

## ***How are we to determine what God wants? Reason, Revelation, or Both***

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### **Intuiting the Infinite: The Role of *Sevara* in Determining the Divine Will**

Why do I need a Biblical verse to teach me this idea? It is a *sevara!*  
(*Bava Kamma* 46b; *Ketubbot* 22a; *Niddah* 25a)

With this interrogative, the Talmud declares that *sevara*<sup>1</sup> is binding.<sup>2</sup> Moreover, anything that can be derived by *sevara* need not be stated explicitly in the text. The purpose of the Torah, it would seem, is to tell us what we would not have known otherwise. Thus, frequently, the Talmud will reinterpret a verse that seems to be teaching us something obvious in such a way that it provides additional content.<sup>3</sup> <sup>4</sup>

<sup>1</sup> The word *sevara* defies precise translation. In modern Hebrew, *sevara* generally means conjecture, opinion, or supposition. In the Talmud, however, the term refers to something known to us through logic or reason, or, put more broadly, knowledge acquired through our intellect without proof from scripture or tradition. As we shall see, it is by no means limited to rigorous syllogistic logic; rather, it reflects a human's capacity to use his or her intellect to determine that which is true and that which is right. Frequently, the term is used in contrast to *gemara*, which refers to transmitted knowledge (see *Erwin* 60a, *Yevamot* 25b, and *Bava Batra* 77a).

<sup>2</sup> The assumption that *sevara* sometimes has the status of biblical law is almost universal. See *Sdei Hemed* (*ma'arekhet samekh, klal* 63), who considers the possibility that this may not be the case. (See also *Ritva Yeravot* 54b and footnote 153 in the Mossad ha-Rav Kook edition.)

<sup>3</sup> See for example, *Hullin* 114b, which states that it obviously is preferable to give a *neveila* (meat not slaughtered properly) as a gift to a *ger toshav* (a non-Jew who keeps the Noahide laws) than to sell it to an idolater; therefore *Devarim* 14:21 must be teaching something innovative. Likewise, R. Sheishet (*Avodah Zarah* 68b) argues that the Torah never will prohibit something that is detestable even without the Torah; in the event that the Torah seems to restrict something that

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Our aim in this essay is to examine the role of human reason in determining the divine will and to delineate the remarkable power of *sevara* and its function in Torah jurisprudence. We will attempt to prove that *sevara* serves as a basis of obligation, a tool of interpretation, and a factor that defines the scope of *mitzvot*. Thus, the human intellect is partner in a law that is yet entirely divine.<sup>5</sup>

This reliance may seem surprising for a number of reasons. One objection is that human reasoning is uncertain. Secondly, one might expect the text of the Torah itself to resolve all questions. We will return to these questions later in the essay. Now, however, let us consider whether a pervasive role of *sevara* minimizes the authority of revelation.<sup>6</sup> Does it not imply an ethic independent of God?<sup>7</sup>

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naturally is abhorrent, it must be teaching something novel. R. Yosef Engel (*Giyyonei ha-Shas, Avodah Zarah* 68b) notes that seems to contradict Rashi (*Makkot* 23b s.v. *le-zakot et Yisrael*), who writes the Torah restricts naturally abhorrent things in order to reward us for what we would do anyways. Apparently, Rashi maintains that there must nevertheless be some form of nuanced *biddush* in the Torah's formulation. Likewise, see R. Shimon's view in *Avodah Zarah* 68a and particularly Rashi (*Avodah Zarah* 68b s.v. *de-ha*). Below, we will discuss the fact that many explicit laws in the Torah seem intuitive.

<sup>4</sup> An obvious question arises. Certain mitzvot seem to be independently derivable, such as the prohibition to murder or steal. How can we claim that every mitzvah is teaching us something we would not otherwise have known? Perhaps the answer is that there is a novel element (*biddush*) in every mitzvah. For example, the categorical prohibition of murder includes euthanasia. Absent that restriction one could have morally defended mercy killing. Likewise, the prohibition of theft includes, according to many *rishonim* such as Ritva *Hullin* 94a, false goodwill. Thus only with the Torah's prohibition would I know that something as insignificant as opening a new barrel of wine in the presence of a guest can be consider theft (if the guest perceives the host as doing the guest a favor that the host did not intend to do).

<sup>5</sup> The limits on the power of *sevara* are an important subject. This essay, at the risk of one-sidedness, will focus on the positive elements that are widely accepted.

<sup>6</sup> The philosophical debate among *rishonim* about the extent to which knowledge must derive from revelation is beyond the scope of our present discussion.

<sup>7</sup> While it may be possible to derive that which is ethical independently and without revelation, there cannot be an ethic independent of God as R. Mayer Twersky deduces from Rambam (*Hilkhot Yesodei ha-Torah* 1:1). R. Twersky writes <[http://www.torahweb.org/torah/2002/parsha/rtwe\\_vayera.html](http://www.torahweb.org/torah/2002/parsha/rtwe_vayera.html)>: "Judaism does not recognize a natural moral independent of *Hakadosh Barukh Hu*. *Hakadosh Barukh Hu* is the source of all morality. Rambam opens his *magnum opus* by declaring that the fundamental principle that underlies all others and the pillar of all wisdom is knowing of the existence of *Hakadosh Barukh Hu*, Creator of heaven and Earth. Rav Soloveitchik, *zt"l* commented that Rambam clearly

### **Does our Reliance upon *Sevara* Imply an Ethic Independent of God?**

The answer to this question is certainly “no” if we assume that *sevara* too is a form of revelation. God conveys His will to mankind in many ways. Prophecy is one. But wisdom too is a divine gift: “For God will give wisdom; from His mouth emanates knowledge and discernment (*Mishlei* 2.6).<sup>8</sup> Though human intellect offers only oblique, feeble, and fallible access to God’s will, it should not be dismissed. Indeed, it is the “glory of our maker” that resides within us.<sup>9</sup> Though reason frequently is the servant of desire, even the slave of passion, the properly motivated seeker of truth is led by God to the discovery of the divine will. As R. Yerucham Levovitz, the great *mashgiyah* of Mir, declared: “With the demands of reason there cannot be compromise, for reason is the command of nature and is part of the Creator’s providence through an agent.”<sup>10</sup>

The Talmud (*Sanhedrin* 99a) states that just as every *gezeira shava* (a hermeneutical principle that is not a *sevara* and requires a tradition<sup>11</sup>) originates from Sinai, so too every *kal va-homer* (an *a fortiori* argument), which is a form of *sevara* and therefore does not need a tradition,<sup>12</sup> also emanates

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indicates that all wisdom depends upon knowledge of *Hakadosh Barukh Hu*, i.e., there is no ethical or moral knowledge independent of Him.”

This does not contradict the widely accepted notion that God is bound by that which is theoretically possible. Clearly, there is a significant difference between limiting God to that which is logically or mathematically possible, which does not imply deficiency, and moral limitations. See, however, “On Divine Omnipotence and its Limitations” by R. Yitzhak Grossman, *Hakira* (vol. 2, Fall 2005).

<sup>8</sup> This is true both on a natural level and on a supernatural level. Thus, Rashi (*Bava Batra* 12b s.v. *re-lav*) writes explicitly that the source of a scholar’s “*sevarat ha-leiv*” is divine. Ramban (*Bava Batra* 12b) likewise asserts that a scholar apprehends the truth through divine inspiration.

<sup>9</sup> Rambam (commentary to Mishnah *Hagiga* 2:1). Thus, Rambam argues, rationality is the common possession of the human race, because the entire human race is created in the image of God (*Moreh Nevukhim* 1:1). Indeed, when Rambam (*Hilkhot Teshuva* 5:1) highlights human uniqueness insofar as humans alone have free will, he stresses that the basis of this freedom is the ability for man to use his mind to determine that which is right. Likewise, *Meshekh Hokhma* (*Devarim* 30:12) writes that God implants moral values in a person’s conscience. Thus, valid moral and rational *sevarot* are of divine origin.

<sup>10</sup> *Hever Ma’amarim* 48.

<sup>11</sup> *Pesahim* 61a; *Niddah* 19b.

<sup>12</sup> *Ibid.* While a *kal va-homer* certainly is a form of *sevara*, it need not always be rational, because its power derives from the assumed inner consistently within the law; see *Shabbat* 132a.

from Sinai.<sup>13</sup> Thus, the independently derived *sevarot* in the Talmud are subsumed under the Sinaitic revelation.<sup>14</sup> The very act of intellectual innovation of a valid *sevara* is rooted in tradition, and the resultant law has identical force to a law transmitted from Sinai.<sup>15</sup> While the *rishonim* debate the extent to which the details of every *mitzvah* were given at Sinai, all concede that to some degree even interpretations without a received tradition have the status of biblical law.

Let us then consider six questions:

- a. What is the normative force of *sevara*?
- b. Does the role of *sevara* change after the giving of the Torah?
- c. What are the parameters of *sevara* as an interpretive principle?
- d. Must *sevara* emerge from immanent or internal Torah principles?
- e. Is there a difference between objective and subjective *sevara*?
- f. What of the generally accepted principle *lo darshinan ta'ama de-kra*, which states that we may not determine the parameters of a *mitzvah* based on its rationale?

The first two questions, which have been developed elsewhere,<sup>16</sup> will

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<sup>13</sup> In a sense, this goes much further than Yerushalmi (*Haggigah* 1:8), which states that “Whatever a seasoned student in the future will rule already has been revealed at Sinai,” because it deems the denial of the Sinaitic origin of a *kal va-homer* heretical. According to the Talmud, denying the divine origin of a *kal va-homer* is equated with denying the divine origin of the entire Torah; someone who does so has “disparaged the Torah and has no portion in the world to come.” (See *Dikdukei Sofrim ad. loc.*, who has an alternate text that states that anyone who denies the authenticity of the thirteen hermeneutical principles is condemned.) Even though a *kal va-homer* is one of the thirteen hermeneutical principles, it is just a strong type of *sevara*. As R. Herschel Schachter has pointed out, it seems that a *sevara* also is one of the hermeneutical principles, even if it did not make the list of thirteen.

<sup>14</sup> One must define “Sinaitic revelation” broadly if one assumes (like Rambam) that alongside the received tradition from Moshe, the sages introduced new interpretations of the Torah (*derashot*) of their own invention.

<sup>15</sup> This seeming paradox must be considered in conjunction with a broader discussion regarding Talmudic statements that depict an all-encompassing Sinaitic revelation, e.g. *Megillah* 19b and *Berakhot* 5a, and Talmudic statements that indicate that the primary thrust of the Sinaitic *mesora* was not a detailed revelation but a transmission of general principles, e.g., *Shemot Rabba* 41:6.

<sup>16</sup> For a fuller treatment of this topic, see R. Avraham Grodzinski’s *Torat Avraham* (pp. 128), R. Yosef Yehuda Leib Bloch’s introduction to *Shiurei Da’at*, R. Aharon Lichtenstein’s “Does Judaism Recognize an Ethic Independent of Halakhah?” (*Leaves of Faith: The World of Jewish Living*, Ktav, 2004, p. 33), R. J. David Bleich’s

be addressed only briefly as a means of introduction to a broader discussion of the latter queries. We will not discuss the role of *sevara* in the post-Talmudic world at this time.<sup>17</sup>

### A. Must we obey a norm that is derived solely through *sevara*?

In his introduction to the Talmud, R. Nissim Gaon writes:<sup>18</sup> “All *mitzvot* that depend on *sevara* and understanding of the heart<sup>19</sup> are binding upon man from the day on which God created man and upon his progeny **forever and ever.**” Indeed, many biblical stories can be understood only in light of the notion that God assigns culpability for violating laws that are intuitive even if they were not commanded explicitly.

For example, Sodom is destroyed because of her “pride, fullness of bread, and careless ease [that] was in her and in her daughters; she did not strengthen the hand of the poor and needy” (*Yehezkel* 16:49). The people of Sodom were culpable because they eschewed kindness and generosity, favoring instead a philosophy of “what’s mine is mine and what’s yours is yours” (*Avot* 5:10). They were not blamed for violating any of the seven Noahide laws. We must conclude that they were accountable even for things that were not specifically instructed. As Ramban (*Bereishit* 6:13) says about the generation of Noach, when it comes to a “law that is intuitively understood, there is no need for a prophet to warn about it.” *Shlah* (*Be-Midbar* 31:14) uses this principle to explain why the Jewish people were punished for not killing the people of Midyan. Likewise, Rambam writes (*Moreh Nevukhim* 3:17):

A person is rewarded according to all the good deeds that he does, although no direct commandment by a prophet was given. Likewise, He will punish all the evil deeds of men, although they have not been prohibited by a prophet, if the intellect indicates that these actions are good or bad.<sup>20</sup>

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<sup>17</sup> “Is there an ethic beyond Halakhah?” (*Studies in Jewish Philosophy* 1987 pp. 527–546), and R. Yehuda Amital’s “Natural Morality” (available at <http://vbm-torah.org/archive/values/02a-morality.htm>).

<sup>18</sup> To some degree, post-Talmudic scholars lack the interpretive authority of their Talmudic counterparts. It would be fruitful to explore why this is so and the nature of this limitation.

<sup>19</sup> This short introduction is included in the first volume of the standard Vilna Shas.

<sup>20</sup> See *Megilla* 24b and *Avodah Zarah* 28b.

<sup>20</sup> Similarly, *Igrot Moshe* O.C. 2:25 writes that non-Jews are obligated to pray in times of distress even though this is not explicitly in the Noahide laws.

The Talmud's reliance upon *sevara* for the source of halakha indicates that it is not just moral insights that are binding; even legal inferences must be followed.<sup>21</sup>

### B. Does the Role of *Sevara* Change after the Giving of the Torah?

Some have argued that *sevara* is unnecessary now that the Torah has been given. As we have seen, thinkers R. Nissim Gaon and *Shlah* seem to disagree. Ethical works like *Emunot ve-Dei'ot* and *Hovot ha-Levavot* appeal to *sevara* as much as to Torah as a source for the path of the righteous. Ramhal writes in the eighteenth chapter of *Mesilat Yesharim* that the defining characteristic of a “*basid*” is his desire to determine and carry out the will of God beyond that which is stated explicitly in the Torah.<sup>22</sup> Me’iri (*Avot* 3:17) goes even further, explaining that “*Im ein derekh eretz ein Torah*” means that if a person lacks the natural morality that emerges from *sevara*, the study of Torah will not help him.<sup>23</sup>

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<sup>21</sup> One might question equating moral *sevarot* and legal *sevarot*. Perhaps only a loose relationship exists between the sort of *sevara* that demands that a human being engage in acts of kindness and the type of *sevara* that places the burden of proof upon the individual attempting to extract money from someone else (*Bava Kamma* 46b). The former moralistic philosophical *sevara* is rooted in a vague and equivocal natural law, while the latter rigorous, legalistic, and almost objective *sevara* inhabits the realms of legal systems and Talmudic jurisprudence. This distinction, while accurate, proves overly simplistic. For example, the Talmud (*Sanhedrin* 74a) offers the following *sevara* to justify the law that one must give up his life before murdering: “Who says your blood is redder, maybe the other person’s blood is redder?” In other words, a human is incapable of determining who is more worthy to live. However, this *sevara* is latent with unproven philosophical and ethical assumptions. One might easily object that there are times when one should be able to make such a calculation, such as a case where one is forced to choose between the life of a young child and that of an old person. [This last point may not be definitive according to the understanding of *Hidushai Ha-Gra*b on *Yeshodai Ha-Torah*.] Another example of a morally laden *sevara* can be found in *Berakhot* 35a. Clearly, then, the sorts of *sevarot* that serve as the basis of specific laws in the Talmud are highly related to the types of moralistic philosophical *sevarot* that serve as the ethical mandate for kindness and generosity even before the giving of the Torah, and must be considered in a single context.

<sup>22</sup> Indeed, according to Ramban’s understanding of *kedoshim tibyu* (*Vayikra* 19:1), this requirement becomes part of the law.

<sup>23</sup> Accordingly, warns R. Kook (*Shmona Keratzim* 1:75), a person must not allow his fear of heaven to supplant his natural sense of morality (*המוסר הטבע*). Instead, *yirat shamayim* and Torah are meant to build upon that which a person intuitively knows from both his heart and his head.

Nevertheless, the opposite position also has its proponents. Some have argued that the giving of the Torah replaced the need to independently determine the divine will; as ben Bag-Bag averred, “Delve into [Torah] and [further] delve into [Torah], for everything is in it” (*Avot* 5:22). Certainly, it has been claimed, one must use his intellectual faculties, but only to uncover that which is hidden within the Torah—never to create something new. One might further contend that no longer can a Jew be punished, as were the people of Sodom, for failure to embrace natural morality; only failure to heed the divine law as defined by the Torah can warrant chastisement.<sup>24</sup> R. Ovadia Me-Bartenura appears to embrace this position. In his commentary to *Avot* (1:1), he explains that *Avot* begins with the chain of tradition to make clear that tradition is essential to ethics as well.<sup>25</sup> Thus, the prologue to *Avot* demonstrates that the ethics of the Rabbis derive from Sinai.<sup>26</sup>

Even R. Ovadia Me-Bartenura, however, does not limit our source of knowledge to Torah, nor could he. After all, many Talmudic laws are derived from *sevara*. For example, the Talmud (*Sanhedrin* 74a) uses *sevara* to deduce that one must give up his life before committing murder.<sup>27</sup> Moreover, it treats laws deduced from *sevarot* as if they were written explicitly

<sup>24</sup> Support for this distinction can be garnered from the rule: “*Nitna Torah re-nithasha Halakha*—Torah has been given and halakha [thereby] innovated” (*Shabbat* 135b), which Rambam (commentary to Mishnah *Hullin* 7:6) reads as indicating that our obligation to perform *mitzvot* stems from the fact that we received the Torah at Sinai, not from what was practiced beforehand. For example, our obligation to perform *brit mila* derives from the giving of the Torah, not Hashem’s command to Avraham centuries earlier. Moreover, Rambam maintains that while Torah is the repository of all wisdom, philosophy continues to provide access to many of the truths of existence (see *On Maimonides* by Dr. Charles Manekin pp. 14-15). Therefore, the philosopher can continue to discover those truths independently of scripture and then reveal them *within* scripture. (Ramban in *Drashat Torat Hashem Temima* makes a similar point.) Thus, even though “everything is in it,” it is not the exclusive source of truth. The same may be said regarding laws derived from *sevara*.

<sup>25</sup> פירוש הרע"ב על אבות א: אמר אני, לפי שמסכת זו אינה מיסודת על פירוש מצוה מסוימת התורה כשאר מסכתות שבמשנה, אלא כולה מוסרים ומדות, והכמי אומות העולם ג"כ חבירו ספרים כמו שבדו מלבים בדריכי המוסר כיצד יתנהג האדם עם חבירו, לפייך התחיל התנאה במסכת זו משה קבל תורה מסיני, לומר לך שהמדות והמוסרים שבזו המסכתא לא בדו אותם חכמי המשנה מלבים אלא אף אלו נאמרו בסיני.

<sup>26</sup> This proof is not definitive, since a careful read of his comment indicates that the ideas mentioned in *Avot* stem from Sinai; he does not state that all ethics are Sinaitic.

<sup>27</sup> סברא הוא... מי יימר דדמא דידך סומק טפי דילמא דמא דהו גברא סומק טפי.

in the Torah. For example, because the Torah links (via *hekeish*<sup>28</sup>) the laws of a betrothed maiden to murder, we learn that one must give up his life before engaging in illicit sexual activities just as one must give up his life before committing murder. Remarkably, a *hekeish* is used even regarding a rule derived via *sevara*.<sup>29</sup> It thus seems clear that the binding nature of *sevara* has not evaporated in the wake of the giving of the Torah.<sup>30</sup>

Some thinkers even offer biblical textual support for the obligation to follow this form of *sevara*.<sup>31</sup> R. Elhanan Wasserman goes even further in arguing for the binding nature of *sevara* even in the absence of a divine commandment. Noting that Moshe is praised for independently discovering and carrying out the divine will,<sup>32</sup> R. Elhanan writes that according to Ramban, this axiological obligation may be the source for *rishonim* who believe that these laws reflect the divine will.<sup>33</sup> *Sefer Hasidim* likewise emphasizes the importance of intuiting the divine will even after *matan Torah*:

We find in the Torah that one who can discern [God's will] is punished for failure to do so even though he has not been commanded to implement it. As it says, "Moshe became angry with the officers

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<sup>28</sup> A *hekeish* is a hermeneutical tool that allows for the derivation of laws based on two subjects being juxtaposed in the Torah.

<sup>29</sup> Aside from the cases where the Talmud states explicitly that the source of a particular rule is *sevara*, there are numerous cases where the *rishonim* write that the source is *sevara*. See, for example, Rashi *Kiddushin* 50b s.v. *u-matinin*; *Tosafot Yeshanim*, *Yevamot* 13b; and *Nimukei Yosef* to *Bava Mezī'a* 46b. See *Maharatz Ḥiyut*, *Mevo ha-Talmud* ch. 15.

<sup>30</sup> Even more astonishing is the question "Why do I need a biblical verse to teach me this idea—it is a *sevara*?" As we mentioned, this query shows not only that *sevara* is binding, but also that the pre-*matan Torah* obligation to follow *sevara* remains to the extent that it alleviates the need for that particular law's restatement. Clearly, however, this cannot be said for every *sevara*—it seems that this sort of question is appropriate only for certain types of *sevarot*. After all, many of the Torah's explicitly stated laws are intuitive. Moreover, it seems that not everything that *sevara* mandates has the status of a law written explicitly in the text. We will return to these issues shortly.

<sup>31</sup> *Meshekh Ḥokhma* understands the verse (*Shemot* 24:12) as instructing us to continue to use *sevara* to guide behavior even after the giving of the Torah.

<sup>32</sup> *Yevamot* 62a.

<sup>33</sup> *Kuntrus Divrei Sofrim* p. 90 (published in vol. 2 of *Koveitz Shiurim*). R. Elhanan frequently applies this principle to explain difficult Talmudic passages; see, for example, *Koveitz Shiurim*, *Kiddushin* 141, *Koveitz He'arot* 30–34, and the third chapter of his "Explanations of *Aggada*" (published in the back of *Koveitz He-arot*). Likewise, see *Netivot ha-Mishpat* 234, who assumes that Hashem's will is that we obey the sages' decree.

of the army... and he said to them, ‘Have you spared the women-folk?’” And why did they not answer him, “And why [should we have killed them]? You did not instruct us to kill the women?”<sup>34</sup>

### C. *Sevara* as an Interpretive Principle.

To ascertain how *sevara* operates as an interpretive principle, let us return to the Talmud’s ruling, based on *sevara*, that one must give up his life before murdering another person. This ruling actually affects not just the law, but the interpretation of the biblical text. On the basis of *sevara*, we conclude that the verse “*ra-bai ba-hem*,”<sup>35</sup> which mandates that Torah law be violated in order to save a person’s life, does not apply in the case of murder.<sup>36</sup> Likewise, *Tosafot* (*Yoma* 74a s.v. *keivan*) write that when a verse can be interpreted in two different ways, we use *sevara* to choose the proper elucidation.<sup>37</sup> Similarly, *Tosafot* (*Avodah Zarah* 20a s.v. *de-amar*) write

<sup>34</sup> Section 153. Translation adapted from “Halakhic Values and Halakhic Decisions,” by R. Mayer Twersky in *Tradition* 32:3 p. 8. Earlier, we saw that *Shlah* makes the same point. *Sefer Hasidim* subsequently notes the terrifying implications of his analysis:

מכאן שהוא אדם ערום ביראה הויל ומענישים אותו על שאינו יודע שיש לדעת ולהקור שהרי לפניו השליט לא תכל לאמר כי שגגה היא.

<sup>35</sup> *Vayikra* 18:5. The verse states, “You shall guard My decrees and My laws that man shall carry out and by which he shall live.” The Talmud (*Sanhedrin* 74a) derives from here that all prohibitions are violated in order to save someone’s life.

<sup>36</sup> Let us consider another example. The Torah states that the witnesses who testify in a death-penalty case should participate in carrying out the execution. What happens if they cannot do so? The Talmud (*Sanhedrin* 45b) records a debate about the status of a person who was sentenced to death by stoning and the witness’s hand was severed. Do we exonerate the accused because the witnesses cannot carry out their task? According to *Tosafot* (*Yevamot* 104b s.v. *de-amar*), even the opinion that the guilty party is put to death concedes that the text of the Torah implies that the guilty party should be exonerated. However, because exonerating a guilty party just because the witnesses cannot carry out the execution violates *sevara*—after all, why should a heinous criminal be pardoned just because the witnesses lost their hands?—we reinterpret the verse to accord with *sevara*.

<sup>37</sup> תוס' יומא עד. ד”ה כיון: דלכני איצטראיך לה רלי יהונן לפרקוי האי טעמא משומ דאי מקרא דכל חלב הויה אמיןיא עיקר קרא לבני איצטראיך וחציו שייעור מדרבן ואסמכוה אקרא אבל השטא דקאמר טעמא דחויז לאיצטראוף סברא הו מאהאי טעמא דדרשה גמורה היא לחצוי שייעור.

*Tosafot* (*Hulin* 5a s.v. *kedei*) and *Tosafot ha-Rosh* (*Sotah* 3a s.v. *hai*) provide two more examples where *sevara* motivates the interpretation of the text in a similar fashion. Likewise, Rashi (*Niddah* 41a s.v. *ahar*) writes that we use *omed ha-da’at* (i.e. *sevara*) to determine which of two possible *drashot* to make.

that the prohibition of *lo tebaneim* (*Devarim* 7:2), which is stated in the context of verses relating specifically to the seven Canaanite nations, applies to all gentiles because *sevara* dictates that in this case, there is no reason to distinguish between different types of gentiles. Here, we find *sevara* overriding contextual clues to determine the interpretation of the text of the verse.<sup>38</sup> Likewise, *Tosafot* (*Yoma* 76b s.v. *gamar*) show how *sevara* informs us about the proper hermeneutical interpretation of the text.<sup>39</sup> For example, *sevara* determines whether or not to learn a *gezeira shava*.<sup>40</sup> Similarly, whether or not the Talmud deduces that the term “*Bnei Yisrael*” means to exclude females depends upon *sevara*.<sup>41</sup> Likewise, Ramban (*Kiddushin* 33b) writes that the scope of a *hekeish* (whether or not we apply the principle of *ein hekeish le-mehtza*) depends upon *sevara*. A particularly forceful example of this principle emerges from *Sifra* (*Vayikra* 15:19) and *Shabbat* 64b. Originally, the word “*be-niddata*”<sup>42</sup> was understood to derive from the root “*nidda*,” implying an added degree of segregation between husband and wife, such that it would be inappropriate for a woman to adorn herself during this period. R. Akiva rejects this reading because it would trigger strife.<sup>43</sup>

<sup>38</sup> *Tosafot* conclude that in the final analysis, it actually is *sevara* that informs us to limit the other verses in this section to the seven Canaanite nations.

<sup>39</sup> תוספות מסכת יומא דף עז עמוד ב: גם ר' שכר שכר מנזיר - ואם אמר לרבי יהודה שלא יליף גיירה שוה בבריתא פרק אמרו לו (בריתות דף יג:) מנא ליה דשתיה בכל אכילה יש לומר מסברא כדאמרין בפ"ג דשכבות (דף כב:) איבעית אימא קרא איבעית אמא סברא אבע"א סברא כדאמרין תוא ונטעום מידי ואולי ואכלוי ושתו א"נ נראת לי נהי דלגבבי ביאת מקדש לא יליף שכר מנזיר לחיב אפי' בשאר משכרים הכא גבי מעשר שניי זהה יליף גיירה שוה דהתק טעם רבה איכא דלא יליף משום דשותוי יין גנאי הוא ליכנס שוכר לפנים דאפיילו לפני מלךبشر ודם אין עושין כן כ"ש לפניו מלך מלכי המלכים הקב"ה וככיו דטעמא מש"ה הוא מה לי יין מה לי שאר משכרים [כלומר לא מסתבר יליף הגו"ש מנזיר לפטור שאר משכרים] אבל בעלמא מודה דגמרא מנזיר תעוז דהא הכא אליבא דמל' אכל דבילה קעלית וככns למקדש חיב דהינו רבי יהודה מסקין גמר שכר מנזיר אלמא מודה רבי יהודה הכא כדפרי.

<sup>40</sup> The extent to which we are willing to do this may depend on the debate between Rambam and the Gaonim about whether we assume that every derivation *HaZal* make from the Torah stems from Sinai.

<sup>41</sup> See *Zera'im* 15b, *Menahot* 43a, and *Tosafot Yeshanim*, *Yevamot* 4a and footnote 9.

<sup>42</sup> In the Talmud this comment is about *Vayikra* 15:33, while *Sifra* is discussing *Vayikra* 15:19.

<sup>43</sup> The Talmud states: “The first elders used to say: “She shall be in her state of *nidda*— [this means that] she may not paint her eyes with makeup, paint her face, or adorn herself with colored garments until she goes to the *mikveh*.” [This was

Perhaps the greatest example of the power of *sevara* with respect to determination of the correct interpretation of the text can be seen from *Tosafot* (*Yeramot* 11b s.v. *le-rabot*), where *Tosafot* understand that Hazal used *sevara* to interpret a verse against its simple reading because the simple reading seems implausible, legally or philosophically.<sup>44</sup> This category forcefully highlights the authority of *sevara*, because *sevara* instructs us to choose an intellectually sound but textually forced reading of a verse over a textually robust but intellectually troublesome interpretation.<sup>45</sup>

This discussion relates to a more general hermeneutical question regarding the impetus behind Talmudic interpretation. Specifically, when two sages disagree about the elucidation of a biblical verse, are they motivated primarily by textual concerns, or is it *sevara* that drives their analysis? According to what we have shown above, it is legitimate to state that at times, their preconceived *sevara* informs their reading of scripture. Indeed, the Talmud itself frequently indicates that even when a dispute revolves around the interpretation of a particular verse, both positions agree that the verses that form the basis of each opinion can be interpreted in

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the interpretation] until R. Akiva came and taught that doing so makes her repulsive to her husband and her husband will divorce her. Rather, the verse means to say that she shall remain in her state of *niddah* until going to the *mikveh*.” Seemingly, the motivation for R. Akiva’s interpretation of the verse is *sevara*. See, however, *Sfat Emet* (ad. loc.), who rejects the possibility that a *sevara* of this sort could cause us to reinterpret the verse entirely. Rather, he suggests, the earlier sages made a decree prohibiting a *niddah* from adorning herself. Their interpretation of the verse was merely an *asmakhta*. See *Shulhan Arukh*, Y.D. 195:9 and the comments of the *Gr”a* 195:13. See also Moshe Halbertal, *Mahapiekhot Parshaniyot be-Hit’harutan*, Magnes Press, 2003.

<sup>44</sup> There are indeed many places where we reject the simple interpretation because of *sevara*. See, for example, *Zeraḥim* 29a (about the source for *pigul*) and Malbim, *Be-midbar*, ch. 27, section 21.

<sup>45</sup> The question of under what circumstances we can use utilize *sevara* to read a verse in a non-simplistic fashion relates to a more general issue discussed by the *rishonim*. What factors justify reading a verse allegorically? R. Sa’adya Gaon in *Emunot v-Da’ot* 7.2 offers four reasons to deviate from the literal interpretation of a biblical verse. The second reason to choose metaphorical elucidation is when the literal interpretation contradicts logic, e.g. the verse that describes Ha-shem as a “consuming fire” (*Devarim* 4:24). On the one hand, this parallels the example in *Yeramot*. However, in R. Sa’adya Gaon’s example, unlike that of *Tosafot*, one can argue that *pshuto shel mikra* has been maintained despite the non-literal interpretation (R. Sa’adya Gaon himself probably would not have used those terms).

accordance with either opinion.<sup>46</sup> Such a dynamic implies that ultimately, it is *sevara* that forms the basis of the dispute.<sup>47</sup> *Tosafot* (*Sanhedrin* 25a s.v. *ha-bi*) articulate this notion clearly.<sup>48</sup> According to Rashi (*Shabbat* 69b s.v. *ha*; *Sotah* 19a s.v. R. *Yehuda*), this phenomenon seems to be reflected in the principle “*lo mesaran ha-katu� ela la-hakhamim*,” which states that in certain instances, the meaning of the verse was left to the sages to determine.<sup>49</sup> Indeed, *Yad Malakhi* (216) proves from *Bekhorot* 26b that anything vague in the Torah was left to the sages to define based on the principle of *lo mesaran ha-katu� ela la-hakhamim*.<sup>50</sup> Indeed, the Talmud (*Yevamot* 21a)

<sup>46</sup> E.g. *Berakhot* 13a. The passage cited above from *Shabbat* 64b (if not read according to *Sfat Emet*) likewise implies that the dispute between the earlier sages and R. Akiva about the elucidation of the text hinges on *sevara*. Netziv, however, argues that the earlier sages were not concerned with divorce because they demanded stiff requirements to allow divorce (following the view of Beit Shammai and Beit Hillel in *Gittin* 90a). Thus, the disagreement revolves not around the validity of the *sevara*, but rather around an external debate about what constitutes legitimate grounds for divorce.

<sup>47</sup> There are those who argue that all *drashot* stem entirely from the text; if someone knows the correct rules of interpretation, the *drasha* follows naturally. Malbim (see, for example, his introduction to *Vayikra*) and *ha-Ketav Ve-ha-Kabbala* adopt this approach. Interestingly, Maharal writes (*Be'ir ha-Gola* 6:16) that when *drashot* deviate from the simple understanding of the verse, this indicates that Hazal independently discovered the principle and interpreted the verse accordingly; thus, the verse does not serve as the true source for the idea.

אל יאמר כי כאשר דרשו דבר מן המקרא, והם באמת רוחקים מן לשון המקרא, ועל זה אמר כי הם אומדנא, רוצה לומר הסברא מהיב זה, רק שםכו העניין על הכתוב. ואם לא היה הדעת והסבירה מהייב אותם, לא היו דורשים אותם מן המקרא. וזה לשון אומדנא נינהו, ופושט הוא.

<sup>48</sup> Likewise, see *Sanhedrin* 78a, where there is a dispute about how to read the verse “*ve-ish ki yakeh nefesh adam*,” yet Rava states explicitly that the dispute hinges on *sevara*. Moreover, there are times when the true source of a law is *sevara*, and yet a *drasha* is provided simply to bolster the preexisting law. See Rashi, *Kiddushin* 57b s.v. *Rava*.

<sup>49</sup> This is true especially regarding *drashot*, as *Tosafot* (*Erwin* 28a s.v. *ahani*) demonstrate.

<sup>50</sup> The scope of *lo mesaran ha-katu� ela la-hakhamim* is a matter of debate. (See, for example, *Teshuvot Hacham Tzvi* 9 and *Teshuvot Rama mi-Pano* 108, who limit the range of this principle.) There are numerous examples, though, where *rishonim* and *aharonim* presume that the interpretation of a biblical concept was left to the sages even in absence of an explicit Talmudic passage to that effect. For example, Ritva (*Shabbat* 114b) assumes that the biblical requirement of rest on Shabbat was left to the sages to define; *Kesef Mishneh* (*Hilkhot Kriat Shema* 1:10) asserts that time for reciting the daytime *shema* was left to the sages to determine; *Sefer Yere'im* (274) writes that the *melakhot* on Shabbat were determined by the sages;

implies that most biblical laws were left vague and undefined and were clarified by the sages.

The remarkable power of *sevara* is most evident in its ability to alter not just the reading of the text, but also the shape and scope of *mitzvot*. A brief consideration of the biblical formulation of some of the most basic *mitzvot* highlights the manner in which *sevara* determines their parameters. For example, regarding *talmud Torah* a narrow reading would entail an obligation to teach but not learn. After all, the verse says, “And you will teach them to your sons.” Nonetheless, Rambam (*Sefer ha-Mitzvot, Asei 11*) understands this to include the obligation to study. That extension is based on logic. Likewise, according to Rambam (in contrast to Ramban) the Torah does not command *teshuva*—all the Torah demands is *viduy*, the verbal declaration specifying, regretting, and renouncing the sin.<sup>51</sup> Rambam nevertheless considers *teshuva* a *mitzvah*.<sup>52</sup>

Another example of a similar phenomenon is the *mitzvah* of honoring one’s parents. The Talmud (*Kiddushin* 31b) implies that the Torah commands that one obey his parents only when it comes to matters relating to satisfying their physical needs.<sup>53</sup> Nevertheless, numerous *rishonim* assert that there is an obligation to obey their requests even when it comes to other matters.<sup>54</sup>

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*Hazon Ish* (*Ishut* 22:3) maintains that the parameters of evidence and concepts such as *meit mitzvah* were determined by the sages.

<sup>51</sup> רמב"ם הל' תשובה א:א: כל המצוות שבתורה, בין עשה בין לא תעשה—אם עבר אדם על אחת מהן, בין בזדון בין בשגגה—**כשיעשה תשובה ושוב מחתאו, חייב להתודות לפניו האל ברוך הוא...** שנאמר “איש או אשה כי ייעשו וגוי והתודה את חטאיהם אשר עשו”

The verse that Rambam brings as the source for repentance is “They shall confess their sins.” It seems that there is no verse that commands repentance, only confession. Thus, he opens the *Hilkhot Teshuva* with the formulation “When a person does *teshuva* and returns from his sins, he is obligated to confess before God...” See *Minhat Hinukh* (mitzva 64) and R. Yosef Dov Soloveitchik’s *Al ha-Teshuva* (pp. 37–41) for more on Rambam’s position.

<sup>52</sup> This can be seen in the *koteret* to *Hilkhot Teshuva*, where Rambam writes that there is a *mitzvah* to repent.

כותרת להל' תשובה, מצות עשה אחת, והיא שישוב החטא לפני ה', ויתודה.

This also is evident from the *Hilkhot Teshuva* 2:7 and from his commentary to the last Mishnah in *Yoma*.

<sup>53</sup> קידושין (לא): איזהו כיבוד... מאכילה ומשקה, מלבייש ומכסה, מכניות ומוציא.

<sup>54</sup> Rashi’s interpretation of *Yevamot* 5b-6a makes it clear he assumes that a child must heed any request that a parent makes:

תלמיד בבלי מסכת יבמות דף ו עמוד א: יכול אמר לו אביו היטמא, או שאמר לו אל תחזר, יכול ישמע לו? ת"ל: (ויקרא י"ט) איש אמו ואביו תיראו ואת שבתותי תשמרו, כולם חיבין בכבוד!

In a similar fashion, narrowly formulated commandments sometimes are interpreted as examples of larger principles, thereby significantly expanding their scope. For example, Rashi (*Shabbat* 128b s.v. *tza'ar*) writes that the biblical source for *tza'ar ba'alei hayyim* (the prohibition against causing pain to animals) is the Torah's obligation to help unload a burdened animal. But we must ask: if the Torah demanded only that we unburden an overtaxed donkey, how do we know that there is a general prohibition against causing needless pain to animals? Similarly, *Sefer ha-Hinuch* (529) and others assume that general wastefulness constitute a violation of *bal tashbit* even though the Torah seems to prohibit only the annihilation of fruit trees during a siege.<sup>55</sup>

The answer to these questions, once again, seems to be *sevara*.<sup>56</sup> The logic that prohibits wastefulness during battle certainly demands efficiency and respect during a time of peace. Likewise, the logic that urges us to unload an overburdened animal surely requires that we refrain from needlessly afflicting any beast.<sup>57</sup> In both cases, we use *sevara* to determine

רש"י אמר לו אביו לכהן היטמא בבית הקברות להשיב אבידת או שהיתה עומדת בחוץ ואמר לו אל תזריר...

Me'iri and Rashba, though they interpret this passage differently, concur.

רש"א שם "ואעפ" שאמור לו האב לחמר אחר הבמה, לפי שאין עיקר כבוד אלא במה שיש לו בו הנאה, וכגד אמרין בקידושין, איזהו כבוד מאכilio ומשקהו ומלבישו ומנעילו, אבל אמר לו לעשות דבר שאין לו בו הנאה של כלום, אין זה כבוד שנצטויה עליו, וכבוד כזה אין בו עשה של תורה שידחה אפי' לא גורידא"

According to *Tosafot* (*Kiddushin* 31b) this is the view of the Yerushalmi. This also is the view of Rabbeinu Yeruham (4:1, cited in R. Perlow's explication of R. Sa'adya Gaon's *Sefer ha-Mitzvot*). Smag (*Aseih* 112-3, as quoted in footnote 291 of *Ritva Yevamot* 6a) agrees. There are numerous *rishonim*, however, who disagree, limiting the technical biblical commandment to matters pertaining to satisfying a parent's physical needs. See, for example, *Tosafot Yevamot* 6a.

<sup>55</sup> ספר החינוך מזכה תקנת בלהשჩית: שלא להשחית אילני מأكل במצוור וכן כל השחתה בכלל הללו... שונמננו מלכודות האילנות כشنצור על עיר כדי להצער לאנשי העיר ולהכאייב לבוטם, ועל זה נאמר [דברים כ', י"ט], לא תשחית את עצה וגוי ואותו לא תחרות. וכן כן נכנס תחת זה הלאו שלא לעשות שום הפסד, כגון לשוווף או לקורע בגדי או לשבר כליל בטלחה, ובכל עניינים אלו ובכל כיוצא בהם השחתה יאמרו זכריהם לברכה תמיד בגמרה [קידושין ל"ב ע"א] והוא עבר משום בל השחית.

<sup>56</sup> Of course, we may treat laws derived from *sevara* differently than those derived from the text. For examples of these differences, see my article in *Beit Yitzchak* vol. 40 (5768) p. 421 footnote 31.

<sup>57</sup> Rambam seems to conclude, however, that *tza'ar ba'alei hayyim* is prohibited only rabbinically. He sees the obligation to unload an overburdened donkey as a reflection of the responsibility to help a friend at a time of need. See *Hilkhot Rotzchaḥ* 13:1-14 and the *Gr'a* C.M. 272:9-10. In *Moreh Nevukhim* (3:17), Rambam goes even further than Rashi with respect to using *sevara* to derive the biblical

the reason for the *mitzvah* and then expand it accordingly. An explicit example of this can be seen in *Sefer ha-Hinuch*, who writes regarding the obligation to appoint a king only if he is Jewish: “**From the root of** [i.e., reason for] **the mitzvah we can extrapolate** that it is prohibited to appoint leaders who are wicked and cruel.” R. Mayer Twersky notes that *Sefer ha-Hinuch* frequently employs this sort of reasoning, which he terms “the expansivity principle.”<sup>58</sup>

Because *sevara* always is accessible, the true interpretation of the Torah always is within reach. Thus, *sevara*, which can be used to determine the correct interpretation of the Torah, guarantees the perpetuity of the Torah. The Talmud (*Temurah* 16a) records how three thousand halakhot were forgotten in the days of mourning after the death of Moshe. The people begged Yehoshua to ask that these halakhot be revealed from the heavens as they were told to Moshe, but Yehoshua refused; Torah is “not in heaven” (*Devarim* 30:12). What recourse, then, is left when the proper interpretation of the Torah is forgotten? R. Avahu concludes that Otniel ben Kenaz saved the day—through *sevara*, he recreated all of the forgotten halakhot.<sup>59</sup>

The value of *sevara* extends beyond retrieval. In R. Yanai’s oft-quoted words, “Had the Torah been given in clear-cut decisions (*hatukha*), there would be no leg to stand on.”<sup>60</sup> Indeed, Moshe himself entreated God for clarity, but God refused, transmitting instead forty-nine aspects of purity and forty-nine aspects of impurity. Humans are left to resolve the

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prohibition of causing pain to animals. He writes: “There is a rule laid down by our sages that it is biblically prohibited to cause pain to an animal; this is based on the words ‘Why have you beaten your donkey?’” (*Be-Midbar* 22: 32). Presumably, the angel’s chastisement of Bilam indicates that causing pain to animals contradicts the *retzon ha-Torah*. This inference alone suffices to create a biblical prohibition—no other verse is necessary.

<sup>58</sup> “Halakhic Axiology within Sefer Ha-Hinnukh” (*Tradition* 33:2). He writes: “In each of the examples considered below, the *Hinnukh* integrates his extrapolation within his conclusion. In other words, he bypasses the *mi-shorshei ha-mitzvah* section because this is non-juridical and non-normative. He also bypasses the *mi-dinei ha-mitzvah* section because it consists of the halakhic details of the specific mitzvah. By grafting the extrapolated directive onto the conclusion, the *Hinnukh* clearly indicates that while his extrapolation is not directly, specifically included within the mitzvah it is nonetheless normative by virtue of the expansivity principle.”

<sup>59</sup> Indeed *sevara* was used several times in history to recreate lost traditions; see *Sukka* 20a, *Bava Mezi'a* 85b, and Rashi *Bava Mezi'a* 33b.

<sup>60</sup> Yerushalmi, Sanhedrin 4:2, *Pesikta Rabbati* 21:14-5, *Midrash Shohar Tov* 12:4, and *Masekhet Sofrim* 16:5.

matter based on majority vote. According to this source, Torah by definition involves creative use of the human intellect and therefore would not be possible without ambiguity. As *Pnei Moshe* (Yerushalmi, *Sanhedrin* 4:2) explains, all of the forty-nine possibilities, which originate at Sinai, are equally true, leaving man to use *sevara* to determine that which is normative. *Korban ha-Eida* (*ibid.*) adds that this very ambiguity guarantees the eternal relevance of Torah by ensuring that it can serve as the arbiter of novel questions. Moreover, *Ridvaz* (*ibid.*) understands that this passage is especially relevant regarding the interpretation of biblical verses, which are written without punctuation.<sup>61</sup>

If *sevara* is as pervasive as we are contending, it may seem strange that that the term is used so rarely. For example, when Rashi expands the obligation to help unload a donkey into *tza'ar ba'alei hayyim*, he relies on *sevara* without acknowledging it explicitly. The explanation may be that its very indispensability accounts for its frequent omission; it is the latent assumption that underlies the entire enterprise of *talmud Torah*. In fact, *Maharatz Hiyut* (*Mero ha-Talmud*, Ch. 15) writes that much of the Torah's legal system is based on "what the sages constructed via logical reasoning and from established practice."<sup>62</sup>

Of course, each thinker utilizes *sevara* within his unique method of thought. Indeed, the term itself has a different connotation for R. Sa'adya Gaon than it does for R. Shimon Shkop. Ultimately, however, the basic supposition that divine wisdom is subject to the interpretation of the human intellect is shared universally.<sup>63</sup>

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<sup>61</sup> Likewise, *Teshuvot Ridvaz* (3:643) posits that the text of the Torah is unencumbered by *nekudot* and *te'amim*, despite the fact that these symbols signal the proper method of public reading of the Torah and are of Sinaitic origin, because their inclusion would inhibit the multiplicity of legitimate possible readings.

<sup>62</sup> *The Students' Guide through the Talmud* Ch. 15 (trans. Jacob Schacter London, 1952 p. 119). This is true especially with respect to monetary laws. For example, *Nimukei Yosef* (to *Bara Mez'i'a* 47b; 28b in the Rif's pagination) writes that when the Talmud states that "**according to the Torah**, money acts as a means of acquisition," it actually is relying on a rule derived from *sevara*, the phraseology "according to the Torah" notwithstanding. In fact, according to R. Shimon Shkop (*Sha'arei Yosher* 3:3 and 5:1), *sevara* is the primary factor in determining monetary law. *Sevara* is not limited to monetary law, though, as described above.

<sup>63</sup> R. Yitzhak Grossman pointed out a fascinating debate between R. Haim Hirshensohn (author of various works, most notably *Malki ba-Kodesh*) and R. Elazar Meir Preil (former Rav of Elizabeth, NJ and father-in-law of R. Pinchas M. Teitz) about the power of *sevara*. R. Hirshensohn wrote an article on *sevara* in volume 7 of R. Yehuda Dovid Eisenstein's *Otzar Yisrael* encyclopedia describing the prominence of *sevara* (available at <<http://hebrewbooks.org/>>

#### D. Must *Sevara* emerge from internal Torah principles?

When considering the role of *sevara*, we must distinguish between internal (immanent) Torah logic and external Torah logic. The use of internal logic rests upon the legal assumption that the content of the law is elaborated from within.<sup>64</sup> External logic, on the other hand, refers to universal logic that lacks specific precedents within the Torah. Not surprisingly, the use of such logic is rarer. Moreover, the argument must be especially compelling.<sup>65</sup>

Let us consider an example. In *Devarim* 2:24, God commands Moshe to provoke war with Sihon. Remarkably, Moshe seems to disobey the divine command. Instead of attacking, Moses relates “words of peace” to Sihon (*Devarim* 2:26). How could Moshe flout God’s instructions? Rashi (quoting *Midrash Tanhuma*) answers that Moshe used logic to modify or reinterpret the divine command; however, it was not external logic, but rather internal Torah logic.<sup>66</sup> He looked towards other instances of divine action, such as God’s offering the Torah to other nations and His patience towards the Egyptians, as models for interpreting this particular directive.<sup>67</sup> While the distinction between internal and external logic does

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pdfpager.aspx?req=2596&st=&pgnum=143>). R. Preil critiques his approach in volume 1 of *ba-Maor* (available at <<http://hebrewbooks.org/pdfpager.aspx?req=10027&st=&pgnum=364>>).

<sup>64</sup> In secular legal philosophy, this is similar to the view of Prof. Ernest Weinrib who argues for the immanent rationality of the law. As opposed to those who see the law as a manifestation of political purposes, legal “formalism postulates that juridical content can somehow sustain itself from within” (Ernest Weinrib “Legal Formality: On the Immanent Rationality of Law,” 97 *Yale Law Journal* 949 (1988) note 3).

<sup>65</sup> R. Moshe Feinstein writes (*Iggerot Moshe* E.H. 2:11) that reasons based on external values (*hashkafot hitzoniyyot*) and invented *sevarot* (*sevarot beduyot mei-ha-lein*) have no value in the halakhic process.

<sup>66</sup> רשי שם, על פי תナחותם דברים י’ ודב”ר: אף על פי שלא צוינו המקומות לקרוא לסיון לשולם, למדתי מזוהר סני, מן התורה שקדמה לעולם: כשבא הקב”ה ליתנה לישראל, חור אותה על עשו וישראל, וגלי לפניו שלא יקבלוה, ואף על פי כן פתח להם בשולם, אף אני קדמתי את סיון בדברי שלום. דבר אחר: ‘מדובר’, מכך למדתי שקדמת לעולמך: יכול היה לשולחך ברק אחד ולשרוף את המצרים, אלא שלחתני אל פעה.

*Midrash Tanhuma* (*Tzav* sec. 3) goes even further. It implies that God actually permanently changed the law based on Moshe’s decision to engage Sihon in peace. For a fuller discussion of the implications of this remarkable *midrash*, see my article in *Beit Yitzḥak* vol. 40 (5768) p. 417 footnote 12.

<sup>67</sup> R. Mayer Twersky, in a brief article on <[www.torahweb.org](http://www.torahweb.org)> entitled “Natural Law,” understands Abraham’s defense of Sodom in a similar fashion based on Rashi *Bereishit* 18:25.

not account for all of the examples in which *sevara* is employed, it will help us understand some of the most radical examples.<sup>68</sup>

This distinction might help us understand what would seem to be a contradiction in statements made by *Hazon Ish*. In *Emuna u-Bitahon* p. 21, he writes, “Moral duties sometimes constitute one corpus with halakhic rulings, and it is halakha that defines the proscribed and permitted of ethical thought.” It seems that according to *Hazon Ish*, halakha is what determines morality.<sup>69</sup>

Yet there are instances where *Hazon Ish* seems to take the opposite track, arguing that *sevara* must be used to determine if something is right or wrong. For example, he writes that even though the Torah explicitly commands one to obey his parents only regarding satisfying their physical needs, there is an obligation to obey their requests in other areas.<sup>70</sup> Moreover, this is a biblical obligation, despite the implication of the verse, because it is the will of the Torah for parents to be honored.<sup>71</sup>

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<sup>68</sup> For example, the aforementioned quote from *Sanhedrin* 74a, where the Talmud deduces that one must give up his life before murdering based on the *sevara* that a human is incapable of determining who is more worthy to live: “Who says your blood is redder; maybe the other person’s blood is redder?” One could argue that this is not just an external *sevara*, but rather an internal *sevara* grounded in other halakhot. For example, *Yad Ramah* (*ad. loc.*) understands the *sevara* as a natural limitation on *va-hai bahem*, which dictates that since the purpose of *mitzvot* is to live through them, they can be violated to save a life. Logically, then, *mitzvot* cannot be violated when no life will be saved. In the case of murder, where the violation of the law will not result in more life, since either way one life will be lost, there is no basis to violate any *mitzvah*. Ultimately, then, this *sevara* is rooted in the verse *va-hai bahem* and can be considered internal logic.

<sup>69</sup> This seems to be in sharp disagreement with R. Kook’s aforementioned warning (*Shmona Keratzim* 1:75) not to allow fear of heaven to supplant a person’s natural sense of morality (המוסר הטבעי). *Hazon Ish* illustrates his position with a story in which an established teacher is supplanted by a young and energetic instructor. *Hazon Ish* rejects the natural compassion to the established teacher based on the halakhic principle that encourages competition in Torah education. However, R. Kook need not disagree with *Hazon Ish* about this point, since *Hazon Ish* disapproves of compassion only when it contradicts halakha, as his story indicates. Moreover, *Hazon Ish* certainly would agree that the community should show compassion and support for the established teacher even as the charismatic neophyte is allowed to replace him.

<sup>70</sup> E.H. 148; *Kiddushin* 32a.

<sup>71</sup> “דמ”מ הוא חיוב Dao’ שהרי רצון התורה בכיבוד אב ומוראו, אלא שיעיקר העשה הוא בכיבוד של מאכילה ומשקהו.”

In these cases, as well as others,<sup>72</sup> *Hazon Ish* argues that it is insufficient to simply look at the text of the Torah to determine what is right and wrong. Rather, we must endeavor to determine what Hashem truly wants and elucidate the law accordingly. At first glance, this position in favor of applying logic to understanding the Torah's will seems to contradict the previously cited statement from *Emuna u-Bitabon*, where he argues that the Torah is the sole arbiter of what is moral and ethical.

It seems that the resolution to this contradiction lies in distinguishing between internal and external logic. In the latter case, we use internal Torah logic to determine that which is moral and ethical. Specifically, we are bound to determine the “*retzon ha-Torah*,” the underlying logic of the *mitzvah*, to determine its parameters. The Torah demands that we obey our parents when it comes to matters relating to their physical needs. This implies the necessity of demonstrating gratitude to the people who brought us into the world. This value of gratitude demands that we obey even regarding matters that do not directly relate to physical needs. Thus, by examining the *mitzvah*, we can decipher the general desire of the Torah and interpret the *mitzvah* accordingly.<sup>73</sup>

Ultimately, *Hazon Ish* does not object to using the intellect to determine that which is moral; however, he does insist that when doing so, our intellect must be grounded in the Torah's internal morality. Thus, it is not enough to apply the specific dictates of the law—one must incorporate the philosophy of the law. This resembles the notion of *lifnim mi-shurat hadin* (beyond the letter of the law) as understood by Ramban,<sup>74</sup> but, in fact, goes much further, because the philosophy of the law becomes part of the law, whereas *lifnim mi-shurat ha-din* remains superimposed upon the law even if it is mandatory. According to *Hazon Ish*, there are times when the spirit of the law becomes the letter of the law.

With this distinction between internal and external logic, we can answer another question. At first glance, the existence of *hukim—mitzvot*

<sup>72</sup> E.g. E.H. 129:13 and *Ishut* 22:3. This relates to *Hazon Ish*'s general reliance upon *sevara*; for example, there are several places where most *abaronim* assume a particular law stems from a *gezeirat ha-katur*, while *Hazon Ish* assumes it to be a *sevara* (e.g. the effectiveness of a *tzurat ha-petaḥ*; see *Gilyonot ha-Hazon Ish al ha-Rambam* 16:16).

<sup>73</sup> The same analysis can be used to understand how *Hazon Ish* reinterprets Rambam's radical position regarding an idolatrous city (*Hazon Ish Sanhedrin* 24:14).

<sup>74</sup> See his commentary to *Vayikra* 19:2 and *Devarim* 6:18. *Sefer ha-Hinuch* (1) adopts a similar approach towards the end of his discussion of *pru u-rvu*, where he writes that neglecting this *mitzvah* is particularly egregious, as it reflects the individual's disinterest in fulfilling the will of his Creator.

whose ultimate reasons are unknowable—points to the limitation of *sevara*. After all, how can we apply *sevara* to something that we do not understand? Moreover, besides *hukim*, which are inexplicable on a philosophical plane,<sup>75</sup> there are laws (termed by the Talmud “*hiddushim*”) that are inexplicable on a legalistic level. Nevertheless, we use *sevara* to understand these types of laws as well. Remarkably, we utilize *sevara* to interpret laws that are defined by their very violation of *sevara!*<sup>76</sup>

Once we have differentiated between internal and external logic, though, this question falls by the wayside. From the perspective of external logic, a *hok* is incomprehensible; however, it is nevertheless subject to analysis through internal logic. This is the distinction between *ta’amei hamitzvot*, which are inappropriate for the determination of normative law because they evaluate *mitzvot* using external logic, and the quest to understand a law’s inner logic, which frequently is employed to determine the parameters of *mitzvot*.<sup>77</sup>

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<sup>75</sup> Alternatively, a *hok* is a *mitzvah* that is paradoxical or problematic for a particular reason (see Ramban, *Be-Midbar* 19:2).

<sup>76</sup> Rashi (*Pesahim* 44b) understands a “*hiddush*” to be a law that violates the normal principles. *Noda be-Yehuda* (Y.D. *Tinyana* 37) sees *hiddush* as something that contradicts *sevara*. Interestingly, the *rishonim* frequently offer rationales for laws that are termed *hiddushim*. For example, Ramban, Ran, and Tur offer reasons for the believability of the latter witnesses in the case of עדים זוממים. See my article in *Beit Yitzchak* vol. 36 for an elaboration of the possible ramifications of the various reasons given.

<sup>77</sup> I am indebted to R. Michael Rosensweig for formulating the above distinction. He also noted that sometimes, it is difficult to know whether something is “good *lomdus*,” which is appropriate when determining the normative parameters of a *mitzvah*, and when it is *ta’ama de-kra*, which we assume to be inappropriate. Frequently, he pointed out, what seems to be a dispute about *ta’ama de-kra* is in fact a dispute about what constitutes “good *lomdus*.” As an example, he cited the debate amongst the *rishonim* regarding whether the *mitzvah* of chastisement (*tobekha*) applies in a case where it is clear that the rebuke will not be heeded. Interestingly, a similar idea might exist in the very case where R. Yehuda and R. Shimon debate whether or not we derive halakha from *ta’ama de-kra*. The Talmud (*Bava Mez’ia* 115a) states that according to R. Yehuda (the normative opinion), one must return the collateral taken from a wealthy widow, even though the reason for the prohibition against taking collateral does not apply in the case of a wealthy widow, because we do not determine the parameters of a law based on the reason for the law. However, Rambam, in his commentary on that Mishnah, states that R. Yehuda maintains that the reason one must return the collateral applies even in the case of a wealthy widow. (This might help us explain Rambam’s statement in *Moreh Nevukhim* [3:48], where he writes that when the Talmud [*Berakhot* 33b] restricts saying, “Your mercy extended to young birds,

Ironically, then, we may turn to *sevara* especially when trying to comprehend the most incomprehensible laws. Thus, Mordechai (*Bava Kamma* 138) notes that the Talmud frequently offers reasons to justify the most mystifying directives. Moreover, these reasons affect the parameters of these laws.<sup>78</sup> Mordechai explains that generally, we do not utilize *ta'ama de-kra* in order to determine the structure and application of a *mitzvah*; however, when it comes to laws that seem to violate *sevara*, we are forced to do so. We do whatever we can to make sure no law is left mysterious.<sup>79</sup> Mordechai's thesis, which points to the limitation of the rule *lo darshinan ta'ama de-kra*, is intelligible only once we have distinguished between internal and external logic.

Moreover, based on Mordechai's thesis, we see that we must further distinguish between two forms of immanent Torah logic:

1. General Torah principles, which are internal in the sense that they emerge from the Torah but remain external to the particular law in question.
2. Logic that emanates internally from within the *mitzvah* being examined.

The aforementioned example, where Moshe offers Sihon peace without divine instruction, illustrates the first category. Another example is the Talmud's use of the verse "Its ways are pleasant ways" (*Mishlei* 3:17) to preclude a law that would be unpleasant (see, for example, *Yeramot* 87b).

These examples differ substantially from the latter category, where *sevara* emerges internally from within the parameters of the particular *mitzvah*. This type of logic, often referred to by the Yiddishism "lomdus," is far more common and more potent.<sup>80</sup> This distinction highlights the difference between the approach outlined here and that of thinkers like R.

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etc.," it follows the opinion that the precepts of the Torah have no reason other than the divine will, but "We follow the other opinion.") As we mentioned, however, the difficulty with this approach is the ambiguous nature of the line that demarcates the distinction between "good *lomdus*" and *ta'ama de-kra*.

<sup>78</sup> For example *modeh be-mikzat* (*Ketubot* 18a), belief of a single witness for *Sotah* (*Sotah* 3a), and *yad be-barzel* (*Sanhedrin* 76b).

<sup>79</sup> Indeed, *sevara* is applied even to the most obscure, incomprehensible law—the red heifer—about which Shlomo exclaimed, "I said I would be wise, but it is far from me" (*Mishlei* 7:23; see *Niddah* 9a). Thus, Rambam writes that even though the Torah states that the person who sprinkles the *mei niddah* (water mixed with ashes from the red heifer) becomes impure, that is inconceivable, because "If it purifies the impure, certainly (*kal va-homer*) the sprinkler will be pure (*Hilkhot Para Aduma* 15:1). The verse therefore must be reinterpreted to be referring to someone who carries the *mei niddah* for no reason.

<sup>80</sup> An example of this category can be found in *Tosafot*, *Yeramot* 8b (s.v. *melameid*).

Eliezer Berkovits. For Berkovits, broad ethical principles (the former category) **frequently** force the reinterpretation of the biblical text. However, as we explain in Appendix A, rarely, if ever, is this the case. Rather, it is logic that emanates internally from within the *mitzvah* that most powerfully shapes the law. Thus, halakha is not the “priority of the ethical”; rather, even as it relies heavily on *sevara*, halakha remains the interpretation of a divine system (19).

#### E. Not All *Sevarot* Are Equal

A further distinction emerges from the attempt to reconcile the varying implications regarding the scope of *sevara*. Some *sevarot* are inconclusive but nevertheless valuable. Thus, despite the distinction between internal and external logic, the binding nature of conclusive external logic remains. This can be seen in *sevarot* such as the rule that the burden of proof falls upon the individual attempting to extract money. The Talmud states that the source for this law is the following *sevara*: “The one suffering from pain goes to a doctor” (*Bava Kama* 46b). Similarly, the one distressed by a claim against another person must prove to the court that he is correct. This does not seem to qualify as internal Torah logic; it simply is common sense.

Likewise, *Kobelet Rabba* (7:22) credits Betzalel for independently discovering the divine will when he told Moshe that it makes more sense to build the *mishkan* before the *aron* so that the *aron* immediately would have a place to dwell. Even though Moshe presumably was speaking in the name of God when he said to build the *aron* first, Betzalel objected to Moshe’s instructions, not based on internal Torah logic, but rather based on common sense. As *Sherut Ya’akov* (3:135) states, “Not all *sevarot* are equal.”<sup>81</sup>

Assessing the relative strength of differing *sevarot* helps us understand how they are employed. For example, there are instances where a *sevara* is binding independently, such as when the Talmud asks, “Why do I need a biblical verse to teach me this idea—it is a *sevara*?” (e.g., *Bava Kamma* 46b, *Ketubot* 22a, and *Niddah* 25a). On the other hand, there exist situations, like the prohibition to consume a minute amount of a prohibited substance (*batzi shinur*), where the *sevara* alone is insufficient to create a prohibition but is sufficiently powerful to compel one reading of a verse over another (see *Tosafot, Yoma* 74a s.v. *keivan*).<sup>82</sup>

<sup>81</sup> דאן הסברות שותת דיש סברא אלימתא וסבירא קלישטה.

<sup>82</sup> חוס' יומא עד. ד"ה כיון: דלhicci איצטראיך ליה לר' יוחנן לפירושי האי טעמא משום دائ' מקרא דכל חלב הויה אמינה עיקר קרא לבי איצטראיך וחצי שיעור מדרבנן ואסמכה אקראי אבל השתה דעתך אמר טעמא דחווי לאיצטראפי סברא הוא מהאי טעמא זדרשה גמורה היא לחצי שיעור.

Likewise, *Tosafot* (*Shervot* 22b s.v. *iba’it*) argue that there are circumstances in which we know that a *sevara* is correct only when there is biblical support for it. *Tosafot* write that for a *sevara* alone to become binding, it must be *pashut* (simple and clear).<sup>83</sup> The *sevarot* in the cases where the Talmud asks, “Why do I need a biblical verse to teach me this idea—it is a *sevara*?” are both clear and simple. For example, the notion that the burden of proof falls upon the party trying to collect funds is obvious and irrefutable—even objective.<sup>84</sup> This contrasts with the *sevara* that someone who swore not to eat should be in violation of his oath if he drinks, or the *sevara* dictating a biblical prohibition of *hatzi shiur* because the various partial *shiurim* could add up to a total *shiur*. In these latter cases, the *sevara* becomes fully binding only in conjunction with a biblical verse.

There also seem to be situations where *sevara* does not directly affect biblical law whatsoever. One example can be found in the Talmud’s attempt (*Berakhot* 35a) to find a biblical source for the requirement to make a blessing before eating. The Talmud fails to find an appropriate verse and concludes that the source of the law is a *sevara*: “It is prohibited for a person to benefit from this world without a blessing.” *Pnei Yehoshua* asks an obvious question: if the source of the law is a *sevara*, then the requirement should be biblical, not rabbinic; after all, we know that *sevara* is binding on a biblical level. Remarkably, *Pnei Yehoshua* concludes that this is indeed the case—*berakhot* before eating are biblically mandated based on *sevara*.<sup>85</sup> Most authorities, though, reject the conclusion of *Pnei Yehoshua*,

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<sup>83</sup> The formulation here is critical. *Tosafot* write: “**דיש דברים שאין הסברא פשוטה כלל וצריך הפטוק להשמעינו הסברא**”

<sup>84</sup> One might object that short of syllogistic logic, no *sevara* is objective, as Ramban writes in his introduction to *Milhamot Hashem*. “Anybody who studies our Talmud knows that regarding the disagreements among the commentators, there are no absolute proofs, and generally there are no irrefutable objections. For this branch of wisdom does not allow for clear demonstrations as does mathematics.”

Moreover, while Torah study is based upon logic and reasoning, it differs from mathematics, in which there can be only one possible conclusion. Torah allows for different possible ways of understanding. Nevertheless, even if absolutely objective logic remains elusive, there are simple and sturdy *sevarot* that are obvious and unobjectionable to nearly any thinking person. *Sevarot* that meet these qualifications are binding even if they lack a supporting verse and even if they are not based on internal Torah logic.

<sup>85</sup> פנ”ג: ”משמעותו כל הפסוקים דלפום הך מסקנא דהכא כל ברכת הנהנים זו מדרבנן לבר מברכת המזון להוד... ולענ”ד לכוארה יש לתמוה דהא בכל הש”ס משמעו דמיידי דאתיא מסברא הווי מדאוריתא ואדרבה מקשה הש”ס הא למה לי קרא סברא הויא....”

and we are left wondering why *berakhot* before eating are not in fact obligatory on a biblical level.

R. Yosef Engel (*Beit ha-Otzar* section 131) answers following the line of reasoning that we have seen until now; he argues that not every *sevara* is sufficiently compelling to independently create a law that is compulsory on a biblical level. According to R. Engel, the *sevara* that requires *berakhot* before eating reflects a sensitivity natural to holy and learned people alone; only a *sevara* that is simple and obvious creates a law that is mandatory on a biblical level.<sup>86</sup>

*Tzlab* and others answer *Pnei Yehoshua*'s question differently, noting that the Talmud asks, "Why do I need a biblical verse to teach me this idea—it is a *sevara*" only regarding the application of halakha, such as placing the burden of proof upon the party attempting to change the status quo. The question is appropriate in such cases because *sevara* guides the operation of halakha. However, *sevara* cannot create a new *mitzvah*, and accordingly, the obligation to recite *berakhot* before eating is not biblical. This rule seems to reflect a limitation in the power of *sevara*, and prompts the question "Why?" Why is *sevara* sufficiently strong to modify laws and reread texts but not strong enough to create a *mitzvah*? Upon reflection, however, *Tzlab* does not necessarily balk at the power of *sevara*. He presumably would agree that one should perform an act that *sevara* demands; he contends merely that such an act, even if obligatory, does not have the status of a *mitzvah*.<sup>87</sup>

<sup>86</sup> R. Engel writes: "דסברת חפמת הרים הקדושה מחייבת כך אבל איןנה סברא חייזונית" "פשותה ואיסור תורה הוא רק כאשר הסברא היא סברא חייזונית פשוטה של כל אדם לא בא בתרורה שבכתב מצוה לברך אדם על ההנהה קודם שייהננו לפיו שהשכל מורה על זה לבני האمة" (Hilkhot Berakhot p. 3 of the Mosad ha-Rav Kook edition). Ritva seems to stress that the reason that *berakhot* before eating are only rabbinic is because the *sevara* mandating them is obvious only to those who are *ba'alei ha-emet*. Likewise, R. Moshe Feinstein writes (*Iggerot Moshe*, O.C. 5:20:17) that if the *sevara* was *gemura u-brura*, *berakhot* before eating would in fact have been biblically mandated.

<sup>87</sup> A possible ramification of the distinction between an obligation and a *mitzvah* would be what to do in case of doubt; only something that has the status of *mitzvah* must be performed under such circumstances. Why would the Torah not have made it a *mitzvah*? Perhaps certain deeds lend themselves to this sort of formulation; for example, because the *sevara* does not create a formal *mitzvah*, the deed is performed more freely. In the case of *birkat ha-mazon*, there is little doubt that imposed gratitude differs substantially from spontaneous thanksgiving. It would follow, then, that if *sevara* demands *berakhot* before eating, the *sevara* must be followed; however, this obligation does not have the status of a *mitzvah*. To refrain from making such a *berakha* because the Torah does not command it

Heretofore, we have seen cases where we distinguish between *sevarot* that are *peshutot* (the words of *Tosafot*) and those that are not so intuitive or are discernible only to the spiritually attuned. Seemingly lacking in our analysis is a strict definition of these terms. Certainly, the indeterminate nature of “*retzon ha-Torah*,” a term used frequently by *Hazon Ish*, is a major lacuna in our discussion. Moreover, while the distinction between external Torah logic and internal or immanent Torah logic is obvious (does the *sevara* rest primarily on a principle or law stated elsewhere in the Torah), applying this dichotomy frequently proves challenging and is the matter of dispute. Rigorous definitions of these terms may not be possible. Firstly, as we have seen, they frequently are debated. Moreover, terms like “*pashut*” are highly contextual and depend on numerous factors, especially when applied to *sevara*. And finally, a concept like “*ratzon ha-Torah*” can emerge only from mastery of the entire Torah. Nevertheless, we will attempt to define these concepts somewhat more clearly in the next section.

#### F. The Interaction between *Sevara* and the Rule of *Lo Darshinan Ta’ama de-Kra*

Thus far, we have seen numerous examples of how we use *sevara* to understand and interpret Torah law. Most strikingly, we have seen how in certain instances, we consider the reason for the *mitzvah* when determining its parameters. Now we must consider how *sevara* relates to the rule of *lo darshinan ta’ama de-kra*. The Talmud (*Sanhedrin* 21a; *Bava Mezī'a* 115a) records a debate about whether one can exact security from a wealthy widow. According to R. Yehuda, it is prohibited based on the verse “You shall not take the garment of a widow as security” (*Devarim* 24:17). R. Shimon, however, opines that in the case of a rich widow, one may exact security.<sup>88</sup> The Talmud understands that R. Shimon’s stance reflects his

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would be to entirely miss the point of the Torah’s omission. According to this understanding, the rabbinic command to recite a *berakha* before eating is surprising, as it would seem to undermine the divine will. One would have to conclude that the enactment was a concession to the unfortunate reality that people were failing to instinctively express gratitude—better imposed gratitude than irreverent silence. *Meshekh Hochma* (*Devarim* 8:10) echoes this notion. He argues that the reason the Torah commands *birkat ha-mazon* after the meal but not before it is because the feeling of gratitude that a hungry person experiences upon receiving food is natural and need not be mandated. Following satiation, however, the feeling of appreciation tends to dissipate.

<sup>88</sup> תלמוד בבלי מסכת סנהדרין דף כא עמור א: אלמנה, בין שהיא ענייה בין שהיא עשירה - אין ממשכניין אותה, שנאמר (דברים כ"ז) לא תחבל בגדי אלמנה, דברי רבי יהודה. רבי שמעון אומר: עשרה - ממשכניין אותה, ענייה - אין ממשכניין אותה, אתה חייב להחזיר לה, ואתה

position that we consider the reason for a *mitzvah* in determining its parameters—*darshinan ta'ama de-kra*.<sup>89</sup> Because halakha follows R. Yehuda, it would seem that we cannot consider the reasons for *mitzvot* when determining their parameters.<sup>90</sup>

Of course, this does not imply that there is no value in attempting to decipher the reasons for *mitzvot*. Rambam (*Hilkhot Me'ilah* 8:8) encourages, and in the third section of *Moreh Nevukhim* engages in, the pursuit of *ta'amei ha-mitzvot*.<sup>91</sup> The Talmud itself is replete with reasons not intended to shape the stricture, but that are generally homiletical explanations for *mitzvot*.<sup>92</sup> However, as the *rishonim* explain (see *Tosafot, Gittin* 49b and *Ritva, Shabbat* 67b), these rationales do not violate *lo darshinan ta'ama de-kra*, as they do not affect the *mitzvah*'s parameters.<sup>93</sup>

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משיאה שם רע בשכנותיה. ואמרין: מי קאמר? - הכי קאמר: מתוך שאתה משכנתה אתה חייב להחזיר לה, ואתה משיאה שם רע בשכנותיה.

<sup>89</sup> “The reason it is forbidden to exact security from a widow is because once you have exacted security from her, you are obligated to return it to her each day [so that she will be able to use the item,] and you will thereby give her a bad name among her neighbors [who, upon seeing your frequent visits, will suspect her of licentiousness].” Since one need not return the collateral of a wealthy widow, there is no reason to restrict taking it from her.

<sup>90</sup> Almost all *rishonim* assume that halakha follows R. Yehuda; see the comments of Ramban, Rashba, and Me’iri to *Nedarim* 73a. Some *aharonim* question whether Rambam adopts this view entirely; see *Kesef Mishneh* (*Hilkhot Issurei Biyah* 12:1), *Lehem Mishneh* (*Hilkhot Mahev ve-Loveh* 3:1), *Sdei Chemed* (*Ma’arekhet ha-Tet* 14), and *Minhat Hinuch* 464. R. Isser Zalman Meltzer understands Rambam as endorsing *ta’ama de-kra* even in the case of extracting collateral (*Even ha-Azel Mahev ve-Loveh* 3:1).

*Sefer Yere’im* (136 and 380) presents a complex perspective. For a more complete discussion of this issue, see my article in *Beit Yitzchak* vol. 40 (5768) p. 422 footnote 36.

<sup>91</sup> הלכות מעילה פרק ח: וראוי לאדם להתבונן במשפטית התורה הקדושה, ולידיע סוף עניינים כפויים. ודבר שלא נמצא לו טעם, ולא ידע לו עילה--אל יהיו קל בעיניו; ואל הרים לעילות אל ה', פון יפרוץ בו.

<sup>92</sup> See, for example, *Niddah* 31b, where the Talmud suggests that the Torah prohibits intimate contact with a *niddah* in order to rejuvenate intimacy; this rationale does not govern the parameters of the law; for example, if a man returns from an extended trip when his wife is a *niddah*, the laws of *niddah* apply nonetheless. נדה לא: היה ר' מאיר אומר: מפני מה תורה נזהה לשבועה, מפני שרגיל בה וקץ בה, אמרה תורה תהא טמאה שבעת ימים כדי שתהא חביבה על בעלها כשתעת ניסתה להופה.

<sup>93</sup> תוספות (גיטין מט: ד"ה ורבי שמואן) "לא פלייגי אלא היכא דאייכא נפקותא בגין גבי חובל בגין אלמנה".

רייטב"א שבת (סז): "ואף על פי שלא היינו צריכים לחתת טעם למקרא אפשר לחתת טעם בדבר".

Moreover, even if the reason for a law does not directly affect its parameters, it may, on occasion, guide the manner in which we carry out the law.<sup>94</sup> One situation where the reason for a *mitzvah* affects its practice is loopholes. According to R. Kook, even though we must follow a law even in a scenario where the reason does not seem to apply, we may, under such circumstances, seek legitimate legal loopholes.<sup>95</sup> Thus, in order to know when seeking a loophole is commendable and when it is deplorable, we must know the reasons for *mitzvot*.<sup>96</sup>

<sup>94</sup> *Teshurot Hatam Sofer* (Y.D. 105 and 254) argues that while we do not utilize *ta'ama de-kra* as a basis for leniency, we consider it as a basis for stringency. Thus, he explains, Rosh rules that the obligation to write a *sefer Torah* demands that we purchase *seforim*, since the reason for the *mitzvah* is to promote study. This corresponds with the approach of *Nefesh ha-Hayyim* (1:21-22), who presumes that we do not follow *ta'ama de-kra* out of concern that we may be wrong in our assessment of the reason for the *mitzvah*, not because the reason does not inherently determine a law's parameters. As such, it makes sense to be stringent out of concern for *ta'ama de-kra*.

<sup>95</sup> R. Kook applies this principle in the thirteenth chapter of *Shabbat ha-Aretz* (p. 112) regarding the *heteir mekhira*.

ואע"ג שהדברים יגעים אם דרישין טעםא דקרה, וזה לענין דינה שלא נבעור על דברי תורה  
לקולא מצד הטעם, אבל במקומות שע"פ טעםא דקרה הד' ראי להורות לקולא לגמרי, ודאי שפיר  
7.מי להורות שנוכל לנוהג בדבר ע"י הערמה המותרת.

This notion is relevant for other loopholes such as *pruzbul* or *heteir iska*. Presumably, these loopholes ideally should not be employed in cases of loans to the poor, where they would undermine the Torah's motivation in prohibiting interest and annulling the loans of those shackled by overwhelming debt. Nevertheless, in a case when the loan would not otherwise be made, then on the contrary, these loopholes further the Torah's agenda of helping the destitute. One might object to this sort of endeavor, as well as R. Kook's particular application, by noting that there often are numerous reasons offered for *mitzvot*. For example, an alternative reason for the annulment of debts is proposed by *Tumim* (67:1): to prevent people from becoming too absorbed in business and forgetting about God. In a remarkable passage, he argues that the “entire point” of the commandment is to cripple business activity. This example certainly points to the caution that must be exercised when utilizing *ta'ama de-kra* in order to determine normative practice.

<sup>96</sup> The reverse is true as well. *Hazon Ish* (*Likutim Halla* 2:1) writes that even if loopholes are effective, they are inappropriate; after all, if the reason for a law applies, attempting to avoid the law undermines the “*rezon ha-Torah*.” We are bound to determine the values that undergird halakha and determine the parameters accordingly. Thus, the value underlying the Torah’s obligation to tithe is kindness and compassion to the poor and vulnerable or to support the teachers of Torah and those who are engaged in other holy activities. This value also demands that we not use loopholes to avoid this obligation. However, even here we must use

A Talmudic source for this line of reasoning can be found in *Yevamot* 90b. The Mishnah states that if a woman remarries based on the affidavit of a single witness who testified that her husband died, but, in fact, her husband is still alive, then, among other things, her husband may not annul her vows. The Talmud explains: “Why did God empower a man to annul his wife’s vows? So that she not become repulsive to him. Here we want her to be repulsive to him!” *Arukha la-Ner* questions the Talmud’s line of reasoning based on the principle of *lo darshinan ta’ama de-kra*. How can we rule based on the reason of a *mitzvah*? The answer seems to be that in this case, the sages saw that the reason for the Torah’s dispensation does not apply, so they instituted that it be revoked.<sup>97</sup>

However, the role of *ta’ama de-kra* does not seem to be limited to the realm of homiletical justifications and the determination of a loophole’s suitability. As we noted earlier, there are numerous instances where Rambam seems to accept the position of *darshinan ta’ama de-kra*. Even more troubling, however, are the places where the Talmud appears to determine the parameters of a biblical commandment based on its reason.<sup>98</sup> For example, the Talmud (*Sanhedrin* 46b) queries as to whether the *mitzvah* of burial is because failure to bury is disgraceful to the corpse or because burial in the ground causes atonement for the deceased. The Talmud states that a practical difference between the two options would be a case where an individual left instructions that he not be buried; while he has

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the details of the law to determine the circumstances under which the Torah frowns upon loopholes. For example, *Hazon Ish* distinguishes between loopholes in *Halla* and *Teruma*. A similar phenomenon emerges from Rashba (*Hullin* 98b), who assumes that even if there is no outright biblical prohibition against nullifying prohibited substances, the biblical text regarding the laws of kashering takes for granted that doing so is inappropriate. This might help explain the *rishonim* (Rashi, *Ketubot* 39a; Ramban, Rashba, Ran, and Ritva *Niddah* 13a) who assume that women are included in the prohibition of destroying seed, even though they are not included in the commandment to be fruitful and multiply. For more on this possibility, see my article in *Beit Yitzchak* vol. 40 (5768) p. 421 footnote 32.

<sup>97</sup> Just as the sages revoked certain loopholes in the laws of tithing because, according to *Hazon Ish*, they violate the *retzon ha-Torah*, so too they revoked the husband’s ability to annul vows when doing so would contradict *retzon ha-Torah*. We should note that according to the text of the Talmud cited in *Tosafot* 89a (s.v. *mai*) and *Tosafot Yeshanim* 90b, the question of *Arukha la-Ner* does not begin.

<sup>98</sup> Recall that earlier, we quoted the view of Mordechai that although we generally do not utilize *ta’ama de-kra* in order to determine the structure and application of a *mitzvah*, when it comes to laws that seem to violate *sevara*, we are forced to do so.

no right to allow for the defilement of his body, he has the right to forgo atonement. An obvious problem arises: How can we consider the reason for the *mitzvah* when determining its parameters if we assume *lo darshinan ta'ama de-kra*?<sup>99</sup> Moreover, *rishonim* actually refer to these sorts of disputes as hinging on the *ta'ama de-kra* of a particular *mitzvah*.<sup>100</sup>

Another example of this phenomenon emerges from the analysis of the *mitzvah* for a *kohen* to contaminate himself upon the death of a relative. According to numerous *rishonim*, the reason for this *mitzvah* is to allow the *kohen* to assist in the burial. Therefore, they maintain, the *kohen* may not contaminate himself through contact with his relative for any other reason (*Tosafot, Niddah* 15b s.v. *u-ra*; *Shulhan Arukh*, Y.D. 373:5). Similarly, *rishonim* note that while the purpose of the *mitzvah* is to facilitate burial, it is permitted even in cases where the burial could be done in their absence, so as to ensure reverential treatment. Therefore, under certain circumstances, contamination is permitted even in the case of non-biblical relatives to ensure that they receive a respectful burial (*Ramban, Yeramot* 89b). Here too, numerous practical regulations emerge from the answer to a “why” question (why must a *kohen* contaminate himself).<sup>101</sup> Likewise, R. Yohanan and R. Huna (*Yeramot* 62a) dispute whether the reason for the *mitzvah* of *pru u-rvu* is to populate the world or to hasten the coming of *mashiach*. The practical difference that emerges from this debate is whether one must attempt to have more children if his children died in his lifetime.

One approach to resolving these questions is to distinguish between the juridical “why,” which does not violate *lo darshinan ta'ama de-kra* because it emerges organically from an analysis of the law, and the philo-

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<sup>99</sup> Most *rishonim* seem to assume that the *mitzvah* to bury in the ground is biblical, based on *Devarim* 21:23. This clearly is the assumption of Ramban (*Sefer ha-Mitzvot, shoresh 1*). See, however, *Hiddushei ha-Ran* (*Sanhedrin* 46b), who asserts that it is a debate among the Amora'im. See also *Lehem Mishneh* (*Hilkhot Areil* 12:1). According to those who consider the obligation to bury rabbinic, we cannot prove anything from this passage.

<sup>100</sup> E.g. *Rosh* (*Niddah* 3:2).

<sup>101</sup> There are even more examples of this phenomenon in the *rishonim*. For example, the *rishonim* debate the reason for *lo titgodedu* (the prohibition against forming factions) and the prohibition against superstition (*nijush*); in both of these cases, practical differences emerge from their debate.

sophical “why,” which cannot determine the parameters of the law because it seeks to understand the law from an external perspective.<sup>102</sup> Analysis that is entirely internal is an acceptable method of determining normative practice.

R. Yosef Dov Soloveitchik<sup>103</sup> presents this division by distinguishing between “constructing” and “reconstructing.” R. Soloveitchik boldly asserts that Rambam’s attempt to offer *ta’amei ha-mitzvot* in *Moreh Nevukhim* “did not succeed” because of his focus on “the causalistic problem.” This failure, according to R. Soloveitchik, emerged because “Instead of reconstructing, he constructed” (92). On the other hand:

It is worthy of note that Maimonides, the halakhik scholar, came nearer the core of philosophical truth than Maimonides, the speculative philosopher... The *Code* does not pursue the objective causation of the commandment, but attempts to reconstruct its subjective correlative.<sup>104</sup>

Thus, the core of philosophical truth lies within halakhah itself, which attempts to “reconstruct” the “subjective correlative” of the commandments, something far superior to the “causal method of the philosophical *Guide*.”

As we mentioned earlier, because this type of “why” seeks only to discover the internal logic of the law, it is possible to ask this sort of question on a law whose true meaning remains mysterious, i.e. a *bok*. Indeed,

<sup>102</sup> R. Aharon Lichtenstein’s description of the *Brisker* style of learning (“The Conceptual Approach to Torah Learning: Its Method and Its Prospects,” in *The Conceptual Approach to Jewish Learning*, ed. R. Yosef Blau (Jersey City, 2006), pp. 37-38) elucidates this distinction: “[I]t relates to the content of Torah, its ‘what’ and juridic ‘why,’ but not to a spiritual and philosophic ‘why.’” R. Michael Rosensweig (“Reflections on the Conceptual Approach to *Talmud Torah*,” *ibid.* p. 198) echoes this sentiment: “Most of Brisker analysis is devoted to describing and formulating halakhic phenomena. Rarely is the effort undertaken to actually explain these phenomena, certainly not to relate them to external matters, unless the explanation constitutes a component or dimension of the Halakha itself.” While the above thinkers use this distinction in their analysis of the Brisker style of learning, the division emerges from the analysis of the *rishonim* and the *Talmud* itself with respect to our question.

<sup>103</sup> *The Halakhic Mind*, New York and London: Free Press, 1986, pp. 92–94.

<sup>104</sup> R. Soloveitchik offers the following illustration:

“Should we pose the question: why did God forbid perjury? The intellectualistic philosopher would promptly reply, because it is contrary to the norm of truth. Thus he would explain a religious norm by an ethical precept, **making religion the handmaid of ethics**. Again, when the same philosopher attempts to sanction dietary laws on hygienic grounds, the specific religious content and meaning are supplanted by a principle of foreign extraction.”

we noted earlier that according to Mordechai, the Talmud is most likely to ask this sort of why in its attempt to understand directives that seem illogical.

Let us consider an example. The Talmud (*Bekhorot* 11a) relates R. Yehuda's position that the Torah's allowance for a firstborn donkey to be redeemed with a sheep is meant as a leniency (since a sheep generally is worth less than a donkey). Accordingly, if one wishes to be stringent and redeem a donkey with its actual monetary value, he may do so. At first glance, R. Yehuda seems to be utilizing *ta'ama de-kra* to determine the parameters of the law. After all, what is the difference between asking, "Why does the Torah restrict taking collateral from a widow?" and asking, "Why does the Torah require that a donkey be redeemed with a sheep?" Upon further analysis, however, we can distinguish between the two "whys." In the latter case, the question "why" is juridical; it is prompted by more basic questions: why does redeeming donkeys differ from redeeming other animals? How is redemption possible when the two animals are of unequal value? Why does an unredeemed donkey have to be axed? Put succinctly, the question "Why does the Torah require that a donkey be redeemed with a sheep" seeks to decipher the inner logic of the laws of redemption. It is from these questions that R. Yehuda's theory emerges, with all of its practical implications. On the other hand, the question "Why does the Torah restrict taking collateral from a widow" is not motivated by the pursuit of the law's inherent logic; rather, it seeks to understand from a philosophical perspective why the Torah prohibited this act.<sup>105</sup>

Despite the cogency of this theory, it suffers from two drawbacks. First, it often proves difficult to determine whether an analysis emerges organically and thus can be used in determining the normative parameters of a *mitzvah* and when it should be categorized as *ta'ama de-kra*, which we assume to be non-normative. Moreover, this distinction does not explain certain cases. For example, the Talmud (*Bara Mez'a* 90a) wonders whether the prohibition against muzzling an animal while it is working applies in a case where the animal suffers from a stomach ailment, as eating in such a case will cause it pain. The Talmud concludes that it does not apply, because the entire reason for the prohibition against muzzling is for the benefit of the animal; certainly, then, it will not apply where unmuzzling the animal will cause it pain.<sup>106</sup> Here too, we must wonder

<sup>105</sup> Another instance that fits this model is the Talmud's discussion (*Sota* 5b) about *yibum* on a doubtful *sota*.

<sup>106</sup> ב"מ ז. (פרש"י שיש לו חולין בבני מעיים), מהו? בעו מיניה מרוב ששת: היתה אוכלה ומתרזה משום דמעלי לה הוא - והוא לא מעלי לה, או דלמא דחויה ומצטערא, והא חזיא ומצטערא?

how we can utilize the reason for the *mitzvah* to determine its applicability.<sup>107</sup> In this case, differentiating between the juridical “why” and the philosophical “why” will not solve the problem, as both “whys” seemingly are philosophical. This question troubles *Tosafot ha-Rosh* as well; he answers:

Even the opinion that does not derive halakha from *ta'ama de-kra* and states that one may not take the collateral of a widow, whether rich or poor, [maintains this view only] because the simple reading of the text (*pashei de-kra*) implies that [that the law applies to both] a rich and poor [widow]. But in this case (i.e. the sick animal), it is obvious (*pshita*) that God did not prohibit [muzzling] except for the good of the animal.<sup>108</sup>

According to *Tosafot ha-Rosh*, everyone agrees that the reason for a law can determine its parameters in a case where the simple reading of the text is not violated.<sup>109</sup> What emerges is that the restriction on using *ta'ama*

**אמר לנו רב ששת: תניתוה, רבי שמואן בן יוחאי אומר: מביא כרשיים ותולה לה, שהכרשיינים יפות לה מן הכל. שמע מינה: משום דמעלי לה הוא, שמע מינה.**

<sup>107</sup> Indeed these questions forced some *abaronim* to conclude that we follow R. Shimon's view in general and are *doresh ta'ama de-kra*; see *Sedai Hemed* tet:14 and *Minhat Hinukh* 464.

<sup>108</sup> Likewise, *Ritva* (*Yeramot* 23a) writes that the motivation for R. Yehuda is textual, not philosophical opposition to attributing normative reasons to *mitzvot*.

<sup>109</sup> Not surprisingly, then, we frequently find the literature surrounding *darshinan ta'ama de-kra* revolving around whether there is sufficient textual justification to modify the law based on the reason. For example, *Tur* (Y.D. 181) quotes Rambam's view that the reason for the prohibition against shaving with a razor and rounding the corners of the head is because idolaters follow this practice. *Tur* rejects this understanding:

טור (יורה דעה סימן קפא): "הקפת הראש והשחתת הזקן גם באלו כתוב מפני שעושין כן עובדי כוכבים ע"כ וזה אינו מפורש ואין אנו צריכים לבקש טעם למצות כי מצות מלך הם עלינו אף לא נדע טעמן."

*Taz* (Y.D. 181:1) understands that Rambam maintains that in cases where the reason does not apply, the law would not apply.

ט"ז שם סק"א: "ונראה דבר זה חולק עם הרמב"ם, דהרבנן מ"מ תלה דין וזה בעובדי כוכבים שהוא חוק שלהם וא"כ יש לפעמים היהר מושם שלום מלכות כמו שמצוין בס"י קעה סעיף ב'. ועל זה כתוב הטור שהרי אינו מפורש שזה יהיה מושם חוקות עכו"ם ולא מצינו היהר מושם שלום מלכות אלא באיסור מושם חוקות עכו"ם, וכ"ת כיוון שאין אנו צריכין אחר למצוה זו מיליא הוה כמפורש, זה אינו דהא אין אנו צריכין לידע טעם למצות וכו'".

For example, it would be permitted to round the corners of one's head and shave with a razor for the purpose of *shalom malkhut*, since the shaving is being done not to copy the idolaters but rather to be able to interact with them in a manner that is beneficial for the Jewish community. In other words, *Taz* understands that in this case, using the reason to determine the parameters of the

*de-kra* to determine halakha is not philosophical but textual.<sup>110</sup> Hence, in cases where there is textual support, or at the very least no implied textual contradiction,<sup>111</sup> we are willing to consider the reason for the *mitzvah* when determining its parameters. This idea, it seems, will explain all of the other cases where we seem to use *ta'ama de-kra* to determine halakha.<sup>112</sup>

However, *Tosafot ha-Rosh*'s thesis still is problematic. Why is it that waiving the prohibition against muzzling an animal under certain circumstances does not contradict the simple reading of the text while waiving

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*mitzvah* does not constitute *darshinan ta'ama de-kra*. *Darkei Moshe* (Y.D. 181) and *Teshuvot Panim Me'irot* (2:79), however, argue that we cannot limit the law based on the reason because doing so would contradict the simple reading of the text.

שׁו"ת פנימ מאריות (חלק ב סימן עט): ואני אומר חיללה לומר כן לדעת הרמב"ם דאך מה שנזכר בסyi קע"ה דאסורי מן התורה ומלאין עליו לדעת הרמב"ם והתיירו חכמים לקרובי מלכות מפני שלא פירשה תורה שם דבר ומסרה להכמים והם ראו להתריר לקרבנים למלכות אבל מה שמאפרש בתורה לאיסור אף שהטעם מפני חוק כותים מ"מ חל מצוה זו על כל ישואאל דאל"כ לדעת הרמב"ם למה לא כלל תורה לאו זה בשאר החקוקים אלא ע"כ כדמן וחיללה לומר לדעת הרמב"ם להתריר לקרבנים למלכות לאו דלא תקיפו

<sup>110</sup> Even R. Yehuda agrees that there are times when we use *sevara* to reinterpret a verse even against the simple reading; however, R. Yehuda opines that we do not reinterpret a verse based on *ta'ama de-kra*. For example, *Tosafot* (*Yevamot* 11b s.v. *le-rabot*) write that according to the majority view (as opposed to R. Eliezer), we interpret *Devarim* 24:4 against the simple reading because the simple reading violates *sevara*. Moreover, despite the possibly broad ramifications of R. Shimon's position, R. Shimon seems to apply this principle only in a handful of instances.

<sup>111</sup> The words of the Mishnah in *Sanhedrin* support *Tosafot ha-Rosh*'s theory: "A widow, whether she is poor or wealthy, one cannot exact security from her, **as it is stated:** 'You shall not take the garment of a widow as security.' These are the words of R. Yehuda." It sounds like R. Yehuda's argument is that the text of the verse supports his view.

<sup>112</sup> For example, in the case of burial, the Torah does not even explicitly command burial. All that the Torah overtly demands is that we not leave the corpse of a hanged convict until evening. From there, we derive the general principle that we must bury the dead. Therefore, there certainly is no textual evidence against limiting the *mitzvah* to cases of either atonement or disgrace to the corpse. Along similar lines, R. Mordechai Willig proves that even the opinion that does not derive halakha from *ta'ama de-kra* agrees that we do derive halakha from "*ta'ama de-drasha*" (*Beit Yitzchak* vol. 39 [5767] p. 324). According to *Tosafot ha-Rosh*, we can explain that this is because in the case where the biblical law is based on a *drasha*, applying the reason will, by definition, never contradict the simple reading of the verse. We should note that practical application of this rule sometimes proves tricky. See, for example, Rambam *Hilkhot Avodah Zarah* 2:2 and *Iggerot Moshe*, Y.D. 2:53 and 111.

the prohibition against taking collateral from a widow under certain circumstances does? In both cases, we are modifying an unqualified prohibition based on its reason.

Perhaps the answer is that in the case of the prohibition against muzzling, the reason for the *mitzvah* is so obvious that the limitation does not contradict the simple reading.<sup>113</sup> The reason for the prohibition against extracting collateral from a widow, on the other hand, is less obvious. Indeed, according to the Talmud, the reason for the prohibition is not simply a protective measure designed to safeguard the vulnerable. Rather, the restriction stems from the Torah's requirement that securities be returned each day. This might lead to the widow's being suspected of licentiousness because the debtor would have to frequent her house to return the collateral. In fact, according to Rambam (commentary on the Mishnah *Bava Mezi'a* 9:13), the reason for the *mitzvah* may actually be the subject of dispute. Accordingly, to read the rationale into the text and thereby limit the prohibition to poor widows violates the simple reading.

A noteworthy corollary emerges from the opinion of *Tosafot ha-Rosh*. If R. Yehuda admits that we do allow *ta'ama de-kra* to determine halakha where there is no implied textual contradiction, it follows that R. Shimon maintains that we follow *ta'ama de-kra* even where there is an implied textual contradiction. Indeed, at least one of the *rishonim* seems to say so explicitly.<sup>114</sup> There may, in fact, be numerous places in the Talmud where R. Shimon expresses this position.<sup>115</sup> This also may have implications regarding R. Shimon's remarkable position (*Sanhedrin* 71a) regarding the law of

<sup>113</sup> Indeed, the words of *Tosafot ha-Rosh* ("But in this case [of the sick animal], it is obvious that God did not prohibit [muzzling] except for the good of the animal") support this reading. However, this understanding seems to contradict the Talmud, which initially wonders whether the reason is to support the animal's health or to prevent it from experiencing pain. (An animal that sees food that it cannot consume feels pain.) This uncertainty indicates that the reason for the *mitzvah* is not clear. Presumably, *Tosafot ha-Rosh* would respond that either possibility presumes that the basis of the law is for the animal's benefit. The Talmud only questions the precise nature of the concern.

<sup>114</sup> Pseudo-Rashba *Menajot* 75b.

<sup>115</sup> For example, in *Nega'im* 12:5 (see commentary of Rosh *ad. loc.*), R. Shimon rejects the simple reading of *Vayikra* 14:36 based on a *sevara* (this inference is based on R. Ovadia Me-Bartenura's interpretation of the Mishnah). Another manifestation of R. Shimon's principle may be *Zeraḥim* 6b regarding the reason for offering the *kivrei atzeret* (this inference is based on Rashi's interpretation of the passage). A remarkable example of this theory can be found in the *Torat Shelamim* (Y.D. 183:4 in his final answer), who assumes that according to R. Shimon and R. Meir who follow *ta'ama de-kra*, relations with a *niddah* who is single is not biblically

the wayward child (*ben soreir u-moreh*); we briefly consider this radical possibility in Appendix B.

### **Conclusion: *Sevara* – the Double-edged Sword**

Thus far, we have explored the power and pervasiveness of *sevara*. However, like all powerful forces, *sevara* can and has been abused. Just as it has built up, so too, and especially in the modern era, it has torn down. Dangers abound when feeble, fallible man, rooted in the finite, speculates about the infinite. When engaging in *sevara* and determining *ta'ama de-kra*, we must be careful that we do not follow the more expansive view of R. Shimon, which is not normative. In reality, though, a much greater fear lurks—*sevara* and *ta'ama de-kra*, when abused, can decimate the entire Torah.

Rashi (*Be-Midbar* 16:1) cites the *midrash* that Korah taunted Moshe by inquiring if a *tallit* made entirely of *tekheilet* requires even a single strand of *tekheilet* to fulfill the *mitzvah* of *tzitzit*. What was his question? Perhaps he was asking that if the entire purpose of *tekheilet* is to remind us of God (*Menahot* 43b), and a single strand of *tekheilet* suffices for this purpose, then certainly a *tallit* made entirely of *tekheilet* will cause us to recall our Creator. Therefore, Korah argued, such a *tallit* should be exempt from *tekheilet* strands. In other words, Korah used the reason for the *mitzvah* to determine its parameters; he used *sevara* to guide his understanding of a divine decree. How do Korah's arguments differ from the legitimate ones above? The distinctions offered above go a long way to answering this question. Ultimately, however, the answers to these sorts of questions, which sometimes are subtle and demand motivated consideration, are difficult to recognize and arduous to convey. When we acknowledge the power of *sevara*, we open the doors to insurrection.<sup>116</sup>

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prohibited since, according to R. Meir (*Nidda* 31b), the reason for the Torah's ban on intimacy with a *niddah* is to renew and invigorate intimacy between spouses, a logic that does not apply to an unmarried woman. Here we have an example of what is almost certainly a homiletical rationale for a *mitzvah* that unambiguously contradicts the simple reading of the text, and yet it is presumed that according to those who follow *ta'ama de-kra*, the reason will determine the parameters of the law. It is only because we accept the view that *lo darshinan ta'ama de-kra* that the prohibition applies whether or not the *niddah* is married.

<sup>116</sup> Indeed, one of the bases upon which certain modern strains of Judaism reject halakha is *sevara*. They argue that *sevara* dictates that we revise halakha in modern times. Even within Orthodox circles this question looms large, as can be seen from our critique of Berkovits and Halbertal in the appendices.

On the other hand, to forsake *sevara* has equally dangerous consequences. The Mishnah (*Hagigah* 2:1) warns: “One who has no regard for the honor of his Maker, it would be better for him had he not come into the world.” According to its simple reading, the Mishnah condemns someone who does not honor God. Rambam (commentary on the Mishnah *ad. loc.*), however, understands “the honor of his Maker” in a remarkable way—it refers to the human intellect (*seichel*). Our intellect is the glory of God. To make less than full use of our intellect—to ignore the power of our *seichel*—is a rejection of our greatest God-given gift.

Yet the very same Mishnah warns of another way to squander our intellect—to ask questions that we cannot possibly answer, to overstep our intellectual bounds and refuse to acknowledge our inherent limitations.<sup>117</sup> When we offer reasons for or apply *sevara* to the *mitzvot* of the Torah, we are entering perilous waters. We are bound to use our intellect, but we must be cautious lest we “break through unto God” (*Shemot* 19:21).<sup>118</sup> When it comes to the intellect, we must tread carefully, for as Rambam states, we would be better off not being born than not using, misusing, or abusing this great endowment.

### **Appendix A: R. Eliezer Berkovits’s Theory on the Use of *Sevara* to Reinterpret the Torah**

In *Not in Heaven: The Nature and Function of Halakha*, R. Eliezer Berkovits initially marshals similar (and sometimes identical) arguments to the ones above regarding the prominence of *sevara*. Moreover, Berkovits similarly argues for the interpretation of the Torah based on immanent Torah principles.

For example, regarding R. Yehuda ha-Levi’s statement: “God forbid that there should be anything in the Torah that contradicts reason,” Berkovits writes:

The rabbis in the Talmud were guided by the insight: God forbid that there should be anything in the application of the Torah to the actual life situation that is contrary to the principles of ethics. What are those principles? They are Torah principles, like: “And you shall do that which is right and good in the eyes of the Eternal”; or “Her

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<sup>117</sup> “Anyone who gazes at four things, it is as if he did not come to the world: what is above, what is below, what precedes, and what follows.” According to Rambam, one who studies metaphysics before proper training is in violation of this injunction.

<sup>118</sup> In *Hilkhot Me’ila* 8:8, Rambam understands this verse to be referring to someone who treats a *mitzvah* lightly if he does not understand it. Likewise, in *Moreh Nevukhim* 1:1, he explains this verse as warning against speculating about matters for which one is not properly prepared.

ways are ways of pleasantness, and all her paths are peace" ... or "That you may walk in the way of good men, and keep the paths of the righteous" (p. 19).

Ultimately, however, Berkovits errs by arguing that these values justify *reinterpretation* of the Torah. According to Berkovits, concern for overarching values such as human dignity, the protection of the innocent, and covenantal symbolism grants nearly unlimited exegetical freedom that allowed for significant evolution of halakha to the extent that the sages could abrogate the practice of biblical laws such as *ben soreir u-moreh*.

One of the reasons for our differing conclusions is the extent to which it is acceptable to use values such as *darkhei noam* to preclude a law that would be unpleasant. For Berkovits, the Talmud's use of *darkhei noam* as a tool of interpretation highlights the notion that the "halakhic conscience" is capable of amending the law for the sake of a higher moral principle.

When we investigate the matter, however, we find that this form of analysis rarely if ever exists. Let us briefly consider this particular example (*darkhei noam*), which, at first glance, is Berkovits's strongest proof.

There are two contexts where this principle is utilized. The first is of delineating the identity of the four species (*Sukkah* 32a and 32b). The Talmud rejects the possibility that one of the species is the thorny *hirduf* because handling it would not be pleasant. The Talmud's usage of the verse in this context is not relevant to our discussion. Firstly, virtually all traditional thinkers agree that the identities of the four species were known based on tradition (see, for example, Rambam's introduction to his commentary on the Mishnah). Moreover, *darkhei noam* is being used to choose between two otherwise equally valid interpretations of the verse, not as the "halakhic conscience" meant to amend existing understanding of the law for the sake of a higher moral principle.

The second and more relevant usage of *darkhei noam* relates to the source of the rule that a woman is subject to the *mitzvah* of *yibum* or *halitzah* only if she has no children at the time of her husband's death. The Talmud (*Yevamot* 87b) wonders how we know that if a widow has a child who dies after her husband's death, we do not require her to do *yibum* or *halitzah* at that point. The Talmud responds that to require her to do so would violate the principle of *darkhei noam*.<sup>119</sup>

<sup>119</sup> According to Rashi, this is because she may become loathsome to her current husband if we were to require her to do *halitzah* based on her union with her previous husband. Me'iri adds that at the very least, this may cause disharmony with her current husband. Rashba, on the other hand, understands that if we were to require her to do *halitzah*, we actually would have to force her to get

At first glance, this passage indicates that when we encounter a law that is unpleasant (or immoral) we can discount it on the basis of *darkhei noam*. As the *rishonim* and *aharonim* point out, however, this cannot be the correct interpretation of the passage, since in numerous other places throughout *Masechet Yevamot* the Talmud takes for granted that the basis for the obligation of *yibum* and *halitza* is determined at the time of the husband's death (see, for example, *Yevamot* 30a). Clearly, then, what the Talmud here is asking is, Perhaps the obligation for *yibum* and *halitza* is so open-ended that a widow could become re-obligated in *yibum* or *halitza* should her child from her deceased husband die. This is impossible, the Talmud responds, because such an interpretation would violate *darkhei noam*. (See Rashi 87b, *Tosafot* 2a, Me'iri 87b, *Koreitz He'arot* 6:8, *Yashreish Ya'akov* 87b, and *Sfat Emet, Sukkah* 32a.)

As such, in this case as well, *darkhei noam* merely helps us choose between two equally plausible readings of a verse (in this case, *Devarim* 25:5); we do not find that *darkhei noam* can be used to amend an existing understanding of the law. Thus, despite our initial reading, the passage in *Yevamot* actually parallels the one in *Sukkah*. Moreover, it is similar to the passage in *Shabbat* 64b, where R. Akiva chooses one reading of the verse over another based on moral considerations.

To fully understand the scope of *darkhei noam*, we must see how it is used by *poskim* throughout the generations. While we do occasionally find the concept mentioned (though quite rarely), *darkhei noam* is utilized only in a limited form and in conjunction with other factors; never is it used as a means of revising a law based on ethical considerations. See, for example, *Teshuvot ha-Ravaz* 3:627, *Ohr Zarua* vol. I *Ohr Yibum* 605, *Bach* C.M. 288, *Teshuvot Noda Be-Yehuda Tinyana* E.H. 79, *Mahari Vayil* 191, *Teshuvot Hacham Tzvi* 46, and *Pithei Teshuva* E.H. 165:3. This limited usage is not surprising considering that the Talmud itself does not use the more expansive variation that Berkovits does.

Similarly, sometimes *darkhei noam* is used to justify a law that already is explicated, such as *Meshekh Hochma*'s interpretation (*Bereishit* 9:7) of why women are exempt from the *mitzvah* of *pru u-rvu* (because of the dangers inherent in pregnancy and childbirth).<sup>120</sup>

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divorced from her current husband. *Tosafot, Yevamot* 2a note that even if she has not remarried, to require her to contend with the brother of her deceased husband after she already has been permitted to marry anyone she pleases would violate *darkhei noam*.

<sup>120</sup> Likewise, ibn Ezra (*Shemot* 20:1) understands that the sages know that the commandment to circumcise our hearts cannot be meant literally because a literal

The reason for the limited use of *darkhei noam* is because even though it emerges from the Torah itself, it remains external to the particular law in question (such as *yibum*). As we endeavored to show in the text, in a legal context this sort of *sevara* is far less potent than logic that emanates from within the very *mitzvah* being examined.

Ultimately, then, we do not find *darkhei noam* acting as the “halakhic conscience” that Berkovits perceives as impelling the Rabbis to limit the application of, or, at times, even render inoperative, a piece of biblical legislation that they find morally offensive (p. 28). In Appendix B, we will consider Berkovits’s assertion that *ben soreir u-moreh* fits such a paradigm.

On a broader level, however, our disagreement lies in what the pervasive use of *sevara* implies. For Berkovits, it indicates that halakha represents not “objective truth” but rather “pragmatic validity” (p. 48), such that “Once a Jew accepts the Torah from Sinai, whatever it teaches him in his search for its meaning and message is the word of God for him” (p. 51). This perspective differs significantly, though sometimes in subtle ways, from the one we presented above, which calls for humility and submission even as it promotes creativity and confidence.

### **Appendix B: The Role of *sevara* in *Ben Soreir u-Moreh***

Contemporary thinkers frequently adduce *ben soreir u-moreh* as an example of the Talmud’s willingness to reinterpret halakha on moral grounds. To assess the validity of this argument, let us consider the matter carefully.

The Talmud (*Sanhedrin* 71a) states:

Now, is it conceivable just because this boy ate a *tartimar*<sup>121</sup> of meat and drank half a *log* of Italian wine that his father and mother shall take him out to be stoned? Rather, there never was and there never will be [a *ben soreir u-moreh*]. Why then was the law written? [God says:] interpret it and receive reward.

Why is it inconceivable that he be stoned? There are two possibilities:

- (a). Because no parent would cooperate (a practical consideration).
- (b). Because R. Shimon felt that executing a *ben soreir u-moreh* is wrong (an ethical consideration).

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interpretation would contradict the principle of *darkhei noam*. In these cases, we are using *darkhei noam* not to change the law, but rather to explicate the reason for a preexisting law. (While in this case, technically speaking, there is no preexisting law, the understanding that the verse should not be taken literally was never questioned.)

<sup>121</sup> The weight of fifty gold coins (R. Ovadia Me-Bartenura, *Sanhedrin* 8:2).

Which explanation is correct? In light of *Tosafot ha-Rosh* and others, who maintain that R. Shimon allows for the usage of *ta'ama de-kra* to amend the simple reading of the text, one is tempted to choose option (b). Indeed, this approach is assumed by a number of modern thinkers, including R. Yehuda Amital,<sup>122</sup> R. Dr. Ḥayyim Soloveitchik,<sup>123</sup> R. Dr. Eliezer Berkovits,<sup>124</sup> and Professor Moshe Halbertal.<sup>125</sup>

There are, however, a number of problems with the approach taken by these aforementioned scholars. Firstly, even if their interpretation of R. Shimon is correct, halakha does not accord with R. Shimon, both regarding his general position about *darshinan ta'ama de-kra* and regarding his view on *ben soreir u-moreh* (as is clear from Rambam *Hilkhot Mamrim* ch. 7).

Secondly, traditional commentaries, including *Yad Ramah* and *Maharsha*, adopt option (a) with respect to the interpretation of R. Shimon's statement. As R. Yitzhak Grossman adeptly demonstrates,<sup>126</sup> what emerges from the above sources is that modern thinkers assumed option (b), while the traditional commentaries adopted option (a). Presumably, this dispute is not just textual; rather, traditional commentators could not conceive of the possibility of a moral *sevara* alone being sufficient to abrogate a *mitzvah*.

Another example of this phenomenon was noted earlier regarding the implications of the passage from *Shabbat* 64b. Modern thinkers, such as Professor Moshe Halbertal,<sup>127</sup> understand this passage in a much more radical manner than traditional commentaries (e.g., *Sfat Emet* and *Netziv*). In the text of the article we attempted to demonstrate how the more conservative approach is technically and conceptually supported by the Talmud and Rishonim. Ultimately this debate highlights the tenuous balance between humility and creativity when applying *sevara* to a divine text.

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<sup>122</sup> <<http://vbm-torah.org/archive/values/02a-morality.htm>>.

<sup>123</sup> “Halakhah, Hermeneutics and Martyrdom in Medieval Ashkenaz,” *Jewish Quarterly Review*, Volume 94, Number 1, Winter 2004, p. 77.

<sup>124</sup> “Not In Heaven,” pp. 28–31.

<sup>125</sup> “Interpretative Revolutions in the Making: Values as Interpretative Considerations in Midrashei Halakhah,” Jerusalem: The Magne Press, 1999 [Hebrew] pp. 46–66.

<sup>126</sup> <<http://seforim.blogspot.com/2009/08/some-literary-scholarly-halachic.html>>.

<sup>127</sup> In the beginning of his *Mahapeikhot Parshaniyot be-Hit'harutan* (Magnes Press, 2003).