



# TRADITION

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## EDITOR'S NOTE

### WHAT IS THE OPPOSITE OF WEAKNESS?

He seeks not the greatness found in sacrificial action but the convenience one discovers in a comfortable, serene state of mind.

(Joseph B. Soloveitchik, *Lonely Man of Faith*)

What is Rome to Jerusalem? What have rabbis in common with Roman Catholic priests? Rabbis are family men; priests are sworn to celibacy. Priests are garbed in supernatural power; they hold the keys to the kingdom, hearing confession and forgiving sins, performing the mysterious miracle of the Eucharist. Rabbis are, literally, teachers. As servants of the community and resources for halakhic rulings they engage in exactly the same activities of Torah study and human kindness that they promote among their flock. All the same, rabbis and priests share a sociological niche as professional symbols of religion; they are often perceived similarly by the laity and often see themselves as likewise set apart.

Two of the great English Roman Catholic writers in the first half of the 20<sup>th</sup> century created fictional priests reflecting their spiritual concerns. First Father Brown, G.K. Chesterton's answer to Sherlock Holmes. Brown, as his name suggests, is outwardly unimpressive. He solves his crimes through a mixture of keen reasoned observation and profound understanding of human beings. Always, he says, he can enter the mind of the criminal tempted to commit the crime, and this insight puts him on the right track. Save for the expertise in human corruption provided by his endless hours in the confessional box, Father Brown's success has nothing to do with his vocation, and everything to do with the good sense characteristic of his outlook.

In Chesterton's day, as in our own, modern-minded people tended to disdain traditional religion in favor of "spirituality," especially of the oriental variety. In "The Red Moon of Meru" Lady Mounteagle admits she had once been prejudiced against "brown people" until she discovered their "wonderful spiritual powers." To which Father Brown ripostes: "Frankly, I don't care for spiritual powers much myself. I've got much more sympathy with spiritual weaknesses."

Father Brown here contrasts spiritual powers, of the sort that attract Lady Mounteagle, with spiritual weaknesses. He bluntly rebuffs her attraction to the external impressiveness through which the typical spiritual guru cultivates his superiority over his audience. At the same time he insinuates

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a positive message: proper attainment of holiness characteristically requires the struggle with the manifold weaknesses of the spirit. Often fascination with the occult is an escape from that everyday struggle. In the story his interest in human weakness may have been rewarded by the prosaic repentance of a thief.

Graham Greene's famous priest is as different from Father Brown as the two authors are from each other. Chesterton is cheerful; Greene is morose; Chesterton's imagination is uproariously comic; Greene's is tormented. The Mexican priest in Greene's masterpiece *The Power and the Glory* remains nameless. Rather than solve crimes in the comfortable manner of an English amateur detective he is himself an outlaw, hunted by the revolutionary Socialist government in the 1930's bent on extirpating the faith he continues to propagate. During the long years of persecution, he has sought comfort in drink and, distracted, has fathered a daughter. He cannot forget that the police, bent on his capture, take hostages, and kill them, wherever they suspect he has been sheltered. The priest sees himself as failure and a disgrace, unworthy of the sacrifice he has occasioned. Yet his fitful attempts at escape come to nothing. Each time he is summoned to administer last rites, he turns back sourly, captive to his vocation.

The serene wisdom of Father Brown and the haunted shadow of the whisky priest both belong to a world infinitely distant from the shabby stories of abuse that have inflicted such harm on the Catholic Church and, to a lesser degree, caused immense pain and consternation in our own community. To explain why, let me cite George Weigl, a prominent Catholic public intellectual who had access to confidential documents in the aftermath of the pedophilia scandals 15 years ago. Discussing one of the most prolific offenders, who had been assigned numerous courses of therapy and then recycled to a new and unsuspecting parish, Weigl comments:

It was also striking that the 1995 "spiritual assessment" of John Geoghan by St. Luke's Institute did not probe the man's beliefs, even at the elementary level: Did Geoghan believe in God? Did he believe that God can make his will known to us? Did he accept the creeds of the Church and the Church's teaching on sexual ethics? Did he believe in sin? In punishment for sin?... What is even more striking, however, is the seeming assumption by the priest-interviewer... that these questions of belief have absolutely nothing to do with the "spiritual assessment" of a clerical sexual predator. Here was the triumph of the therapeutic at its most disturbing.<sup>1</sup>

<sup>1</sup> George Weigl, *The Courage to be Catholic: Crisis, Reform and the Future of the Church* (New York: Basic Books, 2002), 103ff.

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There is no doubt about how either Father Brown or the whisky priest would have answered questions about their beliefs. What makes Greene's priest a religious character rather than a fictionalized case history is the fact that he understands exactly what it means to be a human being created in the image of God with an immortal soul to save or forfeit and what it means to have consecrated one's life to the priestly vocation. In a word, their lives are lived in the full awareness that God's demands on us are absolute and non-negotiable.

Weigl goes on to imply a link between the laxity of the church hierarchy and its failure to insist resolutely on the primacy of church teaching over a mechanical therapeutic mercifulness. The accuracy of his allegations is an internal Catholic matter that need not detain us. Historians of Protestantism, noting the sexual shenanigans involving notable charismatic evangelical figures in cycles of scandal and recovery, might likewise point a finger at their mild-mannered undemanding conception of God. One could go back to the root of liberal Protestantism in 19<sup>th</sup> century Brooklyn, with the famed minister Henry Ward Beecher, celebrated for emancipating American religion from the strict authoritarian God of his father, and even more notorious for carrying on with other men's wives.<sup>2</sup>

One might downplay the importance of religious commitment regarding these questions by arguing that human nature is the same in every place and time and that deviant psychology does not differentiate among religious affiliations. Halakha and common sense regulate the opportunities for sexual transgression precisely because our desires so often defy our mastery. The current scandals are rooted as much, if not more, in fantasies of power than in carnal lust. The abusiveness rife where dominant individuals or cliques within an institution become a law unto themselves, and victims are unable to fight back or even protest, is nothing new, nor is it a phenomenon particularly tied to organized religion. Yet, despite these points, it seems incredible to hold that the presence or absence of bedrock religious faith is irrelevant to behavior and even more so that it is irrelevant to the way the religious community reacts to grievously deviant behavior. Nor is it plausible that those inclined to such behavior are not affected by the general moral and doctrinal atmosphere.

<sup>2</sup> See Richard Wightman Fox, *Trials of Intimacy: Love and Loss in the Beecher-Tilton Scandal* (Chicago: University of Chicago Press, 2000) and Debby Applegate, *The Most Famous Man in America: The Biography of Henry Ward Beecher* (New York: Three Leaves Press, 2006).

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### II

It goes without saying that there are Jewish counterparts to Weigl's questions and that God makes categorical and non-negotiable demands of Orthodox clergy and laity alike. When abusive behavior was hushed up by those in charge the common explanation was that the guilty individual is "doing wonderful work," meaning that he is personally magnetic and attracts those under his influence to identification with what is popularly called the "Orthodox life style," or that we have a manpower shortage. To ask about belief and depth of commitment to God's absolute demands after the fact, when the offending individual's actions have already spoken, is indeed practically irrelevant. How individuals have reached that point should not be ignored, especially if we care about fostering health rather than merely quarantining spiritual disease. We enter religious life and adopt it as a profession for a variety of motives. We may have wished to identify with the Jewish people and foster Jewish identity or to help Jews and humanity. We may have desired a way of life that allows us to learn and teach. We may have been influenced by family traditions and expectations. Or we fell into a way of life without thinking about it much. In the end, as time and suffering and joy do their work, our lives invariably outstrip or fall short of our initial motivations, to the extent we understand them. Yet regardless of our initial motives, we know that it requires discipline and sacrifice and struggle, although we can hardly anticipate the exact form temptation will take and what will be required of us to withstand it.

What is the opposite of weakness? Father Brown implies that the opposite of the charismatic deployment of "spiritual powers" is attention to spiritual weaknesses. The title of Greene's novel contrasts power, as exercised by the police lieutenant, with the ambiguous glory of the flawed but faithful priest. The opposite of power may be weakness. But the opposite of weakness is not power. The opposite of weakness is strength and strength means steadfastness; it means keeping faith.

The difference between our struggles today and the world of Greene's priest is that our culture no longer takes as a given the absolute non-negotiable character of the divine command. As in previous times, many successfully lead sheltered lives, relatively free of temptation. Others, however, are put to the test. Rabbis and religious teachers are especially vulnerable in contemporary society, if only because we are more keenly aware of the gap between nominal adherence to Orthodox standards, where it still exists, and the conviction of divine command and divine mission. As R. Soloveitchik recognized in the middle of the last century, our

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audience “seeks not the greatness found in sacrificial action but the convenience one discovers in a comfortable, serene state of mind.” The blank stare of indifference, the smile of condescension, even the stupidity of an intended compliment that betrays utter miscomprehension, make us wonder what we are doing and to what purpose. In such circumstances one is liable to feel belittled and estranged, summoned to heroism or driven to despair.

Where commitment is steadfast the individual can withstand failure and indifference and keep true to his mission. Where it is not, religious functionaries are exposed to the same temptations that plague other modern men and women. Moreover, because their profession sets them apart from the rest of society, they may imagine compensating for disappointment and futility, bitterly, almost vengefully, by relying on an aptitude for power and domination over others, or by overvaluing such gifts in colleagues. Or they may want to numb the pain of isolation by reaching out for the transient pleasures of the flesh and the illusion of contact, with the vague fancy that God is distant and indifferent.

For as long as we can remember the social environment has been inhospitable to “men of faith” without breaking their integrity and self-discipline. In the past these men, particularly those in the rabbinate, may not have enjoyed great success in recruiting congregants: often they lacked the language and education; always the social odds were against them. For the most part they enjoyed such encouragement as their families could provide and their colleagues were reachable by post. Like Father Brown, these men did not thrive through the deployment of “spiritual powers.” Unlike Father Brown, they constructed lonely citadels of strength and steadfastness not in fiction but in real life, contending not against fictional evil but with all too painful indifference.

I have spoken of faithfulness in terms of unshakable adherence to doctrines and convictions. Let me make it clear that this is not a matter of being able to produce the correct answers to the kind of questions Weigl asks, as if knowing the “approved” positions and repeating them upon demand conferred immunity to faithlessness in practice. No segment of our community is free of guilt, neither the liberals who openly make light of rigorous obligations of belief and behavior, nor those who uphold the most punctilious standards in theory, even while quietly regarding gross violations in their circles as “negotiable” offenses. It is the seriousness of belief and principles that is at risk, rather than merely their precise content.

To forestall misunderstanding, let me also iterate that my intention is not to offer a theory about the causes of rabbinic irresponsibility and abuse. My remarks here are about our spiritual condition rather than

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about causes. To borrow an old philosophical example: fire results when a match is lit, but there will be no fire unless there is oxygen to support the flame: the match is the cause; the oxygen is a condition. Abusive attitudes and behavior and subsequent cover-ups vary with the individual. My concern here is with the religious-moral state of our community and what we ought to do to sustain our steadfastness and integrity.

When I consider what I and my generation needs in order to be strong and steadfast in our commitment to the *Ribbono shel Olam* I am ever inspired by the written record of vigorous study left behind by some of the lonely American *Rabbanim* mentioned above. Last Elul, for example, I studied the newly printed *Moadei Tsevi* by R. Tsvi Hirsh Grodzinski, a rabbi with the best Lithuanian training who served the Jews of Omaha, Nebraska from 1891 to 1948 (57 years!). One section of his book is a practical responsum on the halakhic validity of *hazarat ha-shatz* of Rosh ha-Shana *musaf* when the cantor does not trouble himself to recite the passages assigned to the choir. Side by side with this no doubt dispiriting query is a trenchant analysis of the *sugya* dealing with the institution of *hazarat ha-shatz*. Although his day to day experience as an American rabbi was frustrating, R. Grodzinski's intelligence and calm persistent strength of character speak from his writings. To think of how such men lived is a prophylactic against faithlessness and self-indulgence and a reminder of what we are here for.

The highest level of friendship, as Rambam stated in his commentary to *Avot*, following Aristotle, is that of individuals who share a sublime goal, where one helps the other. If we want to restore the integrity of our religious community, it is important that we seek friends, and become friends, whose entire conduct is a mutual reminder of the existence of absolute and non-negotiable divine demands. If we create such a community, we will not be isolated when we pose to ourselves Weigl's questions about fundamental conviction and commitment.

The whiskey priest is not so fortunate. He yearns for the sacrament of confession and absolution, even at the hands of Padre José, a weak man who has been forced to marry, and is exhibited as an object of mockery and humiliation. Even such a coward is a priest, and even he might help his fellow priest confront his sins and achieve contrition. But Padre José is afraid to come, even when the police lieutenant promises he will not be punished. The whiskey priest spends his last night alone.

He caught sight of his own shadow on the cell wall: it had a look of surprise and grotesque unimportance. What a fool he had been to think that he was strong enough to stay when others fled. What an impossible



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fellow I am, he thought, and how useless. I have done nothing for anybody. I might just as well have never lived. His parents were dead—soon he wouldn't even be a memory—perhaps after all he wasn't really Hell-worthy. Tears poured down his face; he was not at the moment afraid of damnation—even the fear of pain was in the background. He felt only an immense disappointment because he had to go to God empty-handed, with nothing done at all. It seemed to him at that moment that it would have been quite easy to have been a saint. It would only have needed a little self-restraint and a little courage. He felt like someone who has missed happiness by seconds at an appointed place. He knew now that at the end there was only one thing that counted—to be a saint.

It would be good for us as individuals and good for the people we serve if we kept R. Grodzinski's example of dignity, integrity, and lonely persistence before our eyes as a guide and inspiration and source of strength. It would be good if Greene's novel about the whisky priest and his hard-earned deathbed insight helped us to keep the model of religious steadfastness in mind before we become enmeshed in temptation and despair.



*Yitzchak Blau*

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## GUEST EDITOR INTRODUCTION

**A** *shamnu*. The discussion should begin with a frank admission. Orthodoxy has not responded well to the problem of rabbinic sexual abusers and there have been far too many cases of abuse in our community. We have unsuccessfully tried to handle the problem internally without going to authorities. We have refused to accept the guilt of significant rabbinic figures and have not offered victims the support and trust they desperately need. We have found it easier to stand on the side and not speak out to prevent future harm.

Of course, we are not alone in this predicament. Parallel stories exist in the Catholic Church, more liberal Jewish circles, fancy private schools, youth sports leagues, and more. Sexual harassment and the abusive use of power have been prevalent in the news media and in Hollywood. Apparently, these problems reflect challenges inherent in the human condition. Yet this conclusion offers meager comfort. It is far more productive to ask how we can improve and which hurdles are specific to our religious community rather than to engage in comparative moral mathematics. The Talmudic idea that a person should focus on his own flaws before those of others (*Bava Batra* 60b) applies on a communal level as well.

Nor should we fear that such admission will harm our stature and drive people away. A responsum of R. Yehiel Yaakov Weinberg (*Seridei Eish* 2:157) illustrates this quite powerfully. The old *minhag* in Finland was to recite kiddush in shul on Friday night. During the second World War, they stopped this custom due to an absence of kosher wine. After the war, the community wanted to restore the old practice but the rabbi thought it halakhically preferable not to resume the custom since no one eats their Friday night meal in shul and therefore the *berakha* may serve no purpose. The rabbi wrote to R. Weinberg who sided with the community. R. Weinberg assures the rabbi not to worry about losing his stature if he concedes that the community was correct; on the contrary, rabbis who admit they were wrong only enhance their stature. Admitting failure to adequately confront abuse is obviously much more difficult but also far more significant.

Though communal responses have improved as awareness of this problem has grown, much work remains to be done. We should realize the dangers of rationalizations based on ends justify the means arguments. Even a highly successful educator cannot continue to teach if he acts inappropriately with students. Furthermore, this problem should goad us towards rethinking our educational priorities. A well-known yeshiva high school administrator identified charisma as the essential trait he looks for when hiring teachers. I would suggest that honesty, decency, kindness, erudition, and intelligence all come before charisma. While we clearly do not suspect all charismatic teachers of mistreating students, granting more value to other qualities creates a healthier educational atmosphere. When we notice charisma turning manipulative, warning lights should flash on even absent accusations of abuse.

The trait of courage, crucial for adhering to any ideal, must receive greater emphasis in our communal discourse. It is often easier to look the other way, especially if the accused has many ardent followers and raising the alarm will make one unpopular. Another problematic strategy is to remove the person from your school or shul but do nothing to prevent him from accosting students or congregants in another environment. Indeed, several of the most prominent abusers hurt students in more than one educational context; sometimes, they simply moved countries and started again with new victims.

We hope that this volume of *Tradition* will help provide guidance and inspire communities to adopt policies for preventing abuse and for addressing accusations. The six essays deal with a range of issues. Rabbi Yosef Blau and Dr. Shira Berkovits provide an overview of the challenges our community faces in confronting these problems. Rabbi David Brofsky discusses the pertinent halakhic questions regarding *mesira* and *leshon ha-ra*. Dr. Erica Brown utilizes Biblical narrative to demonstrate the guilt of enablers. Rabbi Mark Dratch analyzes the conundrum of reinstating a rabbi who has sinned. In an essay which presents an approach which will be novel to American readers, Professor Yedidya Stern explores the logic of Forum Takana, an institution established in Israel to address sexual abuse in the Religious Zionist world. Prof. Stern raises several potential objections against Forum Takana while arguing for its necessity. However, we were not able to include articles on every angle of abuse. For example, the interested reader might consult the different opinions of Dr. Joel Wolowelsky and R. Dratch in the journal *Hakirah* about mourning an abusive parent.<sup>1</sup>

<sup>1</sup> See Joel Wolowelsky, "Mourning Abusive Parents," *Hakirah* 9 (Winter, 2010), and Mark Dratch, "Honoring Abusive Parents," *Hakirah* 12 (Fall, 2011).

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I thank Rabbi Shalom Carmy for allowing me to guest-edit this important symposium, Rabbi Jeffrey Saks for his helpful editorial efforts, and Rabbi Yamin Levy for his assistance.

*Shira M. Berkovits*

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## INSTITUTIONAL ABUSE IN THE JEWISH COMMUNITY

As the secular and Christian worlds seek to address sexual abuse’s root causes while implementing institutional solutions, the Jewish community writ large has also expanded its exploration of solutions to this communal problem. Sexual abuse occurs across denominations and affects people of various backgrounds and demographics in profoundly life-altering ways. As a professional who works to combat abuse in the Jewish community, I have observed ways in which institutions – even well-intentioned ones – may be misguided in their understanding of abuse or misconduct. In this article, I explore three foundational categories of error in communal responses to allegations of sexual abuse – psychological, legal, and halakhic issues – and offer suggestions for avoiding these common missteps.<sup>1</sup>

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<sup>1</sup> Analyses and suggestions provided herein are meant to be informational and are not intended to provide legal, psychological, or halakhic advice.

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### I. Psychological Factors

Although its visibility has grown in the Jewish community in recent years, sexual abuse is a human problem, not a uniquely Jewish one. As a human problem, responses to sexual abuse are subject to the same fallibilities and oversights present in any human endeavor. Experts in the field of sexual abuse often see individuals charged with responding to abuse allegations downplay or otherwise mishandle them. A closer examination of some psychological explanations for such abnegation of responsibility can help the Jewish community not only avoid similar error but also become more acutely aware of the ways in which our psychologies may lead us towards false assumptions. Those errors can unintentionally undermine Jewish values and damage individual members and our communities as a whole.

Here, I examine four fundamental ways – they are by no means the only ways – in which psychological factors interfere with justice-seeking and victim-support: 1) cognitive dissonance, 2) cognitive distortions, 3) discounting of victims' disclosures, and 4) misunderstandings of clinical evaluations. By understanding how these types of thinking and responses emerge from well-intentioned community members, institutions can learn to avoid and better handle similar situations.

#### 1) *Cognitive Dissonance*

When individuals are faced with evidence that is inconsistent with their beliefs or behaviors, they experience an unpleasant tension, dubbed “cognitive dissonance” in the 1950s by social psychologist Leon Festinger.<sup>2</sup> In an effort to reduce this dissonance, people may alter their beliefs and behavior or seek to discredit and reject the conflicting evidence.

Cognitive dissonance often plays a role in abuse cases, particularly when the alleged perpetrator is a leader or respected community member. Faced with allegations of abuse against someone they know and respect, institutional leaders all too often reject the evidence, privileging their prior beliefs about the individual instead. In fact, sexual offenders report exploiting this tendency by intentionally situating themselves at the center of the community, as generous, kind, learned, and pious leaders, who are truly exemplars in every way. Their sexual abuse behind closed doors thus remains hidden with the victims, and the community often refuses to accept allegations that may eventually emerge.

<sup>2</sup> Festinger, L. (1957). *A theory of cognitive dissonance*. Stanford University Press, Stanford, California.

One offender clearly articulated his benefitting from others' cognitive dissonance.<sup>3</sup> In my conversation with him, he explained: "I went out of my way to make sure I was considered an *ehrllich* person in my community, doing the most *hessed*. In some ways I may have been assuaging my guilty conscience, but even more, it was critically important to me that others saw me this way." He recognized that, if others in the community saw him as especially pious, he would have freer movement in the community and raise fewer suspicions if allegations arose. His perceived *tsidkut* was in actuality a deliberate manipulation, crafted to provide the community with ample evidence of his "good character" with which to counter allegations that were bound to surface later.<sup>4</sup>

In a similar case, an offending clergyperson, initially accused of a single act of sexual abuse but ultimately found to have abused 96 children altogether, told psychologist Dr. Anna Salter that he would "do kind and generous things for people," including giving charity, visiting the sick, and other acts of kindness, especially for older members of the community. When he was eventually accused of abuse, he related that:

They immediately rallied to my defense... They said, 'We know this young man... He has been in our community all of his life. We know his parents, his grandparents, his aunts, his uncles. This is not something he would do. This is not something that goes along with behavior that we see in him day in and day out,' and that was true because I was very careful that they did not see that behavior day in and day out.<sup>5</sup>

He was not forced to deny the accusations nor defend himself; others did so for him. Their cognitive dissonance was so great – and had been so carefully cultivated by the perpetrator – that they ignored the overwhelming evidence rather than undertake the more difficult work of reframing their conceptions of this individual.

Cognitive dissonance is not merely a potential pitfall for community members and institutional heads but also for abusers themselves. On two

<sup>3</sup> Significant descriptive and factual details of all cases included in this article have been changed to protect the identities of those involved. In some instances, multiple institutions have dealt with the same issues, and so for the purpose of this article, these cases have been merged. Any information resembling a case known to a reader is by chance, and likely reflects the universality of the patterns and dynamics found in sexual abuse cases.

<sup>4</sup> Such behavior may be referred to as "grooming a community." See Footnote 7 below.

<sup>5</sup> See p. 33 in Salter, A. (2003). *Predators, pedophiles, rapists, and other sex offenders: Who they are, how they operate, and how we can protect ourselves and our children*. New York: Basic Books.

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different occasions, rabbis asked me to consult on issues of child protection for their institutions. In each case, these communal leaders spent the bulk of our time together detailing their efforts to protect children from abuse and seeking commendation for these efforts. Indeed, their safeguards would have contributed significantly to the safety of children in their *shuls*, if not for the fact that each of them was later found to be harming children. The values these rabbis preached were in tension with their private behaviors; their retaining me was their effort to reduce this tension as they themselves desperately needed to believe the image they projected to their communities. A discussion of denial and acceptance (i.e., an inability to see their abusive actions for what they were) is beyond the scope of this article, but I include these cases here to demonstrate the lengths to which people will go to reduce cognitive dissonance, even when they themselves are the abusers.

One of the more memorable demonstrations of cognitive dissonance I have witnessed came from a rabbi who learned that one of his *shul*'s youth employees had been dismissed from previous institutions for inappropriate boundary crossings with youth. The rabbi described the employee's behavior in his own institution and asked for my opinion. Behavior by behavior, I explained how this employee was engaging in textbook "grooming"<sup>6</sup> of potential victims in the model of a classic child predator. The rabbi listened and responded, "I'm hearing everything you have to say, and I know you must be right. And yet, I cannot believe this wonderful person would ever harm a child. Even now, if I needed to teach a *shiur* at *shul* and my wife wasn't home, I wouldn't hesitate for a moment to ask this man to babysit and leave him alone with my children." To this rabbi's credit, he was able to articulate his own cognitive dissonance and his irrational urge to disregard the evidence before him. Wisely, the rabbi recused himself from the case and turned it over to more objective parties.

These examples demonstrate how well entrenched offenders often are in the community. They may be the very last people one would ever

<sup>6</sup> Grooming refers to a set of seemingly innocent behaviors, or sometimes red-flag behaviors, that a sexual abuser might use to gain the trust and cooperation of a victim, the victim's family, and even an entire community, for his or her own eventual sexual gratification. For an in-depth discussion of grooming, particularly as applied to institutional contexts, see: O'Leary, P., Koh, E., & Dare, A. (2017). *Grooming and child sexual abuse in institutional contexts*. Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney. Retrieved from: [www.childabuseroyalcommission.gov.au/getattachment/14cd286a-ce6b-460a-bd31-b1d73c9f887c/Grooming-and-child-sexual-abuse-in-institutional-c](http://www.childabuseroyalcommission.gov.au/getattachment/14cd286a-ce6b-460a-bd31-b1d73c9f887c/Grooming-and-child-sexual-abuse-in-institutional-c).



imagine harming another. This is not an accident; it is an image offenders work hard to cultivate and one that enables their abuse. The cognitive dissonance individuals and institutions then face in acknowledging allegations of abuse against these beloved members is often too much to accept, leading to a fundamental tension for those charged with the pursuit of justice and protection of the vulnerable.

## 2) *Cognitive Distortions*

Because most people are deeply unsettled by the thought of having a sexual abuser in their midst, approaches tend to be stark and lack nuance. Community members may find themselves engaging in two common cognitive distortions: a) *all or nothing thinking* and b) the need to *label* a person before being able to take steps to respond to concerning behavior. Exploring ways in which community members can add nuance to their thinking may help to alleviate some of the distorted thinking that can lead to divisiveness and distract from the pursuit of truth.

### a) All or Nothing Thinking

Sexual abuse of another is among the most heinous of crimes, and people thus tend to view such perpetrators as monsters. Unfortunately, this perception does not reflect the public persona of the average sex offender. As discussed above, those who sexually abuse others are often exemplary community members in every other respect. If we persist in portraying sex offenders as *all* bad, we will overlook most sex offenders, and institutions will be unable to react responsibly when confronted with allegations of abuse against a person who has clearly done much good.

For example, an assistant rabbi who engaged in voyeuristic and exhibitionistic behaviors with children also served numerous families in times of need, waking in the middle of the night to sit with those who lost loved ones, visiting the ill, and teaching exciting, brilliant *shiurim*. Disregarding this rabbi's positive behaviors would discount his community's very real experience. Instead, community leaders can validate positive interactions with the accused while still holding him or her accountable. By acknowledging a nuanced approach – a person can do good things without *being* all good – perception moves beyond the archetypal “monstrous” abuser and we can search out the truth in a person's sometimes bifurcated existence. Just as individual victims may continue to love and hate their abusers simultaneously, so too a community may recognize the existence of both beneficence and malevolence within a particular community member.

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In a similar vein, when deciding upon levels of access for potentially threatening individuals, nuanced integration rarely exists. Instead, communities are likely to provide either plenty of social support and access but no accountability, or intensive monitoring and restrictions but no social support. Too often, institutions opt for the former by minimizing or dismissing a potential threat, permitting the concerning individual limitless access to the institution's grounds, events, and constituents. At the same time, certain institutions are beginning to understand the dangers posed by serial offenders and consequently make the decision to exclude potentially threatening individuals from community institutions completely and cut off all communal supports.

These binary options overlook subtler possibilities that prioritize both protecting constituents and supporting individuals in their efforts to prevent offending behavior. Clearly, allowing limitless access to an individual who has demonstrated abusive behavior is not an acceptable course of action. At the same time, though excluding a given individual might be the correct and necessary course of action,<sup>7</sup> paradoxically, it may also increase the individual's risk of offending in the community.<sup>8</sup> As such, any

<sup>7</sup> This is particularly true in the case of a clergy offender who wishes to reintegrate into the communal institution in which the offense was committed. For more on the role faith communities can play in integrating offenders, and the limitations of such integration, see: Kewley, S., Beech, A. R., & Harkins, L. (2015). Examining the role of faith community groups with sexual offenders: A systematic review. *Aggression and Violent Behavior*, 25, 1-8, stating "[N]ot all individuals convicted of sexual offending might be appropriately targeted to return to a religious or spiritual community. In particular, those where the faith environment was directly linked to their offending [such as priests or church leaders] might be unsuitable candidates for such a reintegration strategy."

<sup>8</sup> Supporting an individual's efforts to curb offending behavior and live a healthy life is in everyone's best interest. Some studies have found that a supportive environment, regular check-ins with a sponsor (e.g., rabbi, mental health professional, or lay leader), and monitoring are associated with lower levels of recidivism in sex offenders, in part because they reduce the offender's isolation – a risk factor for offending – and increase accountability. See: Tabachnick, J. & Klein, A. (2011). *A reasoned approach: Reshaping sex offender policy to prevent child sexual abuse*. Association for the Treatment of Sexual Abusers. Retrieved from [www.atsa.com/pdfs/ppReasonedApproach.pdf](http://www.atsa.com/pdfs/ppReasonedApproach.pdf); Kewley, S., Beech, A. R., & Harkins, L. (2015). Examining the role of faith community groups with sexual offenders: A systematic review. *Aggression and Violent Behavior*, 25, 1-8; Appelbaum, P. S. (2008). Sex offenders in the community: Are current approaches counterproductive? *Law & Psychiatry*, 59, 352-354. Retrieved from: [www.ncbi.nlm.nih.gov/pubmed/18378829](http://www.ncbi.nlm.nih.gov/pubmed/18378829); Finkelhor, D. (2009). *The prevention of childhood sexual abuse. The Future of Children*, 2, 169-194, retrieved from [www.unh.edu/ccrc/pdf/CV192.pdf](http://www.unh.edu/ccrc/pdf/CV192.pdf); and Friedman, M. (2016). *How to handle convicted molesters in our communities?* Blogs: Times of Israel. Retrieved from: <http://blogs.timesofisrael.com/how-to-handle-convicted-molesters-in-our-communities/>. It

time an institution makes the difficult decision to deny an individual access, it must take additional steps to protect individuals beyond the *shul*. Such action might include alerting others in the community and beyond who need to know about the concerning behavior in order to keep their own constituents safe, as well as implementing support and accountability measures for the excluded individual. These additional steps are not optional “extra credit,” but a moral imperative to keep *all* individuals, not just those who belong to a given institution, safe from abuse.

“All-or-nothing thinking” can also be found in our reactions to disclosures and allegations of sexual abuse. All too often, recipients of such information discount or downplay the abuse if it did not include penetration. Non-penetrative abuse is instead seen as inappropriate, wrong, or lacking in *tsniut*, and the offender will often get away with a simple warning or “talking to.” Those who insist on distinguishing based upon the mechanics of the physical act of abuse itself often point to textual legal or *halakhic* distinctions. The problem with such distinctions is that research has consistently demonstrated the adverse and long-term impact sexual abuse can wreak on a victim, whether or not the abuse included penetration.<sup>9</sup> Individuals who persist in this “penetration fallacy”<sup>10</sup> often intrusively question a victim about the particulars of the abuse in order to determine whether it “counts.” As a community, we would do far better to focus on the victim’s experience and the harm done than on pressing for technical details of the assault.

#### b) Labeling

Too often when allegations of impropriety arise, institutions attempt to discern whether a particular individual should be labeled “a perpetrator.” Conversations center around whether ambiguous behavior was committed with nefarious intent or merely poor judgment. The board of directors splits, people pick sides, and members of the community are

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should be noted though, that a precondition for considering the suggestions in these articles for community integration, is implementing safeguards to prevent offending and working with an individual who welcomes such measures for accountability (see the *Teshuva* section below).

<sup>9</sup> See for instance: Dube, S. R. et al. (2005). Long-term consequences of childhood sexual abuse by gender of victim. *American Journal of Preventive Medicine*, 28, 430-438.

<sup>10</sup> The term “penetration fallacy” was coined by blogger Yerachmiel Lopin (pseudonym). In his post on this topic he discusses the misguided *halakhic* understandings that can lead to this kind of all-or-nothing thinking. See: Lopin, Y. (2017). *Enough with the penetration fallacy*. Frum Follies. Retrieved from: <https://frumfollies.wordpress.com/2017/02/27/enough-with-the-penetration-fallacy/>.

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either “for” or “against” the accused. This is the wrong approach for a community to take. An institution should not ask whether an individual is a perpetrator or has been wrongly accused – a question the institution is likely ill-equipped to answer – but whether the individual can be relied upon to keep constituents safe, to model safe behavior, and to be an exemplar of Jewish values and institutional policies.

If an individual has violated policies, engaged in concerning behavior, or disregarded widely accepted halakhot or norms for a given institution, community members need not identify whether the behavior itself is or is not *technically* abusive. By focusing on what role models and leaders should look like, we can sidestep unanswerable questions and discord, and free ourselves to take the necessary steps. An insistence on applying the labels familiar to us from pop psychology or the nightly news (e.g., such as the term “pedophilia” which is actually a clinical diagnosis applicable to only a subset of individuals who sexually abuse children), impedes the decision-making process. Instead, asking a limited set of questions related to specific violations of communal norms, values, and policies enables communities to employ shared language, avoid labels that can be divisive, and take the steps necessary to protect constituents.

### 3) *Discounting of Victims’ Disclosures*

In discussing disclosures and allegations of sexual abuse, it is almost inevitable that the issue of victims’ (and their families’) integrity will be raised. As discussed in *Cognitive Dissonance* above, people struggle to accept the possibility that a beloved, respected member of the community could have committed sexual abuse, especially when the accused vigorously protests the allegations. In her definitive text on *Trauma and Recovery*, psychiatrist Dr. Judith Herman writes:<sup>11</sup>

After every atrocity one can expect to hear the same predictable apologies: it never happened; the victim lies; the victim exaggerates; the victim brought it upon herself; and in any case it is time to forget the past and move on. The more powerful the perpetrator, the greater is his prerogative to name and define reality, and the more completely his arguments prevail. (p.8)

In cases of child sexual abuse, children are far less articulate, possess fewer civil and social rights and are not nearly as powerful as their perpetrators; as such, they may be even less likely to be believed when they disclose than adult victims. Frequently, children hesitate to disclose abuse,

<sup>11</sup> Herman, J. (1997). *Trauma and Recovery*. Basic Books, New York City.

in many instances delaying disclosure until well into adulthood.<sup>12</sup> In fact, not only do most children conceal their abuse, but when questioned they will deny its occurrence. When children do disclose, they often do so accidentally or tentatively and may later recant the disclosure even though the abuse happened.<sup>13</sup> Research shows that when a child makes the difficult decision to disclose their abuse, almost always it is the child who is telling the truth and the defendant who is lying.<sup>14</sup>

<sup>12</sup> The Australian Royal Commission into Institutional Responses to Child Sexual Abuse noted that a number of factors impact a child's time to disclosure, including age, gender, relationship to the perpetrator, and nature of the sexual abuse. By far, though, the longest delays occurred when the perpetrator was in a position of power, responsibility, or authority over the victim, such as a rabbi or teacher. When the sexual abuse was classified as "institutional abuse," the majority of victims kept their silence for at least 10 years, often well into adulthood. Cashmore, J., Taylor, A., Shackel, R. & Parkinson, P., (2016). *The impact of delayed reporting on the prosecution and outcomes of child sexual abuse cases*. Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney. Retrieved from: [www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/the-impact-of-delayed-reporting-on-the-prosecution](http://www.childabuseroyalcommission.gov.au/policy-and-research/our-research/published-research/the-impact-of-delayed-reporting-on-the-prosecution); also see: Section 5.1, especially footnote 1, of the John Jay Report: John Jay College of Criminal Justice, City University of New York (2004). The nature and scope of sexual abuse of minors by Catholic priests and deacons in the United States 1950-2002. United States Conference of Catholic Bishops. Retrieved from [www.bishop-accountability.org/reports/2004\\_02\\_27\\_JohnJay\\_original/response1.pdf](http://www.bishop-accountability.org/reports/2004_02_27_JohnJay_original/response1.pdf); one unpublished survey of male survivors of child sexual abuse found that on average it took survivors more than 20 years to disclose. For a copy of the survey results email: [canderson@malesurvivor.org](mailto:canderson@malesurvivor.org). Easton, S. D. (2012). *Summary of Results of the 2010 Health and Well-being Survey*. Male Survivor.

<sup>13</sup> In a study of 116 cases of confirmed sexual abuse, almost 80% of the children initially denied the abuse or tentatively disclosed, 75% of those who disclosed did so by accident, and over 20% of the children ultimately recanted their disclosure even though the abuse had occurred. See: Sorensen, T. & Snow, B. (1991). How children tell: The process of disclosure in child sexual abuse. *Child Welfare League of America*, 70, 3-15.

<sup>14</sup> See Table 3-3 of *Child Maltreatment 2012*. Children's Bureau (Administration on Children, Youth and Families, Administration for Children and Families) of the U.S. Department of Health and Human Services, retrieved from: [www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf](http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf), indicating that in only 0.2% of the 3.8 million cases of child abuse reported to Child Protective Services in 2012 did children make intentionally false reports. Also see Oates, R.K., Jones, D.P., Denson, D., Sirotnak, A., Gary, N., & Krugman, R.D. (2000). Erroneous concerns about child sexual abuse. *Child Abuse and Neglect*, 24, 149-57, retrieved from [www.ncbi.nlm.nih.gov/pubmed/10660017](http://www.ncbi.nlm.nih.gov/pubmed/10660017), reporting that only 1.5% of the 551 cases of child sexual abuse reported to Denver Department of Social Services in a 12 month period included false allegations. Other studies have found higher rates of false allegations, ranging from 2-10%, but some of these higher percentages include collusion with a caregiver in custody battles or misinterpretation of behavior rather than lying. For more information, see: Myers, E. B. (2011). *Myers on Evidence of Interpersonal Violence: Child Maltreatment, Intimate Partner Violence, Rape, Stalking, and Elder Abuse*. Aspen Publishers,

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The overwhelming truthfulness of children can be explained by the dynamics of the abuse itself; it is far easier for a child to lie by denying the occurrence of sexual abuse than to lie by providing the intimate details necessary to allege sexual abuse. Additionally, in order to disclose, children must overcome tremendous pressure, and even threats from their abuser or other individuals, whom – especially in close-knit Jewish communities – they are likely to encounter on a regular basis. Most children will deny their abuse and protect their abusers, for fear of not being believed, of getting into trouble, of being harmed, or of losing someone – often the perpetrator – whom they love. Abusers, on the other hand, have nothing to lose and everything to gain by denying the abuse and painting the children as liars. Children understand these dynamics; in a study of children with a sexually transmitted disease – proof of their having been sexually abused – more than half denied that they were abused and instead protected their abuser.<sup>15</sup>

Like children, adults who disclose abuse must overcome tremendous internal and external pressures to do so. If they do eventually disclose, their many years of silence are often taken as evidence that the disclosure is untrue. Those who receive an adult's disclosure of historic abuse often respond by asking the adult, "why are you telling me this now?" or "why can't you just move on?" Sometimes they are outright skeptical, pointing to the absence of other allegations or the offender's many years of dedicated service to the community as supposed proof of the victim's untrustworthiness. But research shows that, like children, adults who disclose sexual assault are overwhelmingly truthful,<sup>16</sup> and, like children, most

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New York; Everson, M. & Boat, B. W. (1989). False allegations of sexual abuse by children and adolescents. *Journal of the American Academy of Child and Adolescent Psychiatry*, 28, 230-235; p. 42-44 of Finkelhor, D. (1994). Current information on the scope and nature of child sexual abuse. *The Future of Children*, 31-53, retrieved from: [www.unh.edu/ccrc/pdf/VS75.pdf](http://www.unh.edu/ccrc/pdf/VS75.pdf); and Trocmé, N., & Bala N. (2005). False allegations of abuse and neglect when parents separate. *Child Abuse & Neglect*, 29, 1333-1345.

<sup>15</sup> See: Lawson, L., & Chaffin, M. (1992). False negatives in sexual abuse interviews. *Journal of Interpersonal Violence*, 7, 532-542; and *id* at 14.

<sup>16</sup> Lisak et al. reviewed the available methodologically sound studies and found the prevalence of false allegations to be between 2 and 11 percent. Results were as follows: 2.1% N=850 (Heenan & Murray, 2006); 2.5% N= 2,643 (Kelly et al., 2005); 3.0% N= 1,401 (McCahill et al., 1979); 5.9% N=136 (Lisak et al. 2010); 6.8% N=2,059 (Lonsway & Archambault, 2008); 8.3% N= 302 (Grace et al., 1992); 10.3% N = 116 (Clark & Lewis, 1977); 10.9% N=483 (Harris & Grace, 1999). The authors conclude: "It is notable that in general the greater the scrutiny applied to police classifications [in the reviewed studies], the lower the rate of false reporting detected. Cumulatively, these findings contradict the still widely promulgated stereotype that

adults do not report their abuse,<sup>17</sup> fearing that if they do, they will not be believed.

In discussing the overwhelming truthfulness of victims, it is important to acknowledge that false allegations of sexual assault, like false allegations of other crimes, do in rare instances occur, and when they do, the result can be devastating for the wrongfully accused. But such instances must be determined by the proper authorities and cannot be determined by the recipient of the disclosure or the average rabbi or institutional head. Those within Jewish institutions charged with receiving reports of misconduct or abuse must understand that the vast majority of reports they receive will be true and that victims may not act the way they expect them to. The fact is that there is no “right” way to be a victim, and every victim reacts to the trauma of abuse differently. Some exhibit behaviors and emotions that are easy to understand, such as fighting back, crying, anger, or fear, while others exhibit behaviors that are harder to understand, such as freezing, defending the perpetrator, justifying the assault, or even making contact with and spending time with the perpetrator following the assault. These behaviors may seem like clear evidence that the assault never occurred, and so it is important to know that these behaviors are in fact common responses as victims struggle to make sense of an event, perpetrated by someone they know or care for, that they desperately wish hadn’t happened.<sup>18</sup>

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false rape allegations are a common occurrence. Lisak, D. Gardinier, L., Nicksa, S. C., & Colt, A. M. (2010). False allegations of sexual assault: An analysis of ten years of reported cases. *Violence Against Women*, 16, 1318–1334 Retrieved from: <http://journals.sagepub.com/doi/pdf/10.1177/1077801210387747>. For an excellent overview of false reports, see: National Sexual Violence Resource Center. (2012). *False Reporting*. Retrieved from: [www.nsvrc.org/sites/default/files/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf).

<sup>17</sup> The Bureau of Justice Statistics found that only 34% of sexual assaults were reported to police in 2014. Truman, J. L., & Langton, L. (2015). *Criminal victimization, 2014*. Washington, DC: Bureau of Justice Statistics, U.S. Department of Justice. Retrieved from: [www.bjs.gov/content/pub/pdf/cv14.pdf](http://www.bjs.gov/content/pub/pdf/cv14.pdf).

<sup>18</sup> Psychologist and forensic expert Dr. David Lisak explains that “victims often deny or minimize what they’ve been through. “That victims try to make everything appear normal after a rape. That self-blame is common, and while the event is occurring, in the presence of the perceived threat, that victims often freeze” (p. 258). In fact, “one of the first reactions for many people is to try and undo it, to try to pretend like it didn’t happen... it’s common in the aftermath of a rape to see the victim have ‘quite extensive interaction with the person who’s alleged to have committed the assault’ as an ‘attempt to try to undo it...you know, if I interact with this person normally, then I can tell myself that...what I feared just happened to me didn’t really happen...Self-blame becomes an irrational strategy for regaining a sense of control, because to accept that what happened was beyond one’s control is ‘far scarier’ than



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In the moment of a disclosure, the recipient's only concern must be to believe and support the individual;<sup>19</sup> to do otherwise is to place the constituents of Jewish organizations at great risk.<sup>20</sup> Moreover, research tells us that being believed and supported at the moment of disclosure is a protective factor for victims that helps them develop greater resiliency in the long-run.<sup>21</sup> Receiving an abuse disclosure is a sign that the victim trusts the recipient enough to share some of his or her darkest, most painful experiences. By understanding the facts and myths regarding sexual abuse allegations, institutions will be better prepared to receive disclosures, support victims, and protect constituents.

### 4) *Mishandling of Clinical Evaluations*

Increasingly, Jewish communities recognize the need for expert guidance in managing convicted sex offenders and others who have engaged in concerning or abusive behaviors. They might turn to the individual's mental health provider or send the individual for a risk assessment to lead to the development of a safe-engagement plan. Assessing an individual's risk of reoffending requires specialized skills, and interpreting a clinical report requires at least a basic understanding of sexual offending. Communities face challenges in seeking outside help, though, because the individual retained may not be sufficiently qualified or the institution may

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blaming oneself." (p. 281). As qtd. in Krakauer, J. (2015). *Misoula: Rape and the justice system in a college town*. Anchor Books, Penguin Random House, NYC.

<sup>19</sup> Independent, objective investigations into the veracity of the allegations may very well be the next step, but such inquiries are rarely the job of the disclosure recipient, and in any event are inappropriate at the moment of disclosure.

<sup>20</sup> In summarizing twenty years of work with child molesters, psychologist Dr. Anna Salter laments: "In the interviews I have done, they (the perpetrators) have admitted to roughly 10 to 1,250 victims. What was truly frightening was that all the offenders had been reported before by children, and the reports had been ignored." p. 57, Salter, A. (2003). *Predators, pedophiles, rapists, and other sex offenders: Who they are, how they operate, and how we can protect ourselves and our children*. New York: Basic Books.

<sup>21</sup> Victims and clinicians tell us that the first step to healing from the trauma of sexual abuse is to speak about what happened, and that a supportive reception to the disclosure can make all the difference in a victim's treatment. As Chris Anderson, former director of Male Survivor, explains: "When a man discloses this secret, often-times that he has ...hidden within for decades, the fear that he may be struggling with cannot be underestimated. A loving and supportive response that honors a man's courage for coming forward, and says to him "we believe you," can be transformative and spiritually reparative. See: Tchividjian, B. (2016). *Heroes in our midst: Chris Anderson & MaleSurvivor (Part II)*. Religion News Service. Retrieved from: <http://religionnews.com/2014/10/31/heroes-midst-chris-anderson-malesurvivor-part-ii/>; and Ullman, S.E. (2003). Social reactions to child sexual abuse disclosures: A critical review. *Journal of Child Sexual Abuse*, 12, 89-121.

lack experience in interpreting clinical reports. This process must involve knowing three things: a) who the clinician is and his or her relationship to the assessed individual, b) the purpose and limitations of clinical evaluations, and c) how to interpret a clinical report.

a) The Clinician and the Patient-Clinician Relationship

Any clinician opining on an individual's risk of sexually reoffending must specialize in the assessment or treatment of sex offenders, or otherwise have extensive experience in issues relating to sex offender risk. A mental health provider inexperienced in this sort of assessment may unintentionally provide incomplete or inaccurate information. One well-respected general clinician told a Jewish institution that the concerning behavior they had observed a congregant exhibiting should be of no concern, as he had treated this man for decades, and during this time the congregant had on numerous occasions expressed guilty feelings about "innocent" interactions with children. The clinician was so invested in his relationship with the client that he overlooked the possibility that his client's repeated attempts to discuss these guilty feelings might have been indicative of a more significant problem, and instead determined them to be artifacts of depression and an indication of how severely his client suffered. Even clinics specializing in the treatment of sex offenders can be overconfident about their client's clinical progress.<sup>22</sup> Clinicians who have worked closely with a client may have a vested interest in reporting that the treatment has been "successful." Similarly, clinicians who provide risk assessments may be retained directly by the individual being evaluated, which can at times lead to a conflict of interest. These issues are not presented here to cast aspersions on the many dedicated and trustworthy individuals who undertake the difficult task of assessing and treating sex offenders. Instead, they are meant simply to name potential concerns to which institutions should be attuned.

b) Purpose and Limitations of Clinical Evaluations

A risk assessment is a clinical tool that considers a variety of factors associated with increased statistical likelihood of reoffending, but it

<sup>22</sup> "Even treatment centers that specialize in treating sex offenders can be astonishingly naïve". See Dr. Salter's description of one of the priest cases for which she testified, on page 21 of Salter, A. (2003). *Predators, pedophiles, rapists, and other sex offenders: Who they are, how they operate, and how we can protect ourselves and our children*. New York: Basic Books.

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cannot predict whether a given individual will reoffend.<sup>23</sup> Clinical interviews and tests to assess risk often rely heavily on self-report and may include only minimal information gained from collateral sources. This means that the evaluation can be only as good as the information the evaluator has; if the information is limited or incorrect, the assessment and recommendations may be as well. In fact, standardized actuarial tools used in assessing sex offender risk caution against overreliance on the exams' predictive accuracy and advise clinicians to consider external factors that may influence risk.<sup>24</sup> Such external factors include victims' or witnesses' version of events, any additional undisclosed offenses or allegations, the individual's record of compliance, any acknowledgement of wrongdoing, participation and success in long-term evidence-based therapy, and other collateral information. Finally, a number of actuarial tools for assessing re-offense risk are normed on convicted offenders and only meant to be conducted within the criminal justice system where individuals are subject to a level of investigation, consequences, and monitoring that those managed by Jewish institutions are not. Too often, though, reports from risk assessments given to Jewish institutions use tools meant for convicted offenders on those without convictions or rely entirely on the alleged perpetrator's account of events. Additionally, Jewish institutions, which are not trained in interpreting risk assessments, may read a report of "low risk" as a predictor of that individual's future behavior.

### c) Interpreting a Clinical Report

At times Jewish institutions receive concerning clinical reports by individuals assessing or treating sex offenders. Perhaps the most common red flag present in these reports is a tone of strong advocacy. In such cases, the clinical evaluators offer subjective presentations, expressing their opinions that the individuals should be fully integrated into communal institutions with no limitations placed on access or behavior. Such reports tend to be vague on the details of treatment or risk assessment, for example stating, "excellent adherence to treatment" without clarification,

<sup>23</sup> For a discussion of recidivism and risk see: *Recidivism of Sex Offenders* (2001). Center for Sex Offender Management. Retrieved from: [www.csom.org/pubs/recidsexof.pdf](http://www.csom.org/pubs/recidsexof.pdf).

<sup>24</sup> For instance, on p. 7 of the introduction to the revised Coding Rules for the STATIC-99 – an actuarial assessment tool for male sex offenders over 18 years of age – the authors advise "prudent evaluator[s]" to "always consider other external factors... that may influence risk in either direction." Phenix, A., Fernandez, Y., Harris, A. J.R., Helmus, M., Hanson, R. K., & Thornton, D. (2016). *STATIC-99 Coding Rules Revised*.

or “determined to be of low risk” without explaining the measures that resulted in this determination.

Consistent with such advocacy, these letters tend to minimize the seriousness of the individual’s offense or neglect to mention the offense at all. Instead, they may emphasize all of the *hessed* and assistance the individual provided to the victim or use passive language, thus removing any mention of the offender’s role in the abuse and subtly shifting blame to the victim. Some letters speak extensively about the difficulties the offender has experienced throughout life or treatment the offender has undergone for other conditions, such as depression or ADHD. None of these issues would “cause” someone to sexually offend but may be used to excuse or justify such behavior. Similarly, reputable mental health providers will not assert that an offender is at zero risk to reoffend or has been “cured.” Instead, one of the primary statements we would expect to see in a low-risk report is an indication of the individual’s remorse, a commitment to never again reoffend, and the embrace of supports to help prevent relapse.

## II. LEGAL ISSUES AND OTHER PRACTICAL CONCERNS

This section details three legal and practical reasons that institutions may defend perpetrators or deny wrongdoing: 1) lack of transparency, 2) governmental involvement, and 3) fear of law suits and bad publicity.<sup>25</sup> Although these issues are often more straightforward and less deeply embedded in psychology than those discussed above, they frequently figure in institutional decisions and therefore must be named and examined.

### 1) *Lack of Transparency*

When allegations of abuse or concerning behavior are made, they are usually communicated privately to a trusted member of the institution, most often a rabbi. Because of its sensitive nature, the information is generally guarded closely, discussed only verbally, and handled by as few people as possible. Though well-intentioned, this manner of handling allegations is ripe for cover-ups, even if unintentional.

<sup>25</sup> Numerous other legal issues – such as statutes of limitations, mandatory reporting, and sex offender laws, to name just a few – have relevance to communal responses to sexual abuse and victim advocacy, but are covered extensively by others and are not addressed here.

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It is rare for an institution to receive an explicit allegation of abuse. More commonly, institutions hear about vague concerns or low-level infractions. On their own, these reports may be unremarkable, but over time and when considered collectively, they become more concerning. In the moment, those receiving reports may feel certain that they will remember every reported detail, but research has repeatedly shown that memories are far less reliable than people believe.<sup>26</sup> If an institution is not documenting each concern, especially in these low-level cases, it will easily miss patterns of concerning behavior, a problem that is heightened when the behavior spans years or decades, or if the reports are made to different institutional leaders who do not communicate with each other.<sup>27</sup>

At the heart of sexual abuse is an abuse of power. The resolution of an abuse of power cannot be an insistence that communities trust a single person in a position of power to handle the complaint correctly. Such concentration of power can easily lead to a mishandling of complaints. Constituents deserve to know the exact process that will be followed for receiving, handling, and following up on a complaint.<sup>28</sup>

The institution too benefits from establishing an explicit and transparent process.<sup>29</sup> Often, institutional leaders will meet with the subject of

<sup>26</sup> See *Documenting the Interview* on page 181 in Savino, J. O. & Turvey, B. E. (2011). *Rape Investigation Handbook*. Elsevier, San Diego.

<sup>27</sup> See for instance, the allegations reported over the span of decades to various institutional heads at Yeshiva Centre in Australia and the significant damage caused by failure to properly document and follow a formal system in responding to these allegations. Coate, J., Fitzgerald, R., & Murray A. (2016). *Report of Case Study No. 22: Response of Yeshiva Bondi and Yeshiva Melbourne to allegations of child sexual abuse made against people associated with those institutions*. Australian Royal Commission into Institutional Responses to Child Sexual Abuse. Retrieved from: [www.childabuseroyalcommission.gov.au/getattachment/e8136521-df46-4082-97ba-a9c474df5272/Report-of-Case-Study-No-22](http://www.childabuseroyalcommission.gov.au/getattachment/e8136521-df46-4082-97ba-a9c474df5272/Report-of-Case-Study-No-22); or the “bits and pieces of various Lanner incidents” that were communicated to lay leaders at the Orthodox Union, without full documentation or a complete report providing an aggregate picture of the many complaints received throughout the years. Joel, R., et. Al. (2000). Public Summary of the Report of the NCSY Special Commission, 22. Retrieved from: [http://failedmessiah.typepad.com/failed\\_messiahcom/Lanner%20Report.pdf](http://failedmessiah.typepad.com/failed_messiahcom/Lanner%20Report.pdf).

<sup>28</sup> These, together with safeguards to prevent abuse from occurring in the first place, are critical components of a responsible anti-abuse policy. For an overview on child-protection policies in Jewish youth-serving organizations, see my previous article: Berkovits, S. M. (2016). *Preventing abuse in Jewish organizations that serve youth: Ten policies to create safer environments*. e-Jewish Philanthropy. Retrieved from: <http://ejewishphilanthropy.com/preventing-abuse-in-jewish-organizations-that-serve-youth-ten-policies-to-create-safer-environments>.

<sup>29</sup> In its report on record keeping, the Australian Royal Commission emphasizes the importance of documentation. They state: “The creation of accurate records and

a complaint to express concerns and set limits, only for the individual to later claim that the institutional leader said no such thing, or that he or she understood different limitations. To avoid giving anyone the opportunity to rewrite history, institutions must ensure that multiple leaders are involved in handling cases and that private meetings with an alleged abuser or concerning individual do not take place with only one institutional representative present. In addition, every step of the case must be documented and stored in a secure file, beginning with the initial complaint and continuing through each step taken to address the complaint.<sup>30</sup>

Setting up a formal, transparent, well-communicated process for handling complaints that includes documentation and communication between multiple institutional leaders may seem obvious. But even institutions with robust anti-abuse policies tend to have relatively weak response policies, which may include only boilerplate language requiring compliance with the law and a vague statement that the institution will take “serious” or “immediate action.” What such action is, the process for ensuring it, and what events will trigger these actions are generally unclear. Jewish institutions frequently default to the rabbi or other institutional head to handle cases based on individual discretion and to make them go away as quickly as possible. This is a recipe for disaster. Instituting a process that includes documentation and oversight<sup>31</sup> does not mean

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the exercise of good recordkeeping practices by institutions that care for or provide services to children play a critical role in addressing, identifying, preventing and responding to child sexual abuse. They are also significant in alleviating the impact of child sexual abuse for victims and survivors... [They are] critical to child protection and institutional accountability.” These principles apply to protecting adults from abuse too. For guidance on developing responsible record keeping procedures see: Royal Commission into Institutional Responses to Sexual Abuse (2016). *Consultation paper: Records and record keeping practices*. Retrieved from: [www.childabuseroyalcommission.gov.au/getattachment/f7289d7c-52e7-4143-a6ed-1aa149263eaf/Consultation-Paper](http://www.childabuseroyalcommission.gov.au/getattachment/f7289d7c-52e7-4143-a6ed-1aa149263eaf/Consultation-Paper).

<sup>30</sup> For a sample form to document concerns regarding child safety in an institution, see the Victorian Department of Human Services Child Safe Standards Toolkit: *Resource 7: Sample Incident Report*. Retrieved from: [www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/child-safe-standards-resources](http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/child-safe-standards-resources). This form can be adapted for concerns regarding the safety of both children and adults.

<sup>31</sup> A discussion on oversight is beyond the scope of this article, but must be mentioned here. There are multiple components to creating a culture of safety, transparency and accountability. The development of policies – including policies on documentation and record keeping – is a critical first step of this process. However, for a policy to be effective it must also be widely disseminated, implemented, and adhered to. Unfortunately, without oversight, too many institutions end up with an official policy “on the books”, that isn’t implemented in daily operations. In an excellent article, law

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that we do not trust our institutional heads. It means only that we understand the nature of cover-ups and want our institutions to be as inoculated from this occurrence as possible.

### 2) *Governmental Involvement*

Sir William Blackstone, an eighteenth century English jurist, famously said “the law holds it better that ten guilty persons escape, than that one innocent suffer.”<sup>32</sup> The high standard required to criminally convict “beyond a reasonable doubt” and the many protections enumerated in the Sixth Amendment mean that Blackstone’s statement is in fact a reality. This is a price most of us are willing to pay, for removing a person’s freedom is a weighty matter and protecting the constitutional rights of the accused is critical to a just society. But access, participation, and employment in a private institution are not constitutional rights or civil liberties; they are privileges that can be revoked. Jewish institutions are not courts of law and thus are not limited by the rules and burdens of proof that bind the criminal justice system. When institutions wait for proof or the results of governmental investigations or adjudication before taking action to protect the constituents in their care, they have waited too long. In fact, a 2011 *Dear Colleague* letter from the Department of Education to schools makes clear that an institution should “take immediate steps to protect” and “should not delay conducting its own investigation”<sup>33</sup> or

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professor Marci Hamilton calls on the United States (U.S.) government to develop regulation and oversight, arguing that “when discrete organizations are left to their own devices, no matter how good their intentions... unaccountable organizations (and that is what an organization governing itself is) will devolve into scenarios of self-protection and adult preferentialism.” See: Hamilton, M. (2017). *The child sex abuse scandals are all the same and they demand the government to act*. Verdict. Retrieved from <https://verdict.justia.com/2017/03/22/child-sex-abuse-scandals-demand-government-act>. Until, and if, the U.S. government implements such regulation, organizations must themselves consider the importance of oversight in ensuring that their abuse-prevention and response efforts are effective. To this end, Sacred Spaces (see author’s bio) is in the process of developing an accreditation system that will assist Jewish organizations in preventing and responding to abuse, and includes a mechanism for compliance.

<sup>32</sup> Editors (2006). Sir William Blackstone. Encyclopedia Britannica. Retrieved from: [www.britannica.com/biography/William-Blackstone](http://www.britannica.com/biography/William-Blackstone).

<sup>33</sup> Whenever possible institutions should hire trained, independent investigators to conduct these investigations. In addition, though institutions may need to launch an investigation without waiting for the results of a governmental investigation, as stated in the *Dear Colleague* letter, the institution should communicate regularly with the involved governmental agencies in order not to interfere or hinder the government’s investigation. For more on both of these issues see *Rabbinic Roles* below.



taking steps to protect the complainant because it wants to see whether the alleged perpetrator will be found guilty of a crime” or because it wants to wait “for the conclusion of a criminal investigation or... proceeding.”<sup>34</sup>

The *Dear Colleague* letter, which is meant to guide schools in applying Title IX to instances of sexual harassment, assault, or violence, does not govern non-educational settings.<sup>35</sup> Yet the values articulated in the letter apply equally to *shuls*, camps, community centers, and other Jewish institutions. Too often, though, when dealing with allegations of sexual abuse, Jewish institutions conflate evidentiary standards and other legal requirements of the criminal justice system with their own institutional procedures. Moreover, it is common for Jewish institutions to misunderstand the technical terms used in civil or criminal records and to ascribe meaning to them that was never intended.

In one troubling case, a dance teacher was accused of sexually abusing a six-year-old girl, but the district attorney’s office declined to prosecute, the police closed the case, and child protective services (CPS)<sup>36</sup> returned a finding of “unsubstantiated.” The dance teacher pointed to these outcomes as evidence of her exoneration and proof that she had been the victim of a false accusation, effectively turning the entire community against the young girl and her family. The school accepted the dance teacher’s explanation at face value and continued her employment, thus providing her with unlimited access to hundreds of children.

Indeed, a case may not proceed to trial or conviction for any number of reasons unrelated to innocence,<sup>37</sup> including but not limited to:

<sup>34</sup> See page 10 of Ali, R. (2011). *Dear Colleague Letter*. United States Department of Education: Office for Civil Rights. Retrieved from [www.whitehouse.gov/sites/default/files/dear\\_colleague\\_sexual\\_violence.pdf](http://www.whitehouse.gov/sites/default/files/dear_colleague_sexual_violence.pdf).

<sup>35</sup> See the United States Department of Education’s *Questions and Answers on Title IX and Sexual Violence*, retrieved from [www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf](http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf). For application of Title IX outside of traditional educational settings see the United States Department of Justice’s *Title IX Legal Manual*, retrieved from: [www.justice.gov/crt/title-ix](http://www.justice.gov/crt/title-ix).

<sup>36</sup> In many states Child Protective Services (CPS) is the name of the governmental agency in charge of child protection, and it is the term I use in this article. Some states use other names – such as the Department of Children and Family Services (DCFS) or Office of Children and Family Services (OCFS) etc.

<sup>37</sup> The International Association of Chiefs of Police (IACP) clarifies the distinction between false reports of sexual assaults and unsubstantiated reports as follows: “The determination that a report of sexual assault is false can be made only if the evidence establishes that no crime was committed or attempted. This determination can be made only after a thorough investigation. This should not be confused with an investigation that fails to prove a sexual assault occurred. In that case the investigation would be labeled unsubstantiated. The determination that a report is false must be supported by evidence that the assault did not happen” (p. 12-13). IACP, National

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technicalities such as an expired statute of limitations; contaminated evidence or lack of evidence, which is common in non-stranger and non-ejaculatory sexual abuse cases, or in instances where institutions cover-up abuse, destroy evidence, or otherwise hinder investigations; heavy caseloads, inadequate trainings, poor departmental policies or practices, and political considerations; a young, nonverbal, unconvincing, intoxicated or “non-credible” victim (for example, a sex worker who alleges assault); instances in which a victim provides apparently inconsistent statements (common following traumatic events) or lies about certain details (out of shame or fear); and uncooperative victims or witnesses – common in close-knit communities, where witnesses are fearful of testifying against fellow community members, particularly powerful ones, and where witness-intimidation is all too common.<sup>38</sup> Similarly, depending on the state, an “inconclusive”, “unfounded” or “unsubstantiated” finding from CPS may not indicate that abuse did not occur, but only that CPS was unable to find sufficient evidence to indicate that it had.<sup>39</sup>

In the case of the dance teacher, unbeknownst to the school, multiple girls alleged sexual abuse – this was documented in the police reports, and in any event could have easily been uncovered with minimal inquiry – but the school claimed that since the authorities had not proceeded, it could not either. This reasoning is flawed. Following the law is our community’s minimum obligation. Our moral and halakhic responsibilities do

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Law Enforcement Policy Center. (2005). *Investigating sexual assaults: Concepts and issues paper*. Alexandria, VA. Retrieved from: [www.iacp.org/Portals/0/pdfs/RCD/InvestigatingSexualAssaultsPaper.pdf](http://www.iacp.org/Portals/0/pdfs/RCD/InvestigatingSexualAssaultsPaper.pdf).

<sup>38</sup> Lisak, D. Gardinier, L., Nicksa, S. C., & Colt, A. M. (2010). False allegations of sexual assault: An analysis of ten years of reported cases. *Violence Against Women*, 16, 1318–1334 Retrieved from: <http://journals.sagepub.com/doi/pdf/10.1177/1077801210387747>.

<sup>39</sup> For instance: “In a sample of 35,000 CPS cases in Missouri, three-quarters of the children who were referred to CPS two or more times – including child fatalities – had cases that were initially unsubstantiated. The decision to unsubstantiate a referral does not guarantee a child’s safety from future harm... The meaning and use of the terms “substantiated” and “unsubstantiated” vary by State. For the purposes of this synthesis... ‘Unsubstantiated’ means an investigation determined no maltreatment occurred, or there was insufficient evidence under State law or agency policy to conclude that the child was maltreated (emphasis added).” Child Welfare Information Gateway. (2003). *Decision-Making in Unsubstantiated Child Protective Services Cases: Synthesis of Recent Research*. Washington, DC: U.S. Department of Health and Human Services. CPS administrative law is complex; institutions require guidance in interpreting findings as terminology varies from state to state (i.e., the same word can have two very different meanings depending on the state), and words that may seem like plain English may actually have technical, legal, or safety implications.

not end simply because the court cannot proceed.<sup>40</sup> If we turn a blind eye every time an action is not prosecutable, we will miss the vast majority of offenders, fail to protect the vulnerable, deny victims the support they desperately need, and expose ourselves to civil liability.<sup>41</sup> This is because most victims never report their abuse, and even when they do, most sexual offenses never result in a conviction.<sup>42</sup>

<sup>40</sup> In fact, page 11 of the *Dear Colleague* letter states this clearly, requiring schools to use a lower burden of proof in adjudicating sexual assault and harassment cases than the one used in criminal cases:

In order for a school's grievance procedures to be consistent with Title IX standards, the school *must* use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The "clear and convincing" standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violation of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

Jon Krakauer, author of *Missoula* explains that this decision is necessarily correct:

school officials, must be allowed to expel students who pose a threat to other students, without waiting many months, or even years for the criminal justice system to run its course- a course that often fails to convict individuals who are guilty of rape, or even charge them with a crime. There is nothing inherently wrong with university systems relying on a lower evidentiary standard – "a preponderance of the evidence" – for the burden of proof. A preponderance of the evidence is all that is required of plaintiffs to prevail in most civil litigation, even when the defendant has been accused of a wrongful act that violates criminal law. See: Krakauer, J. (2015). *Missoula: Rape and the justice system in a college town*. Anchor Books, Penguin Random House, NYC.

Surely, if the United States government appreciates the necessity of taking action beyond the criminal justice system in order to protect students, Jewish communities which respond to a higher moral authority should be guided by similar values.

<sup>41</sup> In fact, one leader at a youth-serving organization shared with this author that his organization had been sued for abuse that was argued to have been foreseeable, because previous allegations against that employee were known. This despite the fact that the former allegations were investigated by the authorities who declined to prosecute. However, as noted above, just because the authorities could not legally proceed, sufficient concerning information existed to put the institution on notice that this employee posed a threat to children. The institution settled out of court.

<sup>42</sup> Telephone interviews with 2,000 children aged 10-16, revealed that only 3% of sexual abuse against children was reported to the police. Finkelhor, D. & Dzuiba-Leatherman (1984). Children as victims of violence: A National Survey. *Pediatrics*, 84, 413-420; Lonsway and Archambault estimate that only 5-20% of

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Furthermore, institutions are far more likely to receive allegations of misconduct (e.g., a college *madrikh* flirting or using lewd language with high school students) or policy violations (e.g., a rabbi meeting with women alone at night to offer “marriage counseling”) than they are to receive allegations of outright abuse. Yet these lower-level allegations might be an institution’s only indicator that something is wrong. This is why institutional anti-abuse policies are so important: they highlight potentially concerning behavior and give leadership license to intervene before the behavior escalates. Of course, institutions without policies can, and must, also take action, but without clearly defined boundaries these institutions often face difficulty when attempting to discern whether a given behavior reflects nefarious intent or merely poor judgment. Just as an institution need not demand a criminal conviction before denying someone access to power, children, or other vulnerable populations, it also need not wait for outright allegations of abuse. If individuals violate policies (e.g., seclude themselves with a child in a room without windows), cross boundaries (e.g., ask intimate questions of others), disregard *halakhot* in a community that is careful about their observance (e.g., a *rebbe* in a girls’ yeshiva high school who violates *shomer negi’a*), engage in grooming behaviors (e.g., frequently volunteering free babysitting or overnight trips to families with children of a specific age and gender), or otherwise generate concerns (e.g., demand physical affection from *shul* children in exchange for candy), they have indicated that they are not individuals we should rely upon to keep our constituents safe.

### 3) *Fear of Lawsuits and Bad Publicity*

Institutions understandably fear the repercussions of legal suits and negative public perception, but when these fears, rather than the protection of constituents, guide an institution’s actions, the institution may make poor decisions which place constituents at risk and may actually

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forcible rapes in the United States are reported to police, 0.4%-5.4% are ever prosecuted, and just 0.2%-2.8% result in a conviction that includes any incarceration for the perpetrator. Lonsway, K. A. & Archambault, A. (2012). The ‘Justice Gap’ for sexual assault cases: Future directions for research and reform. *Violence Against Women*, 18, 145-168. Retrieved from: <http://journals.sagepub.com/doi/pdf/10.1177/1077801212440017>; Summarizing data from the FBI’s 2015 National Incident-Based Reporting System, 2012-2014, RAINN reports that only 0.6% of rapes will result in incarceration for the perpetrator. See *The Criminal Justice System: Statistics*, retrieved from [www.rainn.org/statistics/criminal-justice-system](http://www.rainn.org/statistics/criminal-justice-system).

increase the institution's liability. For instance, one camp was concerned about drafting a policy requiring that reasonable suspicions of abuse be reported to the authorities because they could not find a statute guaranteeing them immunity in the event the alleged perpetrator sued.<sup>43</sup> An aversion to legal suits is, of course, understandable, but the camp's resistance to adopting a reporting policy placed children at risk and raised moral and halakhic questions about their priorities. Interestingly, the camp seemed to have overlooked the possibility that by not implementing a reporting policy, they could be sued for *failing* to report reasonable suspicions of abuse and protect the children in their care.

When a beloved institution is exposed for cover-ups or abuse, members may be tempted to rally behind the institution. They may feel that a pillar of the community, to which significant time, effort, and communal funds have been donated, is being discounted for a single misstep that may have happened many years prior. These reactions are understandable, but the damage done to victims, the Jewish community, and the institution itself by this reversal of victimization can be even more damaging than the accusation. By acknowledging a mistake, even a distant one, institutions can begin to regain the trust they have lost and, perhaps counterintuitively, avoid costly and damaging lawsuits. Trust needs to be rebuilt whether the institution admits to the allegation or not, and denial seldom, if ever, is the road to that rebuilding.

In one case, a group of victims asked their congregation to create a rock garden memorializing the abuse they suffered there as children at the hands of an abusive clergy person. The board of the congregation balked, knowing that such a memorial site would publicly acknowledge

<sup>43</sup> This resistance isn't reserved for policies on reporting. One of the first questions institutions ask before embarking on a comprehensive policy development project is whether the policy will increase their liability. This is indeed a possibility, and to this end the Centers for Disease Control state "it is very important that organizations abide by their youth protection policies and procedures to avoid being criticized for not adhering to them if a youth is sexually abused." Centers for Disease Control. (2007) *Preventing child sexual abuse within youth-serving organizations: Getting started on policies and procedures*. United States Department for Health and Human Services, retrieved from <https://www.cdc.gov/violenceprevention/pdf/preventingchildsexualabuse-a.pdf>. At the same time, institutions that create responsible, practical policies (not a "pie in the sky"), and adhere to these policies, protect constituents and avoid liability exposure for *not* having a policy. In fact, numerous lawsuits have been brought against churches for failing to have proper policies in place. Understanding this, some insurers require that congregations implement policies to reduce clergy sexual abuse as a condition of coverage. See pages 56-58 in Lytton, T. D. (2008). *Holding Bishops accountable: How lawsuits helped the Catholic Church confront clergy sexual abuse*. Harvard University Press, Cambridge.

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the wrongdoing that had occurred. Like many victims, these petitioners initially hoped only for validation, not money.<sup>44</sup> But when the institution refused to acknowledge their pain publicly or even discuss alternatives, the victims instead pursued legal options, filing, and winning, a multi-million-dollar lawsuit. Had the institution admitted fault, apologized, and aimed to rectify the wrong to the extent possible, they may have fared better financially and in the realm of public opinion.<sup>45</sup> As demonstrated here, victims often turn to lawsuits as a last resort, after they have tried numerous other angles and feel as though they have no other options.

The late Kelly Clark, a renowned plaintiff's attorney for victims of institutional sexual abuse, explains this well:<sup>46</sup>

The defendants in child sex abuse cases can do the smart thing, protect themselves, and do the right thing, take care of the victims, at the same

<sup>44</sup> "In many instances, victims wanted most of all to have their claims aired publicly and vindicated by a court and to hold ... [institutional] officials accountable for their role in facilitating and covering up abuse." Victims additionally report seeking redemption, healing, and institutional reform as their primary motive in filing lawsuits, sometimes foregoing lucrative secret settlements in favor of discovery and legal suit, in order to achieve these goals. Balboni, J. M. (2006) *It's not about the money: Truth, consequences, and the real meaning of litigation for clergy sexual abuse survivors*. PhD dissertation, Northeastern University, qtd. in Lytton, T. D. (2008). *Holding Bishops accountable: How lawsuits helped the Catholic Church confront clergy sexual abuse*. Harvard University Press, Cambridge.

<sup>45</sup> "[w]here liability is clear and the damages sought are reasonable, resistance for the sake of intimidation of both present and future plaintiffs is unworthy of and dangerous for a religious institution that must seek the moral high ground." Sargent, M. A. (2002). *Legal defense: When sued, how should the church behave?* Commonweal, 13, as qtd. in Lytton; "a church must act like a church, and it is morally questionable for an attorney representing a church... to take advantage of the damage caused by one of the church's pastors... from a tactical perspective, if the defense attorney is too aggressive ... then he risks having the jury dislike him for attacking – 're-victimizing' – the plaintiff [and risks losing the case]." Schiltz, P.J. (2003). *Defending the church, Litigation*, 29 (3), American Bar Association, as quoted. in Lytton; "while vigorously defending clergy abuse lawsuits has served diocese well in the litigation arena, it has damaged the Church's public image... [Moreover] the Church's efforts to defend itself in litigation – by invoking statute of limitation and charitable immunity, asserting constitutional and common-law privileges, [thus avoiding responsibility on technicalities], alleging comparative negligence and assumption of the risk [legal arguments that blame the victim], and employing aggressive litigation tactics [such as countersuits] - have angered victims and plaintiff's attorneys, many of whom cite anger at the Church as a key motivation for filing lawsuits in the first place (p.71)". Lytton, T. D. (2008). *Holding Bishops accountable: How lawsuits helped the Catholic Church confront clergy sexual abuse*. Harvard University Press, Cambridge.

<sup>46</sup> Clark, K. (2009). Institutional child sexual abuse: Not just a Catholic thing. *William Mitchell Law Review*, 36, 220-240. Retrieved from: <http://open.mitchellhamline.edu/wmlr/vol36/iss1/7>.

time. Doing the smart thing and doing the right thing *is the same thing*. Generally, I would tell them to completely take care of the victim first, and they will find that it goes better for them after that.

As Clark clarifies, when an institution listens to concerns or allegations and responds swiftly to address them, victims are less likely to turn to the media or the courts. As in most relationships, focusing on one's own victimization inevitably escalates the problem, and shifting blame to the victim is a typical neutralization technique.<sup>47</sup> It is normal to feel as though the institution is being attacked when allegations of abuse surface, but institutions that aim to make amends rather than shift the blame fare better in their long-term success and in public relations.<sup>48</sup> More importantly, they also adhere to their espoused values and engage in the important Jewish acts of truth-seeking and the pursuit of justice.

Clearly, a fear of liability is the wrong focus for a Jewish institution meant to be an ethical, guiding light of good in the community. There are many instances in life where we do the right thing simply because it is the right thing to do, or because it is the *halakhic* thing to do, without a guarantee of immunity.<sup>49</sup> Jewish institutions must recognize this principle and display the moral courage necessary to enforce it, despite fears of legal ramifications, by refocusing attention on their moral purpose as an institution.<sup>50</sup>

<sup>47</sup> For a discussion of neutralization techniques and other factors that silence victims in Jewish institutions, see: Benchimol, G. (2016). *Sacrificing victims on the altars of silence and power*. Jewish Week. Retrieved from: <http://jewishweek.timesofisrael.com/sacrificing-victims-on-the-altars-of-silence-and-power/>.

<sup>48</sup> *Id* at 47.

<sup>49</sup> For instance, when gratuitous individuals rescue strangers in need, they are then liable for any ensuing carelessness that causes injury. To encourage rescue many states have enacted *Good Samaritan* laws that provide some level of immunity for rescue. (These laws vary from state to state: e.g., some cover all rescuers, some only professional rescuers). Yet the average rescuer doesn't pause to determine if the state has a *Good Samaritan* law and what it covers before rescuing. The rescue is provided not because of the guarantee of immunity, but because it is the right thing to do to save another's life.

<sup>50</sup> Institutions must always remember that their primary goal is to protect constituents and their secondary goal is to limit liability; introductions to anti-abuse policies should emphasize this priority. See for examples: "As you implement this... program, remember that the main objective is to provide a safe and secure environment for the children who are entrusted to your parish. In seeking to accomplish this objective, you will be accomplishing another very important objective – reducing the legal risk and liability exposure of your parish." Orthodox Church in America (2002). *Reducing the risk of child sexual abuse guidelines for parishes and institutions*. Guidelines for parishes and institutions as approved by the Holy Synod of Bishops of the Orthodox Church in America. Retrieved from: <https://oca.org/Documents/OfficialDocumentsPDF/>



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### III. HALAKHIC AND HASHKAFIC ISSUES

The final category of error in considering responses to sexual abuse, and one that applies uniquely to the Jewish community, is an understanding of halakha and *hashkafa*. Principles of 1) *teshuva*, 2) *tsniut*, 3) *leshon ha-ra* and 4) the role of the rabbi are frequently invoked when discussing allegations and communal handling of abuse, and therefore deserve attention in any discussion of institutional best practices or policy development.

#### 1) *Teshuva*

Earlier this year, a rabbi called me because one of his congregants had been severely abused by her ex-husband, who had recently begun attending services at her *shul* after years of maintaining distance and *davening* elsewhere. The congregant intensely feared her ex-husband's presence, but the ex-husband professed to the rabbi that he had repented from his abusive ways and now wanted to return to the *shul* he loved. Repentance was a theme that featured prominently in the rabbi's *Shabbos Shuva derasha*. He found himself torn between wanting to protect the woman and wishing to accept the man's repentance. "What am I to do?" he asked me. "Don't we believe in *teshuva*?"

The answer is, of course, a resounding yes. But Judaism professes that repentance is determined by God alone, not by a clergyperson or community member.<sup>51</sup> Humans cannot know what is in another's heart, but we can attend to signs that the *teshuva* is insincere, incomplete, or being used as a manipulative tool to gain sympathy or access.

Rambam in *Hilkhos Teshuva* 2:4 describes the behavior we can expect to see from one who has repented:

Among the ways of *teshuva* are for the penitent to constantly shout before God with crying and pleading; and to do *tsedaka* according to his ability; and to distance himself very far from the thing in which he sinned; and to change his name, meaning to say "I am someone else and I am not

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ocaguidelines.pdf; and "A camp has significant potential for legal exposure for claims involving child abuse. Although a camp must anticipate and prepare for the protection of its reputation and resources in the event of a claim against the camp involving child abuse, a camp's priority is its efforts to protect the well-being of children in its care." Gregg, C. R. & Hansen-Stamp, C. (2012). *Child Sexual Abuse: Liability Issues Revisited*. American Camping Association. Retrieved from: [www.acacamps.org/resource-library/articles/child-sexual-abuse-liability-issues-revisited](http://www.acacamps.org/resource-library/articles/child-sexual-abuse-liability-issues-revisited).

<sup>51</sup> Hilkhos Teshuva 2:2: "And the One Who Knows Hidden Things testifies about him that he will never return to this sin."

the same person who did those things;” and to change all of his actions for good and onto the straight path; and to go into exile, because exile atones for sins since it forces him to bow and to *be humble and of low spirit* (emphasis added).<sup>52</sup>

In the case of the rabbi’s congregant, far from exiling himself, the congregant decided that he needed to be in the very *shul* where his former victim *davened* – despite residing in a large city with dozens of other *shuls*. If the man were truly repentant, he would understand just how devastating his presence was to his ex-wife and do everything in his power to avoid places she frequents, not seek them out. The rabbi may trust that the man has done *teshuva* if he wishes to, but he should not accept the man’s presence in *shul*.

In the following halakha, 2:5, Rambam goes one step further, describing behavior that indicates true repentance and behavior that signals anything but:

It is very praiseworthy for the penitent to confess in public and disclose his sins, and reveal interpersonal sins to others and tell them: “I surely sinned against so-and-so and did such-and-such to him; but today, behold, I return and regret.” But anyone who is prideful and does not disclose, but rather hides his sins – his *teshuva* is not complete, as it says: “One who covers his transgressions shall not prosper.” (Proverbs 28:13).

These principles of admission and accountability articulated by the Rambam are at the core of sex offender treatment.<sup>53</sup> True repentance and

<sup>52</sup> It should be noted that some sex offenders engage in the very behaviors enumerated here – changing their names and relocating to other communities – in order to mask their criminal history, and gain the ability to move about freely within a community without constraints or accountability, and thus potentially access additional victims. The intentions underlying such behavior are in direct contradiction to the message of the *Rambam*, even as the behavior itself might be the same. My inclusion of this text here is obviously not meant to condone or encourage such actions. Rather, this text is provided as an example of the general demeanor we might expect to see from one who is truly repentant: humbleness of spirit, shame and regret, to such an extent that one places oneself in exile.

<sup>53</sup> “According to many traditions in sex offender treatment, until they [the offenders] are able to stop making ... excuses and accept that their offending was a matter of personal choice, they remain at a high risk of recidivism and are essentially unreformed. For example, in an influential treatment handbook for working with sex offenders, Salter (1988) wrote, ‘Careful listening to their descriptions of the abuse will detect constant externalization. Blame is placed on their wife’s nagging, their wives’ lack of interest in sex, their own problems at work, provocation by the child, lack of attention and care from the world in general, excessive care and attention from the

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relapse prevention<sup>54</sup> in cases of abuse means taking full responsibility for one's actions, which may include: turning oneself in to authorities, apologizing to victims, and seeking qualified assistance to prevent relapse; a private apology to a clergyperson or a perfunctory declaration of *teshuva* is simply insufficient. If individuals minimize prior actions, blame the victim, or otherwise justify the abuse, they have not accepted responsibility.<sup>55</sup> If individuals are arrogant in discussions of their sexual offenses, disparage

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child... and on their own emotional loneliness... These excuses have the cumulative effect of reducing offender responsibility.<sup>7</sup> Farmer, M., McAlinden, A., & Maruna, S. (2016). Sex offending and situational motivation: Findings from a qualitative analysis of desistance from sexual offending. *International Journal of Offender Therapy and Comparative Criminology* 60, 1756–1775, quoting p. 107–108 in Salter, A. C. (1988). *Treating child sex offenders and victims*. Thousand Oaks, CA: Sage.

<sup>54</sup> It is important to note the distinction between the term “relapse prevention” used in this article and “cure”. Most sex offender treatment providers agree that there is no known “cure” for sex offending. However, there are evidence-based treatments that have been shown to be effective for some sex offenders, and there are additional interventions that are associated with reduced risk. The discussion about relapse prevention in this article relies on the assumption that we should utilize the evidence-based clinical tools available to us to help prevent re-offenses, with the understanding that such prevention may in the case of some offenders save others from ever becoming victims. At the same time, we must recognize that such treatment is not a cure, and treated individual should never be given access to opportunities that would encourage or allow offending. The discussion in this text is provided only to suggest signs that the individual has not sincerely or completely engaged in the requisite relapse prevention measures.

<sup>55</sup> It should be noted that alternative theories for denial of responsibility exist, which do not view accountability of the past as a necessary precondition for preventing relapse in the future. See for instance, Farmer, M., McAlinden, A., & Maruna, S. (2016). Sex Offending and Situational Motivation: Findings from a Qualitative Analysis of Desistance from Sexual Offending. *International Journal of Offender Therapy and Comparative Criminology* 60, 1756–1775, who posit: “Rather than focusing on getting people who are desisting from sexual offending to take more responsibility for things they have done in the past, it may be that the aims of rehabilitation and public protection would be better served by encouraging them to take responsibility for things they will do in the future... In this way, practitioners might help develop and reinforce non-offending identities rather than risking undermining them” and later in the same article, “it is still possible that the... de-emphasis of internal responsibility... serves, at least partially, as a post hoc, revisionist (self-) history intended to shield the individuals from the considerable guilt involved with sexual offending. Furthermore, rather than being a criminogenic or cognitive distortion that facilitates future offending, the situational nature of the narratives collected for this research may be a key ‘shame management’ technique critical to the process of social reintegration... and, relatedly, to desistance from crime” However, even these authors emphasize the need for offenders to “take responsibility for things they will do in the future.” Regardless of which theory of accountability Jewish leaders ascribe to, all should insist that current and future behaviors be consistent with the *Rambam’s* admonishment that the offender “distance himself very far from the thing in which he

those with legitimate safety concerns, attempt to lie or otherwise hide their crimes, or balk at limitations on access to children or other potential victims, they are not on the professed road to recovery, for if they were, they would be the ones advocating for safeguards and support to help ensure that they never again harm another victim.

We must encourage and support individuals in their efforts to do *teshuva*. But when we talk about supporting an offender's repentance or preventing relapse, we are talking about supporting healthy adult relationships and a non-offending lifestyle. We are not talking about cures, trust, or access to vulnerable populations. The offender may have engaged in substantial therapeutic work and repented. We welcome such efforts and commend the offender on a changed trajectory, but it is God alone, not mortals, who can judge an offender's sincerity. No matter how reformed, one who has abused another should never be provided access to former victims or potential new victims (e.g., we must never trust an individual who has sexually abused children to work with children in our communal institutions again).

These limitations are not meant to be punitive, but are simply the necessary consequences of offending behavior. This concept – that certain sins lead to a removal of rights independent of *teshuva* – is found in our Jewish tradition. For instance, “a *kohen* who has killed a person, even unintentionally, may not perform the priestly blessing, even if he has repented.”<sup>56</sup> Likewise, even allowing for the possibility of *teshuva*, there are times when no amount of *teshuva* can compensate for the harm done. The *Mishna* in *Hagiga* 9a discusses that one who neglects to bring the *chagigah* on the first day of *hag* – the preferred time for doing so – may compensate by bringing it any day thereafter until *Shemini Atzeret*. However, after this point the individual has missed his opportunity because “a crooked thing cannot be straightened.” R. Shimon ben Menasya asks “what is a crooked thing that cannot be straightened?” He answers that the verse cannot be referring to robbery, since a robber is able to return the stolen item, or otherwise make restitution, and “thus make the matter straight” again. Instead, he explains that the verse refers to one who cohabits with another man's wife, for such an act produces a result that cannot be undone – either the birth of a *mamzer*, or more simply, the irreparable harm of the woman being forbidden to her husband. On this,

sinned”, including welcoming limited access and other safeguards placed upon him or her to prevent reoffending.

<sup>56</sup> *Shulhan Arukh, Orach Hayim*: 128:35. Note that the *Rema* holds differently than the *Mehaber*: “Some say that if he has repented, he may perform the blessing.”

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Rashi explains that “repentance is not (completely) effective for such a sin, because it produced a result that cannot be undone.”<sup>57</sup> The *Me’iri* extends this concept more broadly, explaining that “the transgression of cohabitation with an *ervah* is cited only as an example. The same applies to any sin that has an outcome that cannot be reversed.” Sexual abuse can result in lifelong consequences for victims. Though these consequences may be overcome, they can never be undone.

### 2) *Tzniut*

The Centers for Disease Control report that in a retrospective study of more than 17,000 adults, 1 in 4 girls and 1 in 6 boys were sexually abused before the age of 18.<sup>58</sup> Despite the implications of such findings, Jewish institutions seldom broach this topic.<sup>59</sup> People hesitate even to consider the possibility that a grandparent might sexually

<sup>57</sup> The *Maharal* on the other hand argues that repentance is always possible.

<sup>58</sup> Centers for Disease Control and Prevention. (2006). Adverse Childhood Experiences (ACE) Study: Major Findings. Retrieved from: [www.cdc.gov/violenceprevention/acestudy/about.html](http://www.cdc.gov/violenceprevention/acestudy/about.html). These staggering statistics were initially met with skepticism by the public. Jewish communal leaders were similarly dismissive, certain that such numbers didn’t apply to “us”. Yet in a survey of over 10,000 children, the National Council for the Child found that approximately 1 in 6 Jewish children in Israel are sexually abused. Today, we know that child sexual abuse occurs across religions, cultures, and socioeconomic status. (Note: While these two studies are methodologically dissimilar and the prevalence rates cannot be compared, they are both included here to provide readers with a sense of the scope of the problem. The original report, authored by Haifa University professors Zvi Eisikovits and Rachel Lev-Wiesel in 2013, is available in Hebrew at <http://society.haifa.ac.il/images/Traina%20findings.pdf>. For an English article summarizing the results see: Skop, Y. (2013). Nearly half of Israel’s children suffer physical, sexual or emotional abuse, study finds. Ha’aretz retrieved from [www.haaretz.com/news/national/.premium-1.557668](http://www.haaretz.com/news/national/.premium-1.557668). No comparable studies have been done on Jewish populations outside of Israel.

<sup>59</sup> The tide – especially in right and centrist Orthodox institutions – is turning, thanks in large part to the tireless efforts of Jewish anti-abuse professionals, educators, and advocates, who are implementing abuse-prevention training. However, despite these significant strides, such prevention efforts: are still only implemented in a minority of Jewish institutions; may be one-off awareness events rather than ongoing conversations; only cover sexual abuse against children, rather than across the lifespan; may put the onus of prevention on potential victims to protect themselves from the abusive advances of those who are more powerful, rather than placing responsibility with the institution; and may focus on stranger danger – despite the *arayot* prohibitions specifically enumerating kinship abuse, and the United States Department of Justice reporting that 93% of sexual abuse against children is perpetrated by someone the child knows and trusts. For details on relationships between offenders and child victims, see Table 6 in Snyder, H. N. (2000). *Sexual assault of young children as reported to law enforcement: Victim, incident, and offender characteristics*. Department

abuse a  
grandchild, or a brother might sexually abuse his sister. But the Torah does not shy away from this topic, listing these and other prohibited *arayot* in Leviticus 18, one by one. Far from a topic meant to be kept silent, this chapter is publicly *leyned* at *minha* on Yom Kippur – the holiest day of the Jewish calendar year. Even with its notable place in Torah, institutions often hesitate to discuss sexual abuse, or do so only in the vaguest of terms, out of a misguided concern for modesty.

Offenders report specifically seeking out those children who are uneducated about their bodies, sex and abuse, in order to “teach” them themselves, suggesting that frank education can help prevent abuse.<sup>60</sup> Yet parents are often reluctant to have these conversations with their children. One parent articulated the tension between education and ignorance: “If I teach my son about this and he teaches the other kids at school, he will be the child who is ‘corrupting others’ with *priksadik* ideas. He’ll get kicked out and our family will be ostracized.” In combatting sexual abuse, Jewish institutions must find a way to uphold the important value of *tsniut* while speaking about these issues directly. This forthrightness is an inherently Jewish approach, and neither modern notions of taboo topics nor misunderstandings of *tsniut* should muzzle institutions that aim for communal safety and adherence to a tradition that encourages discussion of these issues.<sup>61</sup>

Beyond prevention, many institutions become suddenly reticent when responding to cases of abuse. In numerous instances when individuals were arrested or convicted of abusing children, the Jewish institutions where they worked sent letters to their constituents reassuring them that no abuse was found to have occurred in the institution. But these letters beg the question – how do the institutions know this? Did they ask? While a reticence to broach the topic with constituents may not be a direct result of *tsniut* concerns, a general sensibility surrounding issues of “modesty” suggests that certain topics may be discussed and others may not.

of Justice, National Center for Juvenile Justice. Washington, D.C. U.S. Retrieved from [www.bjs.gov/content/pub/pdf/saycrle.pdf](http://www.bjs.gov/content/pub/pdf/saycrle.pdf).

<sup>60</sup> As one offender states “Parents shouldn’t be embarrassed to talk about things like this – it’s harder to abuse or trick a child who knows what you’re up to”, while another advises: “Teach children about sex, different parts of the body, and ‘right’ and ‘wrong touches’... parents ... if they don’t tell their children about these things (sexual matters) – I used this to my advantage by teaching the child myself.” Elliot, M., Browne, K., & Kilcoyne, J. (1995). Child sexual abuse prevention: What offenders tell us. *Child Abuse & Neglect*, 19, 579-594.

<sup>61</sup> See the public *leyning* of Leviticus 18 referenced above, *Yevamos* 97a, *Keritut* 14a, and the direct language used in numerous instances throughout the *gemara*.

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One father relates that his son was sexually propositioned by a rabbi at his camp, and, because he escaped the rabbi's advances, he felt emboldened to disclose the incident, which led to disclosures about the abuse of two fellow campers. "Their abuse likely would have gone undisclosed until adulthood without their parents knowing to ask, as each of these boys blamed themselves for their 'participation.'" One might imagine that these revelations would lead to greater disclosure and discussion on the parts of the institutions where the rabbi worked, but in fact, none of these institutions sent a letter alerting parents. By adhering to a false sense of modesty – of topics that should be "off limits" in polite company – the institutions with which this abuser was associated may have, through omission, led directly to the pain or abuse of other boys.

Given that so few victims disclose abuse, institutions have a moral responsibility when faced with knowledge of abuse to communicate with their constituents so that those who might have been victimized can receive the therapeutic and institutional support they need in a timely fashion. Moreover, when institutions have knowledge of abuse, they must communicate with other institutions where that individual works. *Tzniut* is not a value that conflicts with that of protecting victims, but rather one that should inform our process for doing so.

### 3) *Leshon ha-Ra*

The Book of Jeremiah relates the events leading up to the death of Gedaliah ben Ahikam, stating that Gedaliah was warned that Ishmael, son of Nethaniah, was sent to kill him. Repeatedly, Gedaliah denies this claim, stating "for you are speaking falsely about Ishmael!" (40:16). But the intelligence he received was in fact accurate and Ishmael did assassinate Gedaliah, as well as the Judeans and Chaldeans who accompanied him. The final verse of this passage discusses "the pit into which Ishmael threw all the corpses of the men he had killed *at the hands of Gedaliah...*" (41:9) about which the Beraita in *Nidda* 61a asks:

But did Gedaliah kill them? Why, Ishmael killed them! Rather, since he should have heeded the advice of Yochanan ben Karei'ach, and he did not heed it, Scripture reckons it as though he had killed them.

According to this *beraita*, Gedaliah was wrong for refusing to be suspicious of Ishmael, but it goes one step further too, faulting Gedaliah for the deaths of the others as well. Because Gedaliah neglected to take steps to prevent the killings when he was given ample warning, he is faulted with the preventable harm that befell the others.



The *Gemara* uses this narrative to further a point about *leshon ha-ra* made by *Rava*: “although one should not accept it, one should nevertheless be mindful of it.” The *Gemara* goes on to tell a story of a group of Jewish men who were rumored to have committed murder and asked Rabbi Tarfon to hide them from the authorities. Rabbi Tarfon considers the scenario, using the same principles applied by *Rava* years later: “this is *leshon ha-ra*, and although one should not accept it, one should be mindful of it. You go hide yourselves.”

Believing *leshon ha-ra* and taking protective action are distinct and unrelated. One can decide not to accept *leshon ha-ra* as fact, but there is still a halakhic imperative to take every step possible to protect oneself and those in one’s care from harm. Yet too often institutional heads refuse to hear concerns or allegations because they fear speaking *leshon ha-ra* that may possibly ruin another’s life or *parnassa*. More often than most would believe, we encounter institutional heads who cover up allegations of abuse. The cover-ups do not usually begin as intentional dissimulation but are initiated by well-intentioned leaders who believe they are protecting a beloved employee from a false accusation. These leaders may instruct others to lie to the authorities or omit seemingly “minor details” that would “unnecessarily” make the accused look bad. If Rabbi Tarfon understood the concept of “*meihush lae*,” “don’t accept, do suspect,” in a time when the authorities were far less just, why can’t we?

It bears noting here that when reporting reasonable suspicions of abuse to the authorities, one is not making an accusation. One is simply relaying concerning information and asking the authorities to examine it further. If the authorities choose to proceed, they do so because they have uncovered sufficient evidence to move forward. More often than not, the authorities won’t proceed, not necessarily because the abuse didn’t happen but because they have insufficient evidence.

Finally, the person who files a report is never the one ruining a life; instead, the person who acted abusively harmed his own life and the lives of those he victimized. A misunderstanding of the intricate laws of *leshon ha-ra* and their exceptions has silenced victims of abuse and often led those who might report abuse to protect abusers rather than victims. For instance, a woman relates that when she was a child, a boy in the congregation accused her father, the rabbi, of sexually abusing him. Using *leshon ha-ra* as a defense, the community accused the victim of slander and cautioned him and his parents that the rabbi had a family – including daughters who would need

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*shiddukhim* – to be considered.<sup>62</sup> The woman explains that those supposed defenders of the rabbi's family did not know “that my father was abusing his own children too. They were so worried about *leshon ha-ra* ruining our lives, but it was their silence that ensured that my siblings and I endured many years more of abuse at the hands of our father.” Here we see clearly that these misunderstandings of *leshon ha-ra* prohibitions, while well-intentioned, use the *halakha* in error and can lead to significant harm.

### 4) Rabbinic Roles

The Rabbinical Council of America (RCA) and numerous respected *rabbanim* have *parkened* again and again that when it comes to sexual abuse, the laws prohibiting *mesirah* (reporting crimes to the civil authorities) and *arka'ot* (adjudication in civil courts) do not apply and reasonable suspicions must be reported without delay.<sup>63</sup> “Without delay” means

<sup>62</sup> Ironically, those who are most concerned about *leshon ha-ra* when speaking of the perpetrator do not always extend such concerns to talk about the victim. For instance: “The royal commission found there was considerable evidence that some members of the ... community in both Melbourne and Sydney believed that alleging another Jewish person may have sexually abused a child is engaging in ‘loshon horo’, unlawful gossip, and that such conduct is against Jewish law... In some cases victims and their families experienced such severe ostracism and shunning that they felt unable to remain in their community.” Percy, K. & MacMillan, J. (2017). *Child sex abuse royal commission: Jewish victims ‘shunned after making allegations’*. ABC News, Australia. Retrieved from: [www.abc.net.au/news/2017-03-23/jewish-leaders-thought-it-was-a-sin-to-report-child-abuse/8380574](http://www.abc.net.au/news/2017-03-23/jewish-leaders-thought-it-was-a-sin-to-report-child-abuse/8380574).

<sup>63</sup> For an in-depth discussion on the *halakhic* issues of reporting to the authorities, see: Rabbi Sharaga Feivel Zimmerman, Gateshead Rav Hair (2016). *The Halakhic Obligation of Reporting Abuse to the Authorities*. Kollel Beth HaTalmud. Retrieved from: <https://vimeo.com/196992520>; For official statements of rabbinic leadership on the inapplicability of the prohibition of *mesira* to cases of child abuse see: A proclamation signed by 300 Orthodox rabbis, stating that “The reporting of reasonable suspicions of all forms of child abuse and neglect *directly* and *promptly* to the civil authorities is a requirement of Jewish Law. *There is no need for people acting responsibly to seek rabbinic approval prior to reporting*” Nyer, D. (2016). Proclamation Regarding Child Safety in the Orthodox Jewish Community. Retrieved from: [https://drive.google.com/file/d/0Bz4A\\_l7qN61RX1lWa3p2RUk2TXc/view](https://drive.google.com/file/d/0Bz4A_l7qN61RX1lWa3p2RUk2TXc/view); A Kol Koreh signed by 100 Haredi rabbis in 2015 affirming that “any individual with firsthand knowledge or reasonable basis to suspect child abuse has a religious obligation to promptly notify the secular law enforcement of that information. *These individuals have the experience, expertise and training to thoroughly and responsibly investigate the matter...* every individual with firsthand knowledge or reasonable cause for suspicion of child abuse has a Torah obligation to *promptly* notify the proper civil authorities.”; Moss, A., Gourarie, M., Milecki, B., Kastel, M. & Wolff, L. (2015). *Video: Child Sexual Abuse – A Message from Your Rabbis*. Retrieved from: [www.youtube.com/watch?v=71wKpMW821c](http://www.youtube.com/watch?v=71wKpMW821c); Rabbinical Council of America (2010). *Convention Resolution: Condemning and Combating Child Abuse*. Retrieved from: [www.rabbis.org/news/article.cfm?id=105544](http://www.rabbis.org/news/article.cfm?id=105544) stating that “the

prohibitions of mesirah and arka'ot do not apply in cases of abuse and in fact, it is *halakhically* obligatory to make such reports"; Gutnick, M. (2015). *Rabbinical Council of Victoria (RCV) Response to Royal Commission Inquiry*. Retrieved from: [www.mannywaks.com/rcv-statement-by-rabbinical-council-of-victoria.html](http://www.mannywaks.com/rcv-statement-by-rabbinical-council-of-victoria.html), stating that "any prohibition of mesira and arkaot does not apply in cases of child sexual abuse and that there is an actual obligation to report any allegations of child abuse directly to the police and relevant authorities"; Mervis, E. (2015). *Statement: We are obliged to protect our children*. Retrieved from: <http://chiefrabbi.org/chief-rabbi-strongly-condemns-child-sexual-abuse-in-the-uk/>, stating that: "It is therefore essential that when abuse has occurred, the police must be informed without delay. *Local communities should not attempt to deal with the situation internally*. Delays in reporting abuse can cause vital evidence to be lost, allowing the abusers to continue violating our children. We must all ensure that the children of our communities will be protected by reporting abuse to the authorities wherever it takes place."; Mirvis, E. (2015). *The Chief Rabbi's statement on the Australian Royal Commission into Institutional Responses to Child Sexual Abuse*. Retrieved from: <http://chiefrabbi.org/the-chief-rabbis-statement-on-the-australian-royal-commission-into-institutional-responses-to-child-sexual-abuse/>, stating: "Let there be no doubt: it is a legal, moral and religious imperative to report cases of sexual abuse to the police. Nobody is above the law and no institution is greater than its members or followers. *The impact of bringing sexual predators to light, however embarrassing for our communities, pales into insignificance when the alternative would result in the shame of protecting criminals, abandoning victims and risking the safety of so many others.*" For comprehensive discussions about mesirah and other impediments to reporting abuse in the Orthodox Jewish community, see: Resnicoff, S. H. (2012). Jewish law and the tragedy of sexual abuse of children – the dilemma within the Orthodox Jewish community. *Rutgers Journal of Law & Religion*, 13, 281-362. Retrieved from: <http://lawandreligion.com/sites/lawandreligion.com/files/Resnicoff.pdf>; Broyde, M. J. *Informing on others for violating American law: A Jewish law view*. Jewish Law Articles. Retrieved from [www.jlaw.com/Articles/mesiralaw2.html#102](http://www.jlaw.com/Articles/mesiralaw2.html#102). See footnote 102 citing responsa from Rabbis Auerbach, Elyashiv, and Waldenberg: "Thus, it is clear, that one must report allegations of child abuse (sexual or physical) when one is aware of it, (even if this means that the child might be placed in a Gentile foster home)."; and Rabbi Noach Oelbaum. *Guidelines for mesira regarding child abuse*. Torah Downloads. Audio file retrieved from [www.torahdownloads.com/shiur-19454.html#.Uuk5LhAW7-c](http://www.torahdownloads.com/shiur-19454.html#.Uuk5LhAW7-c).email, citing the Tzitz Eliezer who states that the prohibition against *mesira* does not apply in the case of protecting a child. For more on reporting and *mesirah* see: Billet, H. (2013). *Not enough progress by rabbis, leaders on dealing with sexual abuse*. Jewish Week. Retrieved from [www.thejewishweek.com/editorial-opinion/opinion/not-enough-progress-rabbis-leaders-dealing-sexual-abuse](http://www.thejewishweek.com/editorial-opinion/opinion/not-enough-progress-rabbis-leaders-dealing-sexual-abuse); Blau, Y. (2009) Rabbis dealing with abuse. Tzedek, Tzedek. Retrieved from: <http://tzedek-tzedek.blogspot.com/2009/09/rabbis-dealing-with-abuse.html>; Lopin, Y. (2013). Rabbi Mendel Shafran's position on turning over molesters to the police. Frum Follies. Retrieved from: <http://frumfollies.wordpress.com/2013/02/06/rabbi-shafran-answered-i-never-said-that-you-are-allowed-to-go-%D7%90%D7%96-%D7%9E%D7%A2%D7%9F-%D7%9E%D7%A2%D7%92-%D7%92%D7%99%D7%99%D7%9F-to-the-police-i-said-that-there-is-an-halakhic-o/>; For a video recording of R' Chaim Kanievsky's statement that it is not necessary to consult with a rabbi before reporting abuse "because one is saving others", see: Jewish Community Watch (2015). Leading Charedi Rabbi Chaim Kanievsky: Rabbinic Permission Is Not Needed Before Reporting Abuse. Retrieved from: [www.jewishcommunitywatch.com](http://www.jewishcommunitywatch.com)

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without checking with a rabbi first. When rabbis are consulted first, reporting is necessarily delayed, and sometimes rabbis begin to take matters into their own hands. When this happens, lay leaders who rightly value a rabbi's wisdom and experience may feel compelled to defer to the rabbi.

The RCA and the *rabbonim* referenced above clearly recognize that responding to sexual abuse requires training and expertise, and that rabbis, communal leaders, and institutional heads are not experts in abuse. In certain areas of expertise, communities feel comfortable calling in an expert: most shuls would not ask a rabbi to fix the roof in place of a roofer, nor would a rabbi dictate to surgeons how and when to operate on a congregant. There is an understanding that the rabbi's role is to support the congregation and congregants, and the specialist's role is to complete the job according to his or her training, skill, and knowledge of best practices. Abuse cases are no different, except that too many institutions – of all denominations – think that their leaders know enough to handle them. In a beloved institution facing upsetting allegations, lay leaders may resist turning to outsiders for help. But understanding the way a predator operates requires expertise. Interviewing victims – especially children – requires expertise. Managing risk requires expertise. There are many individuals, some within the Orthodox community, who have training in this area. But institutional heads and rabbis, as a general rule, do not.

Internal investigations, conducted under the auspices of a rabbinic leader or other untrained lay leader, often interfere with the pursuit of justice.<sup>64</sup> Just

[org/leading-charedi-rabbi-chaim-kanievsky-rabbinic-permission-is-not-needed-before-reporting-abuse/](https://www.haaretz.com/leading-charedi-rabbi-chaim-kanievsky-rabbinic-permission-is-not-needed-before-reporting-abuse/).

<sup>64</sup> See for instance the recent alleged internal investigation and mismanagement of men accused of sexually abusing children and women in several Israeli communities. The individuals overseeing the internal management “allegedly received their rabbis’ blessing to seek and collect information on sexual predators in the community, without involving the police. They did so, even maintaining written records of attacks and the people involved. At the end of the process, the perpetrators were forced to agree to undergo therapy within the ultra-Orthodox world... Tens of alleged attackers were documented, some of whom had committed serial offenses, including against children...the police said that the ultra-Orthodox community had been handling the matter internally, collecting information and conducting some form of internal procedure, culminating in a sort of punishment... The statement said... the suspects could continue to live their lives without paying a penalty, and dozens of victims were left without help... The records on the alleged sexual predators were kept by a single person [who]... operates under the imprimatur of a Jerusalem-based body known as the “purification commission” of the community.” Hasson, N. & Ettinger, Y. (2017). *Israel police arrest 22 Ultra-Orthodox Jews for sex crimes against minors and women*. Haaretz. Retrieved from: [www.haaretz.com/israel-news/.premium-1.779763](http://www.haaretz.com/israel-news/.premium-1.779763). Though documenting complaints, concerns, and abuse is critical to protecting the community from concerning individuals

as a Jewish judge must be impartial,<sup>65</sup> so too must investigators of abuse in Jewish institutions be impartial. When an institution investigates one of its own, it is by definition partial.<sup>66</sup> For instance, in one institution with a child safety committee, the committee had made a decision, in consultation with an independent child protection expert, to ban a particular member from the *shul*. A few months later, members of the committee found the individual back in the *shul*. Seeking to understand what happened, they approached the *shul*'s rabbi who explained that he had taken the committee's concerns into account and warned the individual not to speak to children. A rabbi, who has Torah and pastoral experience but not child protection training, should not override the decision of a child protection expert or committee tasked and trained with handling these issues. Giving leaders without proper training authority over something as complicated and important as preventing and responding to abuse misapplies the concept of *kavod ha-rav* or *da'as torah* in deeply problematic ways.

It is important to note that communicating with authorities and retaining independent external experts to manage abuse cases should in no way sideline the rabbi. On the contrary, rabbis have a critical role to play in supporting victims who may be grappling with spiritual injuries by facilitating healing, generating communal support for the victim and the victim's family, and generally modeling a Torah approach to responding to abuse. A kind and encouraging clergy member can be a lifeline to a victimized child or adult whose spiritual injuries may require pastoral

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(see *Lack of Transparency* above), such documentation must always supplement, and never supplant, reports and cooperation with governmental authorities.

<sup>65</sup> See for instance: *Ketubot* 105b; *Hoshen Mishpat* 22:1; *Sanhedrin* 24a.

<sup>66</sup> Institutional investigations are a complex issue. As a general rule, institutions should not investigate themselves for the reasons stated here. However, as noted earlier in *Governmental Involvement*, institutions have a responsibility to respond to allegations of abuse or otherwise concerning behavior, and are not absolved of responsibility simply because a governmental agency may be involved. Institutions facing such allegations should take the following steps: 1) report all reasonable suspicions of abuse to the relevant governmental authority, 2) communicate with that agency to determine what steps the institution may take to protect constituents that will not interfere with the agency's investigation, and 3) hire external, independent, trained investigators from outside of the community to conduct an investigation. Understandably, an institution may not have the financial means to hire such investigators whenever an issue arises – particularly with low level concerns (e.g., an individual who makes parents and children “uncomfortable” but is not accused of any specific abusive behaviors or boundary violations). In these instances, the institution should follow a set of predetermined, transparent, policies to inquire into the issue and take further action as needed. Should additional concerning information be uncovered, the steps listed above should be followed, and independent experts retained. Those seeking assistance in these instances, may contact *Sacred Spaces* for guidance (see author's bio).

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counseling that a mental health expert is not able to provide. Research has shown that victims of sexual abuse who maintain some connection to their faith or receive pastoral support from their rabbis experience better mental health outcomes in the long-run than those who do not.<sup>67</sup> As Rabbi Yosef Blau explains:<sup>68</sup>

Above all, it is the rabbi who must send the message that covering up an incident of abuse is not protecting the community. Judaism, when understood properly, is about imitating God's mercy on all and His concern for the weak and vulnerable. A major step is pursuing justice, and we will only bring ourselves to prevent further suffering when we see those victims brave enough to confront their abusers as heroes, rather than traitors. The layperson looks to his or her rabbi to set this tone. The message sent from the pulpit can determine if attitudes will change and if the scourge of abusers will stop. As true leaders, rabbis have much to offer. As protectors of the image of the community, rabbis are part of the problem. If rabbis show moral courage (as some already do), others will follow. Rabbinic authority is critical when the authority is earned and demonstrates that a Torah leader is a model of justice and compassion.

Increasingly, multidisciplinary response teams (MDTs) are including rabbis in their group,<sup>69</sup> and child advocacy centers (CACs) report the notable progress they are able to make in treating victims and pursuing

<sup>67</sup> Lawson, R., Drebing, B., Berg, G., Vincelette, A. & Penk W. (1998). The long term impact of child abuse on religious behavior and spirituality in men. *Child Abuse & Neglect*, 22, 369-380; Chandy, J. M., Blum, R. W., & Resnick, M. D. (1996). Female adolescents with a history of sexual abuse. Risk outcome and protective factors. *Journal of Interpersonal Violence*, 11, 503-518; Gall, T. L., Basque, V., Damasceno-Scott, M., & Vardy, G. (2007). Spirituality and the current adjustment of adult survivors of childhood sexual abuse. *Journal for the Scientific Study of Religion*, 46, 101-117; Veith, V.I., Tchividjian, D.F.W., & Knodel, K.R. (2012). Child Abuse and the Church: A Call for Prevention, Treatment and Training. *Journal of Psychology and Theology*, 40, 323-330. Conversely, those who do not receive this support from their communities or lay leaders may experience further victimization. In the words of one survivor describing the shunning she experienced by her community's leaders, "the trauma of the abuse is nothing, absolutely nothing... compared to the trauma of not being believed." Krevsky, R. (2015). Speaking at a Jewish Community Watch event in Montreal. Retrieved from: [www.youtube.com/watch?v=XEjrha4Qglc](https://www.youtube.com/watch?v=XEjrha4Qglc).

<sup>68</sup> Blau, Y. (20). *The role of rabbis in combatting abuse in the Orthodox community*. Jerusalem Post. Retrieved from: [www.jpost.com/Opinion/The-role-of-rabbis-in-combating-abuse-in-the-Orthodox-community-381976](http://www.jpost.com/Opinion/The-role-of-rabbis-in-combating-abuse-in-the-Orthodox-community-381976)

<sup>69</sup> Vieth, V. I., Everson, M. D., Vaughan-Eden, V. & Tiapula, S. Chaplains for children: Twelve potential roles for a theologian on the MDT. *CenterPiece*, 3, 1-5. Retrieved from <https://secure.gundersenhealth.org/app/files/public/1438/CenterPiece-Vol-3-Issue-6.pdf>.



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justice when rabbis take active roles (e.g., accompanying victims to the CAC or court hearings),<sup>70</sup> both with the formal proceedings and by supporting the victim within their own communities.

## CONCLUSION

The primary principle guiding the actions of the Jewish community must be to protect the vulnerable among us. As God teaches in *Isaiah* 1, God has no need for empty sacrifices:

(13) Bringing oblations is futile, incense is offensive to Me, new moon and Sabbath, proclaiming of solemnities, assemblies with iniquity, I cannot abide. (14) Your new moons and fixed seasons fill Me with loathing; they have become a burden to Me, I cannot endure them.

Instead, God says:

(16) Wash yourselves clean; put your evil doings away from My sight. Cease to do evil; (17) Learn to do good. Devote yourselves to justice; *aid the victim*; uphold the rights of the orphan; defend the cause of the widow. (Emphasis added).

In this passage, God clearly emphasizes helping others above sacrifices; God does not desire our *tefillot* or the beating of breasts if we remain oblivious to the pain of the vulnerable amongst us. If we want to come close to God, we are offered a simple but explicit prescription: we must stand up for the vulnerable among us and support the victim. This value, while hardly unique to Judaism, takes on a uniquely Jewish quality when viewed through the lens of Isaiah's teaching: God tells us that though piety can adopt misguided forms, it can also be rectified through a focus on justice and righteousness. Sexual abuse victims are among the most vulnerable individuals in our community today. If we support them through transparency, pursuit of truth, and a willingness to confront the darkness among us, then we can stand tall and unashamed before God.

<sup>70</sup> Tishelman, A. C. & Fontes L. A. (2017). Religion in child sexual abuse forensic interviews. *Child Abuse & Neglect*, 63, 120-130.



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## **SEXUAL ABUSE IN THE ORTHODOX JEWISH COMMUNITY: AN ANALYSIS OF THE ROOTS OF THE FAILURE TO EFFECTIVELY RESPOND TO THE CRISIS**

**A**t the 2005 Orthodox Forum, a paper was presented reporting the results of a study by five psychologists on the rate of sexual abuse reported by Orthodox Jewish Women. The statistics showed that the percentage of women who reported that they had been sexually abused was essentially the same as that reported in studies of the general population. The members of the Forum adamantly rejected the conclusion and argued vehemently against the methodology and the sample used in the study. After such strong opposition, the paper did not appear when the volume of that year's Forum was published in 2007. I had been the official respondent to the paper and consulted with psychologists and psychiatrists who all found the results true. This occurred after major abuse scandals involving Orthodox Jews, including rabbis, had become public knowledge. The intellectual leadership of the modern Orthodox community could not accept that incidents of sexual abuse in the Orthodox community were widespread and reflected anything beyond an occasional bad apple. Denial of the problem in the Haredi world and in the broader community prevailed. Until more cases of abuse came to light, and blogs emerged that reported on them and on the cover-up that often followed, denial precluded any serious response.

### **Justifications for the Inaction**

The leadership hesitated to act because in many instances the form of the abuse did not fit into the categories of crime or sin described in traditional rabbinic sources. Technical distinctions about whether an act was literally sexual relations or rape prevented the rabbinate from appreciating the serious ongoing damage to the victims even when there was no physical scar. One can legitimately question the role that an unwillingness to

recognize the problem played in focusing on these technical distinctions. There are different kinds of abuse—including an older authority figure seducing an adolescent girl or boy—where the impact of the offense can only be understood if one knows the psychological ramifications. The category of *oseh melekhet Hashem remiyah*, he does the service of the Lord deceitfully, applies to a rabbi or teacher who takes such advantage of students, but only if one understands the damage done.

Acknowledging the problem is a necessary first step in setting up procedures to reduce the threat of new abuse. Abuse can take place within a family, at a camp, youth program, school, synagogue, or any public location. Training counselors, youth movement leaders, teachers, and clergy is important. When abuse occurs in a religious community the rabbi is often the first person consulted. At present, few rabbis understand abuse and even know enough to recognize their limitations. Traditional rabbinic training did not include any courses in psychological counseling. In many states, clergy are mandated reporters but rabbis are not aware of it.

### **Establishing That Abuse Has Taken Place**

The process of determining whether abuse has taken place is not simple. If a child has been abused within the family, the child may not feel safe to discuss what happened with anyone. If teachers are trained to look for changes in behavior in a child that are indicators of possible abuse, the question becomes what the teacher should do with the information. If the teacher contacts a child protection agency to investigate, the question of *mesira* is triggered since the agency is part of the secular government and it is not clear at this point whether there has been sexual abuse. Most Orthodox Jews see the child protection agencies as an extension of the police. Working with a child to clarify what has happened requires special training and skill. Going to a Jewish agency will not avoid government involvement; the professionals in the agency are mandated reporters who must inform the state agency.

When the child tells a parent of abuse by a teacher it is even more complicated since the parent correctly suspects that the school will defend the teacher against the word of a child. Whether or not the story is true, the child needs to talk with a mental health professional. That therapist is likely to inform the authorities if the child's story is credible. At present, many parents are afraid to do anything that may bring the accusations public for fear of the reaction within the community.

If there are strong indications of abuse the likelihood that this child is not the sole victim must be investigated. This can't be done privately.

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Inevitably some information will become public. Without a fundamental change in the attitude of the community, the reaction will be to blame the child and the parents for besmirching an individual without proof and sully the reputation of the school, camp, youth group, or synagogue. Any institution over years may have an employee who is an abuser; that is not a blemish on the institution. How it responds to the allegation is the real issue. If the response is to protect the reputation of the institution, it leads to a cover-up that exacerbates the initial problem.

When the victim who comes forward is an adolescent, the dynamic is different. Whether the abuser was a relative, a camp counselor, or a teacher—the victim can tell a coherent story. The question again is to whom. High schools have guidance counselors who should know what to do next. Youth movements and summer camps should have clear procedures for registering a complaint. There is a serious possibility that an adult who abuses in one of these settings is a chronic offender.

When abuse has occurred, one can deal with the abuser within the community or go to the secular authorities. Both approaches have adherents and in different ways both have not been successful. The victim needs therapy, which creates the complication that the therapist is a mandated reporter.

### Failure of Internal Mechanisms

Attempts to respond internally have failed badly because there is no proper mechanism. Even when special *batei din* have been set up, the tools for a proper investigation do not exist. Even when the *beit din* finds the abuser guilty, it lacks the ability to punish him and to insure that he is not in position to be a threat to others. The Ran and the Rashba both permit going outside the halakhic process, acknowledging that the criteria needed to find a person guilty according to halakha are too stringent to be effective in controlling crime in society. Today religious courts have far less authority to punish than in the time of the *rishonim*. There has been discussion of whether the abuser can be forced to pay for damages—including the cost of therapy—but this is hardly an adequate restraint on the abuser. Recognizing this reality, some suggest limiting the role of *beit din* to establishing sufficient proof to permit the victim to go to the secular authorities. The assumption that rabbis have the training to make that assessment is unfounded.

Since not every case of abuse is criminal according to secular law, there remains a need for some internal process when the secular authorities can't help. In the religious Zionist community in Israel, Forum

Takana has been set up to work in these situations. Forum Takana was established to combine the authority of rabbis with the expertise of trained psychologists. Without rabbinic involvement the religious community in Israel would not accept the conclusions.

### Going to the Police

Though denial has lessened, victims rarely find their plight high on the community's agenda. If they report the abuse they are condemned for blackening the image of Orthodoxy. When the abuse has occurred within an institution, preserving the institution and people's jobs are perceived to be the primary concern. The victim becomes the one who is threatening the community, while the abuser is protected. In cases of chronic abusers who work in schools or youth movements which give them access, there are usually tens if not hundreds of victims. Concerned about the financial implications of admitting any level of responsibility, the organizations that employed the abuser don't want to know about the numbers or extent of abuse. In those situations, the identity of the majority of victims is not revealed. They continue to suffer in silence, often estranged from Orthodoxy.

When abuse has been reported to the authorities, the case cannot progress unless the victim agrees to testify. Invariably pressure is placed on the victim and his or her family not to testify. Since it normally takes at least a year from the initial complaint until the trial, many victims withdraw their testimony. This will change only if the attitude of the community changes. Often the district attorney won't bother to pursue the case, fearful that by the time of the trial there will be no witnesses. At best, a plea bargain will be accepted, reducing the charges to a minimum; the abuser will then claim that he accepted the plea bargain because the juries are prejudiced against Orthodox Jews.

Many Halakhic arguments are used against a victim or a parent or therapist going to the secular authorities to report abuse, but the most effective is the prohibition of *mesira*. *Mesira* is a taboo with implications of being a traitor to the Jewish people. This is why, although it does not apply in cases of sexual abuse, it continues to leave a stain on the person who reports. The criterion of Rambam (Hilkhos *Hovel u-Mazzik* 8:11) that the accused being a threat to many permits reporting to secular authorities, is clearly met. Abusers do not stop on their own and often hurt hundreds of victims. Even as they age they continue to abuse. Therapy for abusers, except for minors who are caught early, has little proven record of success. Internal procedures have failed. Even the introduction of

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special *batei din* with selected and trained judges who worked with therapists hasn't improved the situation. In a case last year such a rabbinic court, which ruled against an abuser, had its ruling become irrelevant when a second *beit din* in Israel became involved.

The halakhic literature dealing with the question of whether one should report abuse overwhelmingly approves of going to the secular authorities. However, the Israeli posekim who discuss it require getting approval from a *beit din* or at least a known rabbi first. Unfortunately, the assumption that a rabbi is qualified to evaluate an accusation of abuse and to determine its credibility is rarely justified. Halakha relies on experts in many areas; there are psychologists and psychiatrists specifically trained in this area who do have expertise. The victim knows that he or she was abused; it is hard to understand why they need to get approval.

One concern expressed about going to the authorities is that courts will give the abuser an excessive punishment. Since prison is not a punishment listed in normative halakha, that argument would effectively preclude ever going to the secular court system. The principle of *makkiv ve-onshin she-lo min ha-din* is one response given to that concern. Since we give permission to go to the police for other serious crimes where the punishment will also be prison it is unclear why this argument is introduced specifically in cases of abuse.

Threats against those who are willing to testify in court fall under the secular category of intimidating witnesses. Without cooperation from the community this rarely is enforced and the ability for the prosecution to succeed is severely reduced. Again, communal attitude to the abuser and the victims and the position of rabbinic leadership will determine whether witnesses will continue to be intimidated.

### Responses to Actual Cases of Abuse

Examining specific major cases of abuse within the community will clarify what has been described above. In the 1970s, M came to New York proclaiming himself both a rabbi and a psychologist with a PhD. His credentials were apparently never questioned, though it was later discovered that he was neither. He served as a consultant for a prominent social agency in the Orthodox community in Brooklyn and also received referrals from a yeshiva high school in Brooklyn. The agency has denied that it ever employed him although former employees told me that cases were regularly sent to him. He has been accused of tens of cases of abuse. M was also accused of abusing children, both Jewish and non-Jewish, on the block where he lived. The non-Jews went to the police but when the

police came to arrest him, he had been warned and fled to Israel. I saw signs near a synagogue in the Sha'arei Hesed neighborhood in Jerusalem warning about M. For various reasons there was a significant delay before a request was made to extradite him to the United States. Meanwhile he became a member of a large and politically powerful Hassidic group in Israel. He fought the request for extradition to the Israeli Supreme court and is still living freely in Jerusalem.

In the 1980s Rabbi S started a yeshiva in Israel for yeshiva high school graduates from America who were turned off to some degree. He was charismatic and cool and his yeshiva became a major success. A number of his students, when they returned to the States, met with therapists and reported abuse. At the time, the accepted rules of confidentiality prevented the therapists from reporting the abuse. This has changed. Since the students were reluctant to move on to different yeshivot, a higher level program was instituted nearby. The rebbe hired for the new program heard horror stories of abuse and cultic behavior. He returned to America and reported to his rosh yeshiva. After various consultations, Rav Shach, the leading authority in Israel, ruled that S had to leave the yeshiva and took personal responsibility that he would not return to Jewish education. Since R. Shach passed away, leaving behind no documentation on the case, S managed to function in a related area and later attempted to return to direct access to teenage students. During the investigation about the accusations, it emerged that S had gone to Israel from America because of earlier accusations. Many of the students spent years in therapy and some disappeared from the Orthodox community completely. S, having never been arrested, is also living in Jerusalem.

More recently, there were accusations that M, a charismatic head of a group of seminaries for Americans, had sexually abused a number of his students and that complaints to staff members had been ignored. This case was taken to a special Beit Din in Chicago that heard a partial confession and ruled that he was guilty of abuse. Subsequently a different Beit Din in Israel became involved which ruled that no member of the staff was guilty of neglect and all could continue in their roles in the seminaries. While M sold the seminaries and is not directly involved, the consensus in Jerusalem is that he at worst was guilty of a minor indiscretion and nothing prevents him from teaching in the future.

There has been a reluctance of victims and their families to sue the abusers or the institutions that covered up the abuse, despite the impact that such suits had on revealing the scandal in the Catholic Church. In one case, when a group of former students sued Yeshiva University for the actions of their high school principal, the court dismissed the suit because

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of a strict statute of limitation for bringing such lawsuits. Recently it was revealed that Yeshiva Torah Temima had settled two lawsuits that were within the statute for a combined sum of \$2,350,000 in order to protect K, who had been accused of abusing children for over a quarter of a century. As is usual in these settlements, the yeshiva did not admit guilt and the accusers signed a non-disclosure agreement. The story became public knowledge only because Torah Temima defaulted on a large portion of the payments. No Orthodox institution has commented on this development. I suspect that this case will only increase opposition to attempts to amend the present guidelines of the statute of limitations on civil lawsuits.

### Causing Hillul Hashem

Sexual abuse is recognized as a terrible crime and the implication that the Orthodox rabbinate is involved in “sweeping it under the rug” reflects badly on the rabbinate. This has introduced the argument that those who criticize the leadership for inaction are guilty of speaking lashon hara and creating a hillul Hashem. This effectively shifts responsibility to the advocates for change and those who care about the victims. The hillul Hashem argument is particularly strange because it relies on the hope that the initial acts of abuse will be successfully covered up and there will be no public hillul Hashem since people won’t know about it. This assumption in a world of social media is at best tenuous. The broader message that criminal behavior within the Orthodox community should be covered up to protect the community’s image reflects the notion that a community that confronts its problem is perceived as inferior to one that denies them. On the contrary, it is a sign of the strength of Orthodoxy that it acknowledges human weakness and is committed to protect those who suffer and lack powerful supporters.

### Theory and Practice

The Rabbinical Council of America has passed a number of resolutions on abuse that supported going to the police, but it is not clear how much impact they have had on real situations. Apparently there is a barrier between a theoretical position and applying it to an actual person that one knows. When the abuser is a charismatic, manipulative, and controlling figure there are warning signs, but in general abusers look like ordinary people and are not distinguishable in any way.

Even if there will be a fundamental shift and suspected abusers will be reported to the police, the community’s loyalties will have to change; we



must provide support for the victims and create a climate where victims are able to come forward. Rabbis can play a major role in setting the tone through moral leadership in their communities. Presently, if the accused is a member of a rabbi's congregation, the rabbi sometimes writes a letter of support, not realizing that the letter asking for leniency sends a negative message to the victims of that abuser.

A particularly difficult category to deal with is abuse within a family. Conditions that increase the risk for abuse by an older sibling unfortunately exist in parts of the Haredi world. The concern for not mentioning anything about sex, coupled with large families in small apartments has led to older brothers experimenting with their younger sisters with neither of them aware of what it fully means. Only years later do the victims begin to understand that they have been violated and they lack the language to ask for help. In general, abuse within the family strains relationships with parents and siblings pressured to take a side. Family therapy is needed for all the relatives in addition to that provided for the abuser and victim. Experts who are not rabbis can be helpful, although a rabbi may be asked for guidance when the conflicts come to a head before a family celebration.

There is a concern about false accusations. The statistics indicate that they are rare and usually reflect specific conditions that lead to suspicion. In any event the police are trained and rabbis aren't; the police don't bring people to trial unless they are certain that they have enough evidence to get a conviction. There are concerns about false accusations for other criminal behavior and yet this is not a deterrent to reporting other crimes. Children may not be able to describe events clearly but they are less likely to lie than adults.

In some states there are strict statutes of limitations which prevent criminal charges or civil suits for childhood abuse when the victim reaches a certain age. In New York the age is 23. This effectively eliminates criminal charges in many cases because youngsters are afraid of their abusers and it often takes years before they are ready to face the offender at a trial. In general, the organized Orthodox community has not supported changes in the law, although the concept of a statute of limitations is a secular one and does not exist in halakha. Agudas Yisroel has joined the Catholic Church in fighting any change. The message sent is that the primary concern is to protect the financial interests of institutions by preventing lawsuits, together with a willingness to let abusers escape prosecution on technical grounds. This sends a powerfully disturbing message to victims and their supporters.

In many circumstances going to the police is not an option. Our standards of acceptable behavior are different from those in criminal law. We should expect a higher moral level from rabbis and teachers. In a teshuva

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written over one hundred and fifty years ago R. Yosef Shaul Nathanson responded to a case of a teacher accused of abusing boys that there is no automatic right to teach children (*Shoel u-Meishiv* 1:1:185). The welfare of the youngsters is what matters.

We can establish guidelines for schools, youth movements and synagogues. Summer camps need to train their staffs and establish rules for acceptable interactions with campers. There are governmental regulations and Halakhic prohibitions of *yibud* that work as preventive measures. While rabbis don't have the training of police officers and child protection employees, they can set up tribunals that rely on trained professionals to conduct investigations and therapists to guide them in evaluations. All of this requires financial resources which will be available only when the Orthodox community recognizes the depth of the crisis and changes its priorities.

Professionals who work with troubled youth from the Orthodox community who have dropped out and are living in the streets consistently report that a high percentage have been abused. Victims of abuse are at a high risk for suicide, and for drug, alcohol and other addictions. Many struggle with creating a normal family life. They are seen as damaged goods and are shunned. Yet we as a community are partially responsible for the damage they have suffered. When some have the courage to fight back and to confront their abuser, instead of being seen as heroes they are considered troublemakers. Our community needs to become educated, to change and to mature. No matter how much we want to believe that people who are on the surface observant Jews, who may even be Talmudic scholars, couldn't possibly be guilty of sexual abuse, neither religious dogma nor wishful thinking will determine reality. We have the same problem as the rest of society.

The world is aware of the risks the Catholic Church took during decades of ignoring abuse by priests and sending them back to the ministry. In the Catholic Church, where there is a hierarchy, it is clear where to place the blame. In the Orthodox Jewish world the blame is much broader. No archbishop assigns a priest to a church; the congregation elects the rabbi. A principal hires the teachers. Lay boards hire principals, youth directors, camp directors. When an abuser is passed on from school to school or from synagogue to synagogue, there are many people who might be responsible for not checking or for withholding information.

At a conference in Israel about abuse which took place shortly after a scandal involving the head of a seminary in Jerusalem, a session was held about potential risks during the gap-year programs attended by most yeshiva high school graduates. The head of a prominent seminary described

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the programs that were introduced to protect the students in his school. He was asked how many potential parents had questioned him about how their daughters would be protected from abuse during the year in his seminary. His answer was none. There will be little motivation for institutions to make changes when the parents don't seem to care. We need a change in attitude about the seriousness of the danger from abuse. It must come from the rabbinate but equally from the laity.

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## DISCUSSING AND REPORTING ABUSE – A HALAKHIC PERSPECTIVE\*

### INTRODUCTION

Each year more and more cases of physical, sexual, and emotional abuse in the general population, the Jewish world, and more specifically, in religious communities come to light. It seems that not a week goes by without hearing of another case of a parent, a relative, teacher, spiritual leader, employee or employer, or some other member of the community causing harm of some sort to others, especially to women and children.

Of particular concern is the apparent phenomenon, confirmed by rabbis, professionals, and law enforcement officials, of individuals and communities purposely not reporting or taking active steps to stop, and to prevent such abuse. Those who work within social services and law enforcement often express their amazement that the religious community appears to express more concern for the welfare of the abusers than the victims; a true *hillul Hashem*.

Why are so many victims, family members, neighbors, educators, and religious leaders hesitant to take sufficient measures to stop and prevent abuse? Families and professionals are often not properly trained to recognize different forms of abuse, and at times, do not view certain actions and behavioral patterns as abusive. Furthermore, victims of abuse are often inclined to remain silent, due to embarrassment, concern that they

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will not be believed, and fear of the potential impact on one's personal life, family, and/or community. Other factors, including individual and communal cognitive dissonance regarding offenders (especially clergy), as well as the emphasis on *tsni'ut* (modesty) in religious communities, which often prevents victims from accurately describing their experiences, also impede properly reporting abuse.

In addition, some feel bound and prevented by religious tradition and halakha from discussing, or reporting abuse, and therefore do not feel empowered to take the proper measures to stop and to prevent future incidents. In this article,<sup>1</sup> we will focus on two central halakhic reasons why religious individuals and communities are hesitant to report abuse, *leshon ha-ra* and *mesira*, and demonstrate that these concerns should not stand in the way of taking the proper actions to protect victims and prevent further abuse. Furthermore, we will present halakhic sources which demand and obligate us to stop and prevent sexual, physical, and emotional abuse.

### GOSSIP MONGERING – THE FEAR OF SPEAKING ILL OF OTHERS

The first step to preventing further abuse is reporting inappropriate behavior to family members, teachers, principals, local religious leadership, social services, and law enforcement officials. Rabbis, teachers, parents, employers, and lay leadership must raise awareness, create an environment in which victims, as well as those who witness or even hear about potential abuse, feel comfortable relating and reporting incidents of abuse, and ensure that people, especially children, do not keep their experiences a secret. Beyond these broader educational and communal goals, a clear message must be sent to the religious community regarding whether reporting incidents of physical, sexual, or psychological abuse constitutes a form of *rekhilut* (gossip mongering) or *leshon ha-ra* (derogatory speech).

<sup>1</sup> Much has been written on this topic in recent years. See, for example, Steven H. Resnicoff, "Jewish Law and the Tragedy of Sexual Abuse of Children: The Dilemma within the Orthodox Jewish Community," *Rutgers Journal of Law and Religion* 13:2 (2012), 281-362, R. Gedalia Dov Schwartz, "The Abused child – Halakhic Insights," *Ten Da'at*, 2:3 (Spring 1988) 11-12, *Kuntras Dam Re'ekha* (634-666), Yeshurun, v. 15 5765 (2005), and *Breaking the Silence: Sexual Abuse in the Jewish Community*, Edited by David Mandel and David Pelcovitz, Chapters 6-7, which includes important chapters written by R. Mark Dratch and R. Dovid Cohen.

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Although the well-known prohibitions<sup>2</sup> known as *leshon hara*, *rekhlut*, and *motsi shem ra* (defamation)<sup>3</sup> are perceived by many as some of the most difficult commandments to observe, the communal ethic of not speaking ill of another person, and so much more so of not relating information which may somehow defame others, runs deep in religious education and practice.<sup>4</sup> Unfortunately, this seemingly admirable educational success may actually allow abuse to persist. Secrecy enables physical, sexual, and emotional abuse to continue, and even empowers the perpetrators.

<sup>2</sup> These prohibitions emerge from a number of biblical sources, including “you shall not go about as a talebearer (*rakhlil*) among your people” (Lev. 19:16), “Thou shalt not bear a false report” (Ex. 23:1), as well as the commandment to take heed concerning the *tsara’at* affliction and to remember that which God did to Miriam (Deut. 24:8-9), and the well-known verse “Who is the man who desires life, who loves days to see goodness? Guard your tongue from evil and your lips from speaking deceitfully” (Ps. 34:13-14). The Talmud also emphasizes the severity of this sin, stating that one who speaks *leshon ha-ra* will not merit the Divine presence (*Sota* 42a), and that “Anyone who speaks slander, and anyone who accepts and believes the slander he hears, and anyone who testifies falsely about another, it is fitting to throw him to the dogs” (*Pesahim* 118a).

<sup>3</sup> Although the precise definition of these categories is beyond the scope of this article, it is worth noting that the Rambam (*Hilkhot De’ot* 7:1-2) appears to identify four separate categories. He writes: “A person who collects gossip about a colleague violates a prohibition as it states: ‘Do not go around gossiping among your people’ (Lev. 19:16) ... Who is a gossip? One who collects information and [then] goes from person to person, saying: ‘This is what so and so said,’ ‘This is what I heard about so and so.’ Even if the statements are true, they bring about the destruction of the world. There is a much more serious sin than [gossip], which is also included in this prohibition: *leshon ha-ra*, i.e., relating deprecating facts about another person, even if they are true. One who says false [deprecating facts about another] is referred to as *motsi shem ra* (defamation of character). Rather, one who speaks *leshon ha-ra* is someone who sits and relates: ‘This is what so and so has done,’ ‘His parents were such and such,’ ‘This is what I have heard about him,’ telling uncomplimentary things. Concerning this [transgression], the verse states: “May God cut off all guileful lips, the tongues which speak proud things...” (Ps. 12:14).” According to the Rambam, there are four categories: one who relate to people what has been said about them (*rekhlut*), one who speaks disparagingly about another, even if he speaks the truth (*leshon ha-ra*), slander (*motsi shem ra*), and being a habitual gossip (*ba’al leshon ha-ra*).

<sup>4</sup> Although the *Tur* and *Shulhan Arukh* do not dedicate even a single chapter to this issue, the biblical prohibitions mentioned above, and undoubtedly the works of R. Israel Meir Kagan (1838-1933), *Hafets Haim* (pub. 1873) and *Shemirat Ha-Leshon* (pub. 1876), which focused on these prohibitions, had a deep and lasting impact. Interestingly, Prof. Benjamin Brown (“From Principles to Rules and from Musar to Halakhah: The Hafets Haim’s Rulings on Libel and Gossip,” *Dine Israel* 25, 2008, 171-256) argues that the Hafets Haim transformed what was essentially an ethical norm or a halakhic imperative, or as he describes it, “the halakhization of *musar*.” While this issue is far beyond the scope of this article, the Hafets Haim undoubtedly expanded the scope and deepened the severity, and awareness of the laws of *leshon ha-ra*.

Therefore, an individual's hesitance, and a community's unwillingness to discuss cases of abuse not only hinders the prevention of such behavior, but even creates an environment in which offenders fearlessly target their prey.

To what extent is the concern for *leshon ha-ra* and slander an obstacle in the prevention of abuse?

A number of Rishonim write that one may speak *leshon ha-ra* in order to prevent potential damage or injury. For example, the *Sefer Ha-Hinukh* writes:

We were commanded to refrain from gossip, as it says "you shall not go about as a talebearer," and the matter is that if we hear a person speak poorly of his friend we should not go to him and tell him that '*peloni* said such and such,' *unless our intention is to remove the threat of damage and resolve a conflict.*<sup>5</sup>

Similarly, Rabbenu Yona writes:

Know that incidents between man and his neighbor, such as those involving theft, robbery, damage, and the causing of pain, shaming and wrongdoing with words, may be revealed to others. Even a solitary observer should relate what he has seen, so as to assist him who has been wronged and to be jealous for the truth.<sup>6</sup>

Rambam also appears to accept this principle. He writes:

Whenever a person can save another person's life, but he fails to do so, he transgresses a negative commandment, as it states: "Thou shall not stand idly by the blood of thy neighbor" (Lev.19:16). Similarly, this commandment applies when a person sees a colleague drowning at sea or being attacked by robbers or a wild animal, and he can save him himself or can hire others to save him. *Similarly, it applies when he hears gentiles or informants conspiring to harm a colleague or planning a snare for him, and he does not inform him and notify him of the danger.*<sup>7</sup>

These Rishonim clearly believe that the prohibition of *leshon ha-ra* is set aside in order to prevent damage and harm to another.

Interestingly, some even note that the juxtaposition of the two parts of the verse may indicate this principle as well. The verse says, "Thou shalt

<sup>5</sup> *Sefer Ha-Hinukh* 236.

<sup>6</sup> *Shaarei Teshuva*, 3:221.

<sup>7</sup> *Hilkhot Rotse'ah U-Shemirat Nefesh* 1:14.



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not go about as a talebearer among thy people; neither shalt thou stand idly by the blood of thy neighbor: I am the Lord” (Lev. 19:16). While the Rambam appears to explain that the conclusion of the verse comes to emphasize the severity of *leshon ha-ra*,<sup>8</sup> some commentators suggest that the second half of the verse qualifies the first half. For example, R. Hezekiah b. Manoah (13<sup>th</sup> century, France), known as the Hizkuni, explains that “[the verse says] ‘and you shall not go about as a talebearer’, but if you hear a conspiracy to kill your friend, ‘neither shall thou stand idly’ rather you should tell him of the conspiracy.” Similarly, R. Chaim ibn Attar (1696 – 1743), in his commentary to the Torah, Or Ha-Haim, writes:

Neither shall thou stand – the commandment not to gossip is on the condition that he will not stand idly by the blood of you neighbor, so if he saw one group that wished to murder he must tell the person in order to save his liked, and he should not say ‘this is gossip,’ and if he does not tell, he violates that commandment of “neither shalt thou stand idly” ...

This sentiment is echoed by R. Naftali Tzvi Yehuda Berlin, the Netsiv, as well.<sup>9</sup> He writes, “Included in the juxtaposition of these prohibitions is that even that we are warned ‘not to go about as a talebearer,’ still, ‘do not stand idly by the blood of your neighbor’ – in other words, if he knows that a person wishes to ruin the life of another, he is obligated to inform him and it is prohibited to ‘stand by idly on the blood of your neighbor.’”

R. Yisrael Isser Ziv Eisenstein (1827-1889), in his *Pithei Teshuva*,<sup>10</sup> relates to the dangers of being overly strict regarding *leshon ha-ra*. He writes:

I want to note here that while all the books of *musar* are greatly concerned about the sin of *leshon ha-ra*, I am greatly concerned about the opposite problem. *I want to protest about the even greater and more common sin of refraining from speaking negatively when it is necessary to save someone from being harmed.* For example, if you saw a person waiting in ambush to kill someone or breaking into someone’s house or store at night. Is it conceivable that you would refrain from notifying the intended victim to protect himself from the assailant - because of the

<sup>8</sup> *Hilkhot De’ot* 7:1. “[Gossiping] is a severe sin and can cause the death of many Jews, therefore, [the warning]: “Do not stand still over your neighbor’s blood” is placed next to it in the Torah [*ibid.*].”

<sup>9</sup> *Ha’amek Davar*, Lev. 19:16.

<sup>10</sup> *Pithei Teshuva*, *Orach Haim* 156. This commentary was not authored by R. Avraham Tzvi Hirsch Eisenstadt (1813-1868), who wrote the *Pithei Teshuva* on the other three parts of the *Shulchan Arukh*.

prohibition of speaking *leshon ha-ra*? By not saying anything you commit the unbearable sin of transgressing the prohibition of “Thou shalt not go about as a talebearer among thy people; neither shalt thou stand idly by the blood of thy neighbor: I am the Lord” (Lev. 19:16). By not speaking up, you violate the mitsva of returning that which is lost to its owner (Deut. 22:2) ... The general principle is that these are matters which depend upon the speaker’s motivation. If the informant’s intent in relating to these matters is entirely to cause harm, that is *leshon ha-ra*. However if his intent is to bring about benefit to the other person and to save him and to protect him – then it is a great mitsva... Unfortunately, I have seen many times where someone witnesses another person trying to cause harm to someone – and he suppresses the information and says, “Why should I get involved in a matter which isn’t my business... However one needs to be very careful about these and similar matters. Our Sages have said – when the permissibility depends on motivation - it says, “And you should be afraid of your God.

In this very powerful passage, R. Isserlin argues that one should always be concerned about the impact of *not* telling or relating the *leshon ha-ra*.<sup>11</sup>

In the late nineteenth century, R. Israel Meir Kagan (1838-1933) published two books on the topic of *leshon ha-ra*, *Hafets Haim* (pub. 1873) and *Shemirat Ha-Lashon* (pub. 1876). While many note his overall stringency regarding the laws of *leshon ha-ra*, he explicitly permits

<sup>11</sup> This sentiment is also expressed by R. Moshe Sternbuch (b. 1926). In a responsum (*Teshuvot Ve-Hanhagot* 1:558) simply titled “Sometimes it is Permitted to Speak *Leshon Ha-ra*,” he writes:

We have merited [to have] the wonderful *sefer* of the Hafetz Haim z”l on the laws of *leshon ha-ra*... and within the book *Hafets Haim* it appears that at times there is no prohibition to speak *leshon ha-ra*, rather there is a mitzvah to speak [*leshon ha-ra*], such as when one misleads his neighbor in business transactions, or one who borrowed money but did not repay, or regarding marriage arrangements (*shiddukhim*) when a match which is not proper is offered and may lead to harm, and he refrains from telling him as he does not wish to speak poorly or to cause damage, he violates “thou shalt not stand idly by the blood of thy neighbor” ... and it turns out that he is using the commandments of our Lord, blessed be He, in order to injure his friend when he was never commanded to do so ... as well as the commandment of “and you shall love thy neighbor as thyself”... and I have warned about this many times, and therefore one should be careful to learn the laws of *leshon ha-ra* well and to know when it is prohibited and when it is permitted as sometimes there is an obligation to tell, under certain conditions, as the Hafetz Haim himself explained.

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discussing another person's negative behavior as long as seven conditions are met.<sup>12</sup> He enumerates these seven rules:

- 1) One must see the act oneself and not merely hear it from others, unless one clarified afterwards that it was true.<sup>13</sup>
- 2) One must be very careful to not immediately decide that the matter was theft, robbery or damage and suchlike, but carefully examine the matter to see whether it comes under these categories.<sup>14</sup>
- 3) One must first gently rebuke the wrongdoer as this might help and make him change his ways. If he does not listen, one can then tell the public his wrongdoing against his fellow.<sup>15</sup>
- 4) One may not exaggerate the wrongdoing.
- 5) One's intent must be for benefit ... and not to enjoy disparaging the person or because of prior hatred.<sup>16</sup>
- 6) If one can bring about the benefit somehow without speaking *leshon ha-ra* about the person, one may not speak about him.<sup>17</sup>
- 7) One may not cause more damage than halakha demands to the person through one's story than would have been caused if one testified against him in *bet din*.<sup>18</sup>

<sup>12</sup> Hafets Haim, *Hilkhos Leshon Ha-ra*, 10:2.

<sup>13</sup> It is extremely uncommon to witness abuse, especially sexual abuse. Usually a person notices or learns of warning signs which raise suspicions, which must be reported. Attempting to clarify, investigate or seek further proof often hinder a proper investigation, and delays intervening and saving a victim. The Hafets Haim himself explains elsewhere (*Hilkhos Rekhilus* 9, *Be'er Mayim Haim* 9) that even if he did not personally witness the crime, he may relate what he has heard, as long as he explicitly states that he is telling what he heard, and not what he saw.

<sup>14</sup> See above. Furthermore, only professionals should investigate allegations of abuse. Those who are not properly trained are often unable to determine whether or not abuse has occurred, and their well meaning actions may interfere with a proper investigation.

<sup>15</sup> The Hafets Haim (ibid. 7) asserts that there is no need to rebuke the perpetrator if he will clearly not accept the rebuke. Painful experience and extensive research have demonstrated that professional intervention is a necessary prerequisite for preventing repeat offenses, and therefore even if an offender acknowledges his actions, without professional intervention sexual abusers are likely to continue their behavior of abuse, and therefore "gently rebuking the wrongdoer" is utterly ineffective.

<sup>16</sup> In this context we should note that questioning motivations often silences victims. Furthermore, our primary responsibility is to protect the victim, and therefore motivation should not be a concern when initially responding to reports of abuse.

<sup>17</sup> As mentioned above, there is generally no way to ensure to end abuse without professional intervention.

<sup>18</sup> The Hafets Haim (ibid. *Be'er Mayim Haim* 12) emphasizes that while this rule may apply to preventing financial loss, the Rema (*Hoshen Mishpat* 388:8) and Shakh (ibid. 45, citing the Maharam of Rothenberg) clearly rule that this does not apply in cases of physical abuse. This would obviously apply to sexual and even emotional abuse as well.

Although these conditions require further study and analysis,<sup>19</sup> they should not prevent one from relating or even informing on one who commits sexual abuse.

The Hafets Haim himself explicitly relates to a number of cases in which he asserts that one may relate a person's wrongdoing in order to bring a positive result, *le-to'elet*. For example, regarding information which may help a person who has been injured or has sustained financial damage, he writes:

If someone saw someone harming a person by stealing from him or damaging his property, whether the robbed or harmed person knows it or not, or that he shamed him or distressed him or embarrassed him. If one clearly knows that he did not return the stolen item and did not pay him his damage and did not ask forgiveness for his wrongdoing, even one saw this oneself, one may relate the incident to people in order to assist the injured party and to disparage evil deeds before people.

Similarly, regarding future damage or abuse, he writes:

Another case where *rekhilut* does not apply is if one heard Reuven say: "If I meet Shimon in so and so place I will hit him or insult him," or if one heard that Reuven wants to cause him monetary harm. If Reuven is known to have done to do such things many times to other people, or if one sees according to circumstance that Reuven is not exaggerating and will certainly carry out his threat, *one must reveal the matter to Shimon so that he can perhaps avoid the damage or embarrassment*.

The Hafets Haim clearly rules that in order to assist an injured party, and certainly to prevent future damages or injury, one must reveal whatever information is needed.

Halakhic authorities, in many situations and contexts, permit revealing private information in order to prevent damage or injury. For example, R. Ovadia Yosef<sup>20</sup> permits a doctor to inform the Bureau of Motor Vehicles that a person, for medical reasons, may endanger other drivers. Posekim also discuss revealing information about a potential marriage

<sup>19</sup> See, for example, Yosef Zvi Rimon, "*Leshon Ha-ra Le-To'elet*" *Meisharim* 6 (5772), and Daniel Feldman, *False Facts and True Rumors: Leshon Ha-ra in Contemporary Culture* (Maggid Books, 2015), Section Two.

<sup>20</sup> *Yehave Da'at* 4:50. R. Yitzchak Yaakov Weiss (*Minhat Yitsbak* 8:148) also permits informing the authorities of a reckless driver.

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partner.<sup>21</sup> Furthermore, Rabbinic authorities discuss whether one may reveal private information about others in the context of therapy,<sup>22</sup> or when speaking with one's spouse,<sup>23</sup> family members, or close friends.<sup>24</sup> Although these questions are beyond the scope of this article, there is no doubt that one, especially a victim, may relate something as severe as sexual, physical, or emotional abuse, as this is considered to be *le-to'elet*, for a host of reasons.

Regarding sexual abuse, experience has taught us that perpetrators are likely to repeat their behavior, and there is most often no other means of prevention aside from the intervention of social services and/or law enforcement authorities. Therefore, since the purpose of relating information relating to sexual abuse is constructive, there is absolutely no prohibition of *leshon ha-ra*. Both survivors and those who witnessed, heard about or suspect abuse must speak out in order to protect themselves, and others, from future abuse.

## MOSER – INFORMING ON JEWS TO NON-JEWISH AUTHORITIES

A times, it may be proper, of if not legally obligatory, to report cases of abuse to the authorities. Aside from the broader concern of speaking negatively about other Jews, one of the most often cited reasons for not informing on sexual offenders is the prohibition of “*moser*” (reporting or turning over a fellow Jew to secular authorities). As we shall see, the Talmud prohibits informing on a Jew to non-Jews or to secular authorities. This prohibition is deeply rooted in Jewish law, and even more so in religious communal consciousness. Is reporting those who commit sexual,

<sup>21</sup> Many *teshuvot* have been written on this topic. For a few examples, see *Iggerot Moshe*, EH 3:27, 4:73:2 and OH 5:118, *Tsits Eliezer* 16:4, *Shevet Ha-Levi* 4:162 and 6:205.

<sup>22</sup> See *Yoma* 75a, which based on the verse from Proverbs (12:25) advises, “one who finds a worry in his heart should discuss the matter with others.” See, for example, R. Nachum Rabinowitz, *Si'ah Nahum* 91, and R. Yitzchak Zilberstein, *Assia* XI nos. 2-3, 26-32.

<sup>23</sup> While the Hafets Haim (*Hilkhot Leshon Ha-Ra* 8:10; see also *Teshuvot Ve-Hanhagot* 4:312) warn that a husband should not relate “all which happened to him with *ploni* and *ploni* in the beit midrash or in the market,” other Aharonim are more lenient. See, for example, R. Mordekhai Gross, *Om Ani Homa* 2:87, who relates that R. Shlomo Zalman Auerbach and the Hazon Ish ruled leniently. See also R. Yuval Cherlow, *Bein Ish Le-Ishto*, *Tehumin* 27 (2007), 168-179.

<sup>24</sup> See Cherlow, *ibid.* See also R. Yuval Cherlow, *Reshut Hadibur*, (Maggid, 2016), 162-163.

physical or emotional abuse a violation of the Talmudic prohibition of *moser*?

Generally, Jewish law does not condone preventative punishment. A criminal must be forewarned of the severity and consequences of his crime and *beit din* must be presented with sufficient proof before they will consider implementing any form of punishment. There are, however, a number of exceptions. For example, that Torah permits a person to use lethal means to prevent a *rodef* (pursuer) from killing another person.<sup>25</sup> The *beraita* enumerates four other cases in which the general standards of punishment are suspended, and a *beit din* may kill a person in order that the Jewish people should “listen and fear.”<sup>26</sup> These include a *mesit* (one who incites others to worship idolatry),<sup>27</sup> the *zaken mamre* (rebellious elder),<sup>28</sup> *eidim zomemim* (collusive witnesses),<sup>29</sup> and a *ben sorer u-moreh* (“rebellious son”).<sup>30</sup> At times, a king, or even a *beit din*, may mete out a disproportionate punishment in order to correct a societal problem.<sup>31</sup>

Regarding informing on a Jew to the non-Jewish authorities, the Talmud<sup>32</sup> relates:

There was a certain man who desired to show another individual's straw to the gentile authorities, who would seize it. He came before Rav, who said to him: Do not show it and do not show it, i.e., you are absolutely prohibited from showing it. The man said to him: I will show it and I will show it, i.e., I will certainly show it. *Rav Kahana was sitting before Rav, and, hearing the man's disrespectful response, he dislodged the man's neck from him, i.e., he broke his neck and killed him.* Seeing Rav Kahana's action, Rav read the following verse about him: “Your sons have fainted, they lie at the head of all the streets, as an antelope in a net” (Isaiah 51:20). Just as with regard to this antelope, once it falls into the net, the hunter does not have mercy upon it, so too with regard to the money of a Jew, once it falls into the hand of gentiles, they do not have mercy upon him.

The passage not only stresses the severity of informing, but also implies that one who intends on revealing another Jew's property to secular

<sup>25</sup> *Sanhedrin* 74b.

<sup>26</sup> *Sanhedrin* 89a.

<sup>27</sup> Deut. 13:11-12.

<sup>28</sup> Ibid. 17:12-13.

<sup>29</sup> Ibid. 19:17-20.

<sup>30</sup> Ibid. 21:20-21.

<sup>31</sup> See Rambam, *Hilkhos Rotse'ah* 2:2-4.

<sup>32</sup> *Bava Kama* 117a.

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authorities may even be killed! That said, we should also note that the gemara appears to be aware of the consequences of Rav Kahana's actions, and therefore Rav told R. Kahana to "get up and ascend to Erets Yisrael to study there under Rabbi Yohanan, and accept upon yourself that you will not raise any difficulties to the statements of R. Yohanan for seven years."

The Rishonim disagree as to why one may take a person's life simply because he intends to cause another person financial loss. Rosh<sup>33</sup> explains:

One who runs to inform so that a neighbor's money is given to a bandit is compared by the rabbis to one who is running after a person to kill him ... once [the money of a Jew] falls into the hands of a non-Jew he will not have mercy on him, and he will take a little today, and tomorrow he will take all of it, and eventually he will offer his life and they will [threaten] to kill him until he confesses, as he may have more money, and he is [therefore] considered to be a *rodef* and one may save the life [of the Jew] with the life [of the pursuer] ... And therefore it is customary in all Diaspora communities to seek a method of punishment for an established informer who has handed over a Jewish person or his money to bandits three times as a protective measure (*migdar milta*).<sup>34</sup>

Similarly, Rambam<sup>35</sup> rules that an informant is viewed like a pursuer:

It is permissible to kill a *moser* in any country, even in the present age, when the court no longer metes out capital punishment. It is permitted to kill him before he informs. When he says: "I will inform on so and so and endanger his person and/or his property" - even property of minimal value - he has made it permissible for others to kill him. He should be warned and told: "Do not inform." If he says brazenly, "No. I will inform about him," it is a mitzvah to kill him, and whoever kills him receives merit. If the *moser* carried out his threat and informed on a fellow Jew, it appears to me that it is forbidden to kill him, unless he has made it an established pattern to inform. In such an instance, he should be killed, lest he inform on others.

Furthermore, the Rambam relates:

In the cities of the west, the common practice is to kill the *moserim* who have made an established pattern of informing with regard to people's

<sup>33</sup> Rosh, Responsa 17:1. See also Rashba, Responsa 1:181.

<sup>34</sup> *Hilkhot Rotse'ah U-Shemirat Nefesh*, 1:14.

<sup>35</sup> Rambam, *Hilkhot Hovel U-Mazik* 8:10-11.



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property, and to hand the *moserim* over to gentiles to punish them, beat them and imprison them, according to their wicked ways. Similarly, one who causes difficulty and irritation to the community may be handed over to the gentiles to be beaten, imprisoned and fined. It is, however, forbidden to hand over to gentile a person for causing irritation to one individual.

Rambam clearly believes that the *moser*, and all who cause “difficulty and irritation” to the community must be stopped, at all costs.<sup>36</sup>

The *Shulhan Arukh*<sup>37</sup> cites this law and emphasizes the prohibition of informing on a fellow Jew regarding his money or physical security, and discusses the informer’s personal liability, as well as the measure which a community may adopt in order to stop the informer. A full treatment of the laws of informing is beyond the scope, and focus of this article.

Contemporary authorities disagree as to whether this prohibition should be applicable nowadays, in countries with fair judicial systems which are not motivated by anti-Semitism. Broadly speaking, while some authorities maintain that informing is still equally prohibited, others insist that the entire prohibition is no longer relevant, and some distinguish between different scenarios and circumstances.<sup>38</sup>

### DOES THE PROHIBITION OF MOSER PREVENT REPORTING SEXUAL ABUSE?

The prohibition application of informing, if there is one nowadays, generally applies to those who violate the law in a manner which does not endanger others, including cases of income tax violations, zoning violators, and other forms of cheating. However, as we shall demonstrate,

<sup>36</sup> Interesting, Mordekhai ben Hillel Ha-Kohen (c. 1250–1298) offers a different explanation (*Bava Kama* 117). He writes:

Even though as a general rule we do not lower [into a pit] those who cause damage, or thieves, [an informer] is different since he causes benefit to the non-Jew and a loss to the Jew, one who accustoms himself to hand [Jewish] money over to non-Jews is repulsive and he is worse than those who cause damage to peoples’ property.

The Mordekhai apparently believes that this behavior is simply so offensive that it is worthy of extreme punishment.

<sup>37</sup> *Shulhan Arukh, Hoshen Mishpat* 388.

<sup>38</sup> Michael J. Broyde, “Informing on Others to a Just Government: A Jewish Law View,” *The Journal of Halacha and Contemporary Society* 41:5 (2002), 5-49, summarizes the views of 20<sup>th</sup> century halakhic authorities.

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there is absolutely no prohibition, and one is obligated to report those who pose a physical, or even emotional threat, to individuals or to the broader community. This includes, of course, those likely to commit murder, armed robbers, and sexual predators, as those who commit medical malpractice, and even those who may drive in a manner which endangers innocent bystanders.

There are a number of reasons why one should not be concerned with the prohibition of “informing” would not apply in these cases.

First, a number of authorities insist that there is no prohibition of informing to a “just” government, which does not single out or oppress Jews. R. Yechiel Michel Epstein (1829-1908), for example, in his *Arukh Ha-Shulhan*,<sup>39</sup> writes:

As is widely known, in times of old in places far away, no person had any assurance in the safety of his life or money because of the pirates and bandits, even if they took upon themselves the form of government. It is known that this is true nowadays in some places in Africa where the government itself is grounded in theft and robbery. One should remind people of the kingdoms in Europe and particularly our ruler the Czar and his predecessors, and the kings of England, who spread their influence over many lands in order that people should have confidence in the security of their body and money. The wealthy do not have to hide themselves so that others will not loot or kill them. *On all of this [the presence of looting and killing] hinges the rules of informing [moser] and slandering [malshin] in the talmud and later authorities, as I will explain infra: These rules apply only to one who informs on another to bandits and so endangers that person's money and life, as these bandits chase after the person's body and money, and thus one may use deadly force to save oneself*

Although some commentators questioned R. Epstein's sincerity, as he includes the Czar among those who offer safety and security, he still appears to maintain that the basic principles of *moser* are not applicable in our times.

A number of contemporary authorities accept this reasoning. For example, R. Eliezer Yehuda Waldenberg (1916-2006),<sup>40</sup> former head of the Rabbinical Court in Jerusalem, writes:

Even in the understanding of the secular court system it appears that there is a difference between primitive and enlightened governments as is

<sup>39</sup> *Arukh Ha-Shulhan*, *Hoshen Mishpat*, 388:7.

<sup>40</sup> *Tsits Eliezer*, 19:52.

noted by the *Arukh Ha-Shulhan* in *Hoshen Mishpat* 388:7 where it states that “every issue related to informing found in the Talmud and posekim deals with those far away places where no one was secure in his money or body because of the bandits and pirates, even those who had authority, as we know nowadays in places like Africa” such is not the case in Europe, as the *Arukh Ha-Shulhan* notes ... *I write this as a notation of general importance in the matter of the laws of informing.*

R. Gedalia Schwartz, former Rabbinic head (Av Beit Din) of the Beit Din of America, explicitly invokes this reasoning, regarding “a child who is in imminent danger of further bodily harm or of serious mental trauma” and rules that “the proper authorities must be notified in order to protect the victim.”<sup>41</sup>

Beyond the general question whether the prohibition of *moser* applies in modern, Western countries lies the primary and central reason: *the prohibition of moser simply does not apply when informing on a person who is causing harm or injury to others.*<sup>42</sup> As mentioned before, the Torah demands that we are not to “stand idly by while your brother’s blood is at stake” (Lev.19:16).” Although the Shulhan Arukh writes that *mesira* would still apply when an individual, and not a community, is injured, the Rema (ibid. 388:9) writes that this only applies to verbal abuse. R. Yehoshua Falk (Sema ibid. 30) emphasizes that this only applies if the offender cause “discomfort (*tsa’ar*), but if he caused a financial loss, and so much more so if he afflicted him physically (*be-makot ve-onshei ha-guf*) it is permitted.” The Shakh<sup>43</sup> adds that one must report, and even testify in secular court against one who is “*ragil lehakot*” (a repeat physical abuser). Furthermore, it is well established that one who molests an individual is capable, and even likely to abuse others as well, and therefore the relating to incidents as specific and individual, and assuming that rebuking the perpetrator will correct his behavior, is most often not applicable.

Furthermore, a sexual molester may often be regarded as a pursuer (*rodef*). The Talmud teaches that “one who pursues another to kill him” must be stopped, if necessary, by lethal force.<sup>44</sup> This applies to rape as well.<sup>45</sup> The general prohibition of informing the authorities does not stand in the way of the obligation to prevent a person from pursuing another in order to commit rape, or even other forms of sexual or physical abuse.

<sup>41</sup> Schwartz, ibid.

<sup>42</sup> *Shulhan Arukh, Hoshen Mishpat* 399:12. See, for example, *Iggerot Moshe*, HM 4:8, and R. Dovid Cohen, ibid.

<sup>43</sup> Ibid. 399:45.

<sup>44</sup> *Sanhedrin* 73a. See also Rambam, *Hilkhot Rotze’ah U-Shmirat Nefesh*, 1:8.

<sup>45</sup> See Rambam, ibid. 1:10.

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In addition to the above reasons, some add that the prohibition of *moser* does not apply when informing is obligated by the law,<sup>46</sup> even if the punishment administered by the secular authorities is more severe than the punishment prescribed by the Torah,<sup>47</sup> especially when the person will not be executed.<sup>48</sup>

There is one, final reason worth noting. Some fear that taking action to prevent sexual abuse may cause a *hillul Hashem*, a desecration of God's name. Regardless of whether or not this should, at times, be a consideration, it should be understood that in this context, communal silence regarding physical and sexual abuse is itself a grave desecration of God's name, and brings shame upon the entire community. In addition to the obvious injustice caused to the survivors, and to others who may fall victim to abuse due to communal silence, this phenomenon causes many to lose trust in the community, its leadership, and ultimately in God.<sup>49</sup> Modern society understands that there are sexual offenders in all societies, and a healthy and morally upright community takes pride in revealing sexual abuse and protecting its members from further injury.

## RECENT RABBINIC RESPONSES TO QUESTIONS REGARDING SEXUAL ABUSE

In recent years, halakhic authorities, as well as rabbinic organizations, have publicly supported reporting physical abusers and sexual offenders to the secular authorities. For example, the journal *Yeshurun*<sup>50</sup> published halakhic responsa of R. Shalom Yosef Elyashiv,<sup>51</sup> R. Moshe Halberstam, R. Zalman

<sup>46</sup> The Talmud (*Bava Metsia* 83b – 84a) relates that R. Elazar the son of R. Shimon arrested thieves, who were presumably executed by the authorities. Ritva (cited in *Shita Mekubetset* 83b s.v. *amar lahem*) explains since he was acting in accordance with the decree, and law of the king, it was permitted to arrest, and even punish those who violated the law.

<sup>47</sup> See Rashba, Responsa 5:238, and Rosh, Responsa 21:8-9. See R. Herschel Schachter, “*Dina De’malchusa Dina*: Secular Law As a Religious Obligation,” *Journal of Halacha & Contemporary Society* 1:103 (1981), 118.

<sup>48</sup> *Panim Me’irot* 2:155.

<sup>49</sup> See R. Dovid Cohen, *ibid.*

<sup>50</sup> *Yeshurun* 15 (2005).

<sup>51</sup> R. Elyashiv writes, “Thus, all this [i.e. the argument above] only permits informing the authorities in a situation in which it is clear that [the person in question] did in fact do this deed (*yado ma’al*) and in this case there is in fact an aspect of *tikun olam* (fixing or maintaining the world). However, with regard to the question of whether to permit [reporting] where there is not even *raglayim le-davar* (lit. “legs to the matters,” i.e. reasonable cause to suspect wrongdoing) but merely some vague

Nechemia Goldberg, R. Asher Zelig Weiss, and R. Yehuda Silman.<sup>52</sup> Similarly, Rabbi Dr. Abraham S. Abraham, in his *Nishmat Avraham*,<sup>53</sup> relates that he discussed with leading Israeli halakhic authorities whether he must report a case of severe child abuse to the authorities. He reports the R. Shlomo Zalman Auerbach, R. Shalom Yosef Elyashiv, and R. Eliezer Waldenberg<sup>54</sup> agreed that the doctor must report this case to the authorities. R. Elyashiv added that even if the child will be removed from his family and placed with a non-Jewish family, he must still report the abuse to the authorities. Other prominent Modern Orthodox American rabbinic authorities, including R. Herschel Schachter<sup>55</sup> and R. Gedalia Dov Schwartz<sup>56</sup> also demand that those suspected of physical or sexual abuse be reported to the police.

In addition to the rulings of specific halakhic authorities, the Rabbinical Council of America (RCA) published a statement which asserts that “any individual with firsthand knowledge or reasonable basis to suspect child abuse has a religious obligation to promptly notify the secular law enforcement of that information.”<sup>57</sup> Although the Agudas Yisrael also

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suspicion (*dimyon*, lit. imagining) , not only is there no *tikun olam* but rather there is destruction of the world in this case as it is possible that because of some student’s grudge against a teacher, a student may [falsely] accuse the teacher or because of some baseless suspicion (*dimyon shav*) a person could be placed in a situation in which he is better off dead, though he is innocent of wrongdoing and I see no place to permit this.”

<sup>52</sup> All five Sages ruled that fundamentally one may report to the authorities. Some (R. Elyashiv and R. Weiss) expressed concern that one should not report unless there is reasonable suspicion, in order to avoid falsely accusing someone. Others (R. Goldberg and R. Silman) raised the possibility of first consulting with a halakhic authority in order to determine that there is sufficient reason to suspect abuse.

<sup>53</sup> *Nishmat Avraham*, v.4, *Hoshen Mishpat* 388:1.

<sup>54</sup> *Tsits Eliezer* *ibid.* R. Waldenberg rules that a doctor who observes that a child has been beaten, as well as child care professionals who are aware that a child has been sexually abused must report these cases to the authorities.

<sup>55</sup> See [http://www.torahweb.org/audio/rsch\\_120306.html](http://www.torahweb.org/audio/rsch_120306.html) and [http://www.torahweb.org/torah/special/2007/rsch\\_mesirah.html](http://www.torahweb.org/torah/special/2007/rsch_mesirah.html).

<sup>56</sup> *Ten Da’at* 2:3 (Spring 1988). He writes, “However, if in the teacher’s judgment the child is in imminent danger of further bodily harm or of serious mental trauma, then, in fulfillment of the halakha “Do not stand by the blood of your neighbor” (*Vayikra* 19:16), the proper authorities must be notified in order to protect the victim. Under these circumstances of life-saving measures of the fear of *mesira* does not apply just as it would not apply when calling to police to restrain any other violent act, regardless of the person. The above halakha, as well as the obligation of *pikuah nefesh*, demand such immediate action.

<sup>57</sup> <http://www.rabbis.org/news/article.cfm?id=105491>. They conclude: “The Rabbinical Council of America maintains that reporting acts or suspicions of child abuse is not *mesira* (see footnotes below) and commits itself and its members to reporting acts or suspicions of child abuse as required by civil law.”

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ruled that authorities may be contacted in order to prevent further abuse, they apparently demand that a halakhic authority be consulted in order to determine that there are indeed sufficient grounds to warrant turning to the authorities.<sup>58</sup> Many have criticized this position, including a group of prominent rabbis, many from the “haredi” community, who in response to the position of the Agudas Yisrael proclaimed:

The Torah’s statement in Leviticus 19:16, ‘Do not stand by while your neighbor’s blood is shed,’ obligates every member of the community to do all in one’s power to prevent harm to others. In conclusion, every individual with firsthand knowledge or reasonable cause for suspicion of child abuse has a Torah obligation to promptly notify the proper civil authorities.<sup>59</sup>

More recently, over 300 Orthodox rabbis published an additional statement which

condemn[s] attempts to ignore allegations of child sexual abuse. These efforts are harmful, contrary to Jewish law, and immoral. The reporting of reasonable suspicions of all forms of child abuse and neglect directly and promptly to the civil authorities is a requirement of Jewish law. There is no need for people acting responsibly to seek rabbinic approval prior to reporting.<sup>60</sup>

Indeed, the overwhelming consensus of Rabbinic opinions rule that when necessary, one must not hesitate and one must inform the authorities, in

<sup>58</sup> See Resnicoff, *ibid.*

<sup>59</sup> In 2015, 107 well known Orthodox rabbis signed a “*kol kore*” ([http://issuu.com/jewishpress.com/docs/kol\\_koreh/](http://issuu.com/jewishpress.com/docs/kol_koreh/)) which declares: “We, the undersigned, affirm that any individual with firsthand knowledge or reasonable basis to suspect child abuse has a religious obligation to promptly notify the secular law enforcement of that information. These individuals have the experience, expertise and training to thoroughly and responsibly investigate the matter. Furthermore, those deemed “mandated reporters” under secular law must obey their State’s reporting requirements. Lives can be ruined or ended by unreported child abuse, as we are too often tragically reminded. The Torah’s statement in Leviticus 19:16, “Do not stand by while your neighbor’s blood is shed,” obligates every member of the community to do all in one’s power to prevent harm to others. In conclusion, every individual with firsthand knowledge or reasonable cause for suspicion of child abuse has a Torah obligation to promptly notify the proper civil authorities.” This statement apparently contradicts a statement from the Agudas Yisrael, which insists that one “should present the facts of the case to a rabbi who is expert in halakha and who also has experience in the area of abuse and molestation – someone who is fully sensitive both to the gravity of the halachic considerations and the urgent need to protect children” (<http://www.vosizneias.com/87952/2011/07/22/new-york-agdath-israel-clarifies-its-stand-on-reporting-suspicions-of-child-abuse-to-police/>).

<sup>60</sup> [https://drive.google.com/file/d/0Bz4A\\_l7qN61RX1IWa3p2RUK2TXc/view](https://drive.google.com/file/d/0Bz4A_l7qN61RX1IWa3p2RUK2TXc/view).

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order to prevent further abuse. Furthermore, rabbis are most often not trained or experienced in these matters, and all too often cases of physical and sexual abuse were not reported due to rabbinic intervention. As the rabbinic statement above concludes, “*There is no need for people acting responsibly to seek rabbinic approval prior to reporting.*”

## CONCLUSION

R. Moshe Chaim Luzzatto (1707 – 1746), in the introduction to his *Mesilat Yesharim* (Path of the Upright), writes:

I have written this work not to teach men what they do not know, but to remind them of what they already know and is very evident to them, for you will find in most of my words only things which most people know, and concerning which they entertain no doubts. But to the extent that they are well known and their truths revealed to all, so is forgetfulness in relation to them extremely prevalent.

At times, even the most obvious truths must be repeated, in order to remind a person to take them to heart.

Unfortunately, despite the explicit rulings of great halakhic authorities, a number of rabbinic proclamations, and scholarly halakhic articles, it appears that it is still necessary to offer a lengthy halakhic justification for that which should be obvious: The Torah’s command not to “stand idly by the blood of your neighbor” dictates that the prohibitions of *leshon ha-ra*, and even informing, which are so deeply entrenched in the Jewish consciousness formed over thousands of years of exile, must be set aside in order to stop and prevent further abuse.<sup>61</sup>

<sup>61</sup> Of course, this does not mean that we are careless in risking the livelihood and reputation of good, upstanding people. The collateral damage caused by relating sexual abuse, including the impact on the survivor, his or her family, educational institutions, and more specifically innocent people, should always be weighed. The point of this article, and of the halakhic ruling cited within, is to dispel the apparently deeply held view that relating sexual abuse to one’s family, teachers, therapists, employers, and eventually to secular authorities is prohibited due to the restrictions of *leshon ha-ra* and *mesira*.



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## STANDING IDLY BY: WHEN LEADERS ENABLE SEXUAL ABUSE

“**I**n order to escape accountability for his crimes, the perpetrator does everything in his power to promote forgetting,” writes psychiatrist and researcher Judith Lewis Herman about a sexual abuser. “If secrecy fails, the perpetrator attacks the credibility of his victim. If he cannot silence her absolutely, he tries to make sure no one listens.”<sup>1</sup> But, as we sadly know, the abuser is often not the only one who tries to promote forgetting, who compounds the silence with the sin of willful ignorance or worse. Sexual abusers need complicit partners to get away with their crimes. This happens with greater efficacy and credibility when these partners have leadership roles and are trusted authority figures. Look carefully, and it’s not hard to find them.

### A VIEW FROM TRADITIONAL TEXTS ON COMPLICITY

In two of our most horrific biblical stories of sexual misconduct, a small but significant detail often goes unnoticed. In the story of Judah and Tamar, Judah was assisted in his foul-play at Tamar’s expense by his friend Hirah, a “certain Adullamite.” In the painfully dramatic rape of Tamar at the hand of Amnon, the rapist was assisted by Jonadab, the son of Shimeah, David’s brother. These texts are not similar in the nature, brutality, or consequences of the crimes committed, even if the name Tamar appears in both. Yet pondering both texts beside each other will offer an approach and understanding of the role of sexual enablers, those who know what is happening and do nothing or actively promote wrongdoing. It will help us find a portal into how cultures that support sexual abuse may ultimately be just as guilty as those who commit the crimes. They may be worse. While it

<sup>1</sup> Judith Lewis Herman, *Trauma and Recovery: The Aftermath of Violence - From Domestic Abuse to Political Terror* (New York: Basic Books, 2015), 8.

could be argued that the “act” of one predator is criminal and the knowledge and silence of the culture that protects him or her is not, those who protect abusers often engage in other acts of outright deception to mask the crimes and then often protect other crimes and other predators, resulting in massive system-wide cover-ups that then cause suffering to many more, sometimes thousands.<sup>2</sup> In organizations that hide sexual abuse, the pattern repeats itself so frequently that it can become deeply enmeshed in the culture, and the acceptable, unspoken secret prevents those with a modicum of courage from coming forward.<sup>3</sup> When people who come

<sup>2</sup> The Catholic Church scandals and cover-ups led to more scandal and a thick layering of lies that enabled additional abuse, while protecting both the criminals and protecting those who turned a blind eye. For more on this, see *Betrayal: The Crisis in the Catholic Church* by the investigative staff of “The Boston Globe” (Boston: Back Bay Books, 2003), Jason Berry, *Lead Us Not into Temptation: Catholic Priests and the Sexual Abuse of Children* (New York: Doubleday, 1992), A. W. Richard Sipe, *Sex, Priests and Power: Anatomy of a Crisis* (New York: Routledge, 1995), Michael D’Antonio, *Mortal Sins: Sex, Crime, and the Era of Catholic Scandal* (New York: St. Martin’s Griffin, 2014), Leon J. Podles, *Sacrilege: Sexual Abuse in the Catholic Church* (Cleveland: Crossland Press, 2008). Note that the titles of these books all point to a problem with the church and not a problem with the priest, even though each act of abuse is unconscionable.

<sup>3</sup> A case in point: As of this writing in 2016, a judge has upheld a ruling against Watch Tower Bible and Tract Society of Britain (Jehovah’s Witnesses) in a case involving the abuse of a four-year old girl whom they failed to protect for five years. The senior member of the church who attacked her “repented” and was allowed back into the congregation. The girl’s mother came forward when she was 14, but her allegations were dismissed. Although an independent study in Norway in 2009 concluded that this organization does denounce abuse and its rate of abuse is not higher than in society generally, there is widespread concern that elders only report such cases when forced to by law. The Society has tried to muzzle attempts of others to come forward. In 2012, a Superior Court in California ordered Watch Tower to pay \$21 million in damages when an abuse case of a nine-year old girl was not reported to the authorities. In the wake of these cases, others have come forward. An adult who was allegedly raped by someone senior in the church, currently in prison, decided to sue the Church when elders who took the stand failed to be accountable: “I thought, nobody’s taken responsibility for this. You could have held up your hands and said, ‘I’m sorry, we were in the wrong.’” In Australia in 2013, the Royal Commission to Institutional Responses to Child Sexual Abuse was created to hear claims against the Watch Tower Society and the cases of others. The Society handed over 500 documents which contained 1006 files related to child abuse cases made against members of the Church in Australia since 1950 – not one of which was reported by the Church to secular authorities.

See <https://www.theguardian.com/society/2016/aug/12/jehovahs-witnesses-under-pressure-over-handling-of-sexual-abuse-claims>. See <http://www.abc.net.au/news/2012-11-13/victims-react-to-royal-commission-announcement/4368200>.

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forward are summarily dismissed or vilified, this, too, makes its way into the organizational narrative. Abuse is tolerated here. Whistle blowing is not.

There are a number of additional reasons that such cultures stubbornly aid and abet abusers. Within faith communities, the abuser may be a charismatic individual who is able, through a cult of personality, to bring people to greater commitment. The abuser understands that he or she will be afforded protection because of the “results” produced and then continues the behavior and may even amplify it because there seems to be no visible consequences to their status within the organization. People who come forward to out the abuser are often handed the excuse that the religious ends justify the torrid means, and that *they* are actually an obstruction to outreach in trying to shut out the abuser. This trope can still be heard today in “famous” cases of abusers who were also teachers, preachers, and community leaders. If hundreds or even thousands of people have come to religion as a result of this person’s charisma – and this is an explicit goal of the faith – then the abuser is expediting a desired outcome, even if the means is not explicitly appropriate.

These excuses, in no way, excuse the abuser. Yet often the attention that gets paid to the malfeasance of the one distracts from the immorality of the many, leading to the eventual victimization of many more innocents.<sup>4</sup> Attention must be paid.

Hirah is mentioned in the very first verse of Genesis 38, as if to suggest that by leaving the sheltering influences of his family, Judah was

<sup>4</sup> Elsewhere I have written about the problem of religious leaders who commit sexual crimes and the damage that it does not only to the victim’s body but to the victim’s faith, trust in religion, and belief in humanity. When the predator is a rabbi, the damage to the institution of the rabbinate and religious authority in general is severely compromised. See “Straying the Course: Can Jewish and Secular Leadership Archetypes Rein in Religious Leaders,” in *Tempest in the Temple: Jewish Communities and Child Sex Scandals* (Waltham, MA: Brandeis University Press, 2009), 60-73. There I note that three issues must be at the core of any discussion of Jewish leadership and clergy abuse: “the problem of charisma in religious leaders, the difference between public and private morality and its relationship to the clergy, and the importance of creating Jewish institutional environments that deal comfortably with error” (61). Too often, “Denial, wavering, intentional neglect of wrongdoing, and the penalization of the victim or his or her supporters are often found in Jewish abuse cases” (61). I deal with this more extensively in *Confronting Scandal: How Jews Can Respond when Jews Do Bad Things* (Woodstock, VT: Jewish Lights, 2010). See, in particular, “Rabbis and Clergy Abuse,” (97-105). For more on enabling and how to stop it, see Mark Dratch, “A Community of Co-Enablers: Why are Jews Ignoring Traditional Jewish Law by Protecting the Abuser?” in *Tempest in the Temple*: 105-125 and, in the same volume, Amy Neustein and Michael Leshner, “Justice Interrupted: How Rabbis Can Interfere with the Prosecution of Sex Offenders – And Strategies for How to Stop Them,” 197-229.

opening-up another chapter of his life, one that put him far from the center of his values and at possible moral risk: “At that time, Judah left his brothers and went down to stay with a man of Adullam named Hirah,” (Genesis 38:1).<sup>5</sup> It is only after he left Canaan and went to the territory of his friend that he married, had children and had two sons die. He kept his third son from Tamar for fear of losing yet another. This man was sadly fated to lose many of those he loved, but his friend Hirah stuck by him:

After a long time, Judah’s wife, the daughter of Shua, died. When Judah had recovered from his grief, he went up to Timnah, to the men who were shearing his sheep, and his friend Hirah the Adullamite went with him. When Tamar was told, “Your father-in-law is on his way to Timnah to shear his sheep,” she took off her widow’s clothes, covered herself with a veil to disguise herself, and then sat down at the entrance to Enaim, which is on the road to Timnah. For she saw that, though Shelah had now grown up, she had not been given to him as his wife. When Judah saw her, he thought she was a prostitute, for she had covered her face. Not realizing that she was his daughter-in-law, he went over to her by the roadside and said, “Come now, let me sleep with you.” (Genesis 38: 12-16)

As readers, we know immediately how this sordid tale will play out. Judah’s state of mourning clears after one verse and, again, he left the presence of his immediate family to a sheep-shearing with Hirah and stumbled into sin. Judah gave into an impulse that surfaced to a man in grief, alone and away from home that could be sated at the side of the road. Tamar, wanting both a child and to shame her father-in-law in an exercise of vigilante

<sup>5</sup> Adullam is a city in Judea, northeast of Beit Guvrin today. Joshua captured the city that was part of the tribal inheritance of Judah (Joshua 15:35), which may explain the early alliance between Judah and Hirah as an ongoing association over time. In II Chronicles 11:17, we learn that Rehoboam rebuilt the city and fortified it. It played an important role as a place of refuge for David when he left the king of Gat for a cave of Adullam (I Samuel 22:1 and II Samuel 23:13). Rashi observes that Judah and Hirah’s was a business partnership, perhaps minimizing the companionability of the relationship. Radak follows suit. Nachmanides comments on the verb choice, namely that “Judah went down” as a statement of his descent from greatness, following the Talmudic reading (*Sota* 10b) but does not discuss the Adullamite. The Netsiv is puzzled by Hirah’s appearance and ponders what it adds to the meaning of the text. His solution is to make a messianic reference to a future time when the messiah will be announced via an “important and noble man.” Since Judah is associated with kingship and future leadership, Hirah is compared to or an embodiment of Hiram, a friend of the house of David, in midrashic literature [*Genesis Rabba* 85:4]. This midrashic overlay coheres with the future significance of the children born to Judah from Tamar as harbingers of the messiah. This explanation, far from a literal understanding, may demonstrate that traditional rabbinic interpreters had little use for Hirah or interest in the role he played in this specific narrative.

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justice, took objects that could only have been Judah's as collateral. Judah wanted the objects back and sent his friend. Here Hirah is identified only as the Adullamite, as if to suggest that this man was a product of the place, a place far from Judah's moral center:

Meanwhile Judah sent the young goat by his friend the Adullamite in order to get his pledge back from the woman, but he did not find her. He asked the men who lived there, "Where is the prostitute who was beside the road at Enaim?" "There hasn't been any prostitute here," they said. [Genesis 38:19-21]

By asking for the whereabouts of a prostitute, Hirah was putting his own reputation into question but seemed to be nonplussed by the request for this information. Judah, too, must not have experienced great shame at his act if he could so casually have a friend take care of the payment for his dalliance. The two seem to share a friendship that validated their respective sinful doings, or at least Judah's. It is easier to ignore the spiritual cost and consequence of such misdemeanors if a friend stands by in a posture of acceptance and non-judgment.

When we turn to the other Tamar story of the Bible, the stakes were higher, the outcome more horrific, the enabler more nefarious. Tamar's beauty caught her half-brother's attention. The text repeats their relationship with pronouns to identify them as brother and sister even though this information has already been well-established. Clearly the repetition showcases the suggestion of incest that Amnon ignored to his eventual peril.<sup>6</sup> Amnon did not know how to satisfy his frustrated lust until Jonadab

<sup>6</sup> Amnon will be murdered in the same chapter in an honor killing at the hand of Tamar's brother and Amnon's half-brother, Absalom. Although Amnon dismissed Tamar's pleas to do right by her and the royal household, he could not escape a harsh and merciless punishment. Note: Jonadab appears after Amnon's death as a fair-weather friend. He expressed no grief at Amnon's death and discouraged the king from grieving by minimizing the significance of the loss, confirming the reader's sense that Jonadab was a political opportunist of the highest order:

Absalom ordered his men, "Listen! When Amnon is in high spirits from drinking wine and I say to you, 'Strike Amnon down,' then kill him. Don't be afraid. Haven't I given you this order? Be strong and brave." So Absalom's men did to Amnon what Absalom had ordered. Then all the king's sons got up, mounted their mules and fled. While they were on their way, the report came to David: "Absalom has struck down all the king's sons; not one of them is left." The king stood up, tore his clothes and lay down on the ground; and all his attendants stood by with their clothes torn. But Jonadab son of Shimeah, David's brother, said, "My lord should not think that they killed all the princes; only Amnon is dead. This has been Absalom's express intention ever since the day Amnon

devised a rather strange plan. By calling him an adviser, the text suggests the irony of one who mentors another to sin:

In the course of time, Amnon son of David fell in love with Tamar, the beautiful sister of Absalom son of David. Amnon became so obsessed with his sister Tamar that he made himself ill. She was a virgin, and it seemed impossible for him to do anything to her. Now Amnon had an adviser named Jonadab son of Shimeah, David's brother. Jonadab was a very shrewd man. He asked Amnon, "Why do you, the king's son, look so haggard morning after morning? Won't you tell me?" Amnon said to him, "I'm in love with Tamar, my brother Absalom's sister." "Go to bed and pretend to be ill," Jonadab said. "When your father comes to see you, say to him, 'I would like my sister Tamar to come and give me something to eat. Let her prepare the food in my sight so I may watch her and then eat it from her hand.'" (II Samuel 13: 1-5)<sup>7</sup>

Tamar went to the bedside of her half-brother suspecting nothing, not even when Amnon dismissed everyone from his chamber and insisted on eating food that Tamar made and hand-delivered:

Then Amnon said to Tamar, "Bring the food here into my bedroom so I may eat from your hand." And Tamar took the bread she had prepared and brought it to her brother Amnon in his bedroom. But when she took it to him to eat, he grabbed her and said, "Come to bed with me, my sister." "No, my brother!" she said to him. "Don't force me! Such a thing should not be done in Israel! Don't do this wicked thing. What about me? Where could I get rid of my disgrace? And what about you? You would be like one of the wicked fools in Israel. Please speak to the king; he will not keep me from being married to you." But he refused to listen to her, and since he was stronger than she, he raped her. Then Amnon

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raped his sister Tamar. My lord the king should not be concerned about the report that all the king's sons are dead. Only Amnon is dead." (II Samuel 13: 28-33)

<sup>7</sup> Phyllis Tribble observes that Amnon made himself sick on Tamar's account and that Jonadab ironically recommends him feigning illness to provoke his desired outcome. "Jonadab," she writes, "is indeed cunning. Having elicited from Amnon a confession that seeks license, he schemes to gratify the prince. The skills of a counselor he employs to promote illness. He would use the father to overcome the obstacle of the brother and secure the sister. Around Amnon, then, his speeches weave a net of friendship that ensnares Tamar, Absalom, and David," in "Tamar: The Royal Rape of Wisdom," *Texts of Terror: Literary-Feminist Readings of Biblical Narratives* (Philadelphia: Fortress Press, 1984), 41. "A confession that seeks license" speaks to the perfidious role of the enabler.

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hated her with intense hatred. In fact, he hated her more than he had loved her. Amnon said to her, “Get up and get out!” “No!” she said to him. “Sending me away would be a greater wrong than what you have already done to me.” But he refused to listen to her. He called his personal servant and said, “Get this woman out of my sight and bolt the door after her.” (II Samuel 13:10-17))

Amnon’s love turned into hate, then turned into rage. He used Tamar and closed his fickle heart to her supplications. Reviewing her protests, she resisted force and then when that failed, she importuned him about the wicked breach of social convention. When that failed, she spoke as a sister, abject and ruined. When that failed, she was even willing to seek permission to override the sticky implication of incest by gaining the king’s – their father’s – support for the match. The text established her resistance as an act of courage. But no matter. After he slept with her, Amnon had no concern for her future or the dignity of his family and his prized position as royalty. Even so he did not throw her out. It was beneath him. He had a servant do his bidding. Someone else – more than one person – knew what was happening in that chamber: the one who created the plan and the one who brutally tossed Tamar away.<sup>8</sup>

The role of minor characters in the Hebrew Bible has garnered some scholarly attention since a well-accepted principle of biblical study is that sacred texts are economic with language. If a person appears in a biblical narrative, the role may not be as minor as supposed.<sup>9</sup> It is not minor in these two stories, even though the names of Hirah and Jonadab appear only a few times. Immoral enablers do not have to have a major role in advisement or support. Oftentimes they are characterized by silence. Their main contribution to sin is that their very presence without

<sup>8</sup> We have no idea what happened to Tamar and whether or not she was able to lead a “normal” life. Moving from text to life, the long-term scarring on those who are abused is difficult to measure and hard to overcome, as Judith Herman Lewis writes in *Trauma and Recovery*, “Many abused children cling to the hope that growing up will bring escape and freedom...But the personality formed in the environment of coercive control is not well adapted to adult life. The survivor is left with fundamental problems in basic trust, autonomy, and initiative. She approaches the task of early adulthood—establishing independence and intimacy—burdened by major impairments in self-care, in cognition and in memory, in identity, and in the capacity to form stable relationships... She is still a prisoner of her childhood; attempting to create a new life, she reencounters the trauma” (*Trauma and Recovery*, 110).

<sup>9</sup> The Sages, for example, posited that the anonymous man who directed Joseph on the path to Dotan was the angel Gabriel since his appearance in the text is somewhat mystifying and because the one who put Joseph on the road to his future could not remain nameless (*Pirkei de-Rebi-Eliezer* 38).



resistance justifies the wrongdoing of the protagonist. They say nothing, and in that cowardly silence, the protagonist is given the license to exert immense sexual power over his victim, even greater than had he acted alone. Uriel Simon believes that one of the main functions of minor characters in the Hebrew Bible is as a “device for the moral evaluation of the protagonist.”<sup>10</sup> In this instance, we might shift Simon’s words to read “the immoral evaluation of the protagonist.” Where either character in these biblical narratives could have created resistance to sexual exploitation, these individuals, instead, played a role in perpetrating crimes and hiding them, in ignoring the victim or demonizing her.<sup>11</sup> They were not the decision makers in this story. They did not hold the balance of power in the relationship, but they had something more important than power: influence. And in these narratives of abuse, they abused it.

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In *Principle-Centered Leadership*, Stephen R. Covey contends that leaders have three types of power: coercive power, where followers are afraid of the consequences should they not listen to the leader, utility power, where the power in the relationship is based on the useful exchange of

<sup>10</sup> See, for example, Uriel Simon, “Minor Characters in Biblical Narrative,” *Journal for the Study of Old Testament*, 46 (1990), 11-19, which also appears in his short appendix in *Reading Prophetic Narratives*: 263-270. There he writes that the Hebrew Bible has relatively few characters and even fewer minor characters: “...the focus is always on the deeds of the protagonist, while the fate and character of the minor personages is neglected” (263). He contends that minor characters in the Bible play a similar function as they do in other works of literature: “A primary function of some minor characters is to move the plot forward; others endow the narrative with greater meaning and depth” (266). Simon contends that some minor characters offer outright support for the protagonist – like Hirah and Jonadab – in “expressive auxiliary roles” (266). They can also oppose the protagonist’s choices or behaviors, providing an important contrast or “clarify situations by serving as background” (266). For a specific example, see Samuel Hildernbrandt, “The Servants of Saul: ‘Minor’ Characters and Royal Commentary in I Samuel 9-31,” *Journal for the Study of Old Testament*, 40 (2015), 179-200.

<sup>11</sup> Although we have grouped Hirah and Jonadab together, a reasonable argument could be made that the cases are not alike. One could argue that Tamar, in fact, victimized Judah by sleeping with him, an act that he would never have initiated had he known her true identity. As a masked woman, Tamar had power over Judah that she abused. Contextually, however, this is the only power she had over him. His power over her was far greater. As a result of withholding his last son from Tamar, she could neither have children in a levirate marriage nor a new husband from another family. In other words, she had power over an act. He had power over a life.

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goods and services; the follower has something that the leader needs or wants and, finally, principle-centered power, where the leader gains followers because of respect and a compelling ideology. Such leaders can influence because their power emanates from a set of core values:

They are trusted. They are respected. They are honored. And they are followed because others want to follow them, want to believe in them and their cause, want to do what the leader wants. This is not blind faith, mindless obedience, or robotic servitude; this is knowledgeable, whole-hearted, uninhibited commitment. This is *principle-centered power*.<sup>12</sup>

One could make a case that the two biblical narratives above are illustrations of both coercive and utility power since the characters had power over the lives of others via their position as royal or patriarch and that by engaging in these acts of exploitation, they had to forego what little principle-centered power they had. The same can be said for the minor characters in both stories, who had power because they had knowledge of the dark behaviors of their respective friends. Holding someone else's secret is a form of currency and a measure of power over another.

But what was expected of these characters from the reader's perspective was principle-centered power, the kind of power we associate with the values transmitted in our sacred literature. Tamar expected these of Amnon or she would not have resisted with her pleas to a sense of compassion and duty that he lacked. The other Tamar may have believed that deep down Judah would ultimately lead from this place, and he did. He acquitted Tamar and recognized his wrongdoing: "She is more righteous than I..." (Genesis 28:25). In this sense, Judah offers the proto-type of a principle-centered response: admission of guilt and, to some extent, an apology (although not using the exact language of contrition).<sup>13</sup> In speaking to many victims in Jewish sexual abuse scandals at the hands of rabbis, I have never heard a single person share they were offered an apology. Not one said that the offending organization that protected the abuser, in cases where this factor was relevant, reached out to apologize to them personally. The blanket 'apology' sent to the public, if there was

<sup>12</sup> Stephen R. Covey, *Principle-Centered Leadership* (New York: Free Press, 2003), 102. Italics are Covey's.

<sup>13</sup> Although there are midrashim that suggest Judah denied his responsibility in this (*Genesis Rabba* 85:11), Judah's confession, which appears explicitly in the biblical text itself, was regarded as a *kiddush Hashem* in the Talmud and Judah the paradigm of a penitent (*Sota*, 10b).

one, was more about self-protection and re-building a reputation than about healing those who suffered.<sup>14</sup> Such stubborn withholding only deepens the wounds.

For those victimized by an act of abuse, particularly at the hands of a purported religious leader, the heartache is two-fold. There is the physicality of the act in question and the spiritual collapse that comes in the wake of hypocrisy, of expecting leaders to be principle-centered but realizing that they are users and takers. That they can get away with these acts for months, years, and even decades becomes all the more horrifying when we realize that people around them had their suspicions or possessed actual information that could have prevented the abuse. Some claim self-righteous grounds for not turning in an abuser under the umbrella of *mesira*, the sin of turning over an alleged Jewish criminal to secular authorities or courts. Such claims must be scrutinized.<sup>15</sup> What is the defender actually defending?

<sup>14</sup> For more on the public apology that has become an expected and trite feature of business and political conduct, see *My Bad: An Apology Anthology* (New York: Bloomsbury, 2007). Authors Arleen Sorkin and Paul Slansky contend that the popularity of such apologies surfaced about 25 years ago and serve the mechanical function of allowing a leader to resume duties. They anthologize text after text of apologies that sound tame and rather meaningless next to their crimes. *The New York Times* created “Apology Watch” to collect terrible apologies, mostly in the corporate sector. In 2014, Dov Seidman called for an apology ceasefire: <http://dealbook.nytimes.com/2014/02/03/calling-for-an-apology-cease-fire/>.

<sup>15</sup> There is a passage in *Bava Metsia* where R. Elazar, son of R. Shimon, was appointed by the authorities in his town to arrest Jewish thieves. Rabbi Yehoshua ben Korha sent him a message: “You are vinegar, son of wine. Until when will you inform on the nation of our God to be executed (by a gentile king’s court)?” The vinegar label suggests a person who is sour, bitter and not well-liked. This is in addition to the actual prohibition of turning over a Jew to a secular court for either criminal or financial misdemeanors. Even if the person is himself a sinner, Maimonides slurs the one who turns him over, saying that he will have no share in the world to come (*Hilkhot Hovel u-Mazik*, 8:9, *Shulhan Arukh*, H.M. 388:9). There was legitimate concern that because of anti-Jewish sentiment, such criminals would not be treated with justice but such concerns may be mitigated today, as Yitzchok Adlerstein, adjunct chair of Jewish law and ethics at Loyola Law School explains: “The reason that *mesira* was seen as the equivalent of a capital crime is that when you handed over a Jew to secular authorities, courts and prisons were run like independent fiefdoms, and prisoners often did not emerge alive...you were theoretically costing someone their life [sic], and that is not true in America,” cited in Rebecca Spence, “Case of Informant Reverberates through L.A.’s Orthodox Community,” *The Forward* (January 23, 2008). J. Simcha Cohen also shares concerns about the way *mesira* can be misunderstood today in a democratic country and used as a cover up for sexual predators in “Reporting and Prosecuting Jewish Criminals: Halakhic Concerns,” *Ideas and Ideals* (Feb 11, 2008),

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The most insidious abuse protectors are not lone operators, as in our two narratives, but the leaders of institutions that risk their reputations if wide-spread abuse is discovered. One of the great ironies embedded in abuse cases is that the organized structures that protect individual abusers often do so because they want to protect the reputation of the faith or the hierarchical structures that promote faith. This strategy routinely backfires, bringing in its wake condemnation and reprisals. Yet were such safeguards in place to create security for the victim and not the abuser, the religious body in question would likely be regarded as worthy of emulation. When we look closely at the leadership structures of the Catholic Church, we can understand how the culture may have unintentionally and intentionally contributed to the problem.

In *Supreme Authority: Understanding Power in the Catholic Church*, Mary Faulkner tries to understand a Church in crisis, one of many that have beset the Catholic faith in its long history.<sup>16</sup> She refers to the Catholic Church as a study in paradox and contends that although previous scandals resulted in the formation of competing faith structures and denominations, this current crisis of sexual abuse and cover-up has ironically not led people to the loss of numbers expected because “millions of Catholics are more casual about their Catholicism than their forebears once were.”<sup>17</sup> In other words, the Church has curiously not lost its hold on people because it has lost its hold on people.

Faulkner sets out six principles of the hierarchal structure of the Church in relation to non-ranking members that can and have contributed to why abuse problems were not tackled early and eradicated completely. They point to the creation of an authority pyramid that diminishes the lay person’s ability to shape his or her religious experience and even to deny the validity of one’s own opinions in relation to religion. They are also so normative in the Church that that are assumed to be the way that communication and leadership must function:

1. Identification of what is working and not working is done by the leaders.
2. What the people need is determined by the leaders.

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[www.jewishideas.org/print/58](http://www.jewishideas.org/print/58). These sources are included in “Turning in Criminals,” *Confronting Scandal*, 58-63.

<sup>16</sup> Mary Faulkner, *Supreme Authority: Understanding Power in the Catholic Church* (Royersford, PA: Alpha, 2003), 17.

<sup>17</sup> Faulkner, 19.

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3. Leaders are the only ones who know how to get things done.
4. Communication is one-way only: from leaders to subordinates.
5. Accountability is one –way: from people to leaders.
6. Opportunity for leadership is reserved for certain types of people, often based on race, gender, or religious affiliation.<sup>18</sup>

In the aggregate, Faulkner understands how the abuse scandal happened:

The principles of hierarchy and patriarchy combine to create an all-male ruling structure. This ruling authority is believed to be God-given – therefore not open to question. Thus, in the Catholic Church, the highest-ranking male – the pope – has unique access to God that isn’t available to everyone. He stands between the people and God. Through him, all must pass to reach God. He is, therefore (with due allowance made for those who know no better), their means to salvation.<sup>19</sup>

The hierarchy does not end there, as Faulkner explains, and this creates the cultural context for problems to be “solved” or managed internally through a system impenetrable to claims of fallibility.

However, his rank and privilege do not belong to him [the pope] personally, but come to him through his position in the organization: the Church. The Church, then, becomes the means to salvation through which all must pass. Because this deals with something as important as salvation, a primary preoccupation of those in charge is to preach and maintain this self-serving status quo. Such a church is not likely to shed its power lightly.<sup>20</sup>

Judaism in North America and most of the Diaspora has no such centralized structure with which to contend. To a much lesser level, Israel with its Chief Rabbinate does, but it is incomparable to the Church in age, scale or influence. On the sexual side, Judaism does not have the commitment to celibacy that can be the driver of sin for priests seduced by temptation. But these aside, it’s not hard to see that some of the patterns Faulkner describes have resonances for Jewish leadership, where authority is foundational and a ladder of decision trickles down instead of working its way up from lay channels, needs and problems. This is compounded by the notion of *Da’as Torah* that grants rabbis the authority to expand their jurisdiction to lifestyle issues well beyond normative halakhic

<sup>18</sup> Faulkner, 12-13.

<sup>19</sup> Faulkner, 15-16.

<sup>20</sup> Faulkner, 15-16.

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rulings. Given this, Jewish organizations must be particularly vigilant in offering lay people appropriate feedback loops, have an ethics committee to handle internal moral issues and be able to give regular and pointed critique to its leadership.

In *Primal Leadership*, Daniel Goleman, the pioneer of emotional intelligence studies, writes – along with his co-authors – about the problem of self-delusion, the incapacity of leaders to assess themselves accurately. The best way to “correct self-distortions in self-perception,” he writes, is to receive corrective feedback. And although we seem to hear feedback all of the time from friends, colleagues and family, we do not get it regularly enough when we hit the echelons of higher leadership. Goleman calls this the CEO disease. In a word, the higher up you are, the more feedback you need, the less feedback you get:

...people deny their leaders important information – not only about their behavior and leadership styles, but also about the state of the organization. The reasons people are silent include fear of the leader’s wrath, not wanting to be seen as the bearers of bad news, or wanting to appear as “good citizens,” and team players...Often the reason is simply that it makes people uncomfortable to give candid feedback on someone else’s behavior.

Goleman believes that the only genuine antidote to blind spots is for the leader to invite on a regular basis assessment from others through formal and informal means. Organizations must do the same to make sure that the kind of moral gaps and cultural norms that create abuse problems and cover-ups are identified early and ameliorated as soon as possible before the problems grow and hurt more people. This can only happen when those “low-down” in any organizational hierarchy can have reasonable access to those at the top of the pyramid. Power sharing is never easy, especially when the perception is that access is risk rather than access and transparency builds trust. Then there are those who are often to the side of the pyramid when they are usually most at risk: women. Lay boards and senior leadership roles in the Orthodox community are still dominated by men. The large majority of sexual scandals have men at their center. The implicit protection of men by other men is broken when more women take active roles. When the voices of women are sought, they are heard, but too often men in leadership roles imagine what women would say or think in the absence of actual women to inform the conversation and the culture. Token female representation will not shift a culture and make it more healthy and less prone to abuse, largely because the tokenism itself makes the implicit statement that a sponsoring organization is doing enough simply by having one

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woman, treating women's participation as something to be checked off rather than encouraged and cultivated.

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Most of us can name a rabbi who just got out of jail or is in jail for sexual abuse without thinking too hard. We can all name a former Israeli president recently released from jail for rape. Jewish newspapers abound with stories of Jewish organizational heads, journalists and others in high-ranking positions who have fallen mightily.<sup>21</sup> I am not a sociologist or historian to say whether or not this phenomenon is happening with greater frequency or is simply benefiting from more reportage. But from a spiritual standpoint, I believe Orthodox organizations have to take larger and bolder steps to ameliorate the chances of sexual abuse happening in their ranks. Often the steps they do take are small and paradoxically celebrated, offering the moral permission of license not to do more.

Instead of organizational perspective alone perhaps we can view this problem from the inside of the holiness code within which we should abide. In *The Road to Character*, David Brooks addresses the way that suffering builds character, a well-known trope used by amateur theologians. But instead of merely resting on the gratitude for suffering that people often feel with hindsight, Brooks offers a different response. When people are stuck in the midst of difficulty, they may begin to feel a call, a way of morally determining their reaction once they get past the question they will not be able to answer, namely, why does evil happen? It's not in the search to numb the pain:

The right response to this sort of pain is not pleasure. It's holiness. I don't mean that in a purely religious sense. I mean seeing the pain as part of a moral narrative and trying to redeem something bad by turning it into something sacred, some act of sacrificial service that will put oneself in fraternity with the wider community and with eternal moral demands... Suffering simultaneously reminds us of our finitude and pushes us to see life in the widest possible connections, which is where holiness dwells.<sup>22</sup>

<sup>21</sup> This is not the place to profile such crimes or discuss practical solutions. For a greater understanding of what may drive this problem, see Michelle Friedman, "Crossing the Line: What Makes a Rabbi Violate Sexual Boundaries – and What Can Be Done About it?" in *Tempest in the Temple*: 43-59. In the same volume, see "Out of the Jewish Closet: facing the Hidden Secrets of Child Sex Abuse – and the Dame Done to Victims" by Joyanna Silberg and Stephanie Dallam: 77-104.

<sup>22</sup> David Brooks, *The Road to Character* (New York: Random House, 2016), 95.



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If our community has suffered from a few highly-publicized cases of abuse, we must put in every possible hurdle so that there will be no future cases. On a deeper level, we must revisit the notion of holiness and how such cases afford us the opportunity to strengthen our commitment to it, to *kedusha*. By this, I refer not to Otto's difficult *mysterium tremendum*, some mystical state, the stuff of kabbalists and philosophers, but to the very real and lived experience of a life of discipline and self-restraint, of sexual modesty, and a commitment to a life of the mind and the heart. We tell ourselves to be good. We have yet to tell ourselves to be holy. Where holiness lives, abuse cannot live.

Mark Dratch

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## WHAT TO DO WITH ABUSIVE RABBIS: HALAKHIC CONSIDERATIONS

While the vast majority of rabbis, cantors, and teachers lead model religious and ethical lives that command respect and are worthy of emulation, there are some who are guilty of a variety of wrongdoings. There are some who betray their callings, their communities, and their commitments by treating their congregants and students in improper and even abusive ways.

What is the status of such failed leaders? Should they be allowed to continue to function in their sanctuaries and classrooms? If removed from their positions, can they ever be reinstated and function in similar capacities again? Are they still rabbis, or cantors, or teachers? While this article will focus specifically on rabbis, one may extrapolate from this analysis to other positions of spiritual, educational, and communal leadership.

This discussion, however discomforting and repugnant it may be, is vital for protecting the integrity of the Jewish community. And despite the exhortation that one who insults a Torah scholar is considered to be an *‘epikorus* (heretic) and is guilty of *megaleh panim ba-Torah she-lo ke-halakha* (undermining the Torah),<sup>1</sup> in situations of *hillul Hashem* (desecration of God’s Name) we are to defer to no one, not even a scholar.<sup>2</sup> In truth, holding the few unsuitable individuals accountable for their inappropriate actions does not harm the rabbinate at all; it actually enhances its dignity and furthers the admiration and respect that the community holds for its leaders and teachers of Torah.

### RABBINIC INTEGRITY

Now, it goes without saying that no one is perfect. Every human being makes mistakes, suffers failures, and behaves improperly: “For there is not

<sup>1</sup> *Sanhedrin* 99b.

<sup>2</sup> *Berakhot* 19b.

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a righteous person upon earth, that does good, and does not sin” (Ecc. 7:20). And those in positions of leadership and power face even greater challenges than do the masses. They are fallible. At times, they are unable to fulfill properly the demands of their positions or to resolve appropriately the tensions and conflicting demands of their constituents. They are subject to temptations like every other human being, and sometimes, like others, they succumb. At times, they are unable to withstand the enticements and trappings of their offices. The Torah itself hints to us that our leaders will certainly fail: “*When* the leader sins” (Lev. 4:22) it says, not “if.”<sup>3</sup> Nevertheless, imperfection and error do not automatically disqualify a person from serving in religious leadership—otherwise, we would have no leaders.<sup>4</sup>

All the same, religious leadership demands a high level of integrity. Religious leaders are moral and spiritual exemplars, representatives of God and His Torah to the people they are charged to teach, inspire, counsel, and lead. The behavior of any religiously observant person—but especially that of a spiritual leader—is especially sensitive to being a *kiddush Hashem* (a sanctification of God’s Name) as well as its converse, a *hillul Hashem* (a desecration of God’s Name). Their successes and their failings can and do reflect on the One they represent, and impact the religious behaviors and beliefs of their adherents and students, both positively and negatively. When a leader is guilty of *hillul Hashem*, he betrays God and fosters disillusionment, and even cynicism, in his people. It is for this reason that the Talmud reminds us that when a learned, religiously observant person is honest and pleasant that people are impressed with him and the Torah he represents. Conversely, when such a person is dishonest or discourteous people blame the Torah that he claims to represent.<sup>5</sup>

What kinds of activities constitute *hillul Hashem*? Various rabbinic sources enumerate: failure to pay bills on time; giving the appearance that one is lax in his studies or observance;<sup>6</sup> embarrassing one’s colleagues

<sup>3</sup> See Rashi to *Horayot* 10a, s.v. *shani*.

<sup>4</sup> The Talmud, *Yoma* 22b, dictates appointing as leader only those who “carry a basket of reptiles on their backs,” i.e., those with proverbial skeletons in their closets which serve as preventatives to excessive self satisfaction and arrogance.

<sup>5</sup> *Yoma* 86a.

<sup>6</sup> *Yoma* 86a:

What constitutes profanation of the Name? Rav said: If, e.g., I take meat for the butcher and do not pay him at once. Abaye said: That we have learned [to regard as profanation] only in a place wherein one does not go out to collect payment, but in a place where one does not go out to collect, there is no harm in it [not paying at once]. Ravina said: And Mata Mehasia is a place where one

due to the nature of the rumors that are spread about oneself,<sup>7</sup> or embarrassing them by the less-than-dignified activities in which one engages;<sup>8</sup> engaging in permissible activity which others assume is prohibited;<sup>9</sup> being an unsociable, unpleasant or angry individual; degrading the honor of Torah;<sup>10</sup> and being unkempt.<sup>11</sup> In each of these cases, the conduct of God's representatives causes them and their God to be seen in a less than noble and honorable light.

However, *hillul Hashem* is not merely defined by objective acts; it is dependent upon the caliber of the individual involved. An *adam hashuv*, an important, well-known, and well-respected person, and a *talmid hakham*, a pious, learned scholar, are expected by others to live according to strict moral standards—therefore, the greater the desecration when he fails to live up to these expectations.<sup>12</sup> His failures reflect positively not only upon his personal reputation, but upon the Torah that he claims to uphold and upon the God he represents.<sup>13</sup> Thus, as Abraham set out to the Promised Land, he was troubled lest he cause a *hillul Hashem* as others might accuse him of abandoning his elderly father.<sup>14</sup>

What traits must a rabbi possess? Because one of his primary functions is to serve as a judge in matters of Jewish law, the discussions of the

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goes out collecting payments due. Whenever Abaye bought meat from two partners, he paid money to each of them, afterwards bringing them, together and squaring accounts with both. R. Yohanan said: In my case [it is a profanation if] I walk four cubits without [uttering words of] Torah or [wearing] *tefillin*.

<sup>7</sup> *Yoma* 86a.

<sup>8</sup> Rosh to *Moed Katan*, ch. 3, no. 11.

<sup>9</sup> *Yoma* 86a.

<sup>10</sup> *Pesachim* 49a:

Our Rabbis taught: Every scholar who feasts much in every place eventually destroys his home, widows his wife, orphans his young, forgets his learning, and becomes involved in many quarrels; his words are unheeded, and he desecrates the Name of Heaven and the name of his teacher and the name of his father, and he causes an evil name for himself, his children, and his childrens' children until the end of time.

<sup>11</sup> *Shabbat* 114a; *Megilla* 28a.

<sup>12</sup> See also Rambam, *Hil. Yesodei ha-Torah* 5:11. Note that Rambam records these laws here only with regard to a *talmid hakham* or *adam hashuv*.

<sup>13</sup> Rashi, *Shabbat* 33a, s.v. *hillul ha-Shem*, suggests that the *hillul ha-Shem* results when others learn from the activities of the *adam hashuv* and come to dishonor the Torah or, as he suggests in *Kiddushin* 40a, s.v. *aveirah she-osah peirot*, when others imitate his sinful behavior. Further, the *hillul ha-Shem* occurs when the ostensibly righteous person suffers punishment for his transgression and others come to question the value of his previous merits. See Rashi to *Yoma* 86a, s.v., *be-emor*; *Yoma* 86b, s.v., *mefarsemin*; and *Yoma* 87a s.v., *yomeru*.

<sup>14</sup> *Shemot Rabba*, no. 39.

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qualifications of those eligible to adjudicate in rabbinic courts can serve as a framework for the credentials of those suitable for the rabbinate.<sup>15</sup> Rambam lists seven qualifications: wisdom, humility, reverence, disdain of monetary gain, love of truth, love of humanity, and a good reputation.<sup>16</sup> While Rambam allows that not all of these traits will be found in every candidate, they form a framework in which judges and rabbis can be selected and evaluated.<sup>17</sup>

<sup>15</sup> Concerning the qualifications of a Prayer Leader, the Talmud, *Ta'anit* 16a, records:

One having a large family and has no means of support, and who draws his subsistence from [the produce of] the field, and whose house is empty, whose youth was unblemished, who is meek and is acceptable to the people; who is skilled in chanting, who has a pleasant voice, and possesses a thorough knowledge of the Torah, the Prophets and the Hagiography, of the Midrash, Halakhot, and Aggadot and of all the Benedictions.

<sup>16</sup> *Hil. Sanhedrin* 2:7:

“[Choose] wise and understanding men, [known among your tribes, and I will make them rulers over you]” (Deut. 1:13) refers to those with wisdom; “known to the tribes” refers to those who are well regarded by others. How is it that they are well regarded? In that they are magnanimous, humble, and friendly, and their speech and dealings are pleasant. When it also says, “[And you shall choose out of all the people] men of valor, [such as fear God, men of truth, hating unjust gain]” (Ex. 18:21), this refers to those who excel in [the observance of] the commandments, who set high personal standards [of behavior] and who control their evil inclinations, such that there is nothing about them that is objectionable, that they do not have bad reputations or unsavory histories. Included in [the requirement of] “men of valor” are those who have the courage to save the oppressed from the hands of the oppressor, as it says, “And Moses arose and saved them” (Ex. 2:17). In addition, just as Moses was humble, so every judge must be humble; “God fearing,” as it implies; “hating unjust gain,” hastening after riches, even their own, and they do not run to amass wealth...; “men of truth” that they are personally motivated to pursue justice, love truth and hate violence, and flee from all kinds of immorality.

See *Teshuvot Emek Halakha* I, no. 70.

<sup>17</sup> *Sanhedrin* 7b:

Resh Lakish said: He who appoints an incompetent judge over the community is as though he had planted an *Asherah* (a tree worshipped as idolatry) in Israel, for it is written, “Judges and officers shalt thou appoint for yourself” (Deut. 16:18), and after it is written, “You shall not plant for yourself an *Asherah* of any kind of tree” (Deut. 16:19). R. Ashi said: And if such an appointment be made in a place where scholars are to be found, it is as though the *Asherah* were planted beside the altar, for the verse concludes with the words, “beside the altar of the Lord your God.”

See *Teshuvot ha-Maharik* no. 117.

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## RABBINIC ACCOUNTABILITY

There are those who argue that rabbinic infractions are to be dealt with quietly and privately. This discretion is not meant to serve as a “cover up,” but is, rather, to protect the dignity of the rabbinate and the Torah it represents. The Talmud, *Menahot* 99b, states:

Resh Lakish also said, a scholar who committed a sin must not be reproached publicly, for it is written, “Therefore shalt thou stumble in the day, and the prophet also shall stumble with thee in the night” (Hosea 4:5), that is to say, keep it dark, like night.

The Talmud further elaborates in *Hagiga* 15b,

Rava said, what is the meaning of the verse, “I went down to the garden of nuts, to look at the green plants of the valley, etc.” (Song of Songs 6:11)? Why are the scholars compared to the nut? To tell you that just as a nut, even if it is spoiled with mud and filth, its contents are not soiled, so a scholar, although he may have sinned, is his Torah not soiled.<sup>18</sup>

None of these sources suggest that a rabbi is unaccountable for his actions. Rather, they maintain that the rabbi must repent and whatever consequences or punishment he faces must be private.

However, others disagree, and their opinion is the accepted legal conclusion. Rambam, responding to a question posed concerning a wayward ritual slaughterer:

It is already well known by the non-Jews that we would only appoint to perform ritual slaughter, or as our judges and prayer leaders, those that are the most refined among us. The non-Jews respect this and are jealous of us for this. It is forbidden for anyone who believes in the Torah of Moses and who cares for the honor of his Creator, to permit such a wayward person who has not repented completely to slaughter, because this causes the desecration of God’s Name.<sup>19</sup>

*Shulhan Arukh*, *Yoreh De’ah* 334:42, while first siding with the former, protective approach, rules that when there are significant suspicions

<sup>18</sup> See *Hilkhot Talmud Torah* 7:1 and Shakh, *Yoreh De’ah* 257, no. 4. See the trepidation expressed by R. Aharon Walkin, *Teshuvot Zekan Aharon*, II. No. 30 as he proscribes removing a public official from office.

<sup>19</sup> *Teshuvot* ha-Rambam, no. 173. Rema, *Yoreh De’ah* 257:2 also allows for the removal from office of an appointed public official.

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that a rabbi is involved in heresy or that he is engaged in licentious behavior, or if he brings discredit to the rabbinate or the community by desecrating God's Name, he should be held accountable publicly.<sup>20</sup> In fact, "wherever there is desecration of God's Name, honor is not extended, even to a rabbi."<sup>21</sup>

## RABBIS AS ANGELS

Perhaps the most relevant source for addressing our issue concerns the Talmudic response to a rabbi about whom persistent rumors of sexual impropriety were spread. The Talmud describes R. Yehudah's dilemma whether to excommunicate a rabbi "whose reputation was objectionable." "To excommunicate him [we cannot], as the rabbis have need of him [as a capable teacher]; not to excommunicate him [we cannot] as the name of Heaven is being profaned." Rabbah bar bar Hanna instructed him to excommunicate this rabbi. Citing the verse "For the priest's lips should keep knowledge and they should seek Torah at his mouth; for he is an angel of the Lord of Hosts" he explains: "If the rabbi is like an angel of the Lord of Hosts, they should seek the Torah from him; but if [he is] not [like an angel], they should not seek the Torah from him."<sup>22</sup>

R. Yohanan asserts that a rabbi must be more than just an expert in Jewish law and practice. He must be, first and foremost, a moral exemplar. After all, the study of Torah is much more than an intellectual exercise and a rabbi is much more than a professor of Talmud or of legal codes. While one does not necessarily expect moral greatness from a professor of

<sup>20</sup> *Mo'ed Katan* 17a:

Said R. Huna, At [one of the Synods at] Usha they made a regulation that if the Av Bet Din committed an offense that he was not to be [formally] excommunicated, but someone was to tell him, "Save your dignity and remain at home" (II Kings 14:10). Should he again offend they excommunicate him, because [otherwise there would be] a profanation of the Name [of God]. And this is at variance with Resh Lakish; for Resh Lakish said: If a scholar-disciple has committed an offensive deed they do not excommunicate him publicly, because it is said: "Therefore shalt thou stumble in the day and the prophet also shall stumble with thee in the night" (Hosea 4:5), [that is to say], Keep it dark like night (do it as quietly as possible for his sake and that of the community.).

While Rambam, *Hil Talmud Torah* 7:1, seems to rule according to Resh Lakish, see *Hil. Talmud Torah* 6:14, in which he rules that one must respect the excommunication of a sage who was banned due to illicit rumors. This is also the ruling in *Yoreh De'ah* 334:42.

<sup>21</sup> *Berakhot* 19b.

<sup>22</sup> *Mo'ed Katan* 17a.



chemistry or literature, one absolutely requires it of a religious teacher. How can a rabbi preach about repentance or ethics, if he himself is unrepentant or unethical? How can he exhort others to be empathetic and charitable, if he himself is cruel or selfish? How can he represent a kind, compassionate and loving God if he is abusive? How can he bring others to a love of God, when his actions undermine his values and teachings and serve to frustrate and alienate those who seek his guidance? This moral standard is a *sine qua non*. Even if the rabbi's intellectual ability, pedagogic skills, or leadership are required by the community, the rabbi is, nevertheless, unfit to serve.<sup>23</sup>

Despite this ruling that one may only learn from and be led by upstanding rabbinic figures, the great Mishnaic Sage R. Meir continued to learn Torah from his teacher, Elisha ben Avuyah, long after the latter became an apostate and was known by the appellation "*Aher*" (the other). How could R. Meir have done so, after all, *Aher* was no angel of the Lord? The Talmud suggests that "R. Meir found a pomegranate; he ate [the fruit] within it, and he threw away the peel!"<sup>24</sup> It explains that R. Meir was a *gadol*, an astute and discerning individual who could distinguish between the teacher and his teachings. For him, the integrity of Torah remained intact and he had no fear of any damaging influence. However, a *katan*, one who is unable to make such distinctions, may not learn from such a teacher.

Apparently, R. Meir believed that the wisdom of Torah can be transmitted through individuals who, in their personal comportment, do not represent the true nature of Torah. This is so because the integrity of the Torah and its teachings are such that they cannot be contaminated by anyone, and an astute student can distinguish between the messenger and the message. One opinion cited by Tosafot suggests that even the rabbi who was excommunicated because of his "objectionable reputation" even though he was needed by the community, was only barred because the people could not discriminate between him and his teachings. If, however, they could have made this distinction, the rogue rabbi would be an acceptable source of teaching.<sup>25</sup>

However, there is a second opinion cited by Tosafot which maintains that even if one is a *gadol* who can distinguish between the messenger and

<sup>23</sup> Rabbi Shlomo Kore'ah observes that the Talmud does not instruct a person whose teacher is not like an angel to simply find another rabbi; it rules that he is not to learn from this specific rabbi. This teaches us, he says, that even if there is no one else from whom the student can learn he must still refrain from learning from this unacceptable teacher. <http://www.temani.net/http/sprot-timan/10.htm>.

<sup>24</sup> *Hagiga* 15b. Another version: "R. Meir ate the date and threw the kernel away."

<sup>25</sup> *Tosafot*, *Hagiga* 15b, s.v., *ha be-gadol ha be-katan*. See *Me'iri to Hagiga* 15b.

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the message, if the rabbi is guilty of a violation so egregious that he deserves to be excommunicated, no amount of understanding and discernment by any disciple can maintain that rabbi in his position.<sup>26</sup> And the formulations of Rambam and *Shulhan Arukh* agree to this unconditional removal of a blameworthy rabbi from his position without any mention of the discriminating capabilities of his followers.<sup>27</sup> This indicates that they did not accept the Talmud's distinction between *gadol* and *katan*, suggesting that that this distinction may have been R. Meir's justification for his own personal behavior, but that this distinction is not authoritative and is not accepted as the normative law.<sup>28</sup>

The ruling, "If the rabbi is like an angel of the Lord of Hosts they should seek Torah from him," raises significant questions when considering significant factors that contribute to clergy abuse, i.e, the deification of leadership and the absolute authority ascribed to them. Such opinions of often charismatic clergy make victims vulnerable and can contribute to a rabbi's false sense of self. Two important considerations: First, Rabbah bar bar Hanna does not say that a rabbi is an angel of the Lord, he says that the rabbi must be *domeh*—like—an angel, but not an angel; both he and his followers must remember that. Second, the word *malakh*, in addition to being an angel, also means "messenger." Both the rabbi and his followers must remember that the rabbi is only a messenger of God.

In 5719 (1959), R. Moshe Feinstein was asked to rule on the permissibility of playing the music of a certain song writer who was rumored to engage in disreputable behavior.<sup>29</sup> R. Feinstein distinguished between this composer's early compositions and his later ones. Any music written in his early years when this individual comported himself appropriately remained permissible; at that time, he behaved properly and his later activities can not retroactively taint his prior achievements. One of the proofs that R. Feinstein brought is from the case of a Torah scroll that was written by a heretic—Jewish law requires that such a scroll be destroyed so as not to

<sup>26</sup> *Tosafot*, *Hagiga* 15b, s.v., *ha be-gadol ha be-katan*.

<sup>27</sup> *Hil. Talmud Torah* 4:1; *Yoreh De'ah* 246:7.

<sup>28</sup> *Lehem Mishneh* to *Hil. Talmud Torah* 4:1, s.v. *ve-khen ha-Rav she-eino holekh be-derekh tova*; *Shakh* to *Yoreh De'ah* 246, no. 8. *Teshuvot Yabi'a Omer*, VII, *Yoreh De'ah*, no. 19; *Teshuvot Yosef Omets*, no. 33 suggests that R. Meir's distinction does maintain—in theory. However, for fear that even a *katan* who is unable to discriminate may believe he is a *gadol* who can, a situation that will lead to improper influence, no one may learn from such a rabbi.

<sup>29</sup> *Teshuvot Iggerot Moshe, Even Ha-Ezer*, I, no. 96. At a later date, a comprehensive article outlining allegations against Shlomo Carlebach was published, see Sarah Blustain, "Rabbi Shlomo Carlebach's Shadow Side," *Lillith*, Spring 1988 available at <http://lillith.org/articles/rabbi-shlomo-carlebachs-shadow-side/>.

perpetuate his name, reputation or achievements.<sup>30</sup> However, the law also asserts that a scroll written while that person was a true believer remains valid, even if he later became an apostate.<sup>31</sup> Concerning subsequent musical compositions, R. Feinstein stated that even those songs that this person wrote after his “reputation became objectionable” are permissible because music, unlike Torah scrolls, have no intrinsic holiness. Furthermore, the questionable activities had nothing to do with undermining the fundamentals of Jewish belief; rather they were initially understood to do with casualness with regard to the intermingling of the sexes that were not in keeping with Orthodox norms. Such a lapse would not render a Torah Scroll he wrote invalid; it would certainly not disqualify his music. R. Feinstein wrote nothing about learning Torah from this individual. However, based on R. Feinstein’s discussion, one might distinguish between the teachings and insights of a heretic before and after his apostasy: the earlier Torah would remain kosher; the latter Torah would be banned.

That was 1959. Since then the allegations about this individual have become more serious and his music has been widely integrated into the prayer services of many congregations. His music, as well as his stories and teachings, have become a meaningful source of religious inspiration to generations of Jews and has perpetuated his legacy. Alleged victims of this man have expressed hurt and disillusionment over the community’s embrace of his music and his personality. What would R. Feinstein have said if he were responding to this question today?

R. Menasheh Klein and R. Moshe Stern agree with R. Feinstein’s conclusion, with one further restriction. Citing the ruling that it is prohibited to mention the name of an evil person, they prohibit listening to music written or recorded even before the composer’s misconduct if he identifies the music with him.<sup>32</sup>

## REVOKING ORDINATION

Can a rabbi’s *semikha* (ordination) be revoked? Contemporary rabbinic ordination is known as “*heter hora’ah*” (license to adjudicate) by which they are empowered to decide matters of Jewish law.<sup>33</sup> At times this authorization

<sup>30</sup> *Hil. Sefer Torah* 6:8.

<sup>31</sup> *Pit’bei Teshuva*, *Yoreh De’ah* 281, no. 2.

<sup>32</sup> *Teshuvot Mishneh Halakhot* 6:108; *Teshuvot Be’er Moshe* 6:74.

<sup>33</sup> *Sanhedrin* 5a:

Now, what is the content of an authorization? When Rabbah b. Hana was about to go to Babylon, R. Hiyya said to Rabbi [Yehuda ha-Nasi], “My brother’s

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is limited either to specific areas of Jewish law<sup>34</sup> or to limited periods of time.<sup>35</sup> However, even if granted this license, an unqualified person is *ipso facto* not a rabbi, even if ordained. Rambam rules:

One who is not fit to [serve as a] judge [either] because he does not know [the law] or because he is not [personally] suitable, who was [nevertheless] granted license [to adjudicate matters of Jewish law] by the exilarch or who was erroneously appointed by the Bet Din, his authorization is invalid until he [becomes] qualified, [similar to one] one who sanctifies a defective animal [as a sacrifice to be brought on] the altar, which does not become sanctified.<sup>36</sup>

Rabbi Yehudah Aszod, (Hungary, 1794-1866), author of *Teshuvot Yehudah Ya'aleh*, instructed a disciple of his to revoke the ordination that the latter had granted someone who violated the trust of the rabbinate and, furthermore, to publicize the fact that he was doing so.<sup>37</sup> The Code of Jewish Law goes a step further and records that a scholar, who is rumored to be involved in heresy or immoral behavior, such that he causes a desecration of God's Name, is to be excommunicated.<sup>38</sup> Such a person certainly is no longer considered a rabbi.

R. Bernard Revel, first president of Yeshiva College, revoked a graduate's ordination:

When a Yeshiva graduate refused Revel's request to leave a position which had both mixed pews and a mixed choir, his ordination was revoked. Revel wrote to a graduate on September 19, 1933: "It grieves me to inform you that since you refuse to leave Temple...where the sacred laws of traditional Judaism are violated, I urgently request that you return the conditional document of ordination that you received from the Yeshiva. The basic purpose of the Yeshiva is to guard the sanctity of Jewish Law in this land. If you will not return the document of ordination, I will be obligated to publish newspaper announcements declaring the nullification of your ordination."

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son is going to Babylon. [*Yoreh?*] May he, decide in matters of ritual law?" Rabbi answered: "[*Yoreh!*] He may." [R. Hiyya continued,] "[*Yadin?*] May he decide monetary cases?" "[*Yadin!*] He may." "[*Yatir bekhoret?*] May he declare first-born animals permissible [for slaughter]?" "[*Yatir!*] He may."

<sup>34</sup> *Hil. Sanhedrin* 4:8.

<sup>35</sup> *Hil. Sanhedrin* 4:9.

<sup>36</sup> *Hil. Sanhedrin* 4:15.

<sup>37</sup> *Teshuvot Yehudah Ya'aleh*, I, *Orach Hayyim*, no. 37.

<sup>38</sup> *Yoreh De'ah* 334:42.

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The rabbi did not heed Rabbi Revel's request, and the Yeshiva publicly announced the cancellation of his ordination and proclaimed that "one can no longer rely on his answers to inquiries of Jewish Law."<sup>39</sup>

## REINSTATEMENT

Can a rabbi or teacher who has been removed from his position ever be reinstated? May one learn Torah from an individual who has engaged in illicit activities and has subsequently repented?

At first glance, the answer seems straight forward: "One is not permitted to learn from a rabbi who does not follow the good path, even if he is a great sage and the entire nation depends on his [teaching], until he returns to the good."<sup>40</sup> This allowance is based on the premise that once a person has been punished or has repented, his credibility is restored.<sup>41</sup> At times, punishment alone is not sufficient; a person may have to prove that he has really turned over a new leaf. The Talmud elaborates upon the repentance required of those engaged in illicit activities that bring undeserved or illegal financial gain such as dice playing, usury, pigeon raising, and trading in the forbidden produce grown in the Sabbatical year. In each circumstance, the sinners must not only compensate any losses they may have caused others to suffer, but must conduct themselves in ways that are straight and honest and must bend over backwards to prove their integrity and transformation in those specific areas in which they sinned.<sup>42</sup> Consider the case of a butcher who deceives his customers by selling non-kosher meat as kosher, "he who is suspected of passing non-kosher meat [as kosher] cannot be rehabilitated unless he leaves for a place where he is unknown and finds an opportunity of returning a lost article of considerable value, or of condemning as non-kosher meat of

<sup>39</sup> Aaron Rakeffet-Rothkoff, *Bernard Revel--Builder of American Jewish Orthodoxy* (Nanuet: Feldheim, 1981), 165-166.

<sup>40</sup> *Hil. Talmud Torah* 4:1; *Yoreh De'ah* 246:8. As for determining effective repentance in instances of abuse, see my "Forgiving the Unforgivable? Jewish Insights into Repentance and Forgiveness." (2003), *Journal of Religion & Abuse*, 4: 4, 7-24.

<sup>41</sup> Mishna, *Makkot* 23a:

"[Forty lashes he may give him, and not exceed; lest, if he should exceed, and beat him above these with many stripes,] then your brother be dishonored before your eyes" (Deut. 25:30), which shows that on having received the lashes he is [once again considered] "your brother."

<sup>42</sup> *Sanhedrin* 25b.

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considerable value, belonging to himself.”<sup>43</sup> Depending upon his misconduct, a “defrocked” rabbi may have to prove that he is no longer susceptible to the same illicit behavior. In some abusive behaviors, the rate of recidivism is high and experts maintain that it may be extremely difficult, if not impossible, to refrain from repeating the offense.<sup>44</sup> In such cases, reinstatement should never be an option. Furthermore, even “lesser” abuses may prevent a rabbi from continuing his communal service. Careful consideration must be given to the impact of the rabbi’s continued service on his victims, on other victims of abuse, and on the integrity of the entire community. Ignoring, minimizing, or justifying abuse damages the reputation of the entire religious community and reflects negatively on the values it espouses. Community leaders do not have the right or authority to ignore the sensitivities of victims. The requirements for an abusive rabbi’s continued service are steep: he needs to be successfully treated by mental health professionals, repent of his sin, see to the healing of his victims and achieve forgiveness from them, and gain the trust and confidence of the larger community, not just of his own congregation; these requirements effectively bar any abuser from continuing to serve. Being a community rabbi or teacher is not a right, it is a privilege which must be earned, deserved, and continually maintained.

However, with regard to reinstating a person to a rank of communal and religious leadership, Rambam notes a distinction between two different positions. It is from these rulings that we might extrapolate guiding principles for contemporary rabbis and teachers. Rambam writes:

A High Priest that sinned is lashed [in front of a court of] three like the rest of the people and then returns to his prominent [position]. But a *rosh yeshiva* (the Head of the Sanhedrin) that sinned is lashed and is not reinstated to his station. He is also not appointed as a regular member of the

<sup>43</sup> *Sanhedrin* 25a. See *Avoda Zarah* 17a: “Rabbi [Yehudah ha-Nasi] also said: Repentants are not only accepted but they are even called ‘Rabbi!’”

<sup>44</sup> “...the empirical evidence clearly demonstrates that different types of sex offenders have a different propensity to reoffend. This suggests that different recidivism-reduction policies and practices are needed for different types of sex offenders. Policies and practices that take into account the differential reoffending risks posed by different types of sex offenders are likely to be more effective and cost-beneficial than those that treat sex offenders as a largely homogenous group.” Roger Przybylski, “Chapter 5: Adult Sex Offender Recidivism,” Office of Sex Offender Management Assessment and Planning Initiative, Office of Justice Program at [https://www.smart.gov/SOMAPI/sec1/ch5\\_recidivism.html](https://www.smart.gov/SOMAPI/sec1/ch5_recidivism.html). Retrieved April 26, 2017. Other chapters include: Sex Offender Risk Assessment, Effectiveness of Treatment for Adult Sex Offenders, and Sex Offender Management Strategies.

Sanhedrin because [of the principle that one always] increases sanctity and does not diminish it.<sup>45</sup>

What is the difference between the offices of the High Priest and the *rosh yeshiva* such that one allows for a reinstatement and the other does not? The Jerusalem Talmud suggests that the High Priest would also not have been reinstated were it not for the uniqueness of the sanctity of a *kohen*: “Neither shall [a *kohen*] go out of the sanctuary nor profane the sanctuary of his God;] for the crown of the anointing oil of his God is upon him; I am the Lord’ (Lev. 21:12), just as I (God) [always retain] My sanctity, so Aaron (as well as every *kohen*) retains his sanctity.<sup>46</sup> Thus, because the *kohen* is the exception, the rule is that once any leader betrays his office he can never be restored to it. His original status was a function of his initial election or appointment which was revoked and he no longer has any claim to it; the status of a *kohen*, whose sanctity is conferred by divine decree, can never be rescinded.<sup>47</sup>

Why was the *rosh yeshiva* not reappointed? There are many explanations: fear that a leader, once punished, may take advantage of his reappointment to exact revenge against those who convicted him or punished him;<sup>48</sup> Jewish law does not sanction it, even if there is no fear of retribution;<sup>49</sup> concern that the masses may continue to belittle or disparage the leader;<sup>50</sup> the violation is public and constituted a *hillul Hashem*, such a person can no longer serve as a proper role model for the community.<sup>51</sup>

<sup>45</sup> *Hil. Sanhedrin* 17:8-9.

<sup>46</sup> Jerusalem Talmud, *Sanhedrin* 2:1.

<sup>47</sup> *Peirush ha-Mishnayot le-ha-Rambam, Horayot* 3:2. Based on this analysis, the Tel Aviv Rabbinic Court in *Piskei Din Rabanniyim*, VIII, 147, writes:

It is clear, therefore, that we must equate any contemporary position (specifically, in their case, an educator) with that of the *Nasi*, which is a form of community prominence, and not to that of the High Priest who has intrinsic sanctity.

See, however, *Dibberot Moshe, Gittin*, 355, no. 23, n. 56, who maintains that the position of High Priest is not *sui generis* and that a person should be restored to every position. He maintains that the Jerusalem Talmud cited above comes to assert that no matter what a High Priest never loses his sanctity.

<sup>48</sup> Jerusalem Talmud, *Sanhedrin* 2:1; Radbaz to *Hil. Sanhedrin* 17:9. Although the Talmud speaks specifically about the king having those who prosecuted him killed, *Teshuvot Maharsham*, II, no. 56 extends the concern to all types of retribution, including financial.

<sup>49</sup> *Kesef Mishnah, Hil. Sanhedrin* 17:8-9; *Teshuvot Hatam Sofer, Orah Hayyim*, no. 41 and *Hoshen Mishpat*, no. 22.

<sup>50</sup> *Kesef Mishnah, Hil. Sanhedrin* 17:8-9.

<sup>51</sup> *Teshuvot ha-Radbaz*, VI, no. 2078.



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### SERVANTS OF GOD

R. Abraham Isaac Kook, the first Ashkenazic chief rabbi of British Mandatory Palestine, described himself—and, by extension, every rabbi—as an *eved le-avdei Hashem*, a servant of the servants of God. As such, the prime responsibility that a rabbi has is for the physical, emotional and spiritual wellbeing of the members of the Jewish community. At times, this mandate calls for protecting the reputation of the Jewish community at large and defending its leadership and institutions. At other times, however, it means taking serious stock of those very same leaders and institutions in order to make certain that they are upholding and furthering this mandate. If problems are uncovered, they must not be dismissed or hidden. In every case, the circumstances surrounding allegations and suspicions must be evaluated in light of the guidelines outlined above and determinations made as to whether public or private admonition is appropriate, whether or not the rabbi can remain in his position, and, subsequently, whether or not he should be restored to that position. When a rabbi has violated the appropriate boundaries that define the respectful and proper relationship between him and his congregants, considerations for the welfare of the victims, the well-being of the community and the integrity of Torah are priorities. In this way all members of the community—*avdei Hashem*, the servants of God, and *avdei le-avdei Hashem*, the servants of those servants—will fulfill the biblical admonition which calls on us to sanctify the Name of Heaven, “And [God] said to me, ‘You are my servant, O Israel, in whom I will be glorified’ (Isa. 49:3).”

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## “AND YOUR CAMP SHALL BE HOLY” – THE CASE OF THE TAKANA FORUM\*

### 1. The Need for the Forum

Sexual harassment is rampant throughout the world. In Israel, the number of those who are physically harassed comes to nearly 10% of all women above the age of 21 (according to a report by the Commission for the Advancement of Women in the Prime Minister's office), and when taking into account those who are verbally harassed in public spaces, the number reaches some 17% of all women (according to an estimate of the Central Bureau of Statistics). This is not a new phenomenon, but there has been a rise in public consciousness in the past decades in the wake of several incidents in which those accused were prominent public figures, including the President of Israel, senior officers in the army, members of Knesset, famous artists, and also—tragically and embarrassingly—eminent rabbis. As a result, sexual harassment, as well as more serious offenses of a sexual nature, have intensively preoccupied Israeli society in recent years.

In 1998 an innovative law that attracted wide public attention was passed in Israel. The Jerusalem District Court described the legislative intent as follows: "The law for the prevention of sexual harassment seeks to change patterns of behavior rampant throughout society, the military, and the workplace, and to guarantee a safe and secure work environment that safeguards human character and human dignity... The law for the prevention of sexual harassment mandates the public to act in accordance with a new norm. Its objective is to prevent individuals in a professional relationship from relating sexually to others, as such behavior adversely impacts the security, dignity, and privacy of human beings (7654/03, Dr. Amikam Kasir vs. the State of Israel).

\* This essay was translated from the Hebrew by Ilana Kurshan.

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Sexual harassment (a term that will apply for our purposes to all offenses of a sexual nature) is a reality in all sectors of Israeli society, including, of course, the religious community. This article will focus on a particular kind of sexual harassment in the religious sector: sexual harassment committed by those in a position of religious authority and power—rabbis, educators, and others who occupy formal roles in institutions, communities, and public contexts. This list also includes individuals invested with authority on account of their charisma, even if they do not occupy any formal role. If the offenders are figures of religious authority and power, the offense also takes on a unique element of severity.

The vast majority of victims of sexual harassment in the world famously elect not to file charges. Experts in the field agree that the Israeli sexual harassment law is among the most progressive in the world, yet only a minority of women summon the courage to file a complaint. Each year the various organizations that offer assistance to victims of sexual assault receive some 12,000 calls about sexual harassment, but only 20% of those who appeal to these centers for assistance ultimately decide to file charges.

The reasons for the low incidence of reporting are clear: due to the nature of sexual harassment, which generally takes place away from the public eye, the testimonies of the complainants and of the alleged perpetrators are pitted against one another, one person's word against another's. Thus, a common line of defense adopted by those accused of harassment involves scrutinizing the character of the complainants, defaming them, and prying into the history of their sexual behavior. Many of those who file charges of sexual harassment report that the judicial process subjects them to a sort of "second rape," one trauma in the wake of another, this time causing even greater psychological damage. Moreover, the requirement of proof beyond reasonable doubt in criminal law is likely to result in the acquittal of the defendants when there is no additional evidence beyond the testimony of the complainant or the defendant. The failure to convict in a case that receives public exposure is likely to cause many other victims to remain silent.

Members of the religious community who are victims of sexual harassment experience the hardships enumerated above, as well as hardships unique to the social, cultural, and religious characteristics of this sector of society. A public discussion about sexual matters, even if not really taboo, is particularly difficult in the religious community. Religious complainants who are asked to speak about intimate details of a sexual nature in a public venue experience a singular kind of distress. The religious community's prevalent instinct is to assume that "there is no smoke without fire,"

and that indecent things do not happen to decent people. In the religious community there is often implicit censure of the complainants, as if they have contributed to the embarrassing incident and perhaps even initiated it. The rumor mill at times hurts the complainants to such an extent that they find themselves humiliated in ever-widening social circles. The future consequences of filing a charge—even if it is successful—may be very harsh: it may be hard for single people to find matches, as a pall of implicit illegitimacy is cast over their families.

This is all intensified if the complaint concerns the behavior of a religious leader. On account of his stature, a religious leader is much more likely to be presumed innocent. He benefits from the backing and the support networks of those who depend on him in various ways: from a spiritual-religious perspective (his students), from an educational-ideological perspective (those who espouse the pedagogical philosophy with which he identifies), from an institutional and economic perspective (those who attend the institution where he serves and those who are employed there, who may worry that their livelihoods will be impacted), from a communal perspective (the more public a figure the rabbi is), and so on. It is a sad truth that in the religious sector in Israel there is a widespread tendency to respond leniently to religious leaders who transgress, with only limited censure. There are also notorious cases in which an entire incident was covered up under the false pretext of preventing “the public desecration of God’s name.” In general, figures of religious authority benefit from social mechanisms that make it hard to expose them and to investigate the sexual harassment charges filed against them.

It is important to emphasize that the sexual harassment of a religious individual by a figure of religious authority may well have harsher ramifications than other instances of sexual harassment. In addition to everything that is impacted in the life of the person who is harassed, whoever he or she may be, harassment in the religious sector also endangers the individual’s religious life. Such an unsettling of one’s foundations often leads to an even more profound personal crisis. Even though the potential damage caused by sexual harassment in the religious sector is greater, the chances of investigating the matter and successfully bringing sexual offenders to justice are less than would ordinarily be the case. The sexual harassment law is not sufficiently enforced in the religious community.

It is against this backdrop that organizations of religious women established the Takana Forum (see [www.takana.co.il](http://www.takana.co.il)) in 2003, described as “the forum for contending with and preventing sexual harassment by individuals of power and authority in the religious population.” The Forum has two overarching goals: the first is to contend with situations

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in which a sexual harassment complaint is levelled at a religious leader and the case is not handled by the lawful authorities. The second is to discourage sexual harassment by means of raising public consciousness about this matter in the religious community, which includes offering counselling and training services to religious institutions interested in receiving them, ensuring that the Forum's voice is heard in the Israeli media, and participating in relevant public activities.

The Forum composed "regulations for contending with and preventing sexual harassment and/or assault" (as per the Forum's website), which establish rules of conduct for those in positions of power and authority in the religious population. The goal of these rules of conduct is to deter sexual harassment without preventing people in positions of authority from fully functioning in their roles (including, for example, conducting personal conversations and dealing with sensitive topics). The regulations are also designed to protect authority figures from false accusations. The regulations were disseminated throughout religious educational institutions.

It is important to emphasize that the regulations do not permit anything that the State law forbids. Rather, the opposite is the case: the regulations are stricter than the State law in that they proscribe certain forms of behavior that the State law permits. For instance, according to the regulations it is forbidden for an authority figure to study in partnership with a lone pupil; when an authority figure travels with a pupil, the pupil must sit in the backseat and not in front next to the authority figure, etc. The regulations are intended to establish clear standards of appropriate conduct when it comes to the relationship between rabbis and students. The regulations are publicly accessible and are posted on the bulletin boards of most educational institutions, informing rabbis and students of the appropriate standards of conduct.

In addition, an "ethical code for the members of the Forum" was developed, which establishes core principles, such as "it is forbidden to defend or to cover up perversions of justice on the pretext that their exposure would lead to the desecration of God's name. On the contrary, God's name is sanctified when justice is served." The code stipulates what is expected of all Forum members who become aware of instances of sexual harassment.

The Forum is comprised of some thirty members, all of them individuals well-known in the National Religious community. They include a sizeable group of distinguished rabbis at the forefront of Religious Zionism, prominent educators, senior mental health professionals, activists in

organizations that offer assistance to women, and eminent jurists. The Forum is run by its constituent divisions, including the presidency of the Forum, the professional board, the board of directors, and the general assembly. The director of the Forum is Mrs. Yehudit Shilat. The various divisions are staffed by members of the Forum. Major institutions from all across the National Religious spectrum have joined forces with the Forum, including women's organizations, the center for Bnei Akiva yeshivot, the organization of Hesder yeshivot, major networks of schools, youth movements, charitable organizations, and others.

Although the members of the Forum include prominent halakhic decisors from the National Religious population, the Forum does not function as a halakhic decision-making body. It is not a formal rabbinic authority, interpreting and deciding upon matters of Jewish law, that is responsible for determining the legitimacy of particular forms of behavior on the part of the allegedly offending or the injured party, or the way in which the various committees deal with gathering testimony and laws of evidence, or the nature and the content of their rulings. All of the Forum's circles of activity—including the committees that adjudicate and rule in each of the cases—include both women and men who are not trained in halakhic decision-making, such as mental health professionals, jurists, and others. Whoever they may be, all the members of the Forum act out of a moral and religious consciousness which guides them in all aspects of their lives.

## **2. How the Forum is Run**

The Forum's primary activity on an ongoing basis consists of contending with complaints about acts of sexual harassment allegedly committed by figures of authority and power in the religious sector. The Forum has developed a clearly-defined procedure for responding to victims' complaints, which will be detailed below. However, not every report of sexual harassment by a figure of authority or power falls under the Forum's auspices. If the law requires that the alleged incident be reported to the national authorities—as with, for instance, sexual abuse of a minor—the Forum immediately forwards the report to the authorities and withdraws its involvement. Furthermore, if a crime may be involved, (even if there is no obligation to report it), the Forum urges the complainants to file a criminal complaint. Indeed a fundamental principle of the Forum is that complainants should always be encouraged to report the incident to the police, which has the resources, the experience, and the authority to best investigate these charges.

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Only when it is clear to the Forum that the complainants are unwilling to press criminal charges and there is concern that the complaint would not be investigated anywhere else, the Takana Forum gets involved to handle the complaint (and this too happens only after the Forum reports the complaint to the office of the Attorney General and receives a green light to proceed with the case). In addition, if the incident does not seem to be criminal in nature but apparently violates the guidelines for proper conduct outlined in the regulations, then the Forum will likely take on the matter.

Over the years the Forum has dealt with scores of complaints, which fell into two categories: suspected criminal offenses in which the complainants refused to go to the authorities, and behavior that is not illegal but is contrary to the Forum's regulations, which are more stringent than the law. Those complaints that the Forum refrains from handling also fall into two categories: cases in which the Forum managed to persuade the complainants to appeal to the State authorities and go through the official channels, and cases in which the Forum concluded that the complaint was not a criminal act nor a violation of the Forum's regulations.

Upon receipt of a complaint, it is relayed to the Forum's professional board, which determines whether it is appropriate for the Forum to handle. If the answer is affirmative, the professional board then establishes a committee of Forum members to investigate the complaint. The committee is generally comprised of four individuals – two men and two women: a rabbi, an educator, a therapist, and a jurist. This committee summons the complainant and other witness to testify. The committee also summons the defendant to respond to the allegations. This is followed by a hearing. Then a decision is reached as to whether the defendant indeed committed an act of sexual harassment. It is important to note that the committees do not purport to replicate the work of the court. For instance, in an attempt to reach a consensus, the committee is comprised of an even number of members, unlike the common practice where there is a judicial panel. Likewise, the committee's ruling is not arrived at based solely on legal criteria, and thus the Forum draws on the multiplicity of professional perspectives of the diverse group of individuals who comprise the committee.

If the committee concludes that the complaint has been substantiated, it can impose various sanctions—such as specific limitations on how he may conduct himself in his interactions with the public, to very severe sanctions such as mandating that he quit his job and prohibiting him from taken on a public pedagogical role in the future. The Takana Forum does not have enforcement powers like the State, but its public and



religious influence considerably increases the likelihood that the defendant will opt to comply. In addition the Takana Forum may inform various parties, such as the defendant's employers, of his actions, and to request that they uphold the sanctions. For the most part the Forum is highly successful in enforcing the committees' decisions, whether on account of the compliance of the defendants or on account of the cooperation of the institutions and organizations who employ them.

### **3. The Forum and the Laws of the State of Israel**

The Takana Forum is a private organization, and not an organ of the State. Yet the Forum presumes to impose sanctions on individuals, even in criminal cases. Is this permissible?

Theoretically criminal law (as opposed to civil law) deals with the relationships between the individual and the public. Thus it does not fall under the jurisdiction of private bodies, but rather under the public jurisdiction of the State, which relies on its various organs: the State Prosecution and the Attorney General, who also functions as the public prosecutor. The coercive and mandatory nature of criminal law reinforces the sense that there is no place for privatization of norms and standards.

Furthermore the sanctions imposed on one who violates criminal law impact on the rights of the individual who is convicted. Imposing a fine involves appropriating a person's property; defaming an individual tarnishes his reputation; firing a person affect his to freedom of occupation, etc. Criminal law is a societal tool with potentially harsh consequences for the individual.

The State of Israel has exclusive jurisdiction over criminal law and its enforcement. This is out of concern that the privatization of justice—handing over judicial power to an organization, institution, social group, or the like—is liable, on the one hand, to enable the accused to evade the full consequences of his actions should he receive an overly lenient sentence, thus contravening the public interest at large; or, on the other hand, to result in an overly harsh sentence. Obviously the State cannot permit a religious group to establish a private court that would sentence a Sabbath violator to death by stoning, or cut off the hand of a thief.

We can thus understand the Israeli Penal Code's prohibition on establishing private courts to administer criminal justice. Article 269 of the Penal Code provides that "a person may not play a role in the judicial proceeding once a suspicion of criminal activity arises, unless he notifies the Attorney General or his representative." The term "judicial proceeding" is defined in article 268 as a process that leads to one of the

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following: removing an individual from an organization in which he is a member; denying one of his human rights in that organization; publicly defaming him; and—and this is most relevant for our purposes—any other sanction that involves censure.” Anyone who violates this provision and participates in a judicial proceeding under these circumstances risks a year of imprisonment. Consequently private courts, such as that of the bar association or of a university, are not authorized to impose sanctions on an individual if there is any suspicion of criminal activity. This is how the State seeks to ensure that its doctrine of criminal justice will be implemented.

That said, there are exceptions to the national court system’s exclusive jurisdiction over criminal matters. The law permits the Attorney General to allow for exceptions at his own discretion. This is the background to the Forum’s 2006 appeal to the Attorney General at the time (today a Supreme Court justice), Meni Mazuz, Esq., with a request for permission to conduct a judicial proceeding, as per the usage of this term in the Penal Code, against individuals of authority and power in the religious community who are accused of sexual harassment. In this appeal the Forum also detailed a specific incident in which a complaint was filed with the Forum, without revealing the identity of those involved. The request for confidentiality came from the complainants, who feared public exposure, and the Forum respected their wishes.

The Attorney General and his staff met to consider this request. In attendance were the State Attorney and his staff, as well as senior representatives of the Israeli police force. They deliberated for some time, and with good reason: this was not a trivial decision, as will be explained below. In any case, following various in-house consultations, the Attorney General authorized the Forum. He refrained from stipulating at the outset which complaints the Forum was authorized to handle. Instead he ruled that in every incident in which there arises a “suspicion of criminal activity” during a specific proceeding conducted by the Forum, the Forum is obligated to notify the Attorney General of the matter, so that he may decide, in each case, whether to authorize the Forum to handle the incident based on the circumstances. “This will involve also giving credence, among other considerations, to the contribution of the Forum in the struggle to uncover and contend with incidents of sexual harassment of all sorts.”

As for the specific case that had been brought before him, the Attorney General wrote to the Forum that he had decided “not to order the termination of the proceedings they were conducting. This is in light of the nature of the proceeding, the nature of the Forum handling the

matter, and the sense that there would be no point of dealing with the matter in a criminal investigation, primarily in light of the complainant's adamant refusal to file charges with the police or to cooperate with a police investigation." (From a letter from Raz Nazari, Esq., Deputy Attorney General, to Professor Yedidia Stern, member of the Forum, on July 6, 2006.)

The authorization granted by the Attorney General for the operation of the Forum breaks the State's monopoly on criminal law twice over: first, on the level of content, the Forum establishes more stringent norms in the field of sexual harassment; and second, on the institutional level, the Forum conducts judicial proceedings independent of the State judicial system. The State remains the ultimate authority, since the Forum must obtain the Attorney General's authorization in order to continue with a proceeding. However, in approving of the Takana Forum, the Attorney General has authorized a body of private citizens to operate in a judicial capacity, at times impairing the human rights of other citizens who belong to their community, in accordance with the prevailing norms of justice in that community.

#### **4. The Challenges in Running the Forum**

The operation of the Forum parallels the operation of all the various entities that administer criminal justice: It investigates (parallel to the police), it puts individuals on trial (parallel the prosecution) and it imposes sanctions (parallel to the court). But in fulfilling all these roles it runs into several challenges which will be detailed below. Both in the religious sector and in the general public, some citizens maintain that the aggregate weight of all of these challenges undermines the legitimacy of the Forum, which should therefore be abolished. Others maintain that these concerns are not to be taken lightly, but there are ways to confront them by making changes in the way the Forum is run. Yet it seems to me that most of the Israeli public, both religious and secular, supports the operation of the Forum in spite of the many challenges.

A sizeable group of non-religious jurists, including some of the most senior in Israel, understand the importance of the Forum and strongly support it. As noted, the Attorney General too, in conjunction with the State Prosecution and the police, investigated the way in which the Forum conducts its activities and decided to authorize the Forum's operation, while helping to shape the way it is run so as to minimize these concerns.

Here is a breakdown of the challenges:

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### 4.1 The Rule of Law

A study conducted by the Israel Democracy Institute entitled “Religious? National!” (Tamar Herman et al., 2014) revealed that the National Religious public’s trust in the Knesset (39%), the Supreme Court (43%), and the government (42%) is lower than the secular public’s trust in these same institutions (58%, 72%, 59%, respectively). About half of the National Religious population maintains that religious members of Knesset ought to be subject to rabbinic authority when it comes to political matters, and nearly 40% maintain that soldiers in the IDF should refuse to obey military orders to evacuate settlements in Judea and Samaria. It is worth adding that the vast majority of National Religious halakhic decisors in Israel refer to the Jewish and democratic State’s courts as “gentile courts” (*arkhaot shel goyim*), with all the halakhic significance that designation entails.

The picture that emerges, which is very familiar to Israelis, is one of a complicated tension between the political and legal authority of the State, particularly in matters of religion and State and foreign policy and security, and the views prevalent among large sections of the National Religious population. Given this, we could imagine that the State might have difficulty recognizing the quasi-judicial activity of a religious Forum that operates extra-legally on behalf of the religious community. Recognition of a Forum that is run, in part, by rabbis who condition their cooperation with the State on other important issues, is no simple matter.

That said, as explained above, the Takana Forum officially accepted upon itself—in its official documentation and in many public declarations—its full subordination to the law and to the guidelines stipulated by the Attorney General. Those who serve on the Forum include senior jurists for whom a strict adherence to the rule of law is a given. Obviously, had the Attorney General decided not to recognize the Forum, it would have desisted immediately from its quasi-legal activities.

### 4.2 Communal Authority

The members of the Forum are not elected by the community. It is an entirely private group that invites organizations and individuals to join it at its own discretion. Given that, we must inquire about the Forum’s right to claim to be the voice of the National Religious community. Through what process of accreditation or representative election does the Forum derive its authority?

The clear response to this objection, it seems, emerges when we examine the composition of the members of the Forum. This is a group

unlike any other in the public life of the religious community in Israel. Joining each other at the table are leading rabbis from all across the Orthodox ideological spectrum: liberal modern Orthodox, classical National Religious, Zionist-ultra-Orthodox. The very act of bringing together all of these individuals is in itself an extraordinary accomplishment. Then there are the women's organizations, which also represent a wide range of individuals; the mental health professionals, some of whom represent the leading organizations in the field; the jurists, some of them quite senior, who represent a variety of worldviews, etc. The organizational chart of the participants in the Forum is also very impressive.

Perhaps not a single group that plays a significant public and ideological role in the National Religious community is unrepresented. Even in the absence of any formal process that guarantees representation, there is little doubt that this representation is achieved very successfully. The empirical evidence lies in the fact that the Forum's decisions, once received, are implemented by the vast majority of the members of the community.

#### **4.3 Investigating the Truth**

In every legal ruling, there is concern about arriving at the wrong verdict, which would convict the innocent or acquit the guilty. But here the concern is even greater, because unlike jurists in a courtroom, those who serve on the Takana Forum committees are not individuals who engage full-time in this work, and many are not even legally trained. Moreover, the proceedings are not conducted based on clearly-defined rules of evidence. The Forum's committees do not have investigative techniques like those employed by the police, and they lack the authority and the capabilities that the law enforcement system employs as a matter of course.

Likewise the Forum does not permit lawyers—"officers of the court"—to appear before the committees, such that the opposing sides are not represented by professionals. The Forum is currently considering the possibility of changing this practice so as to allow for professional representation at its hearings. In any case, the primary tools that legal systems afford to their judges are not afforded to the committees that deliberate the fate of those accused of sexual harassment. There is therefore a justifiable concern that the committee's verdicts are even more prone to error.

These are very weighty objections that cannot be dismissed with the wave of a hand. From my experience I can attest that the Forum's committees are aware of these limitations and that they try, to the best of their

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ability, to be extremely cautious when it comes to guarding against error in judicial proceedings. They are aided by the fact that in the majority of cases the offenders and the complainants view the committee not just as a “courtroom”; as members of the religious community, they ascribe singular importance to the proceeding and to the committee that deals with their affairs, which is based on the Forum’s public credibility. The absence of investigative techniques and professional experience is made up for, at least partially, by the committee’s religious leadership authority in the eyes of the disputants. Thus, the percentage of cases in which the offender admitted to the charge leveled against him in the context of the Forum’s hearings is much higher than the percentage of admissions of guilt in sexual harassment cases in court. Of course this does not address the real challenge, which still stands.

### **4.4 Miscarriage of Justice**

There is also the concern that there may be a deliberate miscarriage of justice on the part of the individuals conducting the proceedings. This concern is twofold. On the one hand, given that the Forum is intra-communal, it is possible that the members of the committee may commit an act of malice against the accused, whom they may dislike on account of personal circumstances, professional competition, disagreement over ideological matters, etc. On the other hand, the intra-communal Forum may act out of an interest in protecting rabbis who are accused of harassment, and out of a tendency to “close ranks,” such that a valid complaint may be inappropriately dismissed.

There is no perfect response to this concern, but there is an adequate one: The Forum’s committees are not homogeneous, but they are diverse, such that a deliberate miscarriage of justice is unlikely to take place on account of inappropriate interests or personal preferences. As explained above, every committee includes not just a rabbi, but also a mental health professional, and a jurist. It is worth noting that in one specific case in which such claims were raised, the forum broke from its standard practice and significantly increased the number of members on the committee, thereby silencing the gossip-mongers.

### **4.5 Absence of Supervision**

The Forum’s hearings are not conducted in public, and its decisions are not publicized. This way of operating, which is different from courtroom procedure, is necessary under the circumstances, given that opening the Forum’s hearings would defeat the primary purpose of the complainants

who appeal to the Forum, namely the protection of their privacy. But this comes at an inevitable cost: the activities of the Forum are not subject to public or professional review. Moreover, unlike judicial or administrative proceedings, the Forum's decisions are final and not subject to appeal either by the complainant or by the accused. The lack of transparency and the absence of any right of appeal may be seen as fertile ground for arbitrary or mistaken conduct.

In response to these serious arguments, it is worth giving the following two matters their proper due:

First the general assembly of the Takana Forum, which includes thirty men and women, receives a regular report on all the cases dealt with by the various committees, in which all parties remain anonymous. In this context the committees raise various dilemmas that came up in their deliberations, and they conduct a brainstorming session intended to come up with appropriate resolutions. In addition the Forum administratively directs many inquiries—on principle and on specific cases—to leading jurists and other experts outside the Forum.

Second and most important, the members of the Takana Forum do not enjoy any form of immunity, which is naturally afforded to the State's judges and law enforcement officers. They are not protected from being personally sued by the accused for defamation or threats of extortion. Anyone who serves on one of the Forum's committees does so at real personal risk: if (s)he is personally sued on account of his or her role, (s)he will be in a difficult position without the cooperation of the complainant, who is likely to be anxious to protect his or her privacy. This matter underscores the high level of responsibility that the members of the Forum take upon themselves, which is all without any financial reward. This responsibility, and the personal exposure that looms over the participants, are the best guarantees that they will conduct themselves with the utmost propriety.

#### **4.6 Interference with Police Proceedings**

The activity of the Forum might complicate police proceedings. For instance, the Forum may be unaware of that the police is simultaneously conducting a confidential investigation of the defendant. Summoning the suspect to a Forum hearing is liable to apprise him—against the best interests of the investigation—that his actions have been made public. This in turn would allow the defendant to destroy or conceal evidence, to put pressure on other potential complainants, and to engage in other defensive measures.



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As a partial response, the Forum coordinates its work with the Attorney General's office. Every complaint that reaches the Forum is reported anonymously to the Attorney General's office, which determines whether there is a chance that charges have been filed with the police, and whether the defendant is already the subject of a police investigation on account of this incident or other related incidents. Only if the Attorney General's office is satisfied that there is no such possibility does he authorize the Forum to handle the claim.

### **4.7 Confidentiality**

The Takana committees operate with full discretion when it comes not just to the identity of the victim, but also, by necessity, to the identity of the perpetrator. This is required because publicizing the name of the perpetrator generally leads to the exposure of the victim – whether by a deliberate act on the part of the perpetrator, perhaps even an act of retaliation, or whether by the community merely putting two and two together. However, preserving confidentiality when it comes to the identity of the perpetrator diminishes the educational and the deterrent message of a public proceeding. Likewise, if the general public is not privy to these matters, then individuals are not protected against further offenses by the same individual.

This is a very significant challenge that the Forum's committees seek to address by means of the sanctions that they impose. For instance, one sanction commonly employed is to prohibit the perpetrator to return to work or to put himself in a situation that may allow him to repeat his offensive behavior. The Forum also checks that its provisions are followed and occasionally it has interfered, even some time later, to ensure that the offender does not return to a position in which he can cause harm to others.

### **5. The Forum – Interim Summary**

In light of the challenges outlined above, why did the Attorney General authorize judicial proceedings by those who are not legally judges but are rather self-appointed representatives of the social-religious sector? And furthermore, how can the members of the Forum presume take upon themselves the responsibility to cause significant harm to another individual—affecting his livelihood, his reputation, his self-image, and at times also having broader repercussions for his family, his disciples, and others?

There are situations in which an extremely dangerous man walks among us under the guise of a man of God, and there is no legal recourse to save the prey from the predator. The power dynamic between the

perpetrator—a mature and charismatic adult with religious authority, and the victims—who are often young and naïve, fearing both God and man, makes it difficult for the victims to defend themselves during the act itself and to file a complaint after the fact. Given that this is the case, anyone who has the ability to help rescue the victims has the weighty responsibility to do so, as per the Bible’s injunction “Do not stand idle when your neighbor’s blood is at stake” (Leviticus 19:16). The blood of those who have already been hurt, and the blood of those who are likely to be hurt in the future, cries out from the earth.

As the last decade has demonstrated, the National Religious community in Israel has the ability to contend with harassment even in cases where the State is unable to come to the victims’ aid, thanks to a diverse group of communal leaders—both men and women.

But the community can take on this role only after it is clearly determined that its private involvement will not in any way lead to the suppression of complaints that would otherwise be brought to the police’s attention. It is thus incumbent upon every member of the Forum, as per the Forum’s code of ethics, “to refrain from all acts of commission or omission that would lead to the suppression of a complaint.” Moreover the Forum is obligated to cooperate fully with the authorities, to the best of its ability. This obligation is articulated on the Forum’s website in the following explicit terms: The Forum “is at the disposal of victims only in cases when they do not wish or are unable, for their own personal reasons, to file a charge with the police, yet they nonetheless wish for justice to be served and for the perpetrator who took advantage of his position to be removed from any situation in which he is able to engage in further acts of abuse so as to prevent others from getting harmed and so as to safeguard the sacred values on which a religious community seeks to base its life.”

As for the concern that the approval by the State of the Forum’s activities infringes upon the authority of the State and its rule of law, the response is to be found in Takana’s code of ethics and in its regulations, which emphasize that the activity of the Forum is not intended to interfere with State laws, and its decisions should not be interpreted in any way that contradicts the law or the rulings of the Israeli courts.

The consequence is that to the extent that any Israeli citizen who sexually harasses a subordinate or any other individual is “threatened” only after a complaint is filed with the police, and only by Israeli law, an authority figure from the National Religious sector is also “threatened” by the regulations of Takana, whose standards are higher than those established by the law, and whose punishment is not dependent on whether the matter was brought to the authorities’ attention. It thus emerges that

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the very fact of an individual's belonging to this social sector imposes upon him, unwillingly and unknowingly, these singular rules of conduct. One can object to this reality, or one can celebrate it. As one who has been there from the Forum's inception until now, and as one who participated in the decision-making during some very dramatic and foundational cases, I feel that it is a privilege to be part of this important group of those who are literally engaging in Tikkun Olam, the repair of the world.

It seems fitting to conclude with a quote from an article by one of the most senior jurists in Israel, Professor Nili Cohen, who is also the President of the Israel Academy of Sciences and Humanities, and who writes as follows: "The recognition of an arrangement such as that suggested by the Takana Forum is an expression of cultural pluralism. The monolithic national system cannot respond to human complexity. The arrangement offered by the Takana Forum is tailor-made to fit the personal preferences of its members. It gives expression to the diversity of religions, cultures, and faiths. A person who seeks to join a particular community ought to accept its rules." She goes on to say: "A Forum such as the Takana Forum is legitimate, and it constitutes the State's recognition of communal rights and multi-culturalism." [From "Prisoners, Communities, and Natural Authority" in *Law and Business* 14 (2012), 595-637.]

## SURVEY OF RECENT HALAKHIC PERIODICAL LITERATURE: CADAVERIC DENTAL IMPLANTS

### I. THE NATURE OF THE PROBLEM

In recent decades, tooth implants have largely supplanted dentures in replacing natural teeth that have been lost. Implants are essentially false teeth permanently anchored in the jawbone. In some patients, loss of natural teeth is the result of, or accompanied by, bone degeneration that effectively prevents prosthetic implantation. That problem can be ameliorated by augmenting existing bone with implanted material.

Bone grafts are used both as a filler and as a scaffold to facilitate bone formation. Bone grafts also act as a mineral reservoir that serves to induce osseogenesis, i.e., new bone formation. Such grafts are bioabsorbable and produce no antigen-antibody reaction. As natural bone grows it gradually replaces the graft material completely and results in a fully integrated region of new bone. It is possible to use natural bone tissue obtained in the form of an autograft, a bovine-derived xenograft or bone tissue derived from cadavers, or to use artificial, synthetic or natural substitutes, particularly titanium or ceramic-based materials, for this purpose. Which is to be preferred is a matter that varies according to physiological circumstances and the clinical judgment of the practitioner. Bone tissue used in dental implants is sterilized, chemically treated to remove factors and proteins, pulverized and mixed with other materials. The congealed compound is then used to reconstruct the jaw artificially. The material is placed within the jaw and is generally covered by the gum during the process of osseointegration.<sup>1</sup> The implant binds with the natural bone, enabling the jaw to support an implant. When that process is completed the gum is

I wish to express my appreciation to Mr. Yosef Cohen for his research assistance.

<sup>1</sup> During the process of osseointegration blood cells migrate into the tissue surrounding the implant. The blood cells interact with the implant and form a fibrine matrix that acts as a scaffold for the migration of osseogenetic cells and results in formation of osteoid tissue and new bone. See A.F. Mavrogenis *et al.*, "Biology of Implant Osseointegration," *Journal of Musculoskeletal Neuronal Interaction*, vol. 9, no. 2 (June, 2009), p. 62.

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reopened, an abutment is attached to the implant and the artificial tooth is attached.<sup>2</sup>

Over the years, as employment of this procedure has become more widespread, an increasing number of dentists and their patients have queried whether performing cadaveric bone implants is consistent with Halakhah. The issues are threefold in nature: 1) abrogation of the obligation of burial; 2) possible *issur hana'ah*, i.e., violation of the prohibition against deriving benefit from a cadaver; and 3) questions of defilement in cases in which the patient or the dentist is a *kohen*. Although to the best of this writer's knowledge, rabbinic respondents, himself included, have been univocal in sanctioning the procedure, no comprehensive treatment of the issue has appeared in print until recently. The first issue of a new journal, *Yadrim* (Nisan 5777), published by the *Beis Medrash* of the Boca Raton Synagogue, features an article devoted to this topic, authored by Rabbi David Shabtai, M.D., rabbi of the Sephardic Minyan of Boca Raton Synagogue. The material was originally published by Rabbi Shabtai as a monograph titled *Kol Azmotai Tomarnah ha-Shem Mi Kamokha*. The matter is also addressed by R. Asher Weiss in his recently published *Teshuvot Minhat Asher*, II, nos. 71 and 72.

Implantation of cadaveric material in the jawbone of the patient results in the ongoing defeat of the obligation to bury the deceased.<sup>3</sup> However, assuming that the obligation of burial attaches only to a minimum quantity of cadaveric tissue equal in quantity to a *ke-zayit*,<sup>4</sup> the patient has no such obligation with regard to the small amount of bone implanted in

<sup>2</sup> See Mayo Clinic, "Dental Implant Surgery: What You Can Expect," <http://www.mayoclinic.org/tests-procedures/dental-implant-surgery/details/what-you-can-expect/rec-20245754>.

<sup>3</sup> Cf., R. Ezekiel Landau, *Teshuvot Noda bi-Yehudah, Mahadura Kamma, Yoreh De'ah*, no. 90. On the other hand, *Mishneh la-Melekh, Hilkhos Avel* 14:21, s.v. *asher*; *Tiferet Yisra'el, Shabbat, Bo'az* 10:1; and R. Menasheh Pollack, *Teshuvot Helek Levi, Yoreh De'ah*, no. 125, assert that the obligation of burial is limited to burial of the head and the major portion of a corpse. Cf., R. Ovadia Yosef, *Teshuvot Yabi'a Omer*, III, *Yoreh De'ah*, no. 22, sec. 19.

Since there is no statutory obligation with regard to burial of a non-Jewish corpse, the issue is limited to bone tissue derived from the body of a Jew. Cf., however, R. Moshe Sofer, *Teshuvot Hatam Sofer, Orah Hayyim*, no. 208, and *Teshuvot Yabi'a Omer*, III, *Yoreh De'ah*, no. 22, sec. 20. The obligation to bury non-Jewish dead in order to promote harmonious relations between Jews and gentiles does not apply when burial is not desired. See also *infra*, note 5 and accompanying text.

<sup>4</sup> According to R. Chaim Noe, a *ke-zayit* is equal to approximately 23 grams; according to *Hazon Ish* it is equivalent to approximately 30 grams. See R. Ya'akov Kanievski, *Shi'urin shel Torah* (Bnei Brak, 5729), pp. 65–66. Rabbi Kanievski, *ibid.*, p. 71, suggests that according to some authorities, a *ke-zayit* may be as little as 10 grams.

his mouth.<sup>5</sup> Nevertheless, an obligation of burial would be incumbent upon the manufacturer of the compound or upon the dentist who has custody of a quantity of bone equal to a *ke-zayit* derived from a single cadaver.

Elsewhere, this author has discussed the permissibility of benefiting from cadaveric tissue in conjunction with the study of anatomy.<sup>6</sup> As recorded in *Shulhan Arukh*, *Yoreh De'ah* 349:1, a Jew may not derive benefit from either a Jewish or non-Jewish cadaver. Although all authorities recognize the *issur hana'ah* with regard to the corpse of a deceased Jew, whether that prohibition is biblical or rabbinic in nature is the subject of significant controversy among both medieval and latter-day authorities.<sup>7</sup> In disagreement with the ruling of *Shulhan Arukh*, some authorities maintain that there are no restrictions with regard to benefiting from a non-Jewish cadaver.<sup>8</sup> R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 230, *anaf* 6, and R. Shlomoh Zalman Auerbach, as cited by Dr. Abraham S. Abraham, *Nishmat Avraham*, *Yoreh De'ah* (Jerusalem, 5745) 349:1, note 1, permit such benefit in cases of “great need.”<sup>9</sup> Since the majority of this country’s population is non-Jewish it may be assumed that the majority of bone donors are non-Jews. Application of the principle “*kol de-parish me-rubba parish*,” i.e., given the existence of both a major set and a minor set, any separated entity is to be deemed to have separated itself from the larger set, yields the conclusion that, for halakhic purposes, the cadaveric material used in bone grafts must be deemed to have been derived from the body of a non-Jew. Application of the principle of *kol de-parish me-rubba parish* also effectively resolves the problem of burial of cadaveric material.<sup>10</sup>

<sup>5</sup> Cf., however, R. Joseph Babad, *Minbat Hinnukh*, no. 537, who states that “perhaps there is an obligation of burial with regard to even smaller quantity.” A similar doubt was expressed by *Tosefet Yom Tov*, *Shabbat* 10:4.

<sup>6</sup> See J. David Bleich, *Contemporary Halakhic Problems*, II (New York, 1983), 60–64.

<sup>7</sup> See *Pithei Teshuvah*, *Yoreh De'ah* 349:1 and *Contemporary Halakhic Problems*, VI (Jersey City, N.J., 2012), 400–402. For a discussion of suspension of rabbinic prohibitions for therapeutic purposes see *Contemporary Halakhic Problems*, I (New York, 1977), 98–99.

<sup>8</sup> See J. David Bleich, *Be-Netivot ha-Halakhah*, III (New York, 5761), 203–210 and *Contemporary Halakhic Problems*, IV (New York, 1995), 185–187.

<sup>9</sup> See also R. Abraham I. Kook, *Da'at Kohen*, no. 199; R. Ovadiah Hedaya, *Teshuvot Yaskil Avdi*, VI, *Yoreh De'ah*, no. 19; R. Ben-Zion Abba Sha'ul, published in *Teshuvot Yabi'a Omer*, III, *Yoreh De'ah*, no. 20; and R. Ovadiah Yosef, *ibid*, nos. 21–23.

<sup>10</sup> See *supra*, note 3.

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### II. TRANSGRESSION TO PRESERVE LIMBS AND ORGANS

As recorded by Rema, *Yoreh De'ah* 157:1, although a person need not accept death in order to avoid transgression of a negative commandment, he is nevertheless obligated to expend even his entire fortune in order to avoid transgression of a prohibition of such severity. *Shakh*, *Yoreh De'ah* 157:3, expresses doubt with regard to whether even sacrifice of a limb or organ is required under such circumstances but inclines toward leniency.<sup>11</sup> *Pri Megadim*, *Orah Hayyim*, *Mishbezot Zahav* 328:7, notes that *Shakh* is seemingly contradicted by *Shulhan Arukh*, *Orah Hayyim*, 328:17, who forbids infraction of Sabbath proscriptions prohibited by a negative commandment even if necessary to preserve a limb or an organ. *Pri Megadim* resolves the contradiction by adopting *Shakh*'s permissive view with regard to violation of negative commandments other than those involving the even more severe Sabbath violation.<sup>12</sup>

R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, III, *Yoreh De'ah*, sec. 30, assumes as a matter of course that, if deriving benefit from a corpse is a biblical offense, its status is that of transgressing a negative prohibition carrying the statutory punishment of forty lashes. Nevertheless, Rabbi Shabtai correctly reasons that *Shakh*'s ruling constitutes grounds to permit bone transplants even in instances in which it is known that the donor was a Jew.<sup>13</sup>

To this writer, it seems that there are grounds for sanctioning cadaveric implants, even if *Shakh*'s position were not fully accepted. The reason for that assertion is that it is not clear that deriving benefit from a corpse

<sup>11</sup> Presumably, the rationale underlying *Shakh*'s ruling is that a person is required to expend even his entire fortune to avoid transgressing a negative commandment but is not required to accept a sacrifice of greater magnitude. Sacrifice of a limb is an onus greater than expenditure of an entire fortune and hence is not required. For a fuller discussion see J. David Bleich, *Bioethical Dilemmas*, I (Hoboken, N.J., 1998), 241–243. See also *infra*, note 15 and accompanying text.

<sup>12</sup> *Shakh*'s permissive view is adopted by *Be'er Heitev*, *Yoreh De'ah* 157:2; *Bet Lehem Yehudah*, *Yoreh De'ah* 157:3; *Darkei Teshuvah*, *Yoreh De'ah* 157:19; R. Joshua Weingarten, *Teshuvot Helkat Yo'av*, *Kava de-Keshita*, no. 103; R. Ovadiah Yosef, *Teshuvot Yabi'a Omer*, III, *Yoreh De'ah*, no. 23, sec. 30; and Dr. Abraham S. Abraham, *Nishmat Avraham*, *Yoreh De'ah* (Jerusalem, 5744) 157:1, note 3. However, *Shakh*'s position is ostensibly contradicted by one significant authority, R. Shlomoh Luria, *Teshuvot Maharshah*, no. 3, who regards all negative commandments as comparable to Sabbath prohibitions that may not be transgressed for purposes of preserving a limb. See also *idem*, *Yam shel Shlomoh*, *Hullin* 8:13. Curiously, *Shakh*, *Yoreh De'ah* 179:1, cites *Teshuvot Maharshah* without any indication of his own opposing view. See, however, *infra*, note 25 and accompanying text.

<sup>13</sup> See *Kol Azmotai Tomarnah ha-Shem Mi Kamokha*, pp. 5–6.



risers to the level of a negative prohibition carrying the penalty of forty lashes. Rambam, *Hilkhot Avodah Zarah* 7:2, appropriately records the prescribed punishment of lashes with regard to biblically prohibited forms of benefit in conjunction with objects devoted to pagan worship. However, in *Hilkhot Ma'akhalot Assurot* 9:1, Rambam states that consumption of meat and milk that have been comingled in cooking is punishable by lashes but fails to record that the same punishment is imposed for deriving benefit from such a mixture. *Lehem Mishneh*, *ad locum*, explains that omission with the observation that the prohibition against benefitting from such food is not explicitly stated in Scripture.<sup>14</sup> Similarly, Rambam fails to mention a punishment of that nature in either chapter 14 of *Hilkhot Avel* with regard to benefitting from a corpse or in chapter 10 of *Hilkhot Rozeah* with regard to the prohibition against deriving benefit from an *eglah arufah*, i.e., a heifer whose neck is broken in expiation of the murder of an unidentified wayfarer as described in Deuteronomy 21:1–9. The Gemara, *Avodah Zarah* 29b, does not derive the *issur hana'ah* associated with a cadaver from an explicit scriptural passage but by applying a hermeneutic principle effecting transposition of such a stricture from the regulation governing the *eglah arufah*. No benefit may be derived from the corpse of that animal since Scripture compares the *eglah arufah* to sacrificial animals. The Palestinian Talmud, *Avodah Zarah* 5:12, reverses the derivation and deduces the prohibition against deriving benefit from the *eglah arufah* from the prohibition attendant upon deriving benefit from a corpse. The prohibition against benefitting from a corpse is based upon a metaphorical comparison in Psalms 106:28 of human corpses to pagan sacrifices on the basis of which it is established that no benefit may be derived from a cadaver.

There is no citation in either source of an explicit negative commandment with regard to deriving benefit from either an *eglah arufah* or a corpse. The biblical locus of the ban against benefitting from a corpse is the report of the interment of Miriam described in Numbers 20:1. Rabbinic exegesis understands the verse as implying that naught else might be done with her body. The nomenclature employed by Scripture is not that of a negative commandment. Assuming, as does the Palestinian Talmud, that the ultimate source of the prohibition against deriving benefit from a corpse is the rule applicable to the *eglah arufah* which is then

<sup>14</sup> Actually, presumably for the same reason, Rambam, *Hilkhot Ma'akhalot Assurot* 8:16, rules that, for all prohibited foodstuffs from which even benefit may not be derived, lashes are administered only for consuming the food product but not for deriving benefit therefrom.

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transposed to deriving benefit from a corpse, the prohibition against deriving benefit from an *eglah arufah* is itself inferred from the role and nature of the *eglah arufah*. As posited by the Gemara, *Avodah Zarah* 29b, the *eglah arufah* serves to expiate transgression in a manner similar to that of a sacrificial animal. Accordingly, a person deriving benefit from an *eglah arufah* is not subject to lashes because the prohibition against deriving such benefit is not explicit in Scripture. Hence, punishment in the form of lashes cannot be transposed to a violation of the ban against benefitting from a cadaver.

Thus, deriving benefit from a cadaver, even if it constitutes a biblical transgression, would seem not to be in the nature of a transgression of an explicit negative commandment but a prohibition established on exegetical grounds. If so, it is arguable that such a prohibition is suspended in order to avoid loss of a limb or an organ. The argument would be that avoidance of such a transgression does not require surrender of one's entire fortune and hence, *a fortiori*, does not require sacrifice of a limb.

It is clear that a person need not expend more than a fifth of his wealth for the sake of fulfilling a positive commandment. It is undoubtedly for that reason that R. Joshua Weingarten, *Teshuvot Helkat Yo'av*, I, *Dinei Ones*, sec. 7, rules that a person need not risk serious illness in order to fulfill a positive commandment. It would certainly seem that loss of a limb or organ is an even greater burden than loss of one's entire fortune, as is evident from *Shakh*'s ruling that a person is not required to accept loss of a limb or organ in order to avoid transgressing a negative commandment. Presumably, even if *Shakh*'s opinion is not accepted, all would agree that loss of a limb or organ is tantamount to expenditure of more than one-fifth of one's fortune and hence is an onus that a person is not required to assume in fulfilling a positive commandment.<sup>15</sup> *Helkat Yo'av*'s ruling seems to be based upon that line of reasoning. It may then well be the case that any disagreement with *Shakh* would be limited to transgressing a severe prohibition in the nature of an explicit negative commandment entailing punishment by lashes but not of a lesser negative prohibition that is not accompanied by that severe punishment.

The concept of loss of a limb is not limited to physical loss but includes loss of function as well.<sup>16</sup> *Nishmat Avraham*, 3rd ed. (Jerusalem, 5774), *Yoreh De'ah* 349:1, note 4, p. 576, correctly states that "danger to

<sup>15</sup> For a fuller discussion see J. David Bleich, *Bioethical Dilemmas*, I (Hoboken, N.J., 1998), 90–93.

<sup>16</sup> See R. Chaim Noe, *Kezot ha-Shulhan*, *Badei ha-Shulhan* 138:18 and *Nishmat Avraham*, *Orah Hayyim* 328:17, note 46.

a limb” includes not only forestalling future loss of functionality, e.g., ability to masticate food, but also restoration of a function that has already been lost. In support of that reasoning, *Nishmat Avraham* cites *Tosafot*, *Bava Mezi'a* 114b, s.v., *amar leih*, who explain that Elijah, who was a *kohen*,<sup>17</sup> was permitted to make tactile contact with a person who had already died in order to restore him to life.

*Nishmat Avraham* understands *Tosafot* as justifying Elijah’s defilement as an act of *pikuah nefesh*<sup>18</sup> and, accordingly, deduces from *Tosafot*’s comment that restoration of life is to be equated with preventing death from occurring.<sup>19</sup> Similarly, reasons *Nishmat Avraham*, restoring function to an organ<sup>20</sup> is to be equated with preventing loss of function.

However, that understanding of *Tosafot*’s comment is probably incorrect. *Tosafot*, in justifying Elijah’s conduct, employ the phrase “for [Elijah] was certain that he would resurrect him.” If Elijah’s justification was rescue of a life, “certainty” would not have been necessary; even

<sup>17</sup> The Gemara, *Bava Mezi'a* 114b, reports that Elijah was addressed as a *kohen* by Rabbah. *Talkut Shimoni*, *Parashat Pinhas* sec. 771 and *Pirkei de-Rabbi Eli'ezer*, ed. Michael Higger (New York, 5704), chap. 46 identify Elijah as Phineas, the son of Aaron. See also *Pirkei de-Rabbi Eli'ezer* (Warsaw, 5612), chap. 47.

<sup>18</sup> A number of other scholars have also understood *Tosafot* as invoking the principle of *pikuah nefesh*. See R. Jacob Neumark, *Eshel Avraham* (Tel Aviv, 5708), *Perot Ginosar*, no. 23; R. Iser Yehudah Unterman, *Ha-Torah ve-ha-Medinah*, IV, 25f; and *idem*, *Shevet me-Yehudah*, I, *Sha'ar Rishon*, chap. 7.

<sup>19</sup> R. Meir Don Plocki, *Hemdat Yisra'el*, *Maftchot ve-Hosafot*, p. 33, points out that we do not find any source indicating an obligation to resurrect the dead; the obligation to preserve human life extends only to the living. That position is also stated emphatically by R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, II, no. 174. Rabbi Feinstein suggests that the preservation of life referred to by *Tosafot* is either the life of the child’s grief-stricken mother or perhaps that of Elijah himself.

It has been suggested that there is an obligation to resuscitate or “resurrect” the dead but that this obligation is not encompassed within the general obligation to preserve life. Rather, according to this understanding, the obligation to restore life to one who has already died is based upon the rationale adduced by the Gemara, *Yoma* 85b, “Desecrate one Sabbath on his behalf in order that he may observe many Sabbaths.” The concern, then, is to enhance the total number of *mizvot* performed. Since this is the sole halakhic consideration mandating resuscitation of one already dead, *Tosafot* reason that no halakhic prohibition may be violated in the process unless there is absolute certainty with regard to the success of such efforts. See R. Yechiel Ya'akov Weinberg, *No'am*, IX (5726), p. 124, reprinted in *idem*, *Seridei Esh*, III (Jerusalem, 5726), no. 127, p. 350. Cf., R. Naphtali Zevi Yehudah Berlin, *Ha'amek She'elah*, no. 166, sec. 17, who expresses a similar view in a different context.

<sup>20</sup> R. Chaim Noe, *Kezot ha-Hoshen*, *Badei ha-Shulhan* 138:18, states that restoring function even to a partially compromised organ, e.g., correcting a limb, constitutes *sakanat ever*. That position is endorsed by *Nishmat Avraham*, *Orah Hayyim* 328:17, note 36 and *Nishmat Avraham*, 3rd ed. (Jerusalem, 5774), *Yoreh De'ah* 349:1, note 3.

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doubtful, or *safek*, *pikuah nefesh* justifies transgression of a biblical prohibition. R. Yechiel Ya'akov Weinberg, *No'am*, IX (5726), p. 214, reprinted in his *Seridei Esh*, III (Jerusalem, 5726), no. 127, p. 35, explains *Tosafot* as invoking, not the principle of *pikuah nefesh*, but the concept of *met mizvah*. The honor of the dead requires that a *kohen* defile himself in the burial of an otherwise unattended corpse, but only if the *kohen*'s ability to provide a suitable burial is a "certainty." Resurrection is the highest form of honor that can be conferred upon the deceased; hence, Elijah, who was capable of restoring the deceased to life, was permitted to defile himself in resurrecting the corpse just as he would have been permitted to bury a *met mizvah*—but only because his ability to carry out the endeavor successfully was known to him with "certainty."<sup>21</sup> Nevertheless, even though *Tosafot*'s comments do not necessarily confirm *Nishmat Avraham*'s thesis, his position is nevertheless entirely cogent.

That analysis is cogent only if it is assumed that the disparity between the lesser burden that must be accepted in order to fulfill a positive *mizvah* and the greater burden that must be assumed in order to avoid transgressing a negative commandment reflects the severity of a negative commandment, as evidenced by the nature of punishment meted out for infraction, as opposed to the lesser transgression involved in simply not fulfilling a *mizvah*. Alternatively, the distinction may be between an overt act of transgression and merely passive non-performance. The difference between those two rationales would become manifest in situations in which the negative commandment forbids nonintervention, e.g., "You shall not stand idly by the blood of your fellow" (Leviticus 19:16), commanding rescue of an endangered life. That commandment is couched in negative nomenclature but transgression is in the form of passive non-intervention. If it is the formal terminology that governs the extent of financial burden, a person would be required to expend his entire fortune in order to save a life; if it is only avoidance of an overt act that requires a higher degree of financial sacrifice, the potential rescuer's obligation would be limited to one-fifth of his fortune.<sup>22</sup> Similarly, if only avoidance of an active transgression requires sacrifice of one's entire fortune, a married woman threatened with rape would not be required to make that sacrifice despite the fact that breach of a negative prohibition entailing capital punishment is involved.<sup>23</sup>

<sup>21</sup> See *Contemporary Halakhic Problems*, I, 390–391.

<sup>22</sup> See R. Abraham I. Kook, *Mishpat Kohan*, no. 144, sec. 17.

<sup>23</sup> See R. Shlomoh Eger, *Gilyon Maharsha* 157:1 and *Pithei Teshuvah*, *Yoreh De'ah* 157:4.

If the distinction is active transgression as opposed to passive nonperformance, it might then be the case that the converse is also true, *viz.*, avoiding overt transgression of a prohibition derived from a positive commandment would also require sacrifice of one's entire fortune. An example would be consuming the flesh of a human cadaver according to Rambam's categorization of that prohibition. The phrase "these are the animals which you may eat" (Leviticus 11:2) introduces the criteria that serve to identify kosher species. Human cadavers are not among the species permitted on the basis of those criteria. Rambam, *Hilkhot Ma'akhalot Assurot* 2:3, codifies the prohibition against consuming human flesh as a *lav ha-ba mi-klal aseh*—a negative prohibition deduced from a positive declaration.<sup>24</sup> According to Rambam, the verse should be interpreted as, in effect, declaring "these are the animals which you may eat—but you may not eat species that do not manifest these criteria." How much must one expend in order to avoid cannibalism in the face of starvation? If the extent of financial responsibility is governed by a positive or negative formulation of the commandment, since the prohibition against consuming human flesh is derived from affirmative language, avoidance of transgression does not require expenditure of an entire fortune; however, if the governing consideration is avoidance of an overt act, *viz.*, eating, then a person would be obligated to expend his entire fortune in order to avoid transgression.

The same principle applies to deriving benefit from a corpse. Assuming that the prohibition against deriving benefit from a cadaver is biblical in nature, the prohibition is not stated in negative terminology. Hence, it may be argued that one need not expend more than one-fifth of one's capital in order to avoid transgression. It may certainly be assumed that loss of a limb or organ is equal to or exceeds the value of one-fifth of a person's estate. That consideration notwithstanding, it is not clear that a person would be willing to expend a fifth of his net worth in order to acquire a dental implant. Indeed, many people would not. Although he states the matter somewhat differently, *Teshuvot Havvot Ya'ir*, no. 183, expresses some hesitation with regard to whether potential loss of the external portion of an ear is to be equated with the loss of a limb.

<sup>24</sup> Other authorities disagree. Re'ah, cited by *Shitah Mekubbezet*, *Ketubot* 60a, maintains that consumption of human flesh is forbidden on the basis of an *a fortiori* inference from a negative commandment. See also *Maggid Mishneh*, *Hilkhot Ma'akhalot Assurot* 2:3. Ra'avad, *Torat Kohanim*, *Parashat Shemini* as well as Ramban and Rashba, *Ketubot* 60a, deny that human flesh is forbidden by an *issur aseh*. But all authorities agree that such is the status of a number of other forbidden foods, e.g., the meat of non-sacrificial animals slaughtered in the courtyard of the Temple. For a complete enumeration, see *Encyclopedia Talmudit*, II (Jerusalem, 5716), 90.

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*Shulhan Arukh*, *Orah Hayyim* 328:17, prohibits violation of a negative Sabbath commandment in order to avoid loss of a limb. *Pri Megadim* distinguishes between Sabbath prohibitions and other negative commandments by categorizing the former as “more severe,” presumably because such Sabbath transgressions are capital offenses. R. Moshe Sternbuch, in a contribution to *Yad Sha’ul* (Tel Aviv, 5713), ed. R. Yechiel Ya’akov Weinberg and R. Pinchas Biberfeld, pp. 371–375, and reprinted in R. Yechiel Ya’akov Weinberg’s *Seridei Esh*, I (Jerusalem, 5721), pp. 303–308, resolves the contradiction between *Shakh* and *Shulhan Arukh* in a different manner. Rabbi Sternbuch observes that *Shakh* addresses a case of external *force majeure*, i.e., a person who is ordered to transgress upon pain of loss of a limb for failure to do so. *Shulhan Arukh*’s ruling regarding violation of *Shabbat* proscriptions for purposes of avoiding loss of limb is recorded in the context of situations involving voluntary transgression in order to avoid loss of limb. Rabbi Sternbuch regards *Shakh* as permitting transgression of a negative commandment only in face of *force majeure*. The distinction is that an act compelled by *force majeure* is not at all regarded as a voluntary act because the actor’s will is subjugated to, and determined by, the will of the oppressor, whereas an act voluntarily performed to avoid natural consequences is deemed to be freely willed and is sanctioned only on the basis of the principle “and you shall live by them” (Leviticus 18:5).<sup>25</sup>

A distinction of this nature was earlier formulated by a number of scholars in order to resolve that contradiction.<sup>26</sup> That distinction emerges from what would otherwise be a discrepancy between Rambam’s rulings in *Hilkhot Yesodei ha-Torah* 5:4 and 5:7. In codifying the obligation to suffer martyrdom rather than transgress one of the three cardinal sins, Rambam, *Hilkhot Yesodei ha-Torah* 5:4, rules that a person who does transgress in succumbing to external *force majeure* is not subject to the death penalty whereas, in *Hilkhot Yesodei ha-Torah* 5:7, Rambam rules that a person who incurs such a sin in order to avoid death as the result of illness is subject to the prescribed statutory punishment. Those scholars

<sup>25</sup> If Rabbi Sternbuch’s understanding of *Shakh* is correct there is not necessarily any dispute between *Shakh* and Maharshal. Maharshal addresses only a situation involving voluntary transgression of a negative commandment by a sick person in order to avoid loss of limb. If there is no conflict, *Shakh*’s citation, *Yoreh De’ah* 179:1, of *Teshuvot Maharshal* without further comment is quite understandable. Cf., *supra*, note 12.

<sup>26</sup> See R. Meir Simchah ha-Kohen of Dvinsk, *Or Sameah*, *Hilkhot Yesodei ha-Torah* 5:7 and R. Shlomoh Zalman Auerbach, *Minhat Shlomoh*, I, no. 18, sec. 5, s.v. *akah*. See also *Bet Meir*, *Even ha-Ezer* 178:3 and *Teshuvot Noda bi-Yehudah*, *Mahadura Tinyana*, *Yoreh De’ah*, no. 161, as well as R. Joseph Babad, *Minhat Hinnukh*, no. 296.



explain that an act compelled by threat of death is an act performed under duress and, as such, is not attributed to the free will of the actor, whereas, in the absence of an external threat, the act is regarded as determined solely by the will of the transgressor.

### III. PERMITTED VS. FORBIDDEN BENEFIT

Assuming that benefit derived from a corpse is biblically prohibited, there is a significant controversy with regard to the ambit of that prohibition. Many authorities<sup>27</sup> regard the biblical prohibition to be limited to benefits derived *ke-derekh hana'ah*, i.e., benefits that accrue through use in a manner that is customary or usual in nature. Other authorities<sup>28</sup> maintain that even “unusual” forms of benefit are biblically prohibited. Use of bone fragments for grafting purposes is not a “usual” use of bones.<sup>29</sup> As quoted by *Nishmat Avraham*, *Yoreh De'ah* 349:1, note 1, R. Shlomoh Zalman Auerbach maintained that it is forbidden to derive unusual benefit only from a Jewish corpse that requires burial. Accordingly, since in

<sup>27</sup> See R. David ibn Zimra, *Teshuvot Radvaz*, III, no. 147 and R. Samuel Landau, *Teshuvot Shivat Zion*, no. 62.

<sup>28</sup> See also R. Shlomoh Lipschitz, *Hemdat Shlomoh*, *Orah Hayyim*, no. 38; *Or Sameah*, *Hilkhot Yesodei ha-Torah* 5:6; R. Joseph Rosen, *Zofnat Pa'aneah*, *Mahadura Tinyana*, *Hilkhot Yesodei ha-Torah* 5:8; and *Minhat Hinnukh*, no. 296. See also R. Joseph Teomim, *Ginat Veradim* (Pietrkov, 5644), preface, p. 11; *Hiddushei R. Akiva Eger*, *Yoreh De'ah* 349:1; R. Shlomoh Kluger, *Mei Niddah* (Zolkova, 5595), p. 52; and *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 230, *anaf* 3.

<sup>29</sup> R. Asher Weiss, *Teshuvot Minhat Asher*, II, no. 71, concedes that such use was unknown in earlier times but argues that under contemporary circumstances such use has become “usual.” That contention would certainly be rejected by the latter-day authorities who regard visual examination of cadaver organs for educational or scientific purposes as a “benefit” but “unusual” in nature. See *Contemporary Halakhic Problems*, II, 63–64. There are certainly other uses to which animal bones are put. Absent a prohibition, human bones could be used for the same purposes. Such use would represent the “usual” and “normal” benefit to be derived from bones. Artificial uses, such as visual examination and bone grafting, are not purposes for which bones are designed.

R. Moshe Feinstein, *Iggerot Mosheh*, *Yoreh De'ah*, I, no. 230, *anaf* 5, explicitly categorizes transplants as *she-lo ke-derekh hana'ah*. However, *Iggerot Mosheh* defines *she-lo ke-derekh hana'ah* in a different manner. Normal and usual benefit, he defines, as the type of benefit for which the object would be employed by people in general. A person who uses the object in an idiosyncratic manner puts the object to an “unusual” use. In general, according to *Iggerot Mosheh*, a cadaver has no beneficial use at all. Most people do not make use of a cadaver for educational, scientific, or therapeutic purposes. Accordingly, any and all use of a cadaver is “unusual” and results in a benefit of an unusual nature.



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his opinion only “ordinary” or “usual” benefit may not be derived from a non-Jewish cadaver, Rabbi Auerbach maintained that unusual benefit should be permitted if necessary “for purposes of a *mizvah*.”<sup>30</sup>

Rabbi Weiss suggests that, since bone becomes “reanimated” in transplantation, benefit, when it is derived, is derived from living tissue. That argument was advanced much earlier by R. Iser Yehudah Unterman, *Shevet mi-Yehudah*, I (Jerusalem, 5715), addenda, pp. 314–315, with regard to cornea transplants and is of even greater import with regard to transplantation of cadaver organs such as a kidney. That consideration would also obviate any obligation with regard to burial.<sup>31</sup>

Rabbi Unterman is concerned that a cornea transplant may involve a possible violation of the stricture against deriving benefit from a cadaver. In addressing that issue, he raises a more basic question: Scripture records instances of resurrection of dead persons by the prophets Elijah and Ezekiel. Rabbi Unterman queries whether it was permissible for others to derive benefit from what were essentially corpses restored to life. He might just as readily have pondered whether the obligation to bury a corpse would have required burial of those individuals since they had indeed died and were “living corpses.” Those questions are readily resolved by analogy to a third question that was directly addressed by the Sages, *viz.*, the question of whether a resurrected corpse causes defilement. The Gemara, *Niddah* 70b, discusses the question of possible defilement by a person resurrected by a prophet during the eschatological era and declares: “The corpse defiles; but the living person does not defile.” In other words, a person’s corpse defiles, not because the person *has* died, but because the corpse *is* dead. Upon resurrection, the corpse is no longer dead, and hence does not defile. Applying that principle, it is logical to assume that only the dead require burial and it is forbidden to benefit only from a dead body. In essence, death and status as a corpse is nullified upon resurrection.

Rabbi Unterman applies the same line of reasoning with regard to transplanted organs and tissue. The transplanted organ or tissue when integrated in the body of the recipient is no longer dead tissue. Since the organ is now “alive” there is no prohibition against deriving benefit from the tissue of a cadaver nor does such tissue cause defilement.<sup>32</sup>

<sup>30</sup> See *Contemporary Halakhic Problems*, II, 63–64. See also *supra*, note 3 and accompanying text.

<sup>31</sup> See R. Iser Yehudah Unterman, *Shevet me-Yehudah*, I, addenda, p. 322.

<sup>32</sup> Rabbi Shlomoh Zalman Auerbach, quoted in *Nishmat Avraham*, *Yoreh De’ah* 349:2, note 3, p. 262, does not take issue with Rabbi Unterman’s argument regarding the status of the transplanted organ *post factum* but points out that the transplant

Rabbi Unterman describes his thesis as “novel,” and even “at first glance, bizarre,” but attributes the absence of its formulation by any earlier scholar to the fact that transplantation and “revivication” of tissue were unknown until recent times. In point of fact, his “novel” view was earlier formulated by a Moroccan scholar, R. Yeshu’ah Shimon Ovadiah, *Teshuvot Yesamah Levav, Yoreh De’ah*, no. 45. Rabbi Unterman’s view was later accepted by *Teshuvot Yabi’a Omer*, III, *Yoreh De’ah*, no. 23, sec. 27 and R. Joshua Neuwirth as quoted by *Nishmat Avraham, Yoreh De’ah* 349:2, note 3, pp. 261 and 262.

R. Moshe Feinstein, *Iggerot Mosheh, Yoreh De’ah*, I, no. 230, *anaf* 8, reaches a conclusion quite similar to that of Rabbi Unterman on the basis of a different, but perhaps no less radical, thesis. *Iggerot Mosheh* argues that, for purposes of defilement, tissue of a cadaver loses its status when transformed by being put to a utilitarian purpose. That paradigm is the rule pertaining to human skin. The skin of a cadaver has the status of flesh for purposes of defilement. Nevertheless, when the skin is tanned and turned into leather, it no longer defiles. The Gemara, *Niddah* 55a, records in the name of Ula that skin loses its capacity to defile at the very beginning of the tanning process even though it is still fit for consumption by an animal. Rambam, *Hilkhot Tum’at Met* 3:11, rules in

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may be halakhically precluded for a different reason, *viz.*, the obligation to bury the entire corpse is occasioned immediately upon death of the individual. Use of the organ as a transplant thwarts fulfillment of the *mizvah* of burial. Resurrection of a dead body similarly defeats the *mizvah* of burial but is sanctioned because it involves the rescue of a life. A similar view was also expressed by R. Joseph Shalom Eliashiv, *Moriah* (Elul 5764), p. 170. See *Tosafot, Bava Mezi’a* 114b, s.v. *amar leih*. The same is not true of tissue transplanted for non-life saving purposes. Cf., *Teshuvot Yabi’a Omer*, III, *Yoreh De’ah*, no. 22, sec. 23, who implies that there is no obligation to inter organs that will be restored to life. However, *Teshuvot Yabi’a Omer* does not explain why he assumes that to be the case.

Rabbi Auerbach’s objection may be countered by invocation of *Shakh*’s ruling to the effect that even a negative commandment may be violated in order to preserve a limb or an organ. Thus, there are grounds to sanction abrogation of the *mizvah* of burial and of the prohibition against allowing a corpse to remain unburied in order to preserve a limb or an organ.

In any event, Rabbi Auerbach’s objection is not germane in instances of a bone fragment of less than a *ke-zayit* if it is assumed that a lesser amount does not require burial. See *supra*, note 5.

In the third edition of *Nishmat Avraham* (Jerusalem, 5774), *Yoreh De’ah* 349:1, note 4, p. 575, Dr. Abraham reports that Rabbi Auerbach’s reaction to the concept of “revivication” was that it does not justify use of the organs of a deceased individual other than for purposes of *pikuah nefesh*. Rabbi Auerbach’s consideration was that the deceased retains a “property interest” in his organs. For an interesting homiletical analysis congruent with that view see R. Ben Zion Firrer, *Panim Hadashot ba-Torah* (Jerusalem, 5735), vol. IV *Parashat Hukkat*, pp. 126-128.

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accordance with Ula. In the same vein, the Gemara, *Hullin* 122b, declares that the ear of a donkey that is fashioned into a purse no longer defiles as animal carrion. Similarly, argues *Iggerot Mosheh*, tissue used in organ transplantation has been converted from cadaveric tissue to material serving a utilitarian function and hence loses capacity to defile. Transformation and nullification of the status of the organ as cadaveric tissue occurs immediately upon commencement of the process of implantation just as skin loses status as flesh of a cadaver at the very beginning of the tanning process. Thus, in organ transplants, the tissue used in transplantation loses capacity to defile even before the organ is revived by integration into the body of the recipient.

Applying *Iggerot Mosheh's* thesis to the cadaveric material used in bone grafts, it is certainly arguable that the bone fragments lose capacity to defile even before use in the implantation process. The process of preparing the grafted material would seem to be analogous to the tanning process employed in causing skin to become leather. If so, initiation of the process of preparing the bone and compounding it with binding substances serves to transform its purpose and nullifies its status as cadaveric tissue. As a result, it may be concluded that bone treated in such a manner loses capacity to defile even before the implantation process has begun.

In transplantation of an organ such as a kidney the organ is indeed integrated in the body of the recipient and becomes "alive." That consideration, however, intriguing as it is, may be irrelevant to the question of bone grafts. Unlike other organ transplants, a bone graft remains inert in the body of the recipient. Although the grafted bone bonds with the natural bone and becomes inseparable from its new site, it is not physiologically integrated in the jaw of the recipient.

The theses developed by Rabbi Unterman and *Iggerot Mosheh* may seem to be coextensive in application but, in actuality, they are not. In particular, dental implants are an example of a transplant in which *Iggerot Mosheh's* approach is applicable but that of Rabbi Unterman is not. In the process of osseointegration the implanted material becomes inseparably incorporated within the natural bone tissue. Indeed a Swedish scientist reports that the bone tissue was observed to have actually grown into the very thin spaces within implanted titanium.<sup>33</sup> Nevertheless, the implanted material remains inert; it is not nurtured by the blood supply of the host and metabolic processes do not take place within the grafted material. It seems to this writer that Rabbi Unterman and those authorities who

<sup>33</sup> Dr. Per-Ingvar Branemark, "Osseointegration and its Experimental Background," *Journal of Prehistoric Dentistry*, vol. 50, no. 3 (1983), p. 399.

advance a notion of “revivication” would concede that a dental implant does not become newly “alive.” However, inseparable incorporation within the existing natural structures represents an absolute form of bonding. Thus, according to *Iggerot Mosheh*, in implantation, cadaveric material loses its capacity to defile while for Rabbi Unterman, it does not.

Assuming that it is prohibited to derive benefit from the bones of a cadaver, the issue is whether the prohibition is attendant even upon the small quantity of pulverized bone used in a dental graft. R. Zevi Pesach Frank, *Teshuvot Har Zevi, Yoreh De'ah*, no. 277, expresses doubt with regard to how the threshold of the benefit that may not be derived from a corpse is to be determined. Is the threshold to be calculated on the basis of value, i.e., the value of a *perutah*, a small copper coin of the talmudic period that represents the halakhic threshold of monetary value, or is it to be defined in terms of the quantity of the object from which benefit is derived, i.e., tissue having the weight equal to the weight of an olive? The latter quantity, a *ke-zayit*, is the minimum quantity of forbidden food that, when consumed, results in statutory punishment. The quantity of bone fragments used in dental reconstruction is far less than the equivalent of the weight of an olive. Even the lesser prohibition in the form *hazi shi'ur*, i.e., benefit not great enough to result in statutory punishment, is viewed by *Har Zevi* as not applicable. A quantity less than the minimum required for culpability is forbidden only because it can be combined with other lesser quantities to achieve the threshold level for which punishment would be incurred. Only minimum quantities of tissue are used in transplantation, not simply because large quantities are unnecessary, but because larger quantities would thwart the efficacy of the procedure. Accordingly, argues *Har Zevi*, since tissue used for implantation is not suited to combination with another similar quantity of tissue, use of such minimal quantities is entirely permissible.

#### IV. PRIESTLY DEFILEMENT

Virtually all authorities agree that a *kohen* may not defile himself either by touching or “carrying” a non-Jewish cadaver.<sup>34</sup> Less than a *ke-zayit* of flesh derived from a corpse does not cause defilement. The Mishnah,

<sup>34</sup> R. Eliezer of Metz, *Sefer Yere'im*, no. 322, is the sole authority who maintains that a *kohen* may come into contact with a non-Jewish corpse. Rambam, *Hilkhot Tum'at Met* 1:12–13 rules that a *kohen* may be in the same tent as a non-Jewish cadaver but may not otherwise come into contact with the cadaver while *Tosafot*, *Yevamot* 61a, s.v. *me-mega*, maintains that there is no difference between Jewish and

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*Oholot* 2:4, records a controversy between R. Akiva and R. Yohanan ben Nuri with regard to whether flesh equal to a *ke-zayit* when severed from a corpse continues to defile by tactile contact even after being divided into two pieces. Rambam, *Hilkhot Tum'at Met* 4:5, rules that although such smaller particles do not continue to defile by means of touching, they continue to cause defilement by means of “carrying” if their aggregate volume is equal to a *ke-zayit*. The regulations with regard to bones of a cadaver are somewhat different. Rambam, *Hilkhot Tum'at Met* 3:2, records that tactile contact with bone severed from a corpse serves to defile by means of tactile contact even if the bone fragment is equal in size only to “a grain of barley.”<sup>35</sup> Nevertheless, bone the size of “a grain of barley” that is subsequently divided into smaller fragments continues to defile by means of “carrying.” Bones of a cadaver defile by means of being present within a “tent” if their volume is equal to one-fourth of a *kav*.

Bone tissue used in dental implants is pulverized. Since no single particle even remotely approximates the size of “a grain of barley” that material cannot cause defilement by “touching.” However, pulverized bone equal to a grain of barley does cause defilement by “carrying.” If so, since the implanted particles of pulverized bone in the aggregate are greater than “a grain of barley,” it would seem to be the case that the recipient should become defiled as he “carries” the implant.

However, that conclusion is contradicted by the Gemara, *Nazir* 13b. The *Mishnah* declares that a Nazarite is defiled by “carrying” only a minimum quantity of half a *kav* of bones.<sup>36</sup> The Gemara queries the cogency

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non-Jewish cadavers. See *Shulhan Arukh*, *Yoreh De'ah*, 372:1 and *Shakh*, *Yoreh De'ah*, 372:4.

<sup>35</sup> In this context, the *se'orah*, or grain of barley, may be a unit of length rather than a unit of volume. According to the calculation of *Hazon Ish*, the length of a *se'orah* is equal to 1.07 centimeters. See R. Israel Sokel, *Kuntres ha-Shi'urim* (Bnei Brak, 5769), sec. 7. According to R. Chaim Noe, the length of a *se'orah* measures 1 centimeter. See R. Chaim Noe, *Sefer Shi'urei Torah* (Jerusalem, 5707), p. 24. Cf., R. Yechiel Michel Gold, *Me'asef le-Khol ha-Mahanot* 27:4 and R. Chaim Benis, *Middot ve-Shi'urei Torah* (Bnei Brak, 5747) 7:27. Cf., however, R. David Munk and R. Yochanan Alexander Lombard, *Taharat ha-Kohanim* (Jerusalem, 5762), p. 86, who give the measurement of a *se'orah* as 3 centimeters by 1 centimeter but express doubt with regard to whether it is a unit of measure or a unit of volume.

<sup>36</sup> According to *Hazon Ish*, a *kav* equals 2.4 liters, half a *kav* equals 1.2 liters and a quarter of a *kav* equals 600 cc; according to R. Chaim Noe, a *kav* is equal to 1.38 liters, half a *kav* equals 691 cc and a quarter of a *kav* equals 344.5 cc; or, according to Rabbi Benis' analysis of Rambam's position, a *kav* equals 1.2 liters, a half *kav* equals 60 cc and a quarter of a *kav* equals 300 cc. See *Middot ve-Shi'urei Torah* 14:9. Cf., *Taharat ha-Kohanim*, p. 84 where the volume of the quantity of one-fourth of a *kav* is given as between approximately 300 and 600 cc.

of that rule since a half a *kav* is twice the quantity of bone required to defile by virtue of being in the same tent and, quite obviously, is much larger than the equivalent of a grain of barley that defiles by “carrying.” The Gemara responds that the larger quantity of half a *kav* stated as the minimum quantity that causes defilement applies only to bones “turned into flour.” Rashi explains that, although smaller fragments of solid bone cause defilement, only half a *kav* of ground or pulverized bone has the capacity to cause defilement. *Hazon Ish, Oholot* 21:12, explains that the reason for the distinction between solid and pulverized bone is that even a small sliver of bone is recognizable as such whereas ground bone is no longer recognizable as a bone.<sup>37</sup>

If so, even pulverized bone used in an implant would not, at least in theory, present a problem with regard to defilement. There can be no problem with regard to “carrying” the implant by the *kohen* who is the recipient because the quantity of cadaveric material utilized in an implant is far less than the quantity of half a *kav*. Furthermore, it is extremely unlikely that a dental office would have such a large quantity on hand at any particular time. If so, neither the dentist nor the patient could become defiled by entering the “tent” in which the cadaveric material is present.

Rambam, however, fails to record any distinction between bone fragments and pulverized bone with regard to the minimum quantity capable of causing defilement. The *Brisker Rav*, R. Yitzchak Zev Soloveitchik, *Hiddushi ha-Griz al ha-Rambam, Hilkhhot Nezirut* 7:4, endeavors to explain why Rambam does not regard the Gemara’s distinction as normative.<sup>38</sup> If so, it should follow that, according to Rambam, bone tissue reduced to a powder is treated as the bone from which it originated and would cause defilement by means of “carrying” even if it is equal in size only to a kernel of barley. Nevertheless, even according to Rambam, pulverized bone equal in size to “a grain of barley” used in dental implants will not cause defilement by means of “touching.” Rambam, *Hilkhhot Tum’at Met* 5:5, rules that parts of a corpse smaller than the minimum required to cause defilement can no longer cause defilement even if the particles are later recombined and coalesce into a single fragment as a result of human intervention and, upon recombination, constitute more than a minimum quantity. Thus, the powdered bone, even when recombined into a single entity by means of a binding agent, would not defile by tactile contact since each particle of the pulverized bone remains

<sup>37</sup> Cf., R. Gershon Chanoch Leiner, *Sidrei Taharot, Oholot*, p. 67a, who comments that ground bone is “*nitbatel mi-torat ezem*—has lost the status of bone.”

<sup>38</sup> See also *Shi’urei Rabbenu Meshullam David, Nazir*, no. 143.

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discrete and falls short of the minimum quantity capable of causing defilement by “touching.”

However, as noted, the rule with regard to defilement by “carrying” is different in that the minimum quantity of bone equal to a barley grain need not be in the form of a single bone fragment because, unlike “touching,” the entire quantity of bone is “carried” simultaneously. Rabbi Shabtai reports that dental practitioners estimate that the amount of bone used in a typical implantation procedure is equal to two or three grains of barley.<sup>39</sup> If so, according to Rambam, the cadaveric implant should defile when “carried” by the patient.

Nevertheless, there may be another reason why the cadaveric implant may not cause defilement even by “carrying.” The Gemara, *Niddah* 42a, states that, although there is a controversy with regard to whether defilement can be caused by an object concealed in an “inner place,” e.g., in a body cavity, it is nevertheless agreed that a “swallowed” entity, i.e., an object concealed within the body tissue, cannot cause defilement. Thus, if the cadaveric implant under discussion is covered by gum tissue it becomes “swallowed” within the body and can no longer cause defilement. However, such an implant would fail to cause defilement only after it is sealed in place beneath the gum. Accordingly, the patient might become defiled immediately upon placement of the implant in the exposed jaw by “carrying” the cadaveric material before it is covered by the gum. Similarly, the dentist would become defiled in the act of transferring the implant into the mouth from the site of its preparation.

Moreover, although even a thin layer of gum tissue would ostensibly create a situation of *tum’ah belu’ah*, i.e., “swallowed defilement,” that principle would be of no avail in eliminating the problems of defilement associated with dental implants. Although a thin layer of gum tissue is replaced over the implant that tissue remains *in situ* only until osseointegration is complete. When the jaw becomes capable of supporting an artificial tooth, the gum tissue is removed and an abutment is attached to the dental implant. The gum tissue is then closed around, but not over, the abutment. The crown is then placed over the abutment.<sup>40</sup> At that point the defilement is no longer “swallowed.”

Rabbi Weiss’ interlocutor, *Teshuvot Minhat Asher*, II, no. 72, assumes that the status of pulverized bone is that of *rekev* and causes defilement

<sup>39</sup> See *Kol Azmotai Tomarnah*, p. 8.

<sup>40</sup> Mayo Clinic, “Dental Implant Surgery: What You Can Expect,” <http://www.mayoclinic.org/tests-procedures/dental-implant-surgery/details/what-you-can-expect/rec-20245754>.



only if the *rekev* consists of a minimum quantity of *melo tarvad*, or a quantity that can be contained within two hands placed together.<sup>41</sup> Rambam and R. Ovadiah of Bartenura, in their respective commentaries on *Oholot* 22:1, define *rekev* as “dust” that is the residue of a cadaver when it no longer has any moisture and its bone has decomposed. However, as Rabbi Weiss points out, Rambam, *Hilkhhot Tum’at Met* 3:6, rules that the residue of a corpse is reduced to the status of *rekev* only if its degeneration occurs naturally without human assistance in the form of “grinding.” More significantly, as recorded by Rambam, *Hilkhhot Tum’at Met* 3:4, the status of *rekev* pertains only if the process of decomposition affects the entire body, but not if a limb is severed and allowed to decompose. In preparing bone tissue for implantation, it is clear that the bone is removed from the cadaver and that it undergoes transformation that does not occur in the rest of the body.

There are yet other reasons why there is no cause for defilement. 1) In accordance with the first opinion recorded in the Mishnah, *Niddah* 56a, the flesh of a corpse defiles even when it has become dried. However, if the flesh shrinks to the point that it becomes “as earth,” i.e., it disintegrates and crumbles, it no longer defiles. Rabbi Weiss suggests that the pulverized bone, when treated by chemicals, becomes completely “dried” with the result that the bone tissue no longer has capacity to cause defilement. However, as Rabbi Weiss himself points out, R. David ibn Zimra, *Teshuvot Radvaz*, III, no. 548, rules that the crumbled tissue of a mummy does cause defilement. Nevertheless, Rabbi Weiss notes that the Mishnah, *Oholot* 2:2, declares that tissue that has been burned does not

<sup>41</sup> The word “*tarvad*” is a reference to a spoon-like implement that was used by physicians. See *Kellim* 17:12. The term “*melo tarvad*” denotes a quantity equal to that which can be contained with two hands cupped together. See Rambam, *Hilkhhot Tum’at Met* 12:11. It has been suggested that the word “*tarvad*” is a contraction of the words “*trei yad*,” i.e., “two hands.” See Marcus Jastrow, *A Dictionary of the Targumin, Talmud Babli and Jerushalmi, and the Midrashic Literature* (New York, 1950), p. 1696, s.v. *tarvad*.

According to *Tosafot*, *Shevu’ot* 10b as well as Rabbenu Gershom and *Shitah Mekubbezet*, *Ketubot* 6b, a *melo tarvad* is the equivalent of approximately one-half of a *manah*; according to *Tosafot*, *Keritut* 6b, it is the equivalent of one-fifth of a *manah*. A *manah* equals one hundred silver denarii and the weight of a single dinar is equal to 96 grains of barley. The weight of a grain of barley is the subject of significant controversy. *Middot ve-Shi’urei Torah* 26:5 gives the weight of a single dinar as 4.25 grams. Accordingly, *melo tarvad* would equal 2,125 grams or 850 grams. A comprehensive summary of sources is presented by Jacob Gershon Weiss, *Middot u-Mishkalot shel Torah* (Jerusalem, 5745), part 1. Cf., the subsequent discussion of R. Samuel Ze’ev Reich, *Massoret ha-Shekel* (Toronto, Canada, 5748). *Massoret ha-Shekel*, pp. 17 and 119, state that the weight of a *manah* is 350.7825 grams.

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cause defilement and asserts that the effect of the chemical treatment to which the bone is subjected is tantamount to “burning” the bone tissue. There is, however, no source that serves as a basis for equating chemical transformation with carbonization that results from burning by means of fire. 2) Rashi and *Tosafot*, *Nazir* 52a, indicate that a barley-size fragment of bone continues to cause defilement after being reduced in size but only if the bone segments are derived from a single corpse.<sup>42</sup>

Presumably, whether the cadaveric material used in any particular implant is derived from a single cadaver or from multiple cadavers cannot be determined. Accordingly, in practice, since Rambam’s view is a minority opinion and it is doubtful that the bone is derived from a single cadaver, a *kohen* need not be concerned with regard to defilement.

<sup>42</sup> The *Brisker Rav*, *Nazir* 53b, is of the opinion that the two fragments must also be of the same bone. However, that view is contradicted by *Hazon Ish*, *Oholot* 21:7 and *Sidrei Taharah*, *Oholot* 42b, s.v. *le-afukei*, and 66b, s.v. *ezem*.