

Category Shifts in Jewish Law and Practice

I. Introduction

Halakhah is, and always has been, about applying an eternal divine will to the shifting facts of life. The details of halakhic discourse focus not on philosophy, nor even primarily on state of mind, but on specific actions taken in response to our experience in the world. The goal of Jewish law is to filter and direct our lived experience. Some of the most interesting material in *halakhah* relates to the tensions that emerge between the halakhic language of an earlier generation and the emerging halakhic facts of a subsequent one. How do legal authorities and communities respond to the changing significance of certain objects and actions over time and place, such that the performance of a given act in one context may achieve a specific goal, while it may fail to do so—or even act contrary to that goal in another context?

I think it is fair to say that much of the energy in contemporary halakhic discussions is around precisely these sorts of questions. Our world is vastly different from that of *Hazal*, our Sages of blessed memory, both due to dramatic technological change and the often corollary social upheavals that go with it. (I have heard it quipped that Julius Caesar would have been more comfortable at Thomas Jefferson’s inauguration than would Jefferson have been at Ronald Reagan’s.) Questions surrounding identity, and gender in particular, are among the most bewildering and destabilizing in this regard. Risks are high all around: Maintaining legal forms from an earlier age can distort the underlying meaning and purpose of a law. On the other hand, jumping to adjust eternal values to contemporary trends can sap the Torah of its often intentional countercultural purpose.

In this essay, my goal is to explore a series of examples that demonstrate these challenges and to explore one solution for dealing with them. I call this solution a “category shift”: a claim that a certain object or action, which was once properly classified under one rabbinic category has now shifted categories and the applied law should look different. Rather than arguing for a change in the law in light of new circumstances, this approach claims that the new facts lead to a different application of the old, inherited categories. While exploring these examples, we will consider differences between various types of category shifts and analyze why some are more controversial than others.

II. An Early Precedent: Laundry and Mourning

Let's begin with an example found in the Babylonian Talmud itself. In Tractate Ta'anit, the Talmud discusses various laws related to Tish'a B'Av, the national day of mourning that marks the destruction of the two Temples, among other tragedies. **Mishnah Ta'anit 4:7** discusses a penumbra of prohibitions that extend beyond the fast day itself. Specifically, it forbids doing laundry—כִּיבוס—during the week in which Tish'a B'Av falls. The relatively straightforward text would seem to produce a relatively straightforward rule: When your clothes are dirty in the week prior to Tish'a B'Av, you may not use water in order to clean them.

But then a **Babylonian baraita**¹ on Ta'anit 29b glosses the Mishnah's rule with the following phrase: וגיהוץ שלנו ככִּיבוס שלהן / "Our ironing (or pressing) is like their laundering." This text, which speaks about the application of the Mishnah to "our" (Babylonian) setting, produces two legal consequences. First, it quite plainly forbids ironing clothing in the days leading up to Tish'a B'Av. But this text does not simply forbid ironing. If so, it should have read ואף גיהוץ / "And so too our ironing is forbidden." By mapping ironing onto laundry—גיהוץ שלנו ככִּיבוס שלהן—the text points to a second consequence: In Babylonia, laundry is permitted during the days leading up to Tish'a B'Av! **Rashi** makes this explicit:

רש"י מסכת תענית דף כט עמוד ב

וגיהוץ שלנו - אינו יפה אלא ככִּיבוס שלהן, ואסור לגהץ לפני תשעה באב... אבל כִּיבוס שלנו - מותר.

Rashi Ta'anit 29b

Our ironing—is not any better than their laundering and it is forbidden to iron before Tish'a B'Av... but our laundry is permitted.

This is a classic example of what I am referring to as a “category shift.” There is a legal category of כִּיבוס; all other activities that do not rise to the level of this category are permitted (such as folding clothing or hanging it up). There is then a physical activity—laundering—that consists of taking dirty clothing and placing it in water in order to clean it. In the Mishnah, the mapping is simple. Laundering is כִּיבוס and is forbidden. The Babylonian *baraita* claims that the prohibition on כִּיבוס was never about laundry *per sé*, but rather כִּיבוס is a legal category intended

¹ By “Babylonian” baraita, I mean that this text has no parallel anywhere in the literature of *Eretz Israel* and thus its ideas may well reflect later, Babylonian assumptions and teaching, as opposed to a historically accurate picture of the teachings of *Eretz Yisrael*. Nonetheless, it is a baraita in the sense that it is preserved and presented as a Tannaitic teaching and thus was understood by those who taught it to be a faithful transmission of the intentions of Tannaitic teachings. In this case, the Babylonian provenance of the text is blatantly obvious from its very syntax, as we shall see.

to capture the significance of a type of physical activity. Therefore, it is possible that the act of laundering might in another time and space fall outside of the Mishnah's prohibitive legal category and a different type of activity might take its place. In the world of the Babylonian Talmud, laundering no longer fits into the Mishnah's category and is therefore permitted. Ironing or pressing, however, now defines the category of prohibited care for clothing in the week of Tish'a B'Av. Laundering, in other words, has undergone a legal category shift. Once falling into the Mishnah's forbidden category, it is no longer in that category, but permitted. And the forbidden category is now filled by a different activity, which becomes the focus of the prohibition.

What is the basis for this shift? The Talmud does not explicate it, but the reason seems fairly obvious and is already hinted at by Rashi above. The quality of laundering—and therefore the perceived social significance of laundering a garment and wearing laundered garments—was different in Palestine and Babylonia. In Palestine, the water sources ran faster and were full of more abrasive minerals. Both of these factors lead to a superior laundering process. In Babylonia, the waters of the Tigris and the Euphrates—and especially the irrigation canals that branched off of them—were slow moving and brackish. Clothes may have made the man in Babylonia, but laundering certainly did not, and there was thus no reason to forbid this in the days surrounding Tish'a B'Av. However, there was a Babylonian cultural equivalent of laundering—pressing or ironing clothing. This then becomes forbidden as an expression of the underlying value the Mishnah seems to be getting at here: In the week leading up to Tish'a B'Av, don't clean and care for your clothes in a way that make them look new and fresh again.

Let's note two significant things about the dynamics here, one of them stabilizing and the other destabilizing. The stabilizing dynamic is that Jews from Palestine and Babylonia would both recognize one another's practices surrounding Tish'a B'Av as focusing on a key provision of caring for clothing and improving its appearance. While the details might differ, a core value or principle would unite both sets of practice. They might even have translated their differing details of practice into a shared statement: "In the days surrounding Tish'a B'Av, we don't make our clothing look like it is brand new." In Palestine, laundering would have accomplished this, whereas in Babylonia, only pressing or ironing would do the trick. Without the Babylonian remapping, pre-Tish'a B'Av practice in *Eretz Yisrael* and Babylonia would start to *mean* two very different things. Maintaining a ban on laundry in Babylonia would threaten to turn a

practice geared to avoid new-looking clothing into an odd, overly strict ban on more basic forms of cleaning that were never forbidden in *Eretz Yisrael*.

The destabilizing dynamic, of course, inheres in the *baraita*'s claim that “laundrying” does not mean “laundrying”, or more precisely, that *כיבוס* does not mean laundrying. Note that Babylonians also have the word *כיבוס* as part of their lexicon, and it means the same act of cleaning clothing in water. It is not as if the sugya says: *מאי כיבוס? גיהוץ* / “What is the meaning of *כיבוס*? Ironing.” That sort of formulation would have indicated that the word *כיבוס* is no longer a common term in the Babylonian context. In other words, despite the consistency of the language and the *action* it describes, a physical and cultural shift changes the *legal* significance dramatically. This claim, that consistency of language may mask inconsistent meaning—think of it as a version of “it depends on what the meaning of the word ‘is’ is”—is subject to charges of hyperlegalism and antinomianism.

Ironically, these dueling dynamics here produce a situation where what I have called a category shift is simultaneously:

1. the most honest and direct path to understanding the true purpose of the law, and
2. a great threat to the law's perceived stability, particularly across time and space.

It should be no surprise, therefore, that such category shifts are often quite controversial. While Rashi simply accepts the notion that laundrying, in the wake of the Talmud's *baraita*, has become permitted during the week of Tish'a B'Av, **Tosafot** report greater reticence among medieval French Jews. They note that the common practice was still to refrain from laundrying, *מתוך המנהג*, which I would render here as: in order to preserve continuity of practice. In other words, Jews carried with them a literary and physical practice of not washing dirty clothing in water during the week of Tish'a B'Av. Even if the physical and cultural significance of that action changed over time, the language describing it and the basic parameters of the action did not. Many Jews thus apparently resisted permitting what had always been forbidden, even if this meant shifting the essential meaning of the category of *כיבוס* to include levels of cleaning far below what concerned the Mishnah.

This example also brings to light another important dynamic of category shifts. Once one engages in a category shift, one must be vigilant to assure that the action in question has not shifted categories again. This point is hammered home by the **Ran**:

ר"ן על רי"ף תענית ט:; ר' נסים בן ראובן, ספרד, המאה הי"ד

...ולכבסן בארץ ישראל אסור מפני שהם מתלבנין אבל בבבל מותר מפני שאין מתלבנין שם יפה לפי שמימיהן
עכורין שאינה ארץ הרים וגבעות כארץ ישראל הלכך כיבוס שבארצות הללו אפשר שהוא ככבוס ארץ
ישראל...

Ran on Rif Ta'anit 9b, R. Nissim b. Reuven, Spain, 14th c.

...To do laundry in *Eretz Yisrael* is forbidden, because their clothes are truly whitened, but in Babylonia it is permitted, because they do not get truly whitened since their waters are cloudy, for it is not a land of mountains and valleys like *Eretz Yisrael*. Therefore, laundering in these lands might well be considered like the laundry of *Eretz Yisrael*...

Ran begins by articulating the underlying facts motivating the category shift—the move from abrasive, spring-fed water in *Eretz Yisrael* to the brackish waters of the Fertile Crescent. And he explains that the underlying value of the ban on laundry is not to clean clothing to a certain standard during this intensive period of mourning, a value that may translate differently to different contexts. However, despite the general Diasporic medieval trend to follow the Babylonian Talmud over Palestinian traditions, he argues that the rivers used for laundering in Europe seem more similar to those of Palestine. In other words, the very same substantive considerations that led the Talmud to redefine laundering for Babylonia might—and indeed should—lead future generations to redefine it once again, this time for Europe.

Shulhan Arukh OH 551:3 gives a good summary of the various dynamics here: He begins by codifying the Babylonian *baraita* and its claim that laundering is no longer forbidden during the week of Tish'a B'Av, while pressing or ironing is. He then cites the Tosafot's report of popular resistance to this shift and an ongoing practice of forbidding laundering. The **Shulhan Arukh** then gives legal imprimatur to this resistance on two counts: First, this restrictive practice has its own legal weight and should not be destabilized; and second, the Ran may be right that contemporary laundering in Diasporic lands outside of Babylonia is indeed more similar to the laundering of the land of Israel and therefore forbidden by the Talmud's own criteria.

The example of laundry during the week of Tish'a B'Av lays out the basic contours of category shifts: their necessity for any honest application of the substance of a law, the threat they pose to constancy of practice and the need for constant vigilance to make sure that laws are correctly applied over time and space.

With this model in place, we can examine a range of other category shifts, with the following questions in mind: Why do some category shifts catch on while others remain controversial? Do different types of shifts function differently? Are there red lines that cannot be crossed when pursuing this sort of legal analysis? As we explore additional examples, we will aim to develop some criteria for thinking about this mode of halakhic development.

III. Ranges and Ovens: Shifting Temperatures and Laws

In the third chapter of Mishnah Shabbat, we hear about permissible and impermissible ways of cooking and heating up food as one enters into Shabbat on a Friday afternoon. The **Mishnah** offers the following rule:

משנה שבת ג:א-ב

כירה שהסיקוה בקש ובגבבא נותנים עליה תבשיל בגפת ובעצים לא יתן עד שיגרוף או עד שיתן את האפר...
תנור שהסיקוהו בקש ובגבבא לא יתן בין מתוכו בין מעל גביו...

Mishnah Shabbat 3:1-2

One may put food to cook on a **range** that is fired by **straw** [right before Shabbat], but if it was fired with **wood**, one may not put food to cook on it until the coals have either been raked away or smothered with ash...

One may not put food either in or on top of an **oven** [right before Shabbat] even if it was only fired with **straw**...

These passages are the subject of intense Talmudic analysis, but the principle in the Mishnah is fairly straightforward: it is permissible to place food on an insignificant heat source going into Shabbat, whereas it is impermissible to place food on a significant heat source going into Shabbat. A **כירה**, or a range, is an open-air device that does not concentrate heat well on the food placed on it. Therefore, as long as a relatively minor and ephemeral heat source is used—such as straw—it is not hot enough to present a problem. Wood, however, provides too much heat. If wood is used to fire a range, no food may be placed on it heading into Shabbat until the embers have been removed or stamped out. By contrast, a **תנור**, an enclosed oven into which food is placed, is highly insulating and retains significant heat, even when fired with a relatively

insignificant heat source. As a result, one may never place food into a תנור on Friday afternoon, even if it was only fired with straw.

Just as laundry practices changed, so too did the nature of ovens. The Talmud already notes in other contexts² that some ovens are larger and hotter than others, and the same goes for ranges. A professional's range might in fact generate heat equivalent to the common man's oven, such that various laws relating to ovens and ranges might not apply equally to all makes and models. Seizing on this point, R. Hananel on Shabbat 38b (Tunisia, 11th c.), ruled that the Mishnah's proscriptions here spoke only to the equipment of professional bakers. It was indeed forbidden to place anything in a baker's oven on Friday afternoon, but the common man's oven was, according to R. Hananel, subject to the Mishnah's discussion of a professional's range: As long as no live embers remained inside, one could use it.

This is another classic category shift: The word תנור is constant over time and place and signifies an oven used for cooking. However, the objects referred to in common language as תנורים have undergone a shift: Whereas the Mishnah applies to them the *legal* rule of a תנור, they have, according to R. Hananel, shifted to the *legal* category of כירה. The ramifications are significant: We now permit putting food into an oven on Friday afternoon, an act that a surface reading of the Mishnah expressly forbids.³ But once again, the category shift preserves the meaning and the intention of the law as focused on intensity of heat. In contemporary terms, R. Hananel is essentially asserting that the Mishnah meant to say something like: "One may put food on a heat source on Friday afternoon that is below 200 degrees Fahrenheit." In the time of the Mishnah, ovens and ranges were a decent proxy for this distinction. In R. Hananel's time, the category of oven itself must be subdivided to get at this distinction.

As in our example of laundering, this proposed shift was not uniformly accepted either. Maharshal rejected this category shift:

דברי ר' שלמה לוריא המובאים בספר תפארת שמואל על רא"ש שבת ג:א
...ואם קבלה היא נקבל ואם לדין אומר אני דאדרבה דמתניתין איירי בסתם תנור של בעל הבית ולא איירי
דוקא בנחתום. והרי"ף שרגיל לחלק ולהביא דברי הגאונים בכל דוכתא ולא חילק כלל הכא בין תנור שלנו

² See Talmud Bavli Bava Batra 20b.

³ Other Shabbat laws play out differently between ranges and ovens, including permissions on returning food to them on Shabbat. See Shulhan Arukh OH 253.

ושלהם או של נתתום וכ"כ הרב רמב"ן וכן משמע בכל דברי האחרונים דאף בסתם תנור שלהם נפיש הבלא
כדין תנור הנאמר בתלמוד עכ"ל רש"ל ז"ל:

Maharshal as quoted in Tiferet Shmuel on Rosh Shabbat 3:1, R. Shlomo Luria, Poland, 16th c.

If [this distinction between our ovens and the ovens of the Mishnah] is by a received tradition, I will accept it. But if this distinction is offered based on logical deduction alone, then I say that the Mishnah is in fact talking about the common oven found in people's homes and is not speaking about a professional baker's oven. Rif, who commonly introduces such distinctions based on Geonic traditions did not distinguish here at all between our ovens and theirs or those of professional bakers... and this is implied by all the later authorities [who were silent about this distinction], for even their common ovens got very hot, [and they follow] the rule of the oven laid out in the Talmud.

Maharshal argues that if an object is called a תנור and is shaped like a תנור, then it has the halakhic status of the Mishnah's תנור. He argues this point in part based on substance—perhaps the insulated heat of even a small oven is still a problem—but also on the notion that without explicit textual support, it is dangerous to say that words do not mean what they seem to mean. When earlier generations failed to distinguish between various objects or scenarios, one will have to make a clearer case for how contemporary reality is obviously different in order to convince skeptical voices such as Maharshal.

IV. “Everyone is Sick”—Asking Gentiles to Heat Jewish Homes on Shabbat

Such an obviously different reality is in play when Jews relocate to Northern Europe from the Middle East. Another useful and dramatic example of a category shift relates to using Gentiles to light fires for Jews on Shabbat. The following two basic principles are established without dispute in the Talmud: First, Gentiles may not do forbidden labor on Shabbat for Jews, and if they do so, Jews may not benefit from those labors. Second, on Beitzah 22b, **Ulla bR. Ilai** rules that one may instruct a Gentile to do anything on Shabbat—including Biblically-forbidden labors—for the benefit of a sick Jew. This does not refer to someone in mortal danger—even a Jew can violate Shabbat for such a person—but someone whose entire body is in pain and discomfort.

Lighting a fire is a core Biblical violation of Shabbat and it is thus forbidden for a Jew to benefit from a fire lit by a Gentile. **Mishnah Shabbat 16:8** in fact already makes this explicit, saying that a Jew may not use a lamp lit for her by a Gentile. It is therefore initially quite surprising to find medieval authorities who permitted Jews to tell Gentiles to light fires for them on Shabbat:

שו"ת מהר"ם מרוטנברג חלק ד (דפוס פראג) סימן צב, גרמניה, המאה הי"ג
וששאלת על הגויות המחממות בית החורף בשבת בצרפת היו נוהגי' היתר בבית מורי ואמר שרבי' יעקב
דאורליינ"ש התיר אפי' לומר לגוי לתקן האש משום חולה שאין בו סכנה [דאומר] לגוי [ועושה] והכל חולי'
אצל האש לישיב בקרירות. אמנם במלכותינו נ"ל לאסור משום דברים המותרים ואחר' נוהגי' בהן איסור...

Responsa Maharam of Rothenberg IV:92, R. Meir of Rothenberg, Germany, 13th c.

You asked about the Gentile women who heat up the furnace on Shabbat. In France, in the home of my teacher, they were lenient [to allow Jews to benefit from the heat], and my teacher said that R. Ya'akov of Orleans even gave permission to *instruct* a Gentile to light the fire under the permission to tell a Gentile to perform *melakhah* for a sick person, since we are all sick with respect to fire were we to sit in the freezing cold. However, in our land, I think we should forbid under the rubric of forbidding permitted things when others have already treated them stringently...

The category of חולה—or sick—can be thought of in two different ways. On a surface level, it would seem to refer to a small subset of the population that is in a hopefully temporary state of illness. It is an abnormal state, recognized by the physically healthy majority as aberrant. This reading makes it virtually unfathomable to use this legal category as a basis for allowing the entire Jewish population to adopt a general practice of instructing Gentiles to light fires on Shabbat on account of the cold. On the other hand, one might think of חולה is a legal category that is simply a proxy for a standard of discomfort, the point at which one's entire body is in distress and one can no longer enjoy Shabbat. **R. Ya'akov of Orleans** read the category this way; the Talmud simply did not require Jews to be that uncomfortable on Shabbat when Gentiles could be of assistance. In fact, being "strict" and applying the Talmud's leniencies only to more generally sick people would distort the underlying value of that leniency, which involves ensuring, where possible, a certain level of comfort on Shabbat. Here we find an even more

dramatic category shift: “Everyone is sick” with respect to the act of lighting a fire when it is cold.⁴ The category of “well” still exists, but only with respect to other sorts of needs and their remedial violations.

Maharam of Rothenberg adds an interesting German postscript to French interpretive innovation. He “buys” the argument, describing the act of instructing a Gentile to light a fire on Shabbat in the cold as permitted. But he recommends against following through on this suggestion in Germany, where a surface reading of Talmudic texts on this matter remains dominant.⁵ Would it not be excessively destabilizing to march into a community that has routinely sat in the cold on Shabbat for generations and suddenly to pronounce that what was forbidden is now permitted? We get here another glimpse of the destabilizing nature of category shifts: If a word or legal category has already made the transition to another reality—in this case, continuing to apply the category of חולה only to those who are ill—it becomes a tricky proposition to institute a shift at a later point without unsettling religious norms more generally.

The **Shulhan Arukh** codifies R. Ya’akov of Orleans, but with a caveat of his own:

שו"ע או"ח רעו:ה

בארצות קרות, מותר לא"י לעשות מדורה בשביל הקטנים ומותרין הגדולים להתחמם בו, ואפי' בשביל הגדולים מותר אם הקור גדול, שהכל חולים אצל הקור; ולא כאותם שנוהגים היתר אע"פ שאין הקור גדול ביום ההוא.

Shulhan Arukh OH 276:5

In cold lands, it is permitted for a Gentile to make a large fire for children⁶ and then adults may warm themselves by it as well. And it is even permitted for them to do it for adults if the cold is severe, since all are sick when it comes to cold. But one should not act like those who permit this even when the cold is not severe on that day.

⁴ The phrase הכל חולים הן אצל המילה creatively evokes Rava’s statement on Pesahim 69a that הכל חולים הן אצל המילה—that all (infants) have the status of a sick person with respect to circumcision, even if they are otherwise healthy. Rava’s statement itself is a kind of category shift, putting children in the context of circumcision in the category of the ill, despite their general “health.”

⁵ For a clear articulation of the earlier German position, in the name of R. Simhah of Speyer (12th-13th c.), see Hagahot Mordekhai on Shabbat 19a.

⁶ The assumption here is that children are routinely considered to be vulnerable and thus to have the status of sick people (albeit not in mortal danger). See Hagahot Mordekhai cited above and Rema OH 328:17. This is another model for thinking about otherwise healthy people as being in the category of “sick.”

We see here that the Shulhan Arukh fundamentally endorses this sort of category shift as legitimate, without much concern for the destabilization of prior practice. In cold lands, it may indeed be the case that the category of “sick” is the best way to think about “healthy” people who are very cold, since חולה is intended to capture a level of discomfort in the context of this halakhah, not a standard of general bodily health. But he also notes, like the Ran before him on laundry, that one must be vigilant to make sure that the category shift does not become a tendentious formal leniency. The logic of R. Ya’akov of Orleans’ position only makes sense in times and places when it is very cold, such that keeping a person without heat is truly a kind of suffering. There is no basis for relying on Gentiles to light fires when it will raise the temperature from 60 to 68 degrees. And yet, he is aware of many who do this nonetheless and scolds them for doing so. Here we see another dynamic of category shifts: they are open to abuse. It is often simpler for people to function with a menu of cut and dried physical categories: Is it forbidden to tell a Gentile to light a fire on Shabbat or isn’t it? When people are asked to engage with substantive categories—How cold is it? How uncomfortable am I?—the results can be subjective and inconsistent. And as in this case, the fact that a certain action is legitimate in some instances—as when it is very cold—can provide cover for those who want to manipulate the law for their convenience.

V. Reclining at the Seder Table—Two Shifts are Better than One

Sometimes, multiple factors are involved in a category shift. This is on display when we look at halakhic material surrounding the practice of reclining at the Seder. **Mishnah Pesahim 10:1** articulates what seems to be a universal obligation to recline—ואפילו עני שבישראל לא יאכל עד שיסב—/“Even a poor Jew should not eat until he reclines.” The practice of reclining was firmly rooted in Greco-Roman mores and reflective of the posture adopted in a symposium-style meal. Diners ate on couches with small tables of food placed in front of them; the instruction to recline is asserting that this meal must be fancy and one of leisure as opposed to a more rushed meal that might have been eaten sitting upright or even standing.⁷

⁷ As a historical matter, it is less than clear if this Mishnah is *prescribing* reclining as opposed to *assuming* it for a fancy meal such as the Seder. If the latter, then the text is making a comment about the timing of eating: Even though poor people normally ate earlier than others—in part to save the cost of fuel required to light a lamp to eat by (see Talmud Bavli Berakhot 2b and Rashi there)—on this night they must not eat before the prescribed time for dining, which is after dark, in keeping with the Biblical injunction ואכלו את הבשר בלילה הזה. In a Palestinian-Roman context, reclining is simply the way a fancy meal like the Seder would have been eaten. In any event, later

Those mores changed over time. In Northern Europe, kings would eat royal banquets at tables in upright chairs. How was the observant Jew to translate the practice of reclining to this new setting? Some continued a simulated practice of reclining by leaning to the left side while sitting in a chair. But others objected, claiming this distorted the original meaning and purpose of the practice. In Germany, a strong line of thinking developed arguing for discarding the practice, based on this shift in material culture:

ראב"ן פסחים דף קסד עמוד ד, גרמניה, המאה הי"ב

והם היו נוהגין לישב על המיטות ולהסב בהסיבת שמאל אבל אנו שאין אנו רגילין בכך יוצאין אנו כדרך הסיבתינו ואין לנטות ימין ושמאל.

Ra'avan Pesahim 164d, R. Eliezer b. Natan, Germany, 12th c.

Their practice was to sit on couches and recline on the left side, but since that is not our normal practice, we fulfill our obligation the way we sit normally. One should not lean either to the right or to the left.

His grandson, **Ra'aviah** (R. Eliezer b. Yoel Ha-Levi, Germany, 12th-13th c.) concurred,⁸ and a later text cites another German authority as making this point with even greater force:

ספר מהרי"ל (מנהגים) סדר ההגדה

פעם אחת כתב מהר"ש שמצא כתוב בגליון אלפסי שהניח לו אביו מה"ר זעקיל ז"ל, ששמע מפי רבו הר"ר יודא ז"ל דדוקא בימיהם שהיו רגילין בהסיבה בשאר ימות השנה, אז מחוייבין בה בפסח, אבל לדידן שבשאר ימות השנה לא נהגין בהסיבה, אין לנו לעשותה בלילי פסח, דמה חירות שייך בזה אדרבה דומה לחולה, וכ"כ אבי העזרי.

Sefer Maharil, Minhagim, Seder Ha-Hagaddah

[The obligation to recline applied] specifically in their days, when they were accustomed to recline throughout the year. In that context it was obligatory to do so on Pesah. But in our context, where we never recline the rest of the year, we should not do it on Pesah. What does this have to do with freedom? On the contrary, it makes a person appear sick!

generations understood the Mishnah to be prescribing a particular *posture* while eating, and this is the basis for our discussion here.

⁸ See Ra'aviah II:525.

Here we see a passionate case for a category shift as preserving the true underlying value of the law. Whereas eating in a regular chair was once the symbol of a rushed, common meal, in the middle ages in Europe, dinings rooms employed upright seating for all occasions. Sticking to the old form of reclining in this new context will not only have no meaning, but it will deprive the Seder of the very feeling of freedom it is intended to inspire. In the new style of dining room, “reclining” would be a freakish act that is counterproductive! The claim is not that we need to phase out obsolete rituals, but rather that we must translate the underlying values of those rituals to different contexts. “Reclining” never really meant *reclining*, according to these German authorities. It meant adopting a posture that signifies elegance and freedom while eating.

Despite the convincing nature of this analysis, legal authorities were reluctant to accept it. **Hagahot Maimoniyot** Hametz U-Matzah 7:2 (R. Meir Ha-Kohen of Rothenberg, Germany, 13th c.) reports this basis for eliminating reclining at the Seder, but declares it “a lone view” and therefore inappropriate to rely on. So follow almost all subsequent authorities. **Shulhan Arukh** exhorts the Seder participant to set up his chair so that one can recline on it, and **Rema** glosses that while ideally one should cushion one’s chair with pillows to fulfill this obligation, a poor person who owns no pillows should recline on a bench.

Why is this eminently reasonable category shift—sitting upright is the legal equivalent of the reclining of yore—so unsuccessful? This is no mere leniency, but a claim that the best way to demonstrate freedom is to eat in the formal posture of formal meals. Why did this shift not take?

It seems to me that this shift is different from the others we have seen so far, in that it *eliminates* the earlier legal category altogether. When laundering became ironing, ironing remained forbidden. When stoves became ranges, stoves fired with wood remained a problem. When cold people became sick with respect to fire, they were still forbidden to ask Gentiles to do other tasks for them. In other words, there was a true category *shift*, with a certain activity or person switching between two legal categories that retained their integrity. In this case, German scholars were in fact arguing for category *elimination*. True, these German authorities held that one fails to fulfill the obligation to recline at the Seder by slumping over in one’s upright chair, and in this sense, the legal category of reclining has not truly been eliminated but rather transposed with the category of normal sitting. But the average person would experience this category shift as dispensing with something that had once been unusual and obligatory in favor

of something unremarkable and pedestrian. Indeed, Ra'aviah formulates his instruction as ישב כדרכו—one fulfills the obligation of reclining today by sitting normally. To the extent category shifts work with old forms but fill them with new content, this one asks us to break the mold and we should not be surprised that it was not terribly successful.⁹ In other words, category shifts may be less successful when they make practice thinner, eliminating rituals without replacing them with alternatives.¹⁰

Interestingly enough, the Ra'aviah got a second bite at the apple. To see how, we need to return to another set of texts and another category shift, ones that deal with women and their obligation to recline at the Seder. As we noted above, the Mishnah specifies that even the very poor must recline at the Seder, as a sign of the universal freedom granted to all Jews as a result of the Exodus. But displaying this kind of freedom may not be appropriate for all, especially for those who occupy subordinate social positions. On **Pesahim 108a**, the Talmud Bavli rules that a woman does not recline in the presence of her husband unless she is an אשה חשובה, a woman of significant social status (and presumably wealth).¹¹ This distinction was codified and preserved by most authorities.¹² But a **Tosafistic tradition** preserves a different perspective:

רבינו ירוחם - תולדות אדם וחווה נתיב ה חלק ד דף מב טור ד
וכתבו התו' כל הנשים שלנו חשובות הן וצריכות הסבה. והרמ"ם כתב בסתם אשה אינה צריכה הסבה.

Toledot Adam Ve-Havah, Netiv 5, Part 4, 42d, R. Yeroham, Spain, 14th c.

The Tosafot wrote that all of our women are considered important and thus are obligated to recline. But Rambam simply wrote that the average woman need not recline.

⁹ Though I should note that there are many Jews who have a Seder who do not hang off their chairs, or make sure there is a pillow under them, which is in fact in keeping with the Ra'aviah.

¹⁰ It is also worth noting that at a certain point, the “strange” ritual of reclining entered the liturgy of the Haggadah, in the form of the fourth question asked at the beginning of the Maggid section. Combine this with the fact that many “strange” things happen at the Seder, and you have a welcoming environment for stubbornly retaining an odd ritual form of the reclining posture out of context.

¹¹ There is disagreement among interpreters as to whether the Talmud means merely to *exempt* women from reclining or to *forbid* them from doing so, on account of it being an inappropriate usurpation of a higher social status. I have deliberately elided that in translating the Talmudic phrase לא בעיא as “does not.” Other elements I am not engaging here include the question of whether married women and single women are different and whether the husband’s physical presence is key for triggering a wife’s removal from the obligation to recline.

¹² See Rambam Hilhot Hametz U-Matzah 7:8.

Here we have yet another category shift. The world once divided into men and important women—who were required to recline—as opposed to ordinary women, who do not recline. Ordinary women shift categories, according to this view, now reckoned as important and are therefore the equivalents of men with respect to this law. Others, such as students in the presence of their teachers, remain unencumbered by the obligation to recline.¹³

The gendered nature of reclining proved resilient, however, and **Rema** reports that in 16th century Poland, most women had not adopted the practice of reclining at the Seder. Once again, a category shift failed to take hold, perhaps because the claim of all women being considered “important” was insufficiently plausible,¹⁴ or perhaps because the ramification of essentially eliminating the legal category of the common woman was too great a shift to bear. Interestingly, though, the Rema does not reject the Tosafistic claim of universal importance for women as a way of explaining this. Rather, somewhat surprisingly, he maintains that this category shift is indeed in place, but that women refrain from reclining because they rely on the German position that no one needs to recline in a cultural context where formal meals are eaten while sitting upright!

Aside from the Rema’s support for the category shift that rendered all women as חשובות, we learn something else interesting about category shifts from this example: They are often much more successful as *post-facto* explanations of behavior that no longer fits earlier sources than they are as guideposts for how to change practice to fit the times. When early medieval German authorities tried to argue proactively for abandoning the practice of reclining without replacing it with something else based on a category shift, they were largely unsuccessful, no matter how persuasive their arguments. On the other hand, when those who ostensibly should recline were not—in this case women—the category shift became an attractive way to make sense of this behavior. This was further made easier by the fact that men continued to recline thus removing the biggest obstacle to this approach—the elimination of any even pseudo-act of reclining from Jewish practice.

¹³ The exclusion of students from reclining in the presence of their teachers is grounded in the subsequent discussion on Pesachim 108a.

¹⁴ Historical and social context is important here as well, but beyond the scope of our discussion. Suffice it to say that the role of women in the surrounding non-Jewish society would have had significant effects on perceptions of female “importance.” The medieval French context was one where women had a particularly influential role and greater freedoms.

VI. Identities and Defining Categories of People

So far, most of the examples we have looked at concern actions and ritual obligations and prohibitions. Throughout, we have seen earlier authorities assessing the underlying meaning of various terms: Does “laundry” refer to a specific physical action or to a standard of cleanliness? Do “ranges” and “ovens” speak of specific structures, or are they proxies for levels of heat? Does “reclining” refer to a specific posture, or is it a term that captures a socially dependent level of elegance and freedom?

A few examples we have seen begin to deal with classes of people, such as who counts as “sick” and “important.” But these are still malleable states of being, which can change with climate and social standing. How would these sorts of category shifts play out with respect to what seem to be more fundamental groupings of human beings, based on physical attributes and national and ethnic origin? As we shall see, category shifts have been suggested in these areas as well, where they can often be even more vital to the ongoing coherence of Jewish law and practice, even if they are no less controversial.

A. חרשים/Deaf-Mutes

Those who can neither speak nor hear are routinely exempted by Rabbinic sources from various obligations and banned from certain rituals. **Mishnah Hagigah 1:1** states that a חרש/deaf-mute is exempt from making a pilgrimage to Jerusalem on the Three Festivals. **Mishnah Megillah 2:4** declares him invalid to read the *megillah*. **Mishnah Bava Kama 4:4** explains that if the ox of a deaf-mute gores the ox of one who a פקח—one who can hear and speak—the deaf-mute is exempt from payment. **Mishnah Terumot 1:1** rules that a deaf-mute cannot separate out *terumah* (the portion of produce reserved for priests), and if he does so, the *terumah* has no status. **Mishnah Terumot 1:2**, however, considers a boundary case: What if a deaf person who can *speak* takes *terumah*? While the Mishnah maintains that he should not do so, it concedes that such *terumah* is indeed valid and sacred. Why? Because the term חרש, says the Mishnah, only refers to a deaf-mute, and the person in question here can speak.

It is fairly obvious from the context here that the legal category of חרש signifies—at least in most contexts—someone who is of impaired intelligence on account of their handicap. Therefore, a deaf person who can speak, and who can thereby demonstrate intelligence, is not treated the same way as a deaf-mute. In other words, even though the word חרש really only

means someone who cannot hear, it is understood to *signify* those who lack mental intelligence on account of their lack of hearing, and in most cases this is manifested by an inability to speak as well. Someone who can speak, even if they are deaf, is no longer in the legal category of חרש, even if they might commonly be described as a חרש in society.

In case this analysis was not clear, the Talmud Bavli hammers it home. The Talmud wants to understand the significance of the Mishnah's grouping of a חרש together with a שוטה—one of diminished mental capacity who could be clinically classified as insane—and a קטן, a minor. Why would these three categories of people, so utterly different from one another, be listed as a triplet when describing those who are exempt from making a pilgrimage on the Three Festivals? The Talmud's answer:

תלמוד בבלי חגיגה ב:

קתני חרש דומיא דשוטה וקטן, מה שוטה וקטן - דלאו בני דעה, אף חרש - דלאו בר דעה הוא. וקא משמע לן כדתנן: חרש שדיברו חכמים בכל מקום - שאינו שומע ואינו מדבר. הא מדבר ואינו שומע, שומע ואינו מדבר - חייב.

Talmud Bavli Hagigah 2b

The Mishnah teaches [about a חרש in juxtaposition to a שוטה and a קטן in order to indicate that we are speaking] about a deaf person who is similar to a mentally incompetent person and a minor. Just as those two do not have the requisite intelligence, so too we are dealing with a deaf person who does not have the requisite intelligence. This teaches us the rule laid out in the Mishnah in Terumot: “The deaf person about whom the Sages spoke everywhere is one who can neither hear nor speak.” By implication, a deaf person who can speak or a mute who can hear is obligated.

The Talmud here sees the *context* in which the category of חרש is used to be determinative of the scope of its *definition*. Since חרש is discussed in the context of other mentally incompetent people, it must not be a category primarily about hearing, but rather about mental competence. Therefore, whenever there is someone who cannot hear but who is fully mentally competent, this person does not belong in the legal category of חרש.

This basic mode of thinking lays the groundwork for a potential category shift for deaf-mutes who learn sign language and receive a full education in schools designed to work around their handicaps. A category shift approach essentially says that such people, despite having a *physical condition* of being חרשים, inhabit the *legal reality* of the פקח and follow the legal rules that are applied to the mentally competent. And so have held many later halakhic authorities with respect to contemporary deaf-mutes who can communicate through lip-reading, sign language and writing. **R. Markus Horovitz**, of 19th century Frankfurt, took this approach and thought that education in a school for deaf-mutes shifted the students' legal category from חרש to פקח.¹⁵

Nonetheless, others, beginning with **Tzemah Tzedek** (R. Menahem Mendel Krochmal, Poland, 17th c.) and continuing through the present day, resist any category shift of this sort. If someone can neither hear nor speak, they remain a חרש and other indicators of mental competence cannot and should not shift this person's status. The reality that counts is not the intelligence that stands behind the physical handicap, but rather the physical handicap itself. The dynamics here are similar to what we saw in the case of reclining, though with some subtle differences. Those resisting the category shift are clearly nervous about abstracting from a physical category endorsed as significant by classical sources to a concept of intelligence that may be more subjective. On the other hand, in this case, the abstract category—intelligence—is already described by the Talmud as central to our understanding of the legal meaning of חרש. This gives those advocating the shift firmer textual ground on which to stand.

We find a poignant mixture of deep commitment to the category shift along with concern for stability and continuity in the writings of **R. Osher Weiss** (Israel, 20th-21st c.). In a teshuvah published [online](#), he writes the following:

ואי בדידי תליא היה נראה דכל הפוסקים הנ"ל דיברו בזמנם שרוב החרשים אכן כשוטים היו ורק מעטים אחד בעיר ושנים במשפחה הצליחו להתגבר על מגבלתם ולהגיע לדעת שלימה. אבל בזמנינו שרובם המכריע מגיע לדעת שלימה והם מתפקדים כאחד האדם אם על ידי שפת הסימנים ואם על ידי קריאת שפתיים, דינם כפקחים גמורים.

ובירושלים עיר הקודש זכינו שיש כולל אברכים שכולם חרשים אילמים והם לומדים סוגיות הש"ס בעיון ובהבנה, וכמה רחוק לומר שדינם כשוטים.

¹⁵ His view is quoted in Responsa Shevet Sofer EH #21.

ונראה עיקר ההלכה דיש להחמיר בזה לכל צד, מחד גיסא לנהוג בהם דין פקח לכל דבר ולחייבם במצוות התורה, ומאידך להחמיר בהם כמסורת ההלכה דור דור כיון שהלכה זו עמומה ורפויה היא בידינו, וכך נקט גם מרן הגרשז"א במנח"ש שם.

If it were up to me, it would seem that all the earlier authorities spoke about their own time, when most of the deaf-mutes were indeed like the mentally incompetent. Only a few here and there succeeded in overcoming their handicap and to develop a full mental faculty. But in our own time, when a clear majority of deaf-mutes attain full mental ability and they function like anyone else with sign language and lip reading, their status should be that of fully mentally competent people. In the holy city of Jerusalem, we are privileged to have a *kollel* made entirely of deaf-mutes and they learn Talmudic *sugyot* in depth and with understanding. How far from reality to say that they have the status of mental incompetents!

But it seems that the essence of the *halakhah* here is that we should be strict in all directions. On the one hand, we should treat deaf-mutes as fully mentally capable and to obligate them in *mitzvot*. On the other hand, we should be strict in keeping with the halakhic tradition of past generations, given that this *halakhah* remains unclear and unresolved...

Here we see in live and raw form many of the dynamics we have explored throughout this essay.

B. Gentiles

Another famous example of a category shift in matters of identity relates to the status of Gentiles. Classical Jewish law is replete with distinctions between Jews and Gentiles. Jews are exempt from paying damages to Gentiles whose property they have destroyed (at least when such matters are adjudicated by Jewish courts), Jews may (at least on a biblical level) lend money on interest to Gentiles, and Jews may not eat many foods prepared by Gentiles.¹⁶ Perhaps the peak moment of distinction between Jews and Gentiles is when **Mishnah Yoma 8:7** takes for granted that Jews are forbidden from violating Shabbat in order to save the life of a Gentile.

At various points in Jewish history, some of these distinctions came into question. The most famous reassessment in this regard was argued for by **R. Menahem Ha-Meiri** of 14th century

¹⁶ See Mishnah Bava Kama 4:3 for one example of this sort of distinction. We will address some of the sources surrounding Gentile food preparation in a later essay.

Provence. The Meiri argued for a sophisticated sort of category shift: Whenever Gentiles seem to have a different status on account of their idolatrous practices (such as in bans on engaging in commerce with them on their festivals), then contemporary non-idolatrous, monotheistic Christians are no different than Jews.¹⁷ Whenever Gentiles seem to have a different status on account of their moral or ontological inferiority (such as in the context of civil law or saving their lives on Shabbat), contemporary, non-barbarian, legally responsible Gentiles are to be treated like Jews.¹⁸ When Gentiles seem to have a different status because of concerns about Jewish national distinctiveness (as in the case of forbidden Gentile foods and penumbral prohibitions around intermarriage), their status is unchanged.¹⁹ In other words, the term נכרי means different things in different contexts:

בית הבחירה למאירי מסכת עבודה זרה דף כו עמוד א

הרבה ראינו שמתפללים על שבזמנים אלו אין אדם נזהר מדברים אלו כלל ואנו כבר ביארנו עיקר כונת הספר על איזו אומה היא סובבת כמו שיעידו ימי אידיהן שהזכרנו שהם כלם לאמות הקדומות שלא היו גדורות בדרכי הדתות והן אדוקות ומתמידות בעבודת האלילים...ומ"מ לענין חשש איסור שבת וחשש איסור מאכלות ומשתאות כיון נסך וסתם יינם ושאר איסורין הדומים לאלו הן שנאסרו בהנאה הן שנאסרו באכילה הן מאותם שגזרו עליהם מחשש חתנות כל האומות שוות בו...ומעתה יהו דברים אלו מיושרים על לבך ולא נצטרך להשיבם בכל דבר ודבר אלא שתהא אתה בוחן באיזו אתה מפרשם על האמות הקדומות ובאיזו אתה מפרש על כלל הכל ובין ותדע:

Beit Ha-Behirah Avodah Zarah 26a

We have seen many people who are surprised than in our time, no one is careful about any of these things [the Mishnah's prohibitions on helping Gentiles give birth or on receiving medical treatment from them]. But we have already explained: The essence of [the Mishnah's] intention here is directed towards the nations of old that were not bounded in the ways of religion and they were entrenched in constant idolatry... Nonetheless, with respect to concerns about Shabbat prohibitions²⁰ and concerns about forbidden food and drink like [Gentile] wine and other prohibitions like these, whether

¹⁷ See Beit Ha-Behirah Avodah Zarah 2a.

¹⁸ See Beit Ha-Behirah Yoma 84b, Gittin 62a and Bava Kama 37b.

¹⁹ See Beit Ha-Behirah Avodah Zarah 38a-b.

²⁰ As we noted above, Meiri explicitly distinguishes elsewhere between the Gentiles of the Talmud and his Provencal Christian neighbors when it comes to the question of saving a Gentile's life by violating Shabbat. This category, therefore, must refer to other areas of Shabbat law relevant to Gentiles, such as when one is able to ask a Gentile to do a *melakhah* on Shabbat for a Jew. For a broader analysis of Meiri's approach to Gentiles in halakhah, see 80-108, מ. הלברטל, בין תורה לחכמה, see 80-108.

they are prohibitions around benefit or consumption or they were decrees to prevent intermarriage, all the nations are the same... So now, let this be clear to you so we need not explain it in each and every instance. You discern for yourself in which areas the laws are meant to apply [only] to the peoples of old and which are meant to apply generally. Know and understand this.

As was the case with the Talmud's analysis of deaf-mutes, Meiri argues that we always look to see the legal context of the term נכרי. Sometimes it indeed refers to any sort of Gentile, but sometimes it means "idolater," "barbarian," "immoral citizen of a corrupt government that does not recognize my rights," "someone whose culture is hostile to mine," or "someone whose full humanity I do not and cannot respect"—think of a Nazi war criminal in our own time. Meiri reveals that he considers these distinctions to be readily discerned, even intuitive, once we focus on the essence of what a legal category is about and what its context is.

This category shift is powerful in that it essentially denies that the term נכרי has any universal meaning at all, instead seeing this as code for a distinct underlying value that guides each area of law. Its vulnerability lies precisely in this unevenness of interpretation: Sometimes a Gentile is a Gentile and sometimes he is a Jew! It should not be surprising that the Meiri's category shift failed to persuade many Jews and even those uncomfortable with letting a Gentile die on Shabbat found other ways of justifying their practice.²¹ They might have said to Meiri: Until we permit intermarriage and dissolve the Jewish people, we cannot claim that contemporary Gentiles have shifted categories with respect to civil law and Shabbat. The term נכרי cannot mean two things at once.

Nonetheless, there is no denying that the Meiri's category shift is implicitly how many Jews reconcile their own relationships with contemporary Gentiles in light of classical rabbinic sources. However much his analysis has caught on in the world of the *poskim*, it shows that this

²¹ The most common is to invoke the Talmud's category of איבה/enmity between Jews and Gentiles. The idea is that if Jews don't save a Gentile's life on Shabbat, Gentiles will not save Jews, or worse: Gentiles will use this legal discrimination against them to attack and kill Jews. Saving a Gentile life thus becomes justified even on Shabbat as an act of Jewish self-preservation. The outcome is the same, but the philosophical and textual basis is dramatically different. It is always hard to know in such contexts whether the *poskim* in question truly resist the notion that Gentile life is of equal value to Jewish life, or whether they are simply afraid of subjectivity run amok were they to follow the Meiri's lead. For a ruling that exudes the first attitude, see Responsa Tzitz Eliezer VIII:15:6. For a ruling that (perhaps) has echoes of the second attitude, see Responsa Yabia Omer VIII OH #38. Interestingly, neither of them cites the Meiri on this topic.

sort of thinking about categories of identity and ontology is not a modern innovation but a natural continuation of the other sorts of shifts we have looked at.

C. Gender

Finally, I want to conclude with a category shift that is very much still in process and in the infancy of being considered: gender. As is the case with respect to Gentiles, women are given a different status from men in many halakhic contexts. As contemporary Jews confront great equality between men and women in both social and economic spheres, some of these distinctions have come under strain and interrogation. Does Jewish law view men and women as ontologically different in all of these areas? Are these prescriptions meant to be in force even when they are countercultural? Are they sociologically based and malleable over time and place?

Deploying a category shift with respect to gender would seem to involve following the Talmud's lead on deaf-mutes and the Meiri's subtlety with respect to subdividing categories. When we look at the female exemption from various *mitzvot*, we find that women appear in a triplet of their own: נשים עבדים וקטנים—women, slaves and minors.²² This is a jarring juxtaposition to the contemporary ear, but it seems fairly clear to reflect a sociological grouping that would have been quite familiar to an ancient audience: these are social adjuncts and dependents, those who are subservient to the dominant group of free, adult men.²³ And viewed in this context, many of the exemptions for women make perfect sense. Take, for instance, women's exemption from the twice daily recitation of the *Shema* in **Mishnah Berakhot 3:3**. On its own terms, this is somewhat puzzling: Why would women be exempt from this most basic declaration of theological commitment? Aren't women also obligated to believe in one God and to affirm this on a daily basis just like men? But when one considers that rabbinic sources understand the *Shema* at its core to be קבלת עול מלכות שמים—accepting God's ultimate authority over one's life and one's choices—the exemption and those whom it affects make perfect sense. Who must affirm daily, upon waking up and before going to sleep, that God has unrivaled authority? The person who might be deluded by their own social status into thinking otherwise: the free, adult male. Women, slaves and minors live every moment of the day with a clear understanding that they do not sit at the top of the social pyramid. They are not poisoned with

²² For just a few examples of this very common triplet, see Mishnah Berakhot 3:3, 7:2, Pesachim 8:7, Shekalim 1:3,5-6, Sukkah 2:8, 3:10.

²³ For a glaring example of this, consider Paul's statement in the Christian Bible at Galatians 3:18.

the potential arrogance to which the *Shema* is an antidote. A proponent of a category shift around gender would look at contemporary women who wield power and live lives independent of men and would suggest that these women in fact have the status of men with respect to this and other *mitzvot*. Put another way: Is it in keeping with the purpose of the *mitzvah* to recite the *Shema* twice daily to exempt a neurosurgeon, a CEO, or a secretary of state just because they happen to be biologically female?

We saw above, in the context of our discussion of reclining at the Seder, that medieval rabbis already entertained the notion that women's status had changed in a way that eliminated the gendered nature of reclining, a practice intimately bound up with social standing and hierarchy. But even those "important women" of the world of the Tosafot remained exempt from a slew of *mitzvot*, in keeping with a social status that was still that of an adjunct.²⁴ A category shift based on the triad נשים עבדים וקטנים would go one step further. Reading for context—as the gemara directs us to do in the context of deaf-mutes—advocates of this category shift would argue that the *intended and original meaning* of the phrase נשים עבדים וקטנים is "social adjuncts." The category of נשים would thus only be understood as *historically associated with biology*, but, in its essence, the category would be just one example of *social standing*. In the time of the Mishnah, there were then two categories with respect to many *mitzvot*: principals and adjuncts. Adult, free men fell into the first category, whereas women, slaves and minors fell into the second. A category shift around gender would claim that women have shifted categories from adjunct to principal.

Indeed, we have begun to see some contemporary rabbis articulate thoughts in this direction. R. Yoel bin Nun, a contemporary figure in the religious Zionist community, penned the following thoughts a few years ago:

הרב יואל בן נון, מתוך גרנות ג

רוב הנשים של ימינו בנות חורין הן... ואינן דומות לעבדים בשום פנים, שהרי אין רשות אחרים עליהן. לפיכך, כל מי שמצטט פסקי חכמים, שהתבססו על כך ש"אישה דומה לעבד" בכל מקום, איננו מבין שהוא מעביר הלכה ממציאות אחת למציאות אחרת, בלי יסוד. "נשים שלנו", לא רק שכולן חשובות, כדברי הרמ"א, אלא שהן "בנות חורין"... פשוט לא מדובר באותו סוג של נשים.

²⁴ It is often hard to remember how recent many of the victories of feminism and egalitarianism are, even in the West. Until 1974, it was perfectly legal for credit agencies to decline women for a credit card unless they brought a man to vouch for them. And many did just that, in as clear a picture of what it is to be an adjunct as one could find.

R. Yoel Bin Nun, in Granot 3, Israel, 20th-21st c.

Most women in our day are independent/liberated [*benot horin*]... and they bear no resemblance to slaves, because there is no higher power over them. Therefore, anyone who cites the ruling of the Sages, which are based on the notion that “a woman is similar to a slave” in all arenas, fails to understand that he is transferring a *halakhah* from one reality to another without any basis whatsoever. “Our women” are not only all important—as the Rema already said—but they are independent/liberated... it is obvious that we are not speaking about the same category of *nashim*.

To be clear, advocating for this category shift entails claiming that this is the *correct* understanding of the underlying value of the texts in question. A proponent of a category shift on gender is afraid that *exempting* contemporary women from various *mitzvot* would be a *distortion* of the Mishnah’s intention, arguing that the Mishnah never dreamed of exempting someone who could not plausibly be compared to a slave based on their biology alone. This is an excellent example of how debates over category shifts cannot be simply reduced to arguments over leniency and stringency. They are instead arguments of *right* and *wrong*: what is the correct way to understand what an earlier text is getting at and how do I then faithfully apply it to my context? Where the Meiri would see complicity in bloodshed when a Jew allows a Gentile to die on Shabbat, his opponents would see Jewish fundamentals being destroyed by Shabbat desecration if one took action. Similarly, the question of a category shift around gender is not about how lenient one can be in the name of egalitarianism, it is rather at its root a complex question of just how biologically based various *halakhot* are meant to be.

As even Meiri points out, identities can be complex and have multiple components. This is surely true as well in the context of gender. There are many *halakhot* that clearly are grounded in biology and that apply to *women*, not to slaves and minors. These would be unaffected by this category shift analysis, since those *halakhot* are not grounded in a sociological reality.²⁵ We would be forced to take up exactly the sort of work Meiri proposes to his audience: Learn the laws and practices in their larger context and pay attention to the other groups they apply to. This can guide you to think about their proper application in your own day and age.

²⁵ Of course, other factors and analyses might lead to those *halakhot* being applied differently as well, but it would not be on account of the juxtaposition of the term נשים with עבדים וקטנים. A useful parallel to think about might be someone who would contend that contemporary deaf-mutes who can speak sign language fluently are now obligated in all *mitzvot* except *shofar*, since it is a *mitzvah* specifically grounded in *hearing*, not just intellectual ability.

Even if one adopts R. Bin-Nun's approach—it seems obvious to me that more and more people will do so in the years ahead—many questions remain. If sociology is the true force here, then is it really the case that all women should shift to the category of men? What of all the women in the world who still experience subordination on a daily basis? And aren't there men—like the slaves of old—who inhabit an inferior social position and should therefore perhaps be exempt from certain *mitzvot*? Are we confident we can sort out the laws that relate to biology and sexuality from the ones that relate to socioeconomic status? We can expect that as this category shift continues to play out, the same dynamic that manifested in earlier conversations will emerge here as well. But I do think that any long term horizon for a gender-equal Jewish practice that is grounded in *Hazal* will ultimately employ this category shift and integrate it into halakhic discourse just as happened with many of the earlier examples we saw.

VII. Conclusion: Patterns and Red Lines

I would like to end with some summary thoughts on the dynamics we have seen and with an attempt to isolate the factors that may lead some category shifts to be more accepted than others.

A. Patterns

When we consider *halakhah*'s evolving relationship with reality through the dynamics I have described here, a number of patterns emerge:

Correspondence to Reality. A successful category shift is not an excuse for leniency and stringency, but one that speaks compellingly and directly to some sort of change in facts that warrants reading inherited language more creatively than a surface reading might suggest. Laundering simply produced different results in Babylonia and this made plausible the translation of *כִּיבוֹס* into *גִּיהוּץ*. As soon as those facts no longer held up—as in the context of the much more effective laundering that went on in Europe, the category shift failed to hold, and appropriately so. And the converse is true as well: If a category shift is desperately needed for *halakhah* to make sense of reality, other risks inherent in its adoption may be overlooked. We have seen a number of examples of this dynamic and I would argue that this is the single most important factor in a category shift's success.

Degree of Disruption to Common Practice. The more a category shift threatens to undo a standing practice—whether the ban on laundering before Tish’a B’Av or the refusal to tell Gentiles to light fires on Shabbat or the practice to sit in an unusual fashion at the Seder—the more it will be viewed with suspicion by the traditional population. The more the category shift strives to give legal language to facts already on the ground—as when women sit normally at the Seder table—the less controversial it will be.

Local Versus Global Nature of the Shift. The more tailored the category shift is to the *halakhah* in question, the less it threatens the global language of *halakhah*. It is simpler to digest a shift with respect to ovens and stoves than it is to redefine the category of Gentile, with all of its massive implications for texts dealing with a host of issues.

Economy of the Distribution of Legal Data. If a category shift essentially renames or switches categories while leaving the ratio of forbidden to permitted untouched, it is more likely to be adopted with ease. In some cases, the data shifts mildly, as when one type of cleaning clothing is exchanged for another, or even when the specific activity of lighting a fire on a very cold day moves into the permitted column. In all of these cases, the category shift stands a good chance. Things get dicier when the balance is shifted more dramatically, as when Gentiles become Jews or when all women are supposed to behave like men, since society now thinks of being a principal independent of gender. Here we might expect greater resistance to full acceptance of the shift, as an entire category simply threatens to disappear as most of the data it contained migrates elsewhere and nothing else rushes in to replace it.

B. Red Lines

Part of what is so fascinating about category shifts is how bold and direct they are. Instead of chipping away at a received halakhic reality, they simply reassess it in its entirety and propose a new way of looking at things. This can be invigorating and inspiring. It can also be terrifying and destabilizing. Consider the following category shift. **Bereishit 17** features God’s command to Avraham to circumcise himself and his son and codifies the requirement to remove the

foreskin from all Jewish males for all time. The goal and purpose of circumcision is not entirely clear from this text. **Devarim 10:16** uses the exact language of circumcision—ומלתם—to describe the “circumcision of the heart.” And **Yirmiyahu 9:25** seems to minimize the distinction between the circumcision of the flesh and that of the heart: כִּי כָל הַגּוֹיִם עֲרֻלִים וְכָל בֵּית יִשְׂרָאֵל עֲרֻלִי לִב׃/“For all the nations are uncircumcised [in the flesh], and all the house of Israel are uncircumcised of the heart.” Yirmiyahu’s point seems to be that the much vaunted sign of Israel’s superiority over the nations—their circumcision—conceals a corrupt nature that closes them to hearing God’s word and makes them no better than the other nations.

A first-century Jew offered the following analysis and reached the following conclusion:

Romans 2:28-29

For he is not a Jew who is one outwardly; neither is that circumcision which is outward in the flesh: But he is a Jew who is one inwardly; and circumcision is that of the heart, in the spirit not in the letter; whose praise is not of men, but of God.

This passage from the Christian Bible features Paul suggesting a classic category shift, does it not? Our categories are מְעֻלֵּם/circumcised and עֲרֻלִים/uncircumcised. As given to Avraham, the Jews, with a mark in their flesh, fall into the first category, whereas the unaltered bodies of Gentiles place them in the second category. But, argues Paul in light of Devarim and Yirmiyahu, in his own time we should now see physical circumcision as a marker of something more spiritual. It may well now be that many people circumcised in the flesh do not manifest the circumcision of the heart that is the true sign of being God’s servant, whereas many whose flesh has not been cut are truly open to the word of God. The underlying *value* of circumcision has nothing to do with the physical marker itself, argues Paul. That value is inward and of the spirit. To mistake the letter for the spirit is to distort the core intention of the Torah on this point. The major consequence: Gentiles can be a part of the covenant with the God of Israel without circumcision, and Jews, despite their circumcision of the flesh, may in fact be rejected by God and not truly Israel at all.

Whatever one thinks of the biblical interpretation here, there is no question that this analysis is completely incompatible with Rabbinic interpretation of the Torah and what we recognize as non-negotiable Jewish practice throughout the ages. But why? How is Paul’s analysis here so different from the category shifts we have seen? Why can’t this move be assimilated, in the sense of “our hearts are like their foreskins?” Or, framed from the other direction: Why won’t

the dynamic of category shifts lead us down a Pauline slippery slope towards antinomianism, the evisceration of *halakhah* and even the dissolution of Jewish identity?

I want to suggest the red line that Paul crosses here and that must serve as a boundary to any halakhic engagement with category shifts. Most of the category shifts we saw propose that a person fulfill an obligation by *acting* differently. Instead of refraining from laundering, one refrains from ironing. Instead of claiming an exemption from a ritual, one must now perform it. The German approach to reclining at the Seder was a bit different, arguing that the act of reclining no longer fulfilled the obligation of feeling free and that this state of mind could now be accomplished by sitting normally. It should not surprise us that this was rejected by many later authorities. This begins to verge into a different sort of shift, one where one's understanding of the deeper purpose of a law allows one to *eliminate* it.²⁶ Paul's pronouncement in Romans that the true benefits of circumcision can be realized without taking an actual knife to the flesh is precisely the sort of category shift *halakhah* has generally been unwilling to bear. The more durable shifts have tended to be those that replace one physical act with another, such that the Jew fulfilling the *mitzvah* still does so in the flesh, in keeping with *halakhah*'s distinctive emphasis on concrete action above intention and state of mind alone. *Halakhah* is a pathway of the letter and the flesh; rendering concrete actions into abstract states of mind is incompatible with Rabbinic law and practice.

Another red line is how we speak and what our canon is. Often the boundary between acceptable and unacceptable ideas is as much how they are articulated as the substance they convey. The language of category shift can be used in flippant ways to depart from the tradition, or it can be used to tether us more tightly to its underlying values. Here the words of R. Yitzhak Hutner (United States/Israel, 20th c.) should ever ring in our ears. In describing the vast capacity of the discourse of Torah to contain multiple opinions and approaches, R. Hutner lays out one important criterion for an opinion to be in the canon: *אם רק נאמרה לפי גדרי המשא ומתן של תורה שבעל פה* / “provided it was articulated according to the boundaries of discussion of the Oral Torah.” I think R. Hutner here is trying to emphasize the centrality of engaging the traditional canon of halakhic sources and feeling duty-bound to interpret them as opposed to simply replacing them

²⁶ I emphasize “verge,” since the Ra’aviah still required a very specific physical action of sitting at the table—walking around would not have been permitted in his regime. Nonetheless, because it is not apparent to the observer or the participant that any distinctive action is being taken at that moment, it almost feels as if the ritual of reclining is being eliminated entirely.

with one's own opinions. Perhaps even more so than other halakhic ideas, category shifts can risk being broad pronouncements about how "today, everything is different" in a way that can threaten the continuity of discourse that represents a commitment to the eternity of God's will. The "boundaries of discussion" point us back to the canon of Rabbinic sources through the ages and force category shifts to be a best effort to understand and apply that which we have received from the past. Category shifts with integrity and staying power will be those that aim to capture a deep truth embedded in earlier texts rather than aiming to replace the insights of the past with our own.

My hope is that this exploration of this critical dynamic in *halakhah* can help deepen that search for God's will as refracted throughout our people's history of learning and practice.