

CENTER FOR MODERN TORAH LEADERSHIP

Center for Modern Torah Leadership



חרות ואחריות

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"Taking Responsibility for Torah"

SINAI AND ORTHODOX AUTHORITY

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At Columbia University this past Monday night, I was privileged and honored to share my thoughts on the topic "Can One be Halakhic Without being Orthodox?" with a large, patient, tolerant, and talented group of young people, including many alumni of CMTL's Summer Beit Midrash and Winter Beit Midrash, and of Gann Academy. My fear is that they got less out of the experience than I did, as the thought I had to share turned out to be far less developed and coherent than I had hoped and because the topic turned out to require much more extended treatment. So it seems worthwhile to honor their generosity and their challenging engagement by trying again here—in a somewhat different and more limited fashion—in the expectation that I will do so again in a longer format at some soon point, having benefited again from your responses and critiques. The audio of the lecture will be posted early next week.

The Jewish people are a political community bound by religious law. I contend that this proposition emerges from the *Aseret HaDibrot* and indeed all of Torah and is a fundamental necessary assumption of any halakhic Judaism.

By 'political' I mean that we take collective responsibility for the distribution and exercise of power in our community.

By 'religious' I mean that we see Jewish law as deriving its authority from G-d's will.

A community can be bound by religious law, but not be political, if it sees obedience to that law by members of that community as solely a matter of personal choice. The easiest way to accomplish this reasonably is to restrict religious law to ritual and allow a parallel, nonreligious system to take responsibility for issues such as the distribution of material goods (economic policy, *Choshen Mishpat*), the regulation of information (libel and slander laws, *lashon hora*), criminal justice (*dinei nefashot*), and even of membership in the community (immigration policy, *gerus*).

I contend that an authentically halakhic Judaism has a principled opposition to such restriction.

But, I need to qualify that statement immediately by saying that an authentic halakhic Judaism may accept or even advocate for such restriction in particular circumstances, on practical or moral grounds. For example, when the Jewish community is practically unable to use physical force against its members, criminal law needs to be handled by other agencies for practical reasons. When many segments of the Jewish community fundamentally reject the authority of *halakhab*, coercing obedience to it is both practically counterproductive and morally offensive.

A community is political, but not bound by religious law, if it grounds the legitimacy of power on a basis other than Divine Will. But, I need to qualify that statement immediately by saying that it need not ground the legitimacy of power *exclusively* on the basis of Divine Will, nor on the basis of *direct* Divine Will.

In fact, I contend that halakhic Judaism always rejected both. Halakhic Judaism has always held that the legitimacy of power requires heteronomous and autonomous grounds. The simplest basis for this claim is that the Torah became binding when we accepted it, not when G-d gave it.

Furthermore, many features of *halakhab* are specifically and explicitly intended to distance direct Divine Will from power. The clearest illustration of this is Rabbi Yehoshua's use of the Biblical clause *לֹא בַשָּׁמַיִם הִיא*, "It is not in Heaven" in the Oven of Akhnai story. The point of this story is not to celebrate autonomy but rather to legitimate the use of coercive authority by some human beings against others, specifically against others who claim the right to act on the basis of their own experience of Divine Will.

Halakhic Judaism therefore, like many contemporary systems of government, is an intricate dance that revolves around the dynamic interaction of autonomy and authority. That dance must be enacted differently in different contexts. Contemporary

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Orthodox versions incorporate the reality that formal halakhic authority is greatly diminished, in three interconnected ways:

First, the halakhic community has little-to-no access to any means of power other than social suasion. (This is true even in the State of Israel for the overwhelming majority of halakhic issues.)

Second, there is almost no formal framework for granting halakhic authority within the community, especially outside Israel. Even those who believe that titles matter need not hold that having met the minimal standards for *semikhab* confers more than minimal authority.

Third, many of the mechanisms within *halakhab* for granting authority have been sidelined. *Midrash Halakhab* is not used to generate law; legislation is binding at most on narrow local communities; mechanisms for seizing property or annulling marriages are used only in directly precedented cases; there is no mechanism for taking a binding vote on issues of controversy.

If we stay with the dance metaphor, the weakening of one partner does not properly lead to the other asserting more and more dominance. Rather, as in all relationships, one proper response to weakness is to make greater efforts at self-restraint, to ensure that one's partner is still given the fullest possible capacity for self-expression and influence in your shared being.

So one can argue that the proper response to the weakening of formal halakhic authority is not the exuberant celebration but rather the voluntary restriction of halakhic autonomy, especially in areas where the stakes are lower. (Note that both halakhic autonomy and its restriction may play out differently for those who formally make decisions only about their own actions, and those who formally make decisions with the intent to set halakhic precedents.)

A strong-form statement of this argument would be that in the absence of formal authority, the preservation of *halakhab* as law requires us to seek to constitute informal authority whenever and wherever possible.

But I think this is false. *Halakhab* does not restrict the authority of direct Divine Will because it mistrusts G-d; it restricts that authority because it mistrusts humans who would be the conduits of that Will, or would claim to be the conduits. Therefore, *halakhab* has no brief for giving similar authority to human beings on any other basis. So an authentic halakhic system must always allow for authority to be religiously challenged, rebuked, or even disobeyed.

But there must be an authority to challenge, rebuke, or even disobey. A paradox of modernity is that one may be obligated to establish authority in order to disobey it.

So the issue of non-Orthodox halakhic-ness cannot be about, or at least not only about, whether Orthodoxy is generally and/or fundamentally right or wrong about gender roles, or about sexuality.

The issue is not even whether Orthodoxy generally and/or fundamentally excludes the objectively correct positions on such issues.

The question is whether it is possible to reject the informal Orthodox authority exercised on such issues and still authentically maintain a conception of the Jewish people as a political community bound by religious law, and sustain the dance of autonomy and authority in one's individual and communal life.

In the context of that question, I want to make a descriptive sociological claim that may have significant normative implications: The claim is that it is perfectly coherent to describe someone, or for someone to describe themselves, as nonobservant Orthodox, but that it is incoherent to describe someone, or for someone to describe themselves, as nonobservant Halakhic non-Orthodox. If one doesn't practice *halakhab*, then the *halakhab* one doesn't practice is Orthodox.

Assuming I am correct, it means that Orthodox identity exists prior to and independent of praxis, whereas non-Orthodox halakhic identity is constituted by practice. I don't claim that this was always true, or is inevitably true. But if it is true now, it certainly reflects the failure of American Conservative Judaism to develop a successful non-Orthodox basis for grounding halakhic obligation. With rare individual exceptions, Jews today who identify as both halakhic and as non-Orthodox are an epiphenomenon of Orthodoxy. They have rationales for their rejection of specific Orthodox rulings, but they have no independent rationale for accepting the rest of the system.

One might be able to both summarize and generalize this by saying that: (a) no one has yet successfully developed a Jewish theology that both accepts Higher Biblical Criticism and convinces Jews that they are obligated to subordinate their immediate perception of the Divine Will to the perception of others who are more grounded in Jewish tradition; and (b) no one has yet successfully developed a non-Orthodox *halakhab* that Jews see as authoritative whether or not they experience its observance as immediately religiously meaningful.

I want to be clear that the successful development of such a theology or *halakhab* would not necessarily lead me to see it as religiously legitimate. The tradition I see as authoritative has often utterly excluded positions that were genuinely halakhic, meaning that they held with integrity that the Jewish people are a political community bound by religious law. Take for example the Sadducees, or *lehavdil elef alfei havdalot*, Beit Shammai.

On the other hand, I also want to be clear that Orthodoxy is not a magic word, in two ways:

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First, the Orthodoxy of today includes positions that are halakhically legitimate but evil, not because they offer intellectually implausible readings of traditional texts, but because they offend against an objective moral order. If I had my choice I would exclude them, but as I do not have the social power to accomplish this, I believe that my Orthodox identification instead requires that I take responsibility for them. Yigal Amir is Orthodox; at least some of the “price-tag” terrorists are Orthodox; there are virulent racists in American Orthodoxy; and so on. It is *davka* Orthodox Jews who need to denounce them and work toward making such positions unacceptable in their community to the point that they are no longer Orthodox.

Second, the Orthodoxy of tomorrow may become halakhically illegitimate. If tomorrow all the Orthodox synagogues in the world introduce idol worship, with the approval of their rabbis, DON'T LISTEN!

Third, Orthodoxy today or tomorrow may choose to exclude halakhic people or community for completely illegitimate reasons, and if it chooses to exclude a sustainably halakhic community, that community would be entitled to see Orthodoxy rather than itself as violating *lo titgodedu*, the prohibition against factionalism.

What I want to suggest overall is that the interests of Torah are better served in our day if:

(1) People who have moral problems with specific areas of *halakhab*, but recognize the religious necessity of authority, make

their critiques within the Orthodox system rather than excluding themselves.

(2) People who have authority within the halakhic system recognize the religious value and necessity of internal moral and intellectual critique, and see those who engage in such critique—even when they go to the extent of civil disobedience—as vital positive members of their community. (Note that civil disobedience, which involves acceptance of the legitimacy of penalties, must be sharply distinguished from secession or rebellion.)

(3) People who have authority within the halakhic system recognize that authority is constituted not by agreement but by eagerness to engage and willingness to obey in the face of disagreement.

I believe that these recognitions would lead to different and better handling of current and future controversies within and on the borders of Modern Orthodoxy.

I also suggest cautiously that Modern Orthodox leaders should recognize the extent to which their own community's continued presence in the Orthodox coalition is not inevitable. I say cautiously because the recognition of insecurity can lead to the persecution of alleged heretics to prove one's own loyalty. But it can also lead to a mature recognition of the dangers posed by zealots, and concerted effort to prevent them from unnecessarily burning bridges, or grain silos. *Shabbat Shalom!*

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