

The Human Element in the Commandments: The Effect of Changing Community Norms on Halakhic Decisions

By Rabbi Daniel Sperber

Embedded in various rabbinic passages is a very basic principle, namely the force of the human element even in divinely given commandments. In *Mishnat R. Eliezer* (p. 266),¹ for example, it is stated that the difference between the first tablets of the Ten Commandments and the second ones was that “in the first, the image of Moses did not shine within them, but in the second the image of Moses shone within them”, and hence, the second tablets had additional merit. What is being expressed here is that for divinely given commandments to be relevant to human beings, with their frailties and shortcomings, they must be tempered with the human, mundane element. And it is precisely this human element, which we call interpretation (*drash*, midrash, hermeneutics, and the like) that gives the Torah its flexibility, which enables it to be eternally relevant, meaningful and authoritative.

How much more so with regard to man-made halakhic rulings (*de-rabanan*), which must be reconsidered by major authorities in every generation so that the authority and relevance of the rulings can be preserved. Indeed, the great rabbis in each generation were keenly aware of the necessity of ensuring that the halakha remained a living halakha and a livable one. Hence, changing circumstances necessitate re-evaluation of the classic halakhic formulations to ensure that they remain relevant to the contemporary situation.

In this context, it is worth citing the words of R. Hayyim David Halevi, who served as the Sephardic Chief Rabbi and head of the Rabbinical Courts of Tel Aviv, in his essay, “On the Flexibility of Halakha”:

As it is extremely clear, that no law or edict can maintain its position over a long period of time due to the changes in the conditions

of life, and that the law which was good in its time is no longer suitable after a generation or more, but requires correction or change, how is it that our Holy Torah gave us righteous and upright laws and edicts thousands of years ago and we continue to act in accordance with them to this very day (and will even continue to do so to the end of all generations)? How is it that these same laws were good in their time and are good to this very day as well..? Such a thing was only possible because the Sages of Israel were given permission in every generations to innovate in matters of halakha in accordance with the changing times and situations... Anybody who thinks that the halakha is frozen and that one is not permitted to deviate from it right or left, is very much mistaken. On the contrary, there is nothing so flexible as the halakha....And it is only by virtue of the halakha that the Jewish people were able, through the numerous and useful innovations that were introduced by Jewish Sages over the generations, to “walk” in the ways of Torah and *mitzvot* for thousands of years.²

However, sometimes our classical halakhic sources give us a ruling that seems totally impractical in contemporary terms. It is instructive to see how the rabbis deal with such a situation. A case in point is that of a man walking behind a woman. In the Babylonian Talmud *Berakhot* 61a, we read in a *baraita*:

A man should not walk on a pathway behind a woman, even his wife. And if he meets up [with a woman] on a bridge, he should push her to the side. And whoever walks behind a woman by the riverside has no position in the World to Come.³

This ruling is cited by the Rambam in *Hilkhot Issurei Bi'ah* 21:22 in the following formulation:

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snake-bite. Consequently, he was ecstatic to find out that, after taking a pin out of her hair, his daughter had placed the pin through a hole in the wall and inadvertently killed a snake that had been poised to attack her. Amazed, he asked his daughter if she had performed any recent act of *chesed* that would warrant her being saved. His daughter replied, “At the wedding, everyone was too busy feasting and celebrating to notice that a poor, hungry man had come to the door. Upon seeing this man, I immediately offered him my portion of food so that he would not be hungry” (*Shabbat* 156b).

It has been said that one act of kindness can change the world. This message is even more profound in the story of Ruth, where countless acts of *chesed* are performed on a daily basis. If we enrich our lives with these acts of kindness just like Ruth did, we too have the potential to have great things come from us.

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an Orthodox Jewish life or whether I would “give it up.” (I was surprised that people who knew me would even think such thoughts, but positively stunned that anyone would actually ask me that question!) It would never have occurred to me to live any way other than the way I have for most of my adult life, because this *is* who I am. One of the many lessons I have learned is that I became a Jew, but I have always been me. Ruth’s words resonate with me now, as they never did before. After all, it is relatively easy to cling to a people when it means forging a life with the man you love, when both of you are young and looking forward to starting a family. It is quite another to do so in his absence, when those children are a reality and after the shock of losing him prematurely.

Ruth follows her mother-in-law because she has no alternative. Unlike Orpah, there is no turning back for her. I understand that difference now in much more profound ways than I ever could have imagined. Ruth’s determination to stay with her mother-in-law, expressed in one of the most moving passages in the *Megilla*, stops Naomi in her tracks. Naomi offers no more words of discouragement, no more entreaties for Ruth to return to “her” people, for Naomi comes to realize that Ruth’s people *are* the Jewish people.

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He who comes upon a woman in the marketplace is forbidden to walk behind her, but pushes her to the side or behind him. And whoever walks behind a woman in the marketplace is of the simplest, of the ignorant (*mikulei amei ha'aretz*).

Perhaps this formulation is a little less strident than that of the Talmud in that it does not explicitly deny the transgressor a place in the World to Come. However, in present-day terms, it is still pretty severe, to say the least. And Rambam's formulation is quoted verbatim by R. Yosef Karo in his *Shulhan Arukh* (*Even Ha'ezer* 21:1).

Now, this might have been deemed acceptable behavior in the time of the *baraita* (2nd century C.E.), when women generally kept to themselves within their homes, the marketplace was populated mostly by men, and it would not be considered proper for a man to come down to the riverside while the womenfolk were doing their washing. However, in our days, with our crowded sidewalks and bustling throngs, and our totally different attitude to women and modesty, such rulings are wholly unacceptable.

Indeed, practically speaking, how would men deal with such a situation, for example, when standing in a line waiting for a bus or at the checkout counter at the supermarket? Would they push the woman in front of them aside, or shove themselves forward to get in front of her? Obviously not.

This problem was already recognized in the medieval period. Thus, the author of the *Leket Yosher*, R. Jacob ben Moshe,⁴ cited his master, R. Israel Isserlein (1390-1460)⁵ as saying:

It is permitted to walk behind a friend's wife or his mother. For nowadays, we are not all that prohibited from walking behind a woman.

Thus, in Wiener-Neustadt, where R. Isserlein lived much of his life, apparently the men did not adhere strictly to the talmudic-Maimonidean ruling.

How did this great authority partially reject, or at least greatly modify, the ruling? R. Yehuda Henkin, in an important article in *Tradition*, discusses this issue as follows:

What is the meaning of "nowadays we are not all that prohibited ...?" It means that although the Talmud forbade men from walking behind women, lest it cause *hirbur* (sexual arousal), nowadays women go everywhere and we are used to walking in the back of them so no *hirbur* results.⁶

R. Henkin then refers to a responsum of the great contemporary authority, R. Eliezer Waldenberg, who writes⁷:

We may further say that the intention of the *Terumat Hadeshen* was as follows.⁸ For our days are different from those of olden times. For in olden times a woman was not wont to walk about the streets, but would sit in the confines of her home, in accordance with the words of the Rambam (*Hilkhot Ishut* 13:11), namely that it is only seemly for a woman to dwell in the corner of her house, as it is written, "the King's daughter is all glorious within" (Psalms 45:14). And so ruled the Rema in *Even Ha'ezer* 73:1, that a woman should not accustom herself to going out [of her house] much. ... And then on meeting her, walking after her in the street will most likely lead to *hirbur*. But this is not the case nowadays; the situation is different. For women do not confine themselves to their home as they did in olden times, and it is most usual to see them in the streets... So nowadays, there is little likelihood of *hirbur* when walking behind her... And it is for this reason the *Terumat Hadeshen* was lenient, at any rate in the case of a friend's wife or his mother.

If this was true in 15th-century Austria, how much more so in the 21st century, when walking along Broadway, Dizengoff, or Rechov Yafo!

Rabbi Henkin put forward a theory of habituation, bringing several examples to exemplify his argument.

Briefly stated, he reasons that:

When men are accustomed to seeing women constantly, as in present-day society, many halachic stringencies designed to curb male *hirbur* (erotic thoughts) do not apply, for when men are habituated to women, *hirbur* concerns are no longer an issue.⁹

Interestingly enough, R. Joseph Messas of Meknes, Morocco, wrote a responsum in 1954 (*Otzar Michtavim*, vol. 3 p. 211: no.1884) dealing with the question of women's head covering and most remarkably writes as follows:

The covering of a woman's hair is only a custom because in antiquity it was thought to be modest, and not to do so was regarded as immodest and licentious. But nowadays that the consensus is that there is no immodesty in uncovered hair... the prohibition is no longer effective... And just as in unmarried women it was permitted, for there is no erotic thought (*hirbur*) in what one is accustomed to see, so too for married women nowadays. And each man can judge for himself that he sees thousands of women every day with uncovered hair and he pays no attention to them and has no licentious thoughts because of this uncovered hair.

I would modestly and tentatively suggest that this concept of habituation, which both R. Henkin and R. Messas put forward, may serve as a key to solving several untenable halachic situations presented by con-



Avner Moriah, Jerusalem

RUTH/ACCEPTANCE/SIVAN

from the "Women's Zodiac" wall mural on permanent display at the Jewish Theological Seminary.

Courtesy of the artist.

temporary society, We must bear in mind R. Henkin's own important caveat: "certainly the principle of habituation has the potential of being abused and misused by the irresponsible."¹⁰ Nevertheless, careful and judicious application of this principle may ease some of our potentially discomfoting situations and merits further attention as we commemorate *Matan Torah* on Shavuot.

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- 1 *Midrash Eliezer* is a midrashic text that was probably composed in *Eretz Yisrael* in the mid-8th century, and is so called because it begins with R. Eliezer b. R. Yose ha-Galili's *baraita* of 32 Rules. It is also called *Midrash Agur*, as it is also an exposition of Proverbs 30: 1-2 ("The words of Agur the son of Jakeh...").
- 2 *Shana be Shana* 5749 (1988), 182-196.
- 3 A *baraita* is a *tannaitic* teaching not included in the Mishnah. The *tanna'im* were the scholars from the time period of the Mishnah.

- 4 Ed. J. Freimann, Berlin 1903, reprint Jerusalem 1969, *Yoreh De'ab*, 37.
- 5 Author of the famous *Terumot Hadeshen* and of the school of R. Meir of Rothenberg.
- 6 "Ikka d'Amrei / Others Say: The Significance of Habituation in *Halakha*" (*Tradition*, 34: 3, 2000). His thesis was vigorously contested by R. Emanuel Feldman (ibid: pp. 49-57) in a response entitled "Habituation: An Halakhic Void with Risky Implications". However, I find R. Henkin's argument exceedingly convincing.
- 7 *Tzitz Eliezer* vol.9, no.50, sect.3, 195.
- 8 Compare Shlomo Eidelberg, *Jewish Life in Austria in the 15th Century* (Philadelphia 1962), 84 where he writes as follows: Despite their opposition {to gambling and card-playing} the rabbis were forced to tolerate gaming, and turned their efforts to restraining it in various ways. This is evidenced by their admonition against playing cards in the period between Rosh Hashana and Yom Kippur. (*Leket Yosher* 11, p. 118). Here too, we see how these authorities came to grips with the reality presented by their times.
- 9 This is Feldman's formulation, *Tradition*. 49.
- 10 R. Ychuda Henkin, op. cit. 45.