiation and not by force; to prefer arbitration to litigation—for an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose or securing full power for equity (Rhetoric 1.13.1374b)."
   English law also distinguished between courts of law and courts of equity. Courts of equity were more remedy-oriented and less bound by the formal rules that governed courts of law. See F.W. Maitland, Equity. For a broad discussion of equity in Jewish law, see Aaron Kirschenbaum, Equity in Jewish Law: Formalism and Flexibility in Jewish Civil Law (New York, 1991).
   The engraving accompanying this blog post depicts the court of chancery in London, the body charged with deciding cases based on equity. Source information for the engraving is available here.

3. See for example Tosafot Ha-Rosh Sanhedrin 6a s.v. bitzu'a and Temim De'im no. 207. These Rishonim suggest that the plurality of pesharah types is implicit in the different names used for pesharah in the Talmud, Sanhedrin 6a (bitzu'a, pesharah).
4. On pesharah kerovah la-din, see Shut Shevut Yaakov 2:145; Shut Divrei Malkiel 3:182; R. Zalman Nechemia Goldberg, "Shivchei ha-Pesharah" in Dinei Borrerut: Kellalei ha-Din ve-ha-Pesharah (Jerusalem 5765), pp. 263-269; R. Derbamdiker, Seder Hadin (Jerusalem 5770), Chapter 4, Sections 25-32; and R. Yoezer Ariel, Dinei Borrerut: Kellalei ha-Din ve-ha-Pesharah (Jerusalem 5765), pp. 154-259.
   Some poskim add the further constraint that pesharah kerovah la-din cannot deviate in its final award by more than one third from what the decision would have been under pure din. See Shut Shevut Yaakov 2:145 and Pitchei Teshuvah Choshen Mishpat 12:3. See also Shut Divrei Malkiel 3:182.
   For examples of pesharah kerova la-din decisions based on strong circumstantial evidence, see Shu"t Rosh 107:6 (allowing collection of a debt even though the promissory note was lost, given various extraordinary circumstances and the incomplete and suspicious answers offered by the debtor when questioned); Shevut Yaakov, 3:182 (discounting a valid promissory note signed by a father and presented by the creditor-son to his brothers in an attempt to collect the debt from the estate, since the note was more than 15 years old and, in letters written by the son to the father during those years, he repeatedly begged for money without mentioning this debt); Divrei Rivot 109 (discounting a promissory note on the basis of circumstantial evidence, ultimately granting $2,000 of an old, $3,500 promissory note); and Shu"t Maharashdam 367 (directing an arbitrator to make a partial award based on pesharah kerovah la-din for an old promissory note where no good reason could be proffered for failure to collect earlier).
5. See for example, Kenesset Ha-Gedolah Hagahot Beit Yosef, Choshen Mishpat 12 no. 15 (comparing pesharah to shudda de-dayni); Shevut Yaakov 2:145 citing Bava Batra 133b and Rashbam s.v. dayanei; Tosafot Ha-Rosh Sanhedrin 6a s.v. bitzu'a; and Temim De'im no. 207. (But see Divrei Malkiel 2:133, objecting to the idea that pesharah is a form of shudda de-dayni.)
   For the role of pesharah in preserving social harmony and extinguishing disputes, see below Section 4 note 14.
6. Piskei Ha-Rid Sanhedrin 6a ("ka-asher yireh lahem mitokh ta'anoteihem kamah yimchol ha-tove'a ve-kamah yiten ha-nitb'a").
   Poskim also discuss other forms of pesharah, such as deciding a case according to the dayan's sense of what's correct or appropriate given the facts of the case and the individuals involved in the dispute. For example, Divrei Malkiel 2:133 refers to issuing a decision according to "yosher rachok min ha-din." Nachalat Shiv'a (Shetarot, chapter 24) refers to arbitration agreements that provide for the dayanim to decide a case "kefi re'ot 'eineihem." Tosafot Ha-Rosh, Sanhedrin 6a s.v. ve-hacha, refers to a pesharah in which the dayanim decide based on "kol asher yeasher be-'eineihem." See also R. Derbamdiker, Seder Ha-Din, chapter 4 note 62.
   For other formulations of pesharah, see Yad Ramah Sanhedrin 32b s.v. tzedek ("pesharah tzerikha 'iyuna tefei u-le'ayein lefi shikul ha-da'at ve-lirot mi me-hen omer emet ve-al mi rauy le-hachmir yoter"); and Temim Deim 207 ("tzarikh omed ha-da'at livtzo'a ha-mammon u-lechalko be-midah shaveh shelo yehe echad mehem nifsad yoter mikhdei ha-rauy lo").
   For a criticism of "pure compromise" on the ground that pesharah should hew as close as possible to din, see Divrei Malkiel 2:133 ("ha-pesharah rauy le-tzaded kazeh she-yeheh karov la-din emet la-amito").
7. Sanhedrin 6b-7a.
8. R. Eliezer ben R. Yossi ha-Gellili in Sanhedrin 6b.
9. Piskei Rid Sanhedrin 6b)"she-bitzu'a hu gezel, she-lokeach mi-zeh ve-noten la-zeh shelo ke-din"(.
   Other commentators suggest that pesharah constitutes a violation of the court's obligation to do justice through applying the Torah-mandated rules (dinim). See Shi'urei R. Shmuel (Rozovsky) on Sanhedrin 6b, and Meshekh Chokhmah Bereshit 18:19.
10. R. Yehoshua b. Korchah in Sanhedrin 6b.
11. Tur and Shulchan Arukh Choshen Mishpat 12 ("kol dayan she-'oseh pesharah tamid harei zeh meshubach"), Rambam Sanhedrin 22:4.
12. See Tur Choshen Mishpat 12:4, Shulchan Arukh 12:2, Rambam Sanhedrin 22:4.
13. Mekhilta Yitro, observing that in pesharah "sheneihem niftarim zeh mi-zeh ke-re'im."
14. Sanhedrin 6b, Zecharyah 8:16 and Rashi there. See also Shevut Yaakov 2:145 ("ikar ha-pesharah eino rak la-'asot shalom bein ba'alei ha-dinim"); Meishiv Davar 3:10 ("im ha-din eino yakhol le-havi lidei shalom, ha-hekhrach la-asoto pesharah"; Shut Rosh, 107:6 ("natnu koach le-dayan lishpot ve-la'asot mah she-yirtzeh af belo ta'am ve-raya kedei latet shalom ba-'olam"); and Shulchan Arukh Choshen Mishpat 12:3 ("mutar le-beit din le-vater be-mammon ha-yetomim chutz min ha-din kedei le-hashkitam mi-merivot").
15. Compare the common law distinction between equitable remedies and remedies at law. Equitable remedies provide the court with greater range of remedies than would be allowed at law. For the distinction between equitable remedies and remedies at law, see F.W. Maitland Equity.
16. Bava Kamma 60a. See generally Ramban Kuntrus Dina De-Garmi and Rama Choshen Mishpat 386.
17. Bava Kamma 91a. For remedies based on considerations other than the pure principles of tort law, see Rosh Bava Kamma 8:15 and Shulchan Arukh Choshen Mishpat 420:38.
18. R. Zalman Nechemia Goldberg, "Shivchei ha-Pesharah" in Dinei Borrerut: Kellalei ha-Din ve-ha-Pesharah (Jerusalem, 5765) pp. 263-269, and R. Yoezer Ariel "Kellalei ha-Pesharah" in Dinei Borrerut: Kellalei ha-Din ve-ha-Pesharah

(Jerusalem, 5765) pp. 187-195.
See also the Shulchan Arukh's discussion in Choshen Mishpat 12:2 of imposing a pesharah payment in lieu of a shevu'ah obligation ("rashai ha-beit din la-'asot pesharah… kedei liftor me-'onesh shevu'ah").

19. See for example Shulchan Arukh Choshen Mishpat 408.
20. R. Zalman Nechemia Goldberg, "Shivchei ha-Pesharah" (above n. 4) p. 263 and R. Yoezer Ariel "Kellalei ha-Pesharah" (above n.4) pp. 204-206. See also Shulchan Arukh Choshen Mishpat 15:5 and Bi'urei ha-Gra n. 24. For examples of pesharah decisions based on circumstantial evidence see above, note 4.
This discussion relates to the scope of a dayan's discretion under din to issue a decision without perfect evidence. See Rambam Sanhedrin 24:1-2 and Netivot Hamishpat 15:2.
21. Kuntrus Ha-Rayot le-Riaz, Sanhedrin 5b; Piskei Riaz Sanhedrin 1:52,58. Note that the Talmud (Sanhedrin 6a) records a dispute whether the litigants need to perform a kinyan when authorizing the beit din to decide according to pesharah. Both opinions seem to agree, however, that the litigants need to authorize the beit din to do so. They disagree only on whether a kinyan is required.
22. Nachalat Shiv'ah, Shetarot Chapter 24. For earlier appearances of this provision, see the citations in R. Yoezer Ariel, "Kellalei ha-Pesharah" in Dinei Borrerut: Kellalei ha-Din ve-ha-Pesharah (Jerusalem, 5765), pp. 156-158. Some poskim hold that because it has become standard to authorize the beit din to decide hen le-din hen le-pesharah, a litigant cannot request an arbitration to proceed only according to din. See Shut Tzitz Eliezer 7:48, Section 8.
23. Shulchan Arukh Choshen Mishpat 12:5; Shut Rosh 107:6; R. Yoezer Ariel, "Kellalei ha-Pesharah" in Dinei Borrerut: Kellalei ha-Din ve-ha-Pesharah (Jerusalem, 5765), pp. 159-162 and p. 256.
24. Shut Shevut Yaakov 1:109 ("de-kol she-ein ha-davar yakhol le-hitbarrer al pi ha-din, pesharah ba-zeh hayynu dino").
25. See Rashi Devarim 6:18 who interprets ve-asitah ha-yashar ve-ha-tov as the Torah's exhortation to a litigant to accept pesharah over din. See also Bava Metzi'a 30b (and Kuntrus Ha-Rayot Le-Riaz Sanhedrin 6b), criticizing individuals for refusing to resolve their dispute according to pesharah and for insisting on litigating according to din ("he'emidu dineihem al din Torah"). See also Rashi, Shevu'ot 31a s.v. zeh (criticizing an individual who authorizes a lawyer (mursha) to litigate a claim on his behalf without also authorizing him to settle the claim according to pesharah).
26. Sanhedrin 7a, Shulchan Arukh Choshen Mishpat 12:2.
27. Derishah Choshen Mishpat 12:2, Sema Choshen Mishpat 12:6.
28. Shakh Choshen Mishpat 12:6.
29. See above, Section 2.
30. The Beth Din's Rules and Procedures acknowledge that in those cases where Jewish law mandates that pesharah alone provides the basis for resolving the dispute (see for example section 5 above), "no explicit acceptance of such shall be required."