LEHRHAUS Over Shabbat

Tzav

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CONTENTS: Jospe (Page 1); Kurtz (Page 9)

Amidst the war unfolding in Israel, we have decided to go forward and continue publishing a variety of articles to provide meaningful opportunities for our readership to engage in Torah during these difficult times.

SEPARATION OF POWERS AND MAJORITY RULE: INSIGHTS FROM THE TALMUD, MAIMONIDES, SPINOZA, AND MENDELSSOHN

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Note: This article was written and accepted for publication in the summer of 5783/2023 and scheduled to appear after the holidays. Because of the outbreak of Israel's "Iron Swords" war with Ḥamas following the murderous attack on Israel on Shabbat/Simḥat Torah (7 October, 2023), we agreed that publication needed to be postponed. Now, five months into the war with no end in sight, we are nevertheless witness to renewed political tensions, public demonstrations, disagreements and paralysis in appointing judges and the President of the Supreme Court, together with resumption of talk of the "judicial reform." All of these fractures in the fabric of Israeli society and politics a year ago led Ḥassan Nasrallah, head of Ḥizbullah in Lebanon, to observe cynically but all too perceptively that "you are doing our work for us." Despite, then, the continuing tragedy of the war in the south and warfare in the north, a review of how our sources treat the separation of powers and majority rule may help us avoid repeating some of the mistakes of the pre-war political and ideological divisions in Israel and contribute to a more reasoned consideration of the issues.

We witness today in Israel deep and bitter divisions over those who affirm the authority of the Supreme Court to overrule decisions of the government or Knesset (Parliament) and those who argue for limiting the court's authority in favor of what is often called "executive privilege" and the supremacy of the elected representatives and government over unelected judges. Both sides claim to speak on behalf of "the majority"

and to represent "democracy." The arguments have become ever more corrosive, with unprecedented and dangerous developments. On the one side, large numbers (the precise numbers are not published) of reserve soldiers, officers, physicians, and pilots – many of whom have served over years and decades for hundreds, even thousands, of days of service including in elite combat units at great personal risk – have announced that they will no longer volunteer to serve a "non-democratic" or "dictatorial" government. Technically one can question whether this constitutes actual civil disobedience, since many or most of these reservists are volunteers past the age of mandatory service, who are under no legal obligation to continue to serve. But that begs the larger moral issue.

On the other side, we hear criticism that the protesters are undermining national security. Increasingly, we also are witness to vehement *ad hominem* attacks on these reservists and on various generals and the Chief of the General Staff, including by some government ministers and members of the Knesset (not all of whom served in the military), and even accusations that we are in danger of "an army having a state."

A review of some Jewish sources on this subject may enlighten more rational discourse and help proponents of both points of view to learn how some of these questions about the need for separation of powers, limitations on the authority of the court, and the meaning and potential abuses of democratic majority rule, have been dealt with over the centuries.

The issue of separation of powers, and the reasons for the Rabbis' limiting the court's authority, underlie a discussion in the talmudic tractate (*Sanhedrin*) dealing with the judiciary. However, that discussion reflects pragmatic and prudential considerations, not theoretical questions or abstract principles. In the first case, a distinction is made between the office of the high priest and that of the king, and then between two types of kings. According to the Mishnah,[1] in contrast with the high priest who is subject to the authority of the court, "the king does not judge and is not judged, does not testify and is not testified against."

The Gemara on this passage[2] then cites a historical incident to explain why the king is not subject to the court's authority, and differentiates between two types of kings:

> This was only taught concerning the kings of Israel. However, the kings of the house of David judge and are judged . . . Why not [the kings of Israel]? It once happened that the slave of King Yannai[3] murdered someone. Shimon ben Shetah[4] said to the sages: 'Pay attention and let us judge him.'

[1] Mishnah *Sanhedrin* 2:3.

[2] *Sanhedrin* 19a-b. Translation is my own.

[3] Alexander Yannai (127-76 B.C.E.) was the second Hasmonean king, ruling from 103-76 B.C.E. He sided with the Sadducees. His wife Salome (Shlomit) was the sister of Shimon ben Shetah.

[4] Shimon ben Shetah (140-60 B.C.E.) was the nasi, the head of the Sanhedrin, and was a leader of the Pharisees. His

> They sent to [the king]: 'Your slave has murdered someone.' [King Yannai] sent them his slave. So they sent back to him: 'You must come here'[5] . . .The king came and sat down. Shimon ben Shetah said to him: 'King Yannai, stand up so they may testify against you. You are not standing before us but before [God] who created the world' . . . The king replied: 'It is not as you say, but what your colleagues say.' [Shimon ben Shetah] turned to his right, but [his colleagues] looked down at the floor; he turned to his left, and they looked down at the floor. Shimon ben Shetah then said to them: 'You are all indecisive. May [God] who has all thoughts take revenge on you.' Gabriel came and knocked them down to the floor, so they died. At that time the [rabbis] said that the king should not judge nor be judged, does not testify and is not testified against.

Nevertheless, the passage does not clearly explain the difference between the two categories of kings: why are kings of "the house of David" subject to the court's authority, in contrast with "the kings of Israel," who are exempt from the court's authority? For the rabbis, the only legitimate kings could be descendants of David and Solomon, in contrast with the secessionist kings of the northern kingdom of Israel after the death of Solomon. The legitimate Davidic line was stable, in contrast with the northern kings of Israel who often were tyrants and who came to power through *coups d'état*.[6] Applying these two categories anachronistically to their day in late and post-Second Temple times, the rabbis regarded the Hasmoneans, who had successfully expelled the Syrian-Greeks and were themselves of priestly descent (and thus not of Davidic lineage), as having set themselves up illegitimately as both high priests and kings. Therefore, although located in Jerusalem and not in the north, they could only be categorized as "kings of Israel."

Even so, one might expect the rabbis to have concluded the opposite: "kings of the house of David," being legitimate rulers, presumably could be relied upon to follow the law, and therefore should not need to be subject to the court's authority. Conversely and paradoxically, should not the "kings of Israel," being illegitimate, require supervision by the court and be subject to its authority?

Why, then, did the rabbis rule as they did? The

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sister Salome (Shlomit) was the wife of King Alexander Yannai.

[5] Citing Exodus 21:29, the Gemara explains here that the owner of an ox is responsible for what his ox does, by analogy that the master of a slave is responsible for what his slave does.

[6] Of course, not all the kings of the Davidic dynasty were righteous, but at least in rabbinic terms they were legitimate rulers by virtue of their descent and their being based in Jerusalem.

answer, according to Maimonides, goes back to the story of the destructive incident between Alexander Yannai and Shimon ben Shetah. Maimonides discussed this point in two different works. In his earlier *Commentary to the Mishnah*[7] he explained:

> The meaning is that this refers only to the kings of Israel, because their rule is wicked, and they do not regard humility and modesty as important, and they do not tolerate the truth (*al-haqq*). However the kings of the house of David judge and are judged, because they recognize the truth, and modesty is not difficult for them because their rule is legitimate (*shar'i*).

Similarly, in the last section of his later encyclopedic Code of Law (*Mishneh Torah*),[8] Maimonides reiterated:

> We have already explained that kings of the house of David judge and are judged, and are testified against. However, regarding kings of Israel, the sages ruled that they should not judge nor be judged, and should not testify nor be testified against. This is because their hearts are coarse, and this matter would lead to the breakdown and destruction of religion.

In other words, there are no more "kings of the house of David," and the separation of powers between the ruler and the court is necessitated on pragmatic grounds for the sake of preserving the law and peace. The ruler, i.e., the executive branch, controls the armed forces; the court does not. In practical terms, therefore, the court attempting to assert its legal authority over a tyrant can only lead to violence, disaster, and destruction. A separation of powers is thus a prudential necessity, at least in a non-ideal political system established by humans and not (in theory) by divine design. In today's Israeli conflict, both sides agree that a separation of powers is necessary, but disagree about the source of the problem. Those who support restricting the Supreme Court's ability to overrule government decisions and Knesset legislation are arguing that it is the court itself which has violated the separation of powers. Those who oppose the current government are arguing exactly the opposite: it is the government itself which is violating the separation of powers by making the elected government and Knesset supreme.

Although the ancient Sanhedrin enacted laws and judgments based on a majority of the member judges, neither the rulers of the ancient Jewish state nor the Sanhedrin were elected by popular democratic elections. However, democracy itself and majority rule – which both sides in the current

[7] Commentary to Mishnah *Sanhedrin* 2:3. I used Rabbi Yosef Kafih's edition of the Judeo-Arabic original with his Hebrew translation. English translation is my own.

[8] *Mishneh Torah*, *Laws of Kings* 3:7. Translation is my own.

Israeli debate claim to represent – pose other dilemmas. Baruch (Benedict de) Spinoza and Moses Mendelssohn, two pioneers of early modern Jewish thought, are examples of how proponents of democracy can arrive at opposite conclusions regarding democracy's limits and dangers.

Spinoza[9] was familiar with Maimonides's philosophy, although he reached radically different conclusions. In his *Theologico-Political Tractatus*,[10] Spinoza wrote in favor of democracy:[11]

> Democracy . . . [is] of all forms of government the most natural and the most consonant with individual liberty. In it, no one transforms his natural right so absolutely that he has no further voice in affairs; he only hands it over to the majority of a society, of which he is a unit. Thus all men remain, as they were in the state of nature, equals.

Therefore, Spinoza concludes, the citizen, who has rationally transferred his rights to the government of the majority in which he is a unit, has no right of civil disobedience:[12]

> So long as a man acts in obedience to the laws of his rulers, he in nowise contravenes his reason, for in obedience to reason he has transferred the right of controlling his actions from his own hand to theirs.

In that regard, Spinoza, who is so often regarded as an early defender of liberal democracy, strongly opposed laws restricting the freedom of opinion and speech which are "directed against opinions [and] affect the generous minded rather than the wicked, and are adapted less for coercing criminals than for irritating the upright."[13] Nevertheless, Spinoza opposed civil disobedience and failed to take into account the distinct and dangerous possibility of the tyranny of the majority:

> Although complete unanimity of feeling and speech is out of the question, it is impossible to preserve peace, unless individuals abdicate their right of acting entirely on their own judgment. Therefore, the individual justly cedes the right of free action, though not of free reason and judgment; no one can act against

[9] Spinoza was excommunicated (put in *heirem*) by the Amsterdam Jewish community for his radical views, when he was 23. However, he never converted to Christianity. The causes of his excommunication remain a subject of research and debate to this day.

[10] Citations are from the English translation from the Latin by R.H.M Elwes (1883; 2 volumes), reprinted (New York: Dover, 1951), Volume 2.

[11] Ibid., ch. 16, 207.

[12] Ibid., ch. 20, 260.

[13] Ibid., 262.

> the authority without danger to the state.[14]

For Spinoza, then, the danger to society comes from civil disobedience, in contrast with the Mishnah and Maimonides, for whom the danger to society comes from the government itself! Like Spinoza, today's Israeli government and its supporters regard the protests and refusal to serve in the reserves as civil disobedience and as endangering national security. Like the Mishnah and Maimonides, Israeli opponents of the government's policies see the danger as coming from the government itself.

Just as Spinoza knew Maimonides's works but reached radically different conclusions, Mendelssohn[15] was familiar with Spinoza's thought. Because of his principled objection to religious coercion, Mendelssohn regarded Spinoza's excommunication a century earlier as completely wrong. At the same time, Mendelssohn differed sharply from Spinoza, not only in theology and religious practice, but also on the implications of the political regime. Spinoza had argued that Jewish law was only applicable and authoritative in the context of the ancient Jewish state. Mendelssohn accepted Spinoza's distinction between that ancient state and subsequent times, but maintained that the difference was not in the authority *per se* of the divine law, but only in its possibility of being enforced by the power of the state. For Mendelssohn, the divinely revealed Jewish law continues to retain its authority over Jews, but, after the destruction of the ancient Jewish state, the divine law cannot be coercively enforced by any other state.

As for human law, Mendelssohn also disagreed with Spinoza on the question of civil disobedience in a democracy. Unlike Spinoza, Mendelssohn explicitly recognized the danger of the tyranny of the majority in a democracy. In his Preface to the German translation in 1782 of Manassah ben Israel's 1656 *Vindiciae Judaeorum*, addressed to Oliver Cromwell, which pleaded for the legal readmission of the Jews to England, Mendelssohn discussed the need to violate fundamentally unjust laws:[16]

> That barbarous laws (*barbarische Gesetze*) are of the most terrible consequences the more legally the proceedings are conducted, and the more rapidly the judge pronounces after the letter, is an important truth which cannot be too often inculcated. The only way of amending unwise laws (*unweise Gesetze*) is by deviating (*Abweichungen*) from them, as one would correct mistakes in calculation (*Rechnungsfehler*) by

[14] Ibid., 259.

[15] Moses Mendelssohn (1729-1786).

[16] Citation from the translation by M. Samuels in *Jerusalem: A Treatise on Ecclesiastical Authority and Judaism by Moses Mendelssohn* (London, 1838), 89. Mendelssohn's German Preface ("Rettung der Jüden: Vorrede") may be found in *Moses Mendelssohn's Sämmtliche Werke* (Vienna, 1838), with this passage on p. 686.

other willful mistakes.

Mendelssohn's understanding of the potential tyranny of the majority, and his prescient insight that "the most terrible consequences" occur "the more legally the proceedings are conducted" – in other words, that formal judicial procedure can mask terrible substantive injustice – were borne out by courts a century and a half later in Nazi Germany.

What, then, can we learn from these sources (and, of course, there are many more)? First, regarding the separation of powers, let us recall that the almudic rabbis called for a separation of powers and the exemption of illegitimate rulers ("kings of Israel") from the court's jurisdiction not on theoretical or ideal grounds, but on purely pragmatic grounds and for prudential reasons. Whatever one's theoretical ideals may be, the rabbis reached a pragmatic solution of balance of separate powers necessary for social welfare and peace. A conflict between the judiciary and the executive branch leads to destruction, as Maimonides pointed out. Both are necessary, but both – especially those who control the armed forces – must exercise restraint for the sake of larger society.

The talmudic rabbis saw the court as having limited its own authority over the king in order to avoid a dangerous conflict of powers. The danger we face in Israel is similar – a clash between the judiciary on the one side and the legislative and executive branches on the other side – despite differences in the specific circumstances, and from which side the danger originates. Today's Israeli government and its supporters argue that the court has already over-extended its authority, and therefore they seek to have the Knesset, led by the government, impose limits on the court's authority to intervene in, and overrule, legislative and executive decisions. Conversely, those who support the Supreme Court's independence as the ultimate arbiter of the law oppose what the government and Knesset propose. They see a potential danger to Israel if the government should refuse to obey decisions of the Supreme Court, as already advocated by some government ministers and members of the Knesset. Furthermore, if that should happen, it is by no means obvious whether the military, security agencies, and police would obey the government. The resulting clash and chaos would be disastrous for Israel.

In that context, let us recall some common Israeli advice, all too often ignored today: "Don't be right, be smart." Zealous enthusiasm is not the same as wisdom. Let us also recall that while Rabbi Akiva enthusiastically supported the disastrous and tragic revolt (132-135 C.E.) against the Romans of Bar Kokhba, whom he called "the Messiah King," other rabbis sharply disagreed:[17]

> Rabbi Shimon bar Yohai taught: Akiva, my rabbi, interpreted "A star will go forth from Jacob" (Numbers 24:17). When Rabbi Akiva would see Bar Koziba, he would say, by right he is the Messiah King (*malka meshiha*).

[17] Jerusalem Talmud, *Ta'anit* 4:6 (68d). Translation is my own.

> Rabbi Yohanan ben Torta said to him: Akiva, grasses will grow in your cheeks, and the Son of David will still not have come.

Second, regarding majority rule, let us recognize that democracy and majority rule are not ends in and of themselves, but a mode of government in a society in which citizens may differ greatly with each other about the ultimate meaning of life and the goals of the government they elect. According to Spinoza,[18]

> If we hold to the principle that a man's loyalty to the state should be judged, like his loyalty to God, from his actions only – namely from his charity towards his neighbors, we cannot doubt that the best government will allow freedom of philosophical speculation no less than of religious belief.

Mendelssohn's *Jerusalem* concludes on a similar note. Addressing rulers of the state, he wrote:[19]

> Let us not pretend that conformity exists where diversity is obviously the plan and goal of Providence. Not one among us thinks and feels exactly like his fellowman . . . For the sake of your happiness and ours, do not use your powerful prestige to give the force of law to some eternal truth that is immaterial to civic well-being . . . Concentrate on what men should or should not do; judge them wisely by their actions; and let us retain the freedom of thought and speech with which the Father of all mankind has endowed us as our inalienable heritage and immutable right.

We should also consider that there is no inherent or necessary equivalence between the democratic or undemocratic character of a government and the moral obligation – written into Israeli military law – to refuse to obey a "manifestly illegal order." When an American general in the Vietnam War infamously claimed that "we had to destroy the village [including its civilian population] in order to save it," he was serving a democratically elected government, but giving (or following) a "manifestly illegal order" – in short, a war crime. A democratic government can issue "manifestly illegal orders." Conversely, cannot one imagine legal and reasonable orders given by an undemocratic government, for example, to defend the country from foreign aggression or to use military forces for humanitarian missions? Is refraining from military service, even by volunteers, because of legitimate

[18] Op. cit., 261.

[19] Moses Mendelssohn, *Jerusalem, or On Religious Power and Judaism*, in *Jerusalem and Other Jewish Writings*, edited and translated by Alfred Jospe (New York: Schocken, 1969), 109-110; cf. *Jerusalem, or On Religious Power and Judaism*, translated by Allan Arkush, with Introduction and Commentary by Alexander Altmann (Hanover; Brandeis University Press, 1983), 138-139; *Moses Mendelssohn's Sämmtliche Werke*, 290-291.

and fundamental disagreements with the government, wise? If refusal to serve by one side is legitimate today, what is to stop the other side from refusing to serve tomorrow under a different government?

Moreover, we already see external enemies gloating over the internal dissention in Israel as serving their dream of the destruction of the Jewish State from within, perhaps unknowingly anticipating the homiletical interpretation of the prophecy of Isaiah (49:17) that the source of destruction of Israel is internal: "Your destroyers and those who lay you waste will come out from within you."[20]

We face terribly difficult moral and political decisions. Clear thinking by all of us on the correct and desired relation among separate powers, and on the limits of majority rule, is certainly called for. Studying some of the insights of how our sources dealt with these issues may, in turn, help us understand our options better and face our own dilemmas with greater wisdom and acceptance of the other.

[20] My translation. The literal meaning is that foreign enemies will leave the country; the homiletical interpretation is that destruction comes from within the Jewish people itself (cf. Radak [Rabbi David Kimhi] on this verse).

Is Silence Complicity?: An Analysis of Shtikah Ke-Hoda'ah from Classic Halakhah to Current Events

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"Silence is violence." "Silence is complicity." These are common soundbites that are often used to compel disinterested parties to state their position on a given political issue. Following the 2020 racial unrest catalyzed by the death of George Floyd, Professor Jonathan Turley makes the following observation:

> "Silence is violence" has everything that you want in a slogan from brevity to simplicity. But it can also be chilling for some in the academic and free speech communities. On one level, it conveys the powerful message that people of good faith should not remain silent about great injustices. But it can at the same time have a much more menacing meaning to "prove the negative" by demanding that people show that they are not racist…[1]

Following the October 7 mass terror attack on Israeli civilians and the atrocities that ensued, Bret Stephens, writing for *The New York Times*,

[1] Jonathan Turley, "How 'Silence is Violence' Threatens True Free Speech and Public Civility," *The Hill*, August 29th, 2020. See also Bret Stephens, "Silence Is Violence—but Not When It Comes to Israeli Rape Victims," *The New York Times*, December 5, 2023.

observed how "Silence is violence—but not when it comes to Israeli rape victims." The inconsistency of political leaders who advocated for the release of captives in previous crises, but either equivocated or were completely silent when it came to Israelis, has rightly incurred the ire of many Jews.

While the above example easily merits an ironclad condemnation from public officials, what remains less clear is how we determine which other geopolitical events merit a similar response—especially in a world with endless suffering in countries such as Ecuador, Ukraine, China (and even domestically within America!).

This quandary exists not only in the general political arena but also in religious contexts. When a scandal or significant event takes place, some will claim that if a rabbi or Jewish leader (particularly one they do not favor already) does not issue a public statement on the matter, then their silence is tantamount to approval, sometimes even employing the Talmudic principle of *shtikah ke-hoda'ah*: that their silence should be construed as admission. It therefore behooves us to clarify the actual parameters of this principle, which will in turn help us develop the ethical ramifications that naturally emerge.[2]

Silence Due to Disregard vs. The Expectation to Engage

There are several cases in which *shtikah ke-hoda'ah* appears in the Talmud—one of the iconic instances is found in *Yevamot* 87b:

> And we also learned in a *mishnah* (*Kareitot* 11b) that if one witness says to someone: "You ate forbidden fat," and the accused says: "I did not eat it," the accused is exempt from bringing an offering. The Gemara infers: The reason he is exempt is that the individual in question said: "I did not eat it," which indicates that if he had been silent and failed to deny the accusation, the lone witness is deemed credible. Apparently, one witness is deemed credible by Torah law with regard to certain issues… And from where do you infer that the reason is due to the fact that the one witness is deemed credible? Perhaps the

[2] A brief caveat is in order: *Minhat Hinukh* (58:1), on the commandments pertaining to "Claiming and Denying," presents an uncharacteristically truncated exposition on what should be a topic brimming with extensive commentary. He explains: "These laws span the wide seas of the Talmud and later legal literature; therefore, I have withheld my hand from writing about them." In other words, there is virtually no limit to how deep down the rabbit hole one can go when addressing a topic as broad as the legal parameters of claims and admissions. Therefore, I have endeavored to provide a substantive survey of the pertinent aspects of the matter, without presuming to provide a comprehensive collection of the virtually limitless source material.

> accused must bring an offering because he remains silent, as there is a principle that **silence is considered like an admission**.[3]

Jewish law generally regards two witnesses as the gold standard, whereas a single witness's testimony is only admissible in more limited circumstances. In the case above, while the single witness's claim would not be sufficient to convict the accused of consuming forbidden fat, it does serve as a means to eliciting the accused party's silence which is thereby construed as admission. In civil law we regard the principle of *hoda'at ba'al din ke-meah edim damei*—a litigant's admission is equivalent to 100 witnesses (see *Kiddushin* 65b).[4] Thus, the accused party's silence is admissible evidence in Jewish law.

However, not every case of silence constitutes admission—sometimes one's silence is merely indicative of disinterest or disregard. *Shulhan Arukh* (*H.M.* 81:7)[5] rules:

> Silence is only considered admission when it follows an initial verbal admission… but when he is silent from start to finish, **he can claim: "I need not concern myself with responding to you**."

When one verbally concedes to an initial claim, we can construe any subsequent silence to additional claims as continued admission. However, by default, silence does not necessarily constitute admission—quite the opposite actually—there are times that the claim is so spurious that one may decide that it is not even worth engaging with it. To take a lighter and more recent example, if someone were to suggest that we should "reinvent Yom Kippur" with "goat yoga, mosh pits, [and] glow sticks," as a *Wall Street Journal* article documented—would we expect that our synagogue rabbis should feel compelled to castigate it publicly? Or perhaps it is so exotic, shall we say, that it need not even be dignified with a response.

There are several occasions in Talmudic discourse in which Rav is silent. In the context of a debate regarding the proper configuration of a *sukkah*, Ritva (*Sukkah* 7a, s.v. *Ve-Amrinan De-Shatik Rav*) writes:

> And it is unclear whether this silence is because [Rav] conceded or because he had no concern for their words and they were not worthy of a response.

Ritva concludes that since the conclusion of the Gemara records that the consensus was in line with the position of Rav, perforce Rav himself maintained his own stance. Thus Rav's silence was

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[3] Biblical and Talmudic translations are from Sefaria. The rest are my own, unless otherwise noted.

[4] See *Ketzot Ha-Hoshen* (34:4) and the extensive surrounding literature regarding whether this principle is rooted in a hermeneutical tradition, *migo* reasoning, or the creation of a new obligation akin to granting a gift.

[5] Based on *Sanhedrin* (29a); see Rabbeinu Yonah (ad loc).

simply a disregard for his opponents' argumentation.[6]

Not only may one who remains silent claim to be disregarding a statement made against them, but even one who initially answers "yes" can later turn around and explain it was done in jest. The Talmud in *Sanhedrin* (29a) describes a case in which one party claims money from another and the latter can claim, "I was teasing you." Since this scenario took place in an informal context with no designated witnesses, the claimee can reasonably respond in any future litigation that when he said "yes" it was done in order to dismiss the claimant from further pressing him.

Birkat Avraham (*Sanhedrin* 29a), in elucidating the position of *Ketzot Ha-Hoshen*, explains that the claim of jest in the absence of witnesses is a substantial rationale (*amatla*)[7] to the degree that it renders the initial admission as uprooted from the outset. From what we have seen, in general contexts people are not expected to engage with every claim made against them—and even if one does opt to initially engage, it can subsequently be dismissed as immaterial rather than a formal admission of guilt or obligation.[8]

We should note, however, that the calculus changes when we shift our context to the courtroom. *Shulhan Arukh* (*H.M.* 81:6) clearly rules that:

> If a claim was made and he admitted **in front of the court**… he is not able to retract on the basis of jesting. However, he can claim that he already paid [in the interim].[9]

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[6] Cf. *Bava Kamma* (11a). Rama Mi-Fano (*Shivrei Luhot*, p. 15) suggests that Rav possessed an answer on a "hidden" level of Torah. Accordingly, Rav did not concede, but he also did not respond with his "hidden" approach.

[7] Regarding the nature of *amatla*, see *Mishneh Torah* (*Hilkhot Issurei Biah* 4:10), *Ketzot Ha-Hoshen* (81:8), and *Responsa Iggerot Moshe* (*E.H.* 1:84). There are times when an *amatla* will be of no avail, such as when one admits on their own initiative (*Shulhan Arukh*, *H.M.* 81:5) or when an entire group confesses collectively (*Shulhan Arukh*, *H.M.* 81:1, cf. *Shakh* 81:4).

[8] This is in essence what the Gemara (*Sanhedrin* 29b) teaches in the name of Rava: "People do not remember all frivolous matters."

[9] This is not just true vis-a-vis explicit verbal admission but would likewise apply if his admission was inferred from his silence in court. The Talmud in *Bava Metzia* (6a) addresses a case in which both parties claiming ownership over a garment enter the courtroom holding it, when suddenly one party seizes it fully from the possession of the other in the presence of the judges. While the Gemara does not conclude what would happen in the case of only **initial** silence, what is clear is that if the claimee remains silent for the **entire** duration, then the principle of *shtikah ke-hoda'ah* would be applied. Rashba (*Bava Metzia* 6a, s.v. *Mi-Deke'amrinan*) elucidates that "specifically before the court does one need to cry out, for it is a place of rendering judgment, and therefore he should cry out before the court to adjudicate his case. Whereas when it is not in the presence of the court, he could reasonably claim: 'Since there is no one to adjudicate my matter, why should I bother crying out.' For one who has a matter that requires a judicial ruling should go to the courthouse; and there, he should put forth his grievance." See also R. Binyamin Wolf Lau (*Sha'arei Torah*, Vol. 1, *Klal* 3, *Prat* 10, Par. 13), based on a responsum of Maharit (Vol. 2, *E.H.*, no. 1) who likewise notes that the case in *Bava Metzia* is distinct from other scenarios we explored because "it is the norm to cry out before the court when false testimony is made against him."

However, see Ramban (*Bava Metzia* 6a, s.v. *Ha De-Ba'i*), Ritva (s.v. *Ba'i*), and Ran (s.v. *Ha Ka Hazu*), who suggest the opposite—that when there is no court present, he should feel compelled to defend himself since the judges are not there to witness them snatching the item from him. See also Shakh (*H.M.* 138:6), who equates the context of witnesses with being in court. However, *Urim Ve-Tumim* (*Tumim*, *H.M.*

From what we have reviewed, one is not expected to engage with every arbitrary accusation leveled against him. However, if the claim takes place in a formal context, namely a courthouse—a *makom mishpat*—where one is supposed to be taking the matter seriously, his lack of protest can thus be construed as admission. Furthermore, a subsequent claim of jest would not avail the defendant, as one is obligated to take the judge's interrogation with utmost seriousness. To return to our example of reinventing Yom Kippur with goats and glow sticks, if this was raised at a formal synagogue board meeting, it would behoove the rabbi to address it. Silence in such a circumstance would be unacceptable.

Silence as an Extrinsic-Circumstantial Mechanism

Rosh (*Responsa* 107:6), however, expands the application of *shtikah ke-hoda'ah* beyond our established norms. The case involves a claimee's refusal to reply in the face of constant accusations outside of the courthouse (in addition to his recalcitrance within the court):

> And I say that he should respond and provide a rationale and proof [as to] why he did not respond to the warnings of [the collector's] agent. It would be expected that when the agent of Rebi Shlomo (i.e., the claimant) gave him the aforementioned warnings that **Rebi Yisrael [i.e., the claimee] ought to rend his garments and raise a great and terrible cry to shake the world and let them know that the money he already paid is being claimed from him again a second time**. He ought to reply to the agent, "How can you say these things to me—for he knows that I already paid him the money, and he gave me a receipt and it was torn up—for it was torn in front of you!" **And [the claimee] ought not to disengage from the agent with silence, which is tantamount to admission**.

Rosh asserts that anyone who is the subject of constant assaults on his integrity and reputation should naturally retort to defend himself—that is a fact of human nature. Thus, the accused individual's silence raises a suspicion.

However, R. Yaakov Ariel (*Responsa Be-Ohalah Shel Torah* 6:36)[10] explains that Rosh is not employing the literal principle of *shtikah ke-hoda'ah*; rather, the judges are using their common sense to assess the unique nature of the case presented to them. This is evident from Rosh's invocation of the guiding principle *ein lo la-dayan ela mah she-einav ro'ot*—a judge must rule in accordance with what he sees. While silence

138:5) rejects Shakh, as none of the medieval commentators appear to be willing to equate silence in court with what occurs outside before witnesses.

[10] This responsum was originally published in the journal *Tehumin* (volume no. 24). Another important point he makes in this piece is that there is a distinction between the court and law enforcement. In the case of the latter, one may feel compelled to confess to something that he did not commit, due to the pressure exerted on him.

outside court generally does not constitute *shtikah ke-hoda'ah*, the court reserves the right to evaluate different instances of silence on a **circumstantial** level.[11]

In truth, while R. Ariel frames the circumstantial consideration of silence as an aberration beyond the framework of *shtikah ke-hoda'ah*, there is ample evidence, based on everything we have seen, to suggest that *shtikah ke-hoda'ah* is, in fact, **fundamentally** circumstantial in its very essence.

Let us return to the above-quoted passage in *Yevamot* in which a single witness accuses a person of consuming forbidden fat and the latter is silent. One way to understand this is to view the witness as instrumental in creating the circumstances in which the accused party's silence can serve as an admission.[12]

However, both *Tosafot* (*Yevamot* 88a, s.v. *De-shtikah*) and Ran (*Kiddushin* 61a; Rif on *Kiddushin* 28b) claim that, in truth, the opposite is what is occurring.[13] *Shtikah ke-hoda'ah* does not operate as an actual admission from the accused party; rather, his silence lends credence to the testimony of the single witness.[14] According to this framework, *Shtikah ke-hoda'ah* is fundamentally **circumstantial** in nature. We interpret the claimee's lack of opposition as lending sufficient basis to the claim leveled against him.[15] [16] With this understanding, it is

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[11] A related example of judicial intuition is recorded by Shakh (*H.M.* 81:17), who cites *Piksei Maharam Rikanti* (no. 423)—that the court can determine that one was silent, since they required a moment to formulate their response.

[12] See *Birkat Avraham* (*Yevamot* 87b).

[13] Cf. *Shakh* (*Y.D.* 127:10).

[14] See R. Elchonon Wasserman in *Kovetz He'arot* (63:2), who explains that a single witness is not simply weaker than two witnesses but is fundamentally in a separate category. Whereas two witnesses determine the truth, the single witness can sometimes just help us with making a pragmatic yet uncertain determination. This framework can further help us appreciate how silence is used to bolster the tenuous admissible claim of a single witness.

[15] This is conceptually similar to one of the approaches to *modeh be-miktzat*—that when one admits to part of a claim, they are obligated to take an oath to substantiate their denial on the remainder as their initial admission lends credence to the claim against them (see *Kuntresei Shiurim* on *Bava Metzia* 3:2, s.v. *U-vebeiur*).

One other concept that connects to this discussion, but that I will leave for a future analysis, is the principle of *umdana de-mukhah* which iconically appears in *Bava Batra* (146b). The concept of *umdana* is fundamentally tied to the principle of *shtikah ke-hoda'ah* as it essentially dictates that in some circumstances we can draw inferences from unspoken factors. One example provided is a father who, upon hearing of his only son's death, bequeaths his entire inheritance to another party. Despite the fact that he did not append any explicit stipulations, it is evident from the sequence of events that he only intended to relinquish his estate because he was mistakenly led to believe that he had no son to inherit his estate. See Ritva (*Bava Batra* 146b) and *Ketzot Ha-Hoshen* (12:1), who reconcile *umdana* with the principle of *devarim she-balev einam devarim*—"the words of the heart are not words." For a general analysis of the *umdana de-muhakh*, see *Minhat Elazar* (2:39) and *Kuntrasei Shiurim* (*Kiddushin*, essay no. 21).

[16] This is akin to how *Ketzot Ha-Hoshen* (138:2) explains that the silence in the case in *Bava Metzia* (6a) does not constitute admission but rather the defendant's forfeiting the right to take an oath to help his case. See also R. Binyamin Wolf Lau's *Sha'arei Torah* (Vol. 1, *Klal* 3, *Prat* 5, Par. 7), which discusses a dichotomy in whether *shtikah ke-hoda'ah* is admission or *mehilah*, forgoing. The latter would be consonant with *Tosafot*, et al. who argue that *shtikah ke-hoda'ah* merely lends credence to the claimant rather than serving as bona fide admission. See also *Sha'arei Yosher* (5:16) about the nature of *mehilah* vis-a-vis one's possessions.

clear how Rosh could have the latitude to apply *shtikah ke-hoda'ah* even when it does not occur before a courtroom nor before designated witnesses. Rosh could interpret the claimee's silence as a bona fide instance of *shtikah ke-hoda'ah* because the court's ability to invoke *shtikah ke-hoda'ah* is fundamentally a context-dependent decision.

Circumstantial Evidence: The Criminal Context

Unlike in civil matters (such as a financial dispute) in which we established that "a litigant's admission is equivalent to 100 witnesses," when it comes to criminal matters we generally apply the principle of *ein adam mesim atzmo rasha*, that categorically one is incapable of incriminating himself in court.[17] However, may the court interpret one's silence against him? If *shtikah ke-hoda'ah* is literally a formal admission, then an admission as a result of silence should not be any more legitimate than an outright verbal admission which is not admissible in a criminal context. However, if we instead construe *shtikah ke-hoda'ah* as circumstantial evidence, perhaps it could be taken into account in criminal cases since it would not be in violation of *ein adam mesim atzmo rasha.* Indeed, some went so far as to claim that overwhelming circumstantial evidence could actually be utilized in a criminal setting as well.[18] Rivash (no. 234) writes:

> Also nowadays, that which we only adjudicate capital cases based on immediate necessities is because that general authority has terminated [from earlier generations]. However, the court will administer lashes and punishments that are not strictly mandated by the law, based on immediate needs, and **even absent absolute testimony**, so long as we have clear bases which indicate that the accused committed the sin.[19]

[17] See also Rabbi Dr. Norman Lamm's essay "Self-Incrimination in Law and Psychology: The Fifth Amendment and the Halakhah" (Norman Lamm, *Faith and Doubt: Studies in Traditional Jewish Thought* [Jersey City: KTAV Publishing House, 2006], chap. 10) in which he analyzes how the concept of *ein adam mesim atzmo rasha* in Jewish law differs from American law: "The Halakhah does not distinguish between voluntary and forced confessions, for reasons which will be discussed later. And it is here that one of the basic differences between Constitutional and Talmudic law arises. According to the Constitution, a man cannot be compelled to testify against himself. The provision against self-incrimination is a **privilege** [emphasis added which differs from original] of which a citizen may or may not avail himself, as he wishes. The Halakhah, however, **does not permit** self-incriminating testimony. It is **inadmissible**, even if voluntarily offered. Confession, in other than a religious context, or financial cases completely free from any traces of criminality, is simply not an instrument of the Law. The issue, then, is not compulsion, but the whole idea of legal confession" (268).

[18] See *Tosafot* (*Shevuot* 44a, s.v. *De-i*).

[19] From a practical standpoint, this is line with what Rambam (*Mishneh Torah, Hilkhot Rotzeah* 4:8) codifies regarding someone who is clearly guilty of murder but gets off on a technicality, yet court still has legal recourse for dealing with them by incarcerating them in a *kipah* where "they are fed parched bread and small amounts of water until their digestive tract contracts. Then they are fed barley until their bellies burst because of the extent of the sickness, and they die." See also *Hilkhot Rotzeah* (6:5) and *Hilkhot Melakhim* (3:10) for similar examples of super-legal mechanisms.

While Rambam codifies the use of alternative forms of punishment in instances of relying on circumstantial

Following the dissolution of the ancient Sanhedrin and the loss of the tradition for bestowing bona fide rabbinic ordination, modern Jewish courts are generally not authorized to hand out punitive rulings, from fines to capital punishment. Nonetheless, Rivash was willing to accept the ad hoc use of such measures, even on the basis of circumstantial evidence.

Rivash (and some other sources) aside, normative Halakhah does not take circumstantial evidence into account except, potentially, for exceedingly extenuating circumstances. It would thus stand to reason that, in general, we cannot apply *shtikah ke-hoda'ah* in criminal matters, even if it is generally a flexible circumstantial concept.

Silence vs. Protest: The Ethical Dimension

There are many sources in rabbinic literature which praise the virtue of silence. In *Pirkei Avot* (3:13), "Rabbi Akiva says… 'A safeguarding fence around wisdom is silence.'" Likewise, in *Avot De-Rabbi Natan* (22:2),[20] it is recorded: "His son Shimon would say, 'All my life, I grew up among the sages, and I never learned anything better for a person than silence. And if silence is good for the sages, how much more so for the foolish!'" Indeed, R. Ariel, in his aforementioned reponsum, commends silence in the face of spurious claims:

> One is not required to engage with any claim that appears to him as provocative. His silence in such a case **would constitute wisdom**, not admission.

Sefer Orhot Tzaddikim (Ch. 21, "The Gate of Silence") articulates which forms of silence are considered virtuous and which are ethically erroneous:

> There are times when silence is good, as when **Divine justice** strikes against a man, as in the case of Aaron, as it is written: "And Aaron held his peace" (Leviticus 10:3). If a person hears people reviling him, he should be silent. And this is a great quality, to be silent in the face of one's revilers. And one should also accustom himself to be silent in the synagogue, for this is modesty, and it requires great alertness properly **to direct his heart in prayer**. And if one is sitting among the wise, he should be silent and listen to their words; for when he is silent, **he hears what he does not know**, but when he speaks, he does not add anything to his knowledge. However, if he is doubtful as to the

evidence, he nonetheless cautions in *Sefer Ha-Mitzvot* (Negative, no. 290) against using inferences to administer direct corporal or capital punishment: "That He prohibited the judge to declare punishments by way of strong conjectures, and even when it is almost certain… And when we do not declare punishments based on strong appearances, the end result is surely that we will acquit the sinner. But if we declare punishments based on appearances and conjecture, we would surely sometimes kill someone innocent."

[20] Cf. *Pirkei Avot* (1:17).

> meaning of the words of the wise, he should ask them, for to be silent in such a case is very bad: **King Solomon said, "A time to keep silence, and a time to speak" (Ecclesiastes 3:7)—there are times when speaking is good and there are times when silence is good…** But there are times when silence can be evil, as it is written, "Answer a fool according to his folly, lest he be wise in his own eyes" (Proverbs 26:5). With respect to words of the Torah, if a person sees that the fools are scorning the words of the wise, **he should answer in order to turn them back from their errors** so that they do not imagine themselves wise in their eyes. If a man sees another man committing a transgression, **he should protest and reprove him**.[21]

The Talmud in *Bava Metzia* (84b) relates the terrible fate of Rabbi Elazar son of Rabbi Shimon. When prompted to explain why he suffered so terribly he explained, "One day I heard a Torah scholar being insulted, and I did not protest as I should have." Thus we can observe how in certain contexts it is specifically passivity and inaction which yield negative results.[22] Similar to what we reviewed in Rosh's responsum, certain situations should cause us such profound and untenable pain that our only natural response is to viscerally object with a *ze'akah gedolah u-marah*, a great and terrible cry.[23]

R. Elchonon Wasserman laments the fallacy that to be a righteous person is to always be passive and conciliatory. In *Kovetz Ma'amarim* (vol. 1, p. 262), he writes:

> What should we do in a situation as terrible as this in which the Jewish people are not their own [empowered] nation? Should we give up and clasp our hands together until we receive mercy from Heaven? God forbid that such an idea should even occur to us! They say in the name of the author of the *Nefesh Ha-Hayyim* [R. Hayyim of Volozhin] of blessed memory—regarding the line in the Mishnah at the end of [Tractate] *Sotah* (49b): "And for us what can we rely on but our Father in Heaven"—that in this *mishnah* it lists that which will happen leading up to the Messiah. And the giant [R. Hayyim of Volozhin] explained that these final words in the Mishnah are also a curse—and they are worse than all the other curses which preceded it. For the God-fearing people who live in those days will give up, and their

[21] Translation from Sefaria.org.

[22] There are countless additional sources which discuss the imperative to speak up, such as *Esther* (4:13-14), *Sotah* (11a), *Avodah Zarah* (18a), and many more.

[23] Rosh's language is adapted from Genesis 27:34 and Esther 4:1.

> hands will loosen from waging the war of God—and this is a great error, for the verse (Psalms 68:35) declares: "Ascribe might to God…"

Some may justify their silence on the basis that they do not wield sufficient influence and thus *mutav she-yiheyu shogegin*—it is better to allow others to sin unknowingly. However, R. Aharon Lichtenstein in *Leaves of Faith*[24] debunks this erroneous suggestion:

> Hence, where *tokhahah* [rebuke] will not result in the desired effect, and might even be counterproductive, it is best foregone. ***Meha'ah***, by contrast, is publicly oriented. It is part of an ongoing struggle for **communal spiritual integrity**… Consequently, the restrictive term, *amitekha*, which singles out a spiritual confrere, "a member of the nation who shares in your observance of Torah and *mitzvot*," for spiritual remedy of *tokhahah*, has no bearing upon *meha'ah* which is mandated by an event rather than by its agent.

Our goal is not always to change other people's minds but to maintain our own. Addressing protests[25] against public desecrations of Shabbat,[26] R. Moshe Sternbuch writes (*Responsa Teshuvot Ve-Hanhagot* 7:42):

> The basis of protest (*meha'ah*) is because when the "free people" [non-observant Jews] breach the observance of the holy Shabbat—it causes harm to us. For it influences the general public to lessen the severity of violating the holy Shabbat—and in particular it compromises the education of our children internalizing the gravity of violating the holy Shabbat.

Protesting and not remaining silent in the face of desecration of our faith not only helps others; it helps us—we are the beneficiaries. Thus, there is a value to speaking up for Torah values, even if only for strengthening our own "communal spiritual integrity," as R. Lichtenstein put it. Lest our community see our complacency and conclude as the Talmud in *Gittin* (56a) formulated

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[24] Aharon Lichtenstein, *Leaves of Faith: The World of Jewish Living*, vol. 2 (Jersey City: KTAV Publishing House, 2003), 98. See *Shabbat* 55a regarding the distinction between rebuke and protest.

[25] Regarding the nature of protests and public demonstrations, see *Rosh Hashanah* (19a) and *Ta'anit* (18a). R. Yehuda Herzl Henkin (*Responsa Benei Banim* 2:51) employs these Talmudic passages as precedent for his support of the 20th-century demonstrations for Soviet Jews.

[26] See what R. Henkin writes in *Benei Banim* (Vol. 4, *Mamar* 11) in which, similar to R. Sternbuch, there is a value in protesting to remind ourselves of our own values (i.e., Torah values). See also R. Yosef Shalom Elyashiv's approach to Shabbat protests in *Kovetz Teshuvot* (4:35). For a broader survey of rabbinic approaches to protesting, see the following articles: R. Alfred Cohen, "Protest Demonstrations" *Journal of Halachah and Contemporary Society* 25 (1993); R. Yitzchok Oratz, "Property Values: Rabbinic Ruminations on Property and Protest, Racism and Riots," *Journal of Halachah and Contemporary Society* 76 (2021); and Yitzhak Grossman, "A Time To Keep Silence, and a Time To Speak" *The Lehrhaus* (October 26, 2020).

it: “Since the Sages were sitting there and did not protest, learn from it that they were content with what he did.” Let not our *shtikah* be construed as *hoda’ah*.

The interplay between silence and speech is a delicate balance that requires mindful navigation. While silence can foster contemplation and cultivate wisdom, there arise moments when the weight of our convictions and the pressing nature of the circumstance demand that we respond with vehement objections and protestations. In a personal and informal context, one may have the luxury of simply disregarding spurious claims. However, in more formal and public forums, the perilousness of allowing them to proliferate renders it necessary to respond—to the extent that silence is akin to acquiescence, if not tacit approval.

This creates a precarious minefield for public figures who are inclined to take overt stances on critical issues. While it is practically untenable for an organization or individual to be expected to issue a statement of opposition or solidarity for every crisis that emerges, perhaps each one would benefit from developing predetermined criteria as to what kind of topics fall within their purview. An Israel advocacy organization can commit to only issuing statements that are pertinent to Israel, or a local non-profit professional may be advised to refrain from opining on other communal organizations’ programming. Those not arguing in good faith will always find grounds for fault, but this should not deter an honest attempt at establishing consistent standards—at the very least to thine ownself be true.