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THE HALAKHIC MIDRASH: A REJOINDER

That the pages of *Tradition* should carry an article which 1) in effect questions the integrity of the halakhic process; 2) rejects as "over-credulous" the idea that the tradition of a Talmudic sage could have historical validity; 3) rejects the testimony of Rav as absurd; 4) accuses the Hillelites of deliberately editing a Mishnah and perverting its meaning because it contradicted their own opinion; 5) purports to give a more accurate reading of a Mishnah than does the Gemara (whose interpretation it terms "forced"); and 6) does not accept the Oral Tradition as we know it—all this in Professor Halivni's discussion of the Halakhic Midrash—poses issues which, to say the least, require soul-searching by those of us who are responsible for producing this "Journal of Orthodox Jewish Thought."

However, it is not only on halakhic and philosophical grounds that the article is problematic. Even if its halakhic orientation were traditional, its scholarship leaves many unanswered questions. For it must be noted that many of Halivni's theories are based on conjecture, pseudo-history, and untenable conclusions. It is this writer's view that, transcending Halivni's questionable attitude towards the Oral Tradition, his thesis is dubious even on objective scholarly grounds. Therefore, it is his methods and his arguments rather than his philosophy—which requires a truly separate treatment—which this rejoinder will consider.

In essence, his article deals with the question of which form of the study of Halakhah was earlier: the Mishnaic form where *derashot* are rarely mentioned; or the Midrashic from (*Mekhilta, Sifra, Sifrei)* where the laws are taught as based on *derashot*. He notes several examples which indicate that the Midrashic form existed before Herodian times, approximately at the beginning of the Common Era.

1) In his first example he states that there are two places in the Mishnah where the Temple Mount and Temple Court (*har ha-bayit* and *azara)* are used interchangeably.[1] This proves, he claims, that Midrashim stem from a pre-Herodian era. The proof is as follows: 1) *Har ha-bayit* is being confused with *azara;* 2) after Herod beautified and enlarged the Temple this confusion could never have taken place; therefore, 3) the mishnah stems from pre-Herodian times.

These premises are quite flimsy. There is no evidence to begin with that Temple and Temple Court are being "confused." As Halivni himself twice points out, *har ha-bayit* is used in the Bible as a term for the Temple.[2] It therefore should not be surprising if they were used as synonyms. Even more so, the term *har ha-bayit* in the two sources cited by Halivni are in one case, in a *derashah,*[3] and in the other, in a law derived from a *derashah.*[4] In a *derashah,* which is based on a Biblical source, it would be reasonable that of the two synonyms for Temple, the Biblical term, *har ha-bayit,* would be used.

The second premise—that this "confusion" could not have taken place after Herod expanded the Temple area—is nothing more than conjecture. Even were we to accept the idea that there was in fact a confusion between *har ha-bayit* and *azara,* what could have been the reason for such confusion? Even before Herod there was a wall around the Temple separating it from the Temple Mount. If so, why should any such confusion have taken place? If such confusion did exist, the most logical reason for it would be a confusion of nomenclature (based on the Biblical use of Temple Mount for Temple, which would make the two words interchangeable.) But why would nomenclatures suddenly change because Herod refurbished the Temple? Halivni writes that the Temple Mount became a distinct sacred place only starting with Herod's "refurbishing and enlargement." No evidence is adduced for this.

Furthermore, the halakhic restrictions referring to *har ha-bayit* and the Temple proper are standard elements of halakhah[5] which were not affected in any way by Herod's building. To conclude from this that the mishnah stems from pre-Herodian times has no solid basis.

2) Halivni's second example is as problematic as the first one. It is based on the following two premises: 1) A certain *derashah* in a mishnah indicates that originally the court was at the edge of town. 2) Another *derashah* indicates that it later was moved to the center of town. Therefore, 3) the mishnah dates from the first century B.C.E. because "the best guess" is that the move from the edge of town to the

center of town took place during the Hasmonean rule when Palestine was Hellenized. Hellenization took place in the third century B.C.E. Such moves take a long time. The date of the *derashah* in the mishnah must "perforce be earlier than the first century B.C.E."

The source for the first premise that the mishnah had the court at the edge of town is as follows: *sekillah* (stoning), according to *Sanhedrin* 42b, shall take place "outside the court." The *derashah* adduced for this in the mishnah is the verse *"hotse et ha-mekallel (el mi-huts la-mahane)*—take out the curser (outside the camp)" (Lev. 24:14). (The verse-ending is in parenthesis in the mishnah because most versions do not contain this verse-ending.) According to Halivni this shows that the court was at the edge of town. His reasoning is as follows:

> Both Talmuds raise the problem of the discrepancy between "outside of the court" (stated in the Law) and "outside the camp" (stated in the supporting scriptual text). . . . The Talmud interprets "outside the court" as meaning far away from the court, stretching all the way to the end of the camp. This interpretation seems quite forced. It is also unnecessary to express such a simple idea as "outside the camp" in such a roundabout way.

Halivni therefore offers his own interpretation of the mishnah:

> The author of the drashah in the Mishnah lived at a time when the court was situated at the gate at the edge of town, as in biblical times. Outside the court was thus also outside the camp (outside the city) in one direction. When the author of the drashah said "outside the court" he was referring to that direction which makes outside the court automatically outside the camp; hence the Scriptual support "outside the camp."

This therefore proves that the mishnah "knows only of the court's sitting at the gate."

Before dealing with the proof it should be pointed out that in Halivni's haste to discard the Talmudic explanation of this mishnah as "forced," he has totally misread it on two counts. First, a minor misreading: it is not true that "both Talmuds raise the problem of the discrepancy between 'outside of the court' (stated in the Law) and 'outside the camp' (stated in the supporting Scriptual text)." In *Sanhedrin* 42b the Talmud deals with a discrepancy between the mishnah and a *baraita* where these two different locations are mentioned.

But a major misreading by Halivni is his contention that the Talmud justifies the two versions of the place of stoning by explaining that the "court stretches to the end of the camp" (whatever that means). This is simply not so. In fact, the Talmud justifies it in the following way: when the mishnah orders the stoning place to be outside the court, this means that there is an obligation to have the

stoning place away from the court even where the court is situated outside the city. In other words, there are two independent obligations: a) the stoning place should be outside the city; and b) it should be away from the court even where the court is already outside the city. There is nothing "forced" about this in any way. The mishnah is saying exactly what it means.

(The Talmud derives this from the word *hotse* ("take out"), a superfluous word which is meant to order this second obligation. This explains why most versions of the mishnah derive the rule from "*hotse et hamekallel*" and omit the last words of the verse "*mi-huts la-mahane.*" The words "*mi-huts la-mahane*" are irrelevant for this second obligation to which the mishnah refers. Accordingly, even those versions which do quote the last words of the verse do not derive the law from those words but are merely in conformity with the Talmudic practice of avoiding the truncation of a verse in mid-sentence. On the other hand, according to Halivni's erroneous reading of the mishnah, the words *mi-huts la-mahane* are the crucial words, since they are synonymous with "outside the court." Why, then, would most versions of the mishnah omit these crucial words?)

Quite apart from a) Halivni's cavalier haste in rejecting out-of-hand an interpretation of the Sages, and b) his proferred explanation which fails to fit the language of the mishnah, is the fact that his reading results in a dead end. Halivni's premise that the mishnah "knew only of a court sitting at the edge of town" is entirely unfounded. It is well-known that the Sanhedrin as well as two lesser courts were situated on the Temple Mount which was not at the edge of town.[6] Why would the mishnah state a law which would not include these three major, supreme courts? For them, "outside the court" would not be "outside the town in one direction."

In addition, when the Scriptural sources put the court at the gate of the city (*sha'ar ha'ir*), it is difficult to imagine, as Halivni assumes, that the court was a kind of toll-booth within the gate entrance itself. More plausibly, *sha'ar* refers to the open space immediately within the gates of the city, a space to which merchants from the surrounding fields would bring their produce and wares.[7] This area, which was probably the hub of the city's commercial activity, was the logical location in which to place the courts. The court could well have been in the middle of the market area and still have been referred to as "in the *sha'ar ha'ir,*" at the gate of the city. "Outside the court" would in this case not be "outside the city in one direction."

Now even if Halivni's far-fetched explanation of *sha'ar ha'ir* as within the very doorposts of the city were true, it still would not stand to reason that a mishnah would say "outside the court" when it means "outside the city" because, as Halivni says, it would assume

that we automatically understood this to mean in one direction: towards outside the city and not towards the center of the city. A body of law would be more precise in its orders and would certainly avoid such obvious ambiguities. This would be especially so since, as above, the major courts of the nation, the courts of the Temple Mount, were away from the edge of town. Yet despite this, Halivni rejects the clear interpretation offered by the Talmud and substitutes his own explanation—because the mishnah's is "forced."

This first premise is coupled by Halivni with another: that in later times the position of the court was changed to the center of town. This statement is given no other historical evidence than a Sifrei[8] which, from the verse "and she shall go up to the gate" (*ve-aleta ha-sha'ara),*[9] orders the court for *halitsa* to be at the highest point in the city. Halivni assumes that this must be in the center of the city.

There is no basis for such an assumption. All that can be proved from the words *ve-aleta ha-sha'ara* is that the *gate* was at the high point of the city. (It would be logical that the gate of the city would be the high point of the city since the walls of cities were usually built at their most defensible points, normally at the high point of the surrounding terrain.) If, as Halivni states, this shows that the place of the court changed, then why would Scripture refer to it as *"sha'ar"* (gate)? The Sifrei is simply saying that there is a requirement "to go up" to the court performing the *halitsa,* a requirement which should be met even when the court is not at the gate of the city. (Incidentally, unlike Halivni's assumption, *halitsa* is the only judgment for which the court must be at the high point of the city. This is because it is necessary to publicize the fact that a *halitsa* has taken place.) To Halivni, however, this single source is sufficient basis to support his conjecture that the place of the court changed from the edge of town to the center of town.

Putting the premises together, Halivni proceeds to deduce the date of the mishnah. The time of this change must have taken place, he says, during the first century B.C.E. This is due to the following reasoning:

> Unfortunately, *we do not know* when the court changed from the location at the gate to the location at the highest point of town. . . . *The best guess* is that this move occurred in the wake of significant increase in the Jewish population under the Hasmonean rule. . . . Sitting at the gate was an oriental custom, and when Palestine was Hellenized *this old custom must have slowly fallen by the wayside.* Intense Hellenization occurred . . . in the third century B.C.E. The process of moving the court from the gate to the town would not, however, have been immediate; such moves take a long time. *Most likely,* it was later, during the expansion of the Hasmonean state. . . . Accordingly, the date of the drashah in the Mishnah Sanhedrin . . . must *perforce* be earlier than the first century B.C.E. (emphasis added).

Although we "unfortunately do not know when" the change took place, the "best guess" is during the Hasmonean rule. Because of this "best guess" the Mishnah must "perforce" be from the first century B.C.E. From the "guess" to "most likely" to "perforce" is a quantum leap, but while the gymnastics are impressive, the logic is not.

Halivni does not explain the connection between Hellenization and the purported move of the court to the center of town. He seems in fact confused about the reason he attributes for it. Thus he begins by saying that it was due to the increase in population; then he states that it was due to the fall of an oriental custom under the sway of Hellenization. (He gives no source for his assumption that this was an oriental custom. As above, it is most probable that the reason was due to practical, not cultural considerations.) Although Halivni is indecisive on these points, he is confident enough to conclude that the date of the move was "perforce earlier than the first century B.C.E."

The method here is the same as in the first proof: conjecture and speculation, and the absence of any solid base for his conclusion.

3) The third example from the realia of the Mishnah is from a mishnah in Eduyot [10] which says that R. Yose Ben Yoezer (hereafter RYBY) testified that "*de-yikrav be-mita mista'av ve-karu leh Yose sharya*—whoever comes close to a corpse is unclean, and they called him 'Yose the Permitter'." This proves, he says, that the Midrashic form existed in the time of RYBY. The proof is as follows:

Obviously RYBY does not mean to say simply that whoever comes close to a corpse is unclean, for this is an explicit verse in the Torah. Furthermore, why would he be called "the Permitter" because of this? (Both of these questions are posed by the Talmud in *Avodah Zarah* 37b.) Halivni cites the "general scholarly consensus" which "follows the Babylonian Talmud—with some variation—that the testimony originally ended with a missing negative statement to the effect that whosoever touches a corpse is unclean, but not he who touches a man who touched a corpse, or he who touches an object that comes in contact with corpse." This "scholarly consensus" (cited from a certain *Monatschrift)* is precisely a rejected interpretation for RYBY offered in the Talmud *ad loc.* (The only difference is that the Talmud makes no mention of any missing negative statement, and states only that RYBY meant to infer by his statement that these other cases are clean.[11])

Halivni rejects this explanation because "that interpretation should add, besides the negative statement, the words 'for seven days'

to the available statement." This reasoning is redolent of Lewis Carroll at his best, for how can one object to missing words in a statement which is itself missing? If the entire negative statement is missing, is it not possible that the words "for seven days" were missing as well? Halivni says no, by the following argument:

> "While the addition of the missing negative statement is necessitated by the context, these additional words in the available statement are not dictated by the initial statement."

This writer is at a loss to understand the logic behind this argument.

Having duly disposed of the general scholarly consensus, Halivni proceeds to offer his own explanation of RYBY. This is that RYBY originally stated a *derashah* supporting Shammai's opinion that a proselyte need not undergo a cleansing process following his proselytization.[12] RYBY's words, *"de-yikrav be-mita mista'av"* are merely a *derashah* excluding proselyte. If this is his intention, why is there no reference to proselyte in RYBY's words? Halivni conjectures that this was subsequently deleted, probably by the Hillelites who found the *derashah* obnoxious since it contradicted their opinion which opposes that of Shammai. Although Halivni admits that this is conjectural, he claims that it is definite that a *derashah* originally appeared in RYBY's words. Thus he proves that *derashot* existed in the time of RYBY.

Here we have another example of conjecture and speculation offered up as historical proof. Not only is there no evidence that there ever was an omission, but Halivni's suggestion that there was an original *derashah* is totally without basis. First, no *derashah* in any Talmudic or Midrashic source ever begins with a citation of a verse in Aramaic translation, which is what Halivni is suggesting here. Second, the purported law excluded by the *derashah* is a rabbinic law[13] which never (except in the case of *asmakhta,* which is not relevant here) requires a *derashah.* In addition, Halivni's contention that the Hillelites deleted the law of the proselyte because it opposed their view is not only conjecture (which Halivni admits) and hubris (which he does not), it is totally without reasonable basis. Why would the Hillelites forget to delete the very phrase which gave away their treachery; namely, the phrase that RYBY was called "Yose the Permitter?" The Hillelites, Halivni says, could not delete the entire mishnah because of "tradition." Why did tradition permit them to delete just that phrase which is crucial to understanding the law? The conjecture that there was an omission, coupled with the speculation that there was an original *derashah,* is offered by Halivni as "proof" that there was originally a *derashah* in RYBY's words.

It is, incidentally, apparent that in this proof as well as in the previous one Halivni does not read his sources carefully. After citing

the view of the "general scholarly consensus," Halivni cites these scholars as having quoted "a similar statement in the Sifra, Vayikra, Hova 12:1 (22d)" by the early elders. This is used by the scholars as a proof that the change from Midrashic to Mishnaic form took place during the time of RYBY since the early elders use a *derashah* and RYBY does not. Halivni quibbles with them as to the identity of the "early elders" but fails to note, as his scholars fail to note, that the text in the Sifra cited has no bearing at all on the law of RYBY. RYBY is referring to someone who touches a *corpse,* while the Sifra is referring to someone who touches *any other unclean object* such as *nevelah.* The law in Sifra is a universally accepted law and needed no testimony from RYBY to corroborate it.

4) The final indication, from the Temple Scroll, is from a citation concerning a seducer: *ki yefateh ish na'arah . . . ve-hi re'uyah lo min ha-hok.* This teaches that a seducer can only marry a woman who is permitted to him and not one forbidden to him.

Halivni sets out to demonstrate that this whole phrase is borrowed from a *derashah* in a mishnah. Yadin, says Halivni, interprets this to mean that a man cannot marry a woman if she is not eligible to marry according to the laws of the Torah. But, objects Halivni, "is there a need to tell us that? . . . No one would make such a mistake."

Halivni seems to have overlooked the very definite need to tell us this very law. This is because of the well known principle that *aseh doheh lo ta'aseh,* by which a positive commandment overrides a negative prohibition. By this principle there would be ample reason to believe that a seducer (who is obligated by a positive commandment to marry his victim) could marry a woman forbidden to him by a negative commandment. (The principle, according to some opinions, [14] would not apply to a woman such as a sister, forbidden by a negative commandment involving the punishment of *karet,* divine excision, but in all opinions it would apply to a woman forbidden by a simple negative commandment.) It is quite necessary, therefore, for the mishnah and the Temple Scroll to inform us that this is not so. Furthermore, Halivni also seems to have overlooked the fact that according to most commentaries' reading of the Talmud on the cited mishnah (*Ketubbot* 40a), this is exactly the point intended by the *derashah* of the mishnah: that we avoid applying the principle of *aseh doheh lo ta'aseh* to a woman forbidden by a negative commandment.[15]

Despite this elementary explanation, Halivni proceeds to offer his own interpretation of the mishnah; namely, that it is teaching us

that a man does not lose his social status by having relations with a forbidden woman. Losing status through illicit relations is a concept which has no precedent in the Talmud or the Midrashim—even a priest is not disqualified by having relations with a forbidden woman[16]—yet Halivni considers it real enough to require a *derashah* to obviate it.

Be that as it may, having offered his interpretation of the mishnah, Halivni now shows that the Temple Scroll is referring to this *derashah* of the mishnah. (It is unclear why Halivni found it necessary first to prove that the accepted explanation of the mishnah is incorrect. No matter what the interpretation, if the Temple Scroll is referring to the *derashah* of the Mishnah, his "proof" would hold.) His proof is from the word "*lo*" in the Scroll):

> If it were not quoting the drashah, the *lo* ("to marry him") would not have been used. The Temple Scroll did not have to say this for the sake of clarity; on the contrary it confounds matters by raising another issue, that of consanguineous relationship. The expression is there because it is a part of the drashah that the Temple Scroll is quoting . . .

It is difficult to understand how the word *lo* (to him) makes any difference. What is the difference between "she is legally permitted to him," and "she is legally permitted?" Halivni's purported interpretation of the Scroll is no more buttressed by the one phrase containing *lo* than by the other. Furthermore, what exactly does Halivni mean by "it confounds matters by raising another issue, that of consanguineous relationship?" How does the word *lo* raise this issue? And what precisely is this issue? Halivni does not bother to inform us, although this is the crux of his "proof."

In summation, there are two troubling aspects to Prof. Halivni's thesis: a) his rejection of *Torah she-be-al peh* as we know it, and b) his own scholarly methods and his reading of certain basic texts—even granting him his non-traditional orientation.

Perhaps one of the benefits which can be salvaged from his paper is that it demonstrates that the methodology and scholarship of non-traditional Talmudic studies would profit from the rigorous discipline and requirements of traditional Talmudic analysis and the halakhic process. This can serve only to strengthen and renew one's commitment to the classic halakhic tradition of the Sages.

NOTES

1. *Bikkurim* 1:8; *Hagigah* 1:1.
2. E.g. Isaiah 2:2, 56:7; 66:20; Joel 4:7; Micah 4:1.

3. *Bikkurim* 1:8.
4. The source for the mishnah in *Hagigah* 1:1 is the word *regalim;* see Rashi *ad. loc.,* 2a.
5. Cf. *Pesahim* 67a and sources cited there in glosses of *Mesorat ha-Shas.*
6. *Sanhedrin* 86b says that one court was within the Temple, one court at its entrance, and one court on the Temple Mount. The boundary of the Temple Mount, the Beit Paggi (*Menahot* 78b) was within the confines of the city of Jerusalem, as shown by Tosafot to *Sanhedrin* 14b, *s.v. melammed,* and Rashi there, and therefore even the court on the Temple Mount could not be within the doorposts of the entrance of Jerusalem. It goes without saying that the two other major courts in the Temple area, which were surrounded by the *har ha-bayit,* were not within the entrance to Jerusalem.
7. See *Encyclopedia Judaica* V, p. 595.
8. Sifrei *Devarim* 289.
9. Deuteronomy 25:7.
10. *Eduyot* 8:4, cited in *Avodah Zarah* 37a.
11. See Rashi *ad loc., s.v. ve-asu.*
12. *Pesahim* 82a, which states that this is a rabbinic law.
13. *Ibid.*
14. E.g. Tosafot *Yevamot* 6a, *s.v. she-ken;* this contradicts the Talmud *loc. cit.* 7a, where no such distinction is made. See *Sedei Hemed* IX, 76 (Vol. 5, p. 398, Beit Hasofer edition, Bnei Berak).
15. Tosafot *Ketubbot* 40a, *s.v. neitei,* in first and third explanation; for views followed by most commentaries, see *Shita Mekubbetset ad loc.*
16. See Maimonides, *Issurei Bi'ah* 19:1.