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HAVVOT YAIR'S "SAFEGUARD PRINCIPLE" AND THE DAUGHTER'S KADDISH

A daughter's recitation of kaddish for a deceased parent was the subject of a groundbreaking but perplexing responsum by the celebrated scholar and rabbi, Yair Hayyim Bacharach (Worms, 1638–1703) in his *Havvot Yair*, first published in Frankfurt am Main in 1699.¹ Initially, R. Bacharach opines unequivocally that a daughter's kaddish has the identical halakhic significance and legitimacy as the kaddish recited by a son. He then rejects the practice on the grounds that, if implemented, the "customs of Israel, which are also Torah, will be weakened." The halakhic rationale that he marshals to support his concerns about the "customs of Israel" is based upon Tosafot's interpretation of a Talmudic passage in *Berakhot*. While this responsum has served as the point of departure for most discussions on the subject of the women's kaddish, writers tend to cite only its first part. It is there that the author introduces the question and presents his position on the matter, as framed above. However, it is at this point that virtually all writers conclude their citation and immediately proceed to discuss R. Bacharach's decision, either extoling its significance or decrying its apparent severity, without even mentioning the rest of the responsum or critically analyzing the Talmudic source that he produces to substantiate his ruling.²

¹ Isadore Twersky, "Law and Spirituality in the Seventeenth Century: A Case Study in R. Yair Hayyim Bacharach" in I. Twersky and B. Septimus, eds., *Jewish Thought in the Seventeenth Century* (Harvard University Press, 1987), 447–467. On the life and works of R. Bacharach see the important studies of Jay R. Berkovitz, "The Persona of a *Poseq*: Law and Self-Fashioning in Seventeenth-Century Ashkenaz," *Modern Judaism* 32:3 (2012), 251–269; and "Crisis and Authority in Early Modern Ashkenaz," *Jewish History* (2012) 26:1–2, 179–199.

² See Rahel Berkovits, "A Daughter's Recitation: Women and the Mourner's Kaddish" in *Hilkhot Nashim* 1 (JOFA/Maggid Books, 2018), 1–141. Virtually all the relevant sources and authorities are cited and discussed in this monograph. Two notable exceptions, in which R. Bacharach's rationale is examined, can be found in Leon Wieseltier, *Kaddish* (Knopf Publishers, 1998), 178–190; and Malka Puterkovskiy, *Mehalekhet Bederakhah* (Yediot Sefarim, 2014), 257–295.

TRADITION

It is precisely this analysis, heretofore lacking, that will now be undertaken.

Responsum number 222 of *Havvot Yair*³ begins as follows:

An unusual thing happened in Amsterdam, and was widely known there. A man died without leaving a son, and prior to his death he requested that for twelve months after his death, ten men should be retained to study in his house, and at the conclusion of their studying, his daughter should say the kaddish.⁴ [See the Responsa of Rabbi Samuel de Medina, *Orah Hayyim* 6.] And the sages and *parnassim* (lay leaders) of the congregation did not object.

He begins his response with a justification of the intrinsic religious value of the daughter's kaddish:

Even though there is no proof that would contradict it—for women too are commanded to sanctify the Name, and there was a quorum of ten men present—and even though the tale of R. Akiva, which is the basis for the recitation of kaddish by mourners, speaks only of a son [whose kaddish may redeem his father], it is reasonable to assume that a daughter may also bring benefit and repose to the soul of the dead, for she, too, is his progeny.⁵

After establishing the fact that the recitation of the mourner's kaddish by the daughter would benefit the deceased just as the son's would, and that it would take place in the presence of a minyan of ten men who completed a study session, R. Bacharach demurs:

³ *Responsa Havvot Yair* II (Machon Eked Sefarim, 1996), 626. I quote the translation of the responsum found in Wieseltier, *Kaddish*, with alterations.

⁴ In this case, the kaddish recited after learning rabbinic texts, called the *Kaddish de-Rabbanan*, the "rabbi's kaddish," which is not the standard Mourner's Kaddish.

⁵ Wieseltier (*Kaddish*, 173ff.) mentions the following excerpt from the ethical will of R. Abraham Horowitz (Poland, 1540–1615) called *Yesh Nohalin* that is cited both in Hebrew and in English translation by David De Sola Pool, *The Kaddish* (Leipzig, 1909), 104–105: "Let the son keep a particular precept given him by his father, and it shall be of greater worth than the recital of the Kaddish. *The same is true also of daughters* [Italics added]. For the Kaddish is not a prayer of the son that the father may be brought up from Sheol, but a recognition of the parent's merit, since through its recital the child best vindicates the memory of his parent by causing the congregation to respond to him with the praise *Amen Yehei Shmei Rabba* etc." The final sentence is indeed a translation of the original version, but the first two sentences, including the reference to a daughter, is not found in the *editio princeps* (Prague 1615) or any subsequent edition for that matter, and apparently must be attributed to De Sola Pool and not Horowitz, thus rendering Wieseltier's accusation of censorship moot. This seems not to be the statement of a venerable predecessor of R. Bacharach, but rather a twentieth century British-American rabbi.

All this notwithstanding, we must be concerned that, as a consequence [of allowing the daughter to recite the kaddish], the authority of the customs of Israel, which are also Torah,⁶ will be weakened, and each man will build his own altar on the basis of his own thinking, and treat the words of the rabbis with derision and jest, and come to scorn them.

R. Bacharach then cites Tosafot's comments on a *baraita* cited in *Berakhot* 34b in support of his ruling:

So wrote the Tosafists in the chapter *Ein Omedin* [*Berakhot*, ch. 4] regarding the one who seeks to bow at the end of every benediction [of the *Amida*] in their response [to the question "But why not let him bow more?].

What is this seemingly unrelated restriction that serves as the bulwark against encroachments upon "the customs of Israel, which are also Torah"? The relevant background necessary for understanding this pivotal reference follows below.

Bowing in the *Amida*⁷

In the biblical and Second Temple periods, particularly in the Temple ritual, prostration was the primary, if not the exclusive physical gesture that characterized Jewish prayer.⁸ The Rabbis, however, selected genuflection, or bowing on both knees, as the main gesture for prayer in the *Amida*, the central prayer of the liturgy recited three times daily. Several scholarly explanations for this change have been offered. Some see it as part of a process whereby the rabbis sought to distance themselves from the practices of the heretics, in this case from kneeling, which was adopted by

⁶ For background on this phrase and Ashkenazic custom in general, see Israel Ta-Shma, *Minhag Ashkenaz ha-Kadmon* (Magnes Press, 1992), 28ff, and Haym Soloveitchik's critical review in his *Collected Essays II* (Littman Library, 2014), especially 49ff.

⁷ Linguistic note: *Keri'a* (kneeling) is upon the knees, *hishtahavaya* (prostration) is spreading out of hands and feet; bowing, used here to translate the rabbinic term, *shebi'a*, is more moderate in nature than either of these gestures, and does not involve bodily contact with the ground (*Berakhot* 34b and parallels). In later sources, the term *keri'ah* is used to denote bowing, not kneeling, and is used interchangeably with *she'biah*.

⁸ The most comprehensive work on this topic is Uri Ehrlich, *The Nonverbal Language of Prayer: A New Approach to Jewish Liturgy* (Mohr Siebeck, 2004), 38. Scholars that have dealt with the issue of bowing in prayer and its development include Gerald J. Blidstein, "Prostration and Mosaics in Talmudic Law," *Bulletin of the Institute of Jewish Studies* 2 (1974), 19–39; and Eric Zimmer, *Olam ke-Minhago Nohag* (Merkaz Zalman Shazar, 1996), 72–113.

Christianity.⁹ Others claim that this change is an extension of the biblical prohibition forbidding prostration on a stone floor outside of the Temple.¹⁰ Uri Ehrlich notes that the shift from prostration to bowing also occurred in the interpersonal realm by the third century. He proposes that in the biblical period, prostration was the conventional gesture before a human ruler, but in the rabbinic era, bowing was the accepted convention in royal courts, and this induced a harmonization of prayer gestures to fit the changing social reality.

It has been suggested that the original practice may have been for the worshipper to bow each time the Divine Name was mentioned in all the benedictions of the *Amida*, as was theoretically expected of the high priest and the king (see below).¹¹ However, a lone *baraita* prescribed bowing only for the opening and closing benedictions, *Avot* and *Modim*, and discouraged any additional bowing on the part of the ordinary worshipper.¹² The interdiction against excessive bowing during the *Amida* “points to the prevalence of the practice” prior to its being reined in by the Sages.¹³ This inconspicuous *baraita*, the history of its exegesis, and its impact on Jewish custom comprise a case-study of the relationship between *minhag* and halakha, and the process of tracing its development uncovers a wealth of issues and insights that continue to reverberate in contemporary Jewish life and observance.

The Lone *Baraita*

The *baraita* is cited in *Berakhot* 34a:

The Sages taught: These [are the] blessings [in the *Amida* prayer] in which a person bows: In [the first blessing, the blessing of the] Patriarchs, [one bows] at the beginning and the end; in [the blessing of] Thanksgiving, [one bows] at the beginning and the end; and if one seeks to bow at the

⁹ Blidstein, “Prostration,” 21.

¹⁰ Ehrlich, *Nonverbal*, 43–44, and Shaul Chona Kook, *Iyunim u-Mekhbkarim* (Mosad Harav Kook, 1959), 345–363.

¹¹ Blidstein, “Prostration,” 17, and *Yerushalmi Berakhot* 4:3. This would parallel the Temple practice.

¹² See David Henshke, “Between Blessings and Prayer: On the History of the Amida Prayer.” [Hebrew], *Tarbiz* 84 (2016), 345–395, who conclusively argues the fact that the final blessing of the *Amida* was originally *Hoda’ah* (Thanksgiving). See also R. Moshé Lichtenstein, “*Birkat Sim Shalom*” in *Zikbron HaRav* (Rabbi Isaac Elchanan Theological Seminary, 1994), 221–228. It appears that our *baraita* stems from the period before the nineteenth blessing was added.

¹³ Blidstein, “Prostration,” 20.

end of each and every blessing and at the beginning of each and every blessing, he is taught not to do so.

The Talmud continues:

Rabbi Shimon ben Pazi said [that] Rabbi Yehoshua ben Levi said in the name of Bar Kappara: A layperson conducts himself as we said; [he bows at the beginning and the end of the blessings of Patriarchs and Thanksgiving and is admonished if he seeks to bow at the beginning and end of the other blessings. It is appropriate, though, for] a High Priest [to bow] at the end of each and every blessing; and [for] a king [to bow] at the beginning of each and every blessing and at the end of each and every blessing.¹⁴ Rabbi Yitzhak bar Nahmani said: It was explained to me [directly] from Rabbi Yehoshua ben Levi himself differently: An ordinary [person, conducts himself] as we said; a High Priest [bows at] the beginning of each and every blessing; the king, once he has bowed [at the beginning of the first blessing], does not rise [until he concludes the entire prayer], as it is stated: “And it was that when Solomon finished praying all [of his prayer to the Lord], he rose from before the altar of the Lord, from kneeling upon his knees [with his hands spread forth toward the heavens]” (I Kings 8:54).¹⁵

The context of this Talmudic discussion is the prescribed manner for the recitation of the *Amida*. The *baraita* requires one to bow at the beginning and end of the first blessing, called *Avot*, and at the beginning and end of the eighteenth blessing, which at the time may have been the last blessing, called *Modim*, but not at any other juncture during the *Amida*. Curiously, the term used by the *baraita* “he is taught”—*melamedim oto*—is not one that normally conveys a formal prohibition, but rather directs those in authority to discourage additional bowing and instruct those who engage in it to refrain from it in the future. Neither the *baraita* itself nor the subsequent Talmudic discussion specifies the reason why additional bowing is to be discouraged.¹⁶ It may be inferred from the amoraic discussion that follows that, theoretically, while additional bowing may have been the appropriate ritual for the king or the high priest, it was not regarded as such for the ordinary worshipper.¹⁷

¹⁴ Rashi explains that this is because the loftier one’s status, the more important it is to demonstrate his subservience to God.

¹⁵ Elucidated translations according to the *Koren Talmud Bavli*.

¹⁶ This is the major concern of Blidstein’s article.

¹⁷ R. Abraham Maimuni arrives at the opposite conclusion. See R. Abraham ben Moshe ben Maimon, *Sefer ha-Maspik le-Ovdei ha-Shem*, part II, vol. 2, (Bar Ilan University Press, 1989), 118–119.

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R. Isaac of Dampierre, known as Ri (d. 1189), provided the primary interpretation to our *baraita*. R. Judah Sir Leon of Paris (1166–1224), one of Ri’s major disciples and his relative, records in his Tosafot to *Berakhot* 34a, based on the Ri’s teachings, two reasons why voluntary bowing should be discouraged:

[The first reason is the concern] that he should not uproot the words of the Sages, because it must not be said that anyone can invent his own stringencies as he pleases, thereby nullifying the rabbinic edict. Secondly, we are concerned with presumptuousness [*yuhara*].¹⁸

At the outset it must be stressed that both R. Judah, and his teacher Ri, understood the *baraita*’s directive as a formal rabbinic enactment (*takana*), restricting all voluntary bowing in the *Amida*, despite the moderate terminology—*melamedin oto*—which is used. As we will see, their understanding was to become the dominant one among Ashkenazic authorities.¹⁹

R. David ha-Levi Segal (Poland, c. 1586-1667) in his *Turei Zahav*, explains the rationale for the enactment as follows: A religious act that is taken on voluntarily is normally not treated as seriously as a formal rabbinic obligation, and therefore additional bowing at the beginning and end of blessings will result in blurring the lines between what is required and what is not, thus undermining the force of the rabbinic enactment.²⁰ Blidstein points out that “such a repression of bowing is consonant with the historical development of the liturgy,” and explains that “the second century saw a growing formalization and universalization of prayer.” As a corollary to the formal requirement to bow at *Avot* and *Modim*, the proscription against additional bowing was intended to safeguard the integrity of

¹⁸ *Tosafot Rabbenu Yehuda Sir Leon al Massekhet Berakhot*, ed. Nissan Sachs (American Academy for Jewish Studies, 1969) I, 358. The standard Tosafot printed on *Berakhot* are based on the Tosafot of R. Judah Sir Leon. Urbach thinks they were authored by a German Tosafist, while Epstein ascribes them to a figure from the school of Rabbenu Peretz. See Judah Galinsky, “The Rosh of Germany in Spain” [Hebrew], *Tarbiz* 74:3 (2005), n. 41.

¹⁹ An earlier authority in Provence, R. Abraham b. Isaac, known as *Rabi* (Narbonne, 1110–1179), when asked by a disciple about bowing during the *Nishmat* prayer, responded: “One should not bow in any of the benedictions established by the early authorities [referring to the Men of the Great Assembly, the principal authors of the prayer service] except in those places that they mentioned.” See *Teshuvot ha-Ge’onim ha-Hadashot*, ed. S. Emanuel (Makhon Ofek/Koren Publishers, 1995), no. 36. See his comments on bowing on the High Holy Days below. *Encyclopedia Talmudit* 32:265, n. 274, mistakenly identifies this responsum as Geonic.

²⁰ *Turei Zahav* on *Shulhan Arukh Orach Hayyim* 113:1.

the formal structure of prayer the rabbis had established, and was regarded as an integral part of the enactment as a whole.²¹

A second reason for the prohibition recorded by R. Judah Sir Leon was explained in the commentary of the *Talmidei Rabbenu Yonah* (Catalonia, 1200–1263) on Alfasi's *Halakhot*:

Some explain [that additional bowing is prohibited] because it looks like *yuhara*—presumptuousness, i.e., that he considers himself more devout [literally: *kasher*] than the rest of the congregation.²²

Similarly, R. Aaron Halevi, a disciple of Nahmanides, writes in his commentary on Alfasi's *Halakhot*:

They teach him not to bow: [The reason is] that when an ordinary person bows in a place where it is inappropriate for him to do so, it constitutes [an improper display of] haughtiness.²³

Similarly, R. Aaron's disciple, Ritva, conspicuously omits the first reason in Tosafot in his commentaries to *Berakhot* and *Rosh Hashana*²⁴ and makes no mention of any rabbinic enactment, despite the likelihood that they were familiar with the first answer of Tosafot. For them, additional bowing is a display of inappropriate piety unbecoming the ordinary worshipper and therefore should be discouraged. Blidstein explains: "Bow-ing... is a gesture of humility and submissiveness; but to bow some nineteen or twenty times in the course of one prayer is likely to issue in either empty formalism, or the hypo-critical arrogance of piety, or both." It appears that they do not interpret the *baraita* as a formal rabbinic edict as do their Ashkenazic counterparts, but see it rather as falling under the broader category of *yuhara* (presumptuousness), that is, undertaking a

²¹ A similar understanding is offered by R. Joshua Falk (Poland, 1555–1614) in his commentary *Perisha* on *Tur Hoshen Mishpat* 84:17.

²² *Hilkhot ha-Rif* 24a. There were commentators who mistakenly attempted to conflate the two reasons offered. See for example *Nahalat Zvi*, cited in *Encyclopedia Talmudit*, op. cit., note 256.

²³ *Hiddushei R. Aaron ha-Levi* on *Berakhot* (Ahavat Shalom Publishers, 2000), 249.

²⁴ *Hiddushei ha-Ritva* on *Berakhot* (Mosad HaRav Kook, 2008), 125, and *Rosh Hashanah* (Mosad HaRav Kook, 2008), 162. For a detailed treatment of the use of Tosafot by Nahmanides and his students Rashba, R. Aaron ha-Levi, and Ritva, see Ephraim Kanarfogel, "Between Ashkenaz and Sefarad: Tosafist Teachings in the Talmudic Commentaries of Ritva," in *Between Rashi and Maimonides: Themes in Medieval Jewish Thought, Literature, and Exegesis*, edited E. Kanarfogel and M. Sokolow (Yeshiva University Press, 2010), 237–273.

religious stringency that is disrespectful or inappropriate, a generic concern that relates to other areas of religious behavior as well.

Back to the Daughter's Kaddish

We are now in a position to understand R. Bacharach's reference to Tosafot in *Berakhot*. He generalizes Tosafot's restriction on bowing and regards it as a safeguard for all rabbinic edicts related to liturgy in order to preserve the "customs of Israel." R. Bacharach invokes what may be termed the "safeguard principle" to protect the integrity of the custom of reciting the mourner's kaddish, heretofore recited solely by men, from being undermined.

R. Bacharach then concedes, however, that the cases may not be comparable, since in fact the kaddish is not a formal rabbinic enactment like bowing in the *Amida*, but rather a *minhag*. Perhaps the "safeguard principle" is not applicable to "mere" customs? Nevertheless, he argues that the comparison is still valid:

Should you suggest that the case [of bowing during prayer] was a stipulation of our early sages and appears in the Talmud [and therefore is a stricter matter than the case of the mourner's kaddish, which does not appear in the Talmud, and therefore may be permitted to women in mourning], it must be replied that this custom [the mourner's kaddish], which is not in the Talmud but originated nonetheless in the Midrash,²⁵ must be strengthened all the more, like all the customs of Israel. The sages reinforced their pronouncements with greater severity than prohibitions of Torah law so that people would not treat them lightly, as stipulated in *Yevamot* 36b.

For R. Bacharach, liturgical customs assume the same status as formal rabbinic enactments, and thus need protection from being undermined by unilateral expressions of religious enthusiasm, precisely because they are customs and not legal enactments. Anticipating another argument, he acknowledges that the injunction against additional bowing was not formulated by the *baraita* as a formal prohibition, but rather as a tactful corrective to be offered to an unwitting worshipper:

²⁵ A comprehensive account of the midrash of the Tanna and the Dead Man can be found in M.B. Lerner, "The Account of the Tanna and the Deceased: Its Literary and Halakhic Afterlives" [Hebrew], *Asufot* 2 (1988), 29–68. A recent treatment of the story is David I. Shyovitz, "You Have Saved Me From the Judgment of Gehenna: The Origins of the Mourner's Kaddish in Medieval Ashkenaz," *AJS Review* 39:1 (April 2015), 49–73.

[In the case of bowing] it does not say that they prevent him from bowing, it says only that they instruct him not to bow, and does not [formally] object to it, and [the Talmud] does not even call it reprehensible (as it does regarding someone who recites the *Shema* twice); which is the reason why, in my view, Maimonides does not mention it in his code.

R. Bacharach explains that the Talmud provides for more stringent correctives in the case of improper gestures and spontaneous liturgical formulations, correctives that might have been utilized to deter additional bowing, but our *baraita* uses the more neutral term *melamedim oto* instead, which gives the impression that additional bowing is not a serious infraction, and which also explains why, in R. Bacharach's estimation, Maimonides does not mention it in his code.²⁶ However, R. Bacharach draws a distinction between this case and the daughter's recitation of kaddish:

In that case [of bowing] however, they were describing the practice of an individual, and others will not learn from it. They will conclude only that this man [who keeps bowing] is coarse. That is why the Tosafists rightly mentioned the [second] reason for discouraging this action [as an individual's arrogance].²⁷ [A woman saying Kaddish, by contrast, would become an example for others.] And so, in the matter before us, since it is in public and is widely known, it [the daughter's Kaddish] must be protested.²⁸

So concludes the responsum. It can be summarized as follows: the daughter's kaddish is a legitimate expression of *Kiddush Hashem* that benefits the soul of the departed parent, but its implementation jeopardizes the integrity of a universally accepted custom. This concern is grounded in the Talmudic restriction limiting voluntary bowing in the *Amida*, which is a generic principle ("the safeguard principle") restricting self-expression

²⁶ R. Bacharach's comment about Maimonides reveals an extremely significant fact, largely overlooked by rabbinic commentaries on the Mishne Torah: the great codifier Maimonides does not include any restriction on additional bowing in his code. Like the other Sephardic authorities cited above, he does not interpret our *baraita* as constituting the source for the "safeguard principle."

²⁷ R. Joseph Engel argues otherwise. He claims that if voluntary bowing is permitted in the *Amida*, it might be viewed as normative, and consequently onlookers will think that they are required to bow as well; see *Gilyonei HaShas* (Vienna, 1924), I:12.

²⁸ How public can it be if it takes place in the privacy of the deceased's home? Apparently R. Bacharach considers the presence of a minyan a public event. This stringency might constitute the point of contention between him and the authorities that permitted the women's kaddish in a private home (see Responsa *Shvut Yaakov*, II:93, and *Yad Yitzhak* III:10, cited in Berkovits, *Hilkhos Nashim*, n. 1).

in prayer beyond the formal liturgy. R. Bacharach allows that its specific application in the case of the daughter's kaddish may be disputed on two grounds, the first, that the mourner's kaddish is a custom while bowing in the *Amida* is a rabbinic edict, thus the cases are not comparable, and the second, the language used by the *baraita* is suggestive, not restrictive. Notwithstanding these apparent weaknesses in his argument, R. Bacharach nonetheless insists on applying the "safeguard principle" in the case of the daughter's kaddish.

Exceptions to the "Safeguard Principle"

R. Bacharach's determined application of the safeguard principle notwithstanding, when we examine if and how the principle was applied in other contexts, we find that it was either ignored or altered by the same Tosafists when it clashed with an established liturgical *minhag*. For example, there was a longstanding custom to recite the entire *Amida* on the days of judgment, Rosh Hashana and Yom Kippur, while bowing, kneeling, or even while fully prostrate on the ground. For R. Jacob b. Meir Tam, cited in *Mahzor Vitry* 53, this practice was not problematic at all, as is evident from the subsequent Talmudic discussion of the *baraita*:

From *Sefer ha-Yashar*. Why do we pray [the *Amida*] while bowing on Rosh Hashana and Yom Kippur? Because it is the time of judgment, and we find that the king was judged every day, as it is written, "And judge his servant and his people Israel each and every day" (I Kings 8:59), and he prays [the *Amida*] every day while bowing. How do we know this? For it is written, "And it was that when Solomon finished praying all of his prayer to the Lord, he rose [from before the altar of the Lord], from kneeling upon his knees [with his hands spread forth toward the heavens]" (*ibid*, v. 54). And on Rosh Hashana and Yom Kippur we are like kings, for that is our day of judgement.²⁹

Rabbenu Tam clearly saw no contradiction between this popular *minhag* and the restriction of bowing in the *baraita*. During the High Holy Days, the days of judgement, all Jews assume the status of kings, and bowing is mandatory for kings. It is unclear whether he actually viewed this analogy as having legal force, and thus overriding the rabbinic enactment, or simply a homily that can be used to defend the prevalent *minhag* that takes

²⁹ *Mahzor Vitry* 53 (Otzar ha-Posekim, 2009), III: 727. See fn. 1 for the sources that cite this ruling, that include Abudraham, *Sefer ha-Manhig*, Rabbeinu Peretz, Tur, and others. See also Meiri, *Hibbur ha-Teshuva* (Yeshiva University, 1950), 368.

preference over the *baraita*, given its tenuous nature. In any case, his reading was endorsed by many later authorities.³⁰

Despite being the foremost disciple and nephew of R. Tam, Ri did not adopt his master's exegesis that accorded the status of kings to all Jews on Rosh Hashana and Yom Kippur, as we will see below. For him, as well as for many of his fellow Tosafists, the restriction of the *baraita* was a formal rabbinic enactment that ought to be applied even on the High Holy Days, in spite of the prevalent custom. How did they deal with this custom that contradicted their understanding of the *baraita*? They did so by using the dialectic method of interpretation, as we will now see.

The *Baraita* of R. Akiva

Immediately following the statement that proper intent (*kavvana*) is required on the part of the worshipper during the *Amida* (“One who prays [the *Amida*] must focus his heart toward Heaven”), the Talmud relates the following story about R. Akiva's intent in prayer:

It was taught [in a *baraita* that] R. Yehuda said: This was the custom of R. Akiva, when he would pray with the congregation he would shorten [his prayer] and go up, due to [his desire to avoid being an] encumbrance on the congregation [by making them wait for him to finish his prayer]. But when he prayed by himself [he would extend his prayers to an extent that] a person would leave [R. Akiva alone] in one corner [of the study hall] and [later] find him [still praying] in another corner. And why [would R. Akiva move about] so much? Because of his bowings and prostrations.³¹

R. Hai Gaon understands the passage to mean that Rabbi Akiva's enthusiasm in prayer was so great that as a result of his bowings and prostrations he would unwittingly move from one corner to the other. This would seem to be the basic understanding of the story. But how could R. Akiva bow whenever he liked in the *Amida*? What about the restriction of our *baraita*?

³⁰ See previous footnote. An apparent exception to this consensus is found in the responsum of R. Abraham b. Isaac, cited above in footnote 19. He writes that “bowing [during] the *tekiot*” (which Prof. Bernard Septimus identifies with the three benedictions added to the Rosh Hashanah *Amida*) is “a foolish practice; I would almost suggest that the custom began with [worshippers] who were not familiar with the verses [in prayers recited once a year] and had to bend over in order to look into the [prayer] books that were in front of them”!

³¹ *Berakhot* 31a.

TRADITION

According to the Tosafist R. Joseph (probably R. Joseph Porat), Rabbi Akiva must have been constrained by our *baraita*'s restriction on bowing, and the latter's excessive gestures therefore must have occurred *after* he completed his formal *Amida*, and comprised part of his private, additional supplications. Many authorities concurred with this reading of the story, however forced, because they could not accept a reading that R. Akiva would engage in excessive bowing during the *Amida* proper, against the *baraita*'s ruling.³² But Ri, again quoted in R. Judah Sir Leon's Tosafot, offered another interpretation:

Certainly [R. Akiva] did not bow at the end of the blessings [of the *Amida*, for that is forbidden], but [rather] in the *middle of the blessings where it is permissible* [to bow], and when he reached the end of the blessing he stood up straight. Therefore, there are those who have the custom to bow on Rosh Hashana and Yom Kippur when they recite [the special additions to the *Amida*] *zochrenu* and *u-vekhen ten pakhdekha*, but when they get to the end of the blessing, they stand straight, for one is not to bow at the end of a blessing except where it has been decreed.³³

By limiting the application of the rabbinic enactment against voluntary bowing to the beginning and the end of the blessing alone, Ri created a "neutral zone" in which bowing was permissible, namely, during all the intermediate segments of the *Amida*. This enabled him to interpret Rabbi Akiva's practice as adhering to the *baraita* while at the same time justifying, and perhaps limiting, the popular *minhag* of bowing on the High Holy Days. While other Tosafists questioned the logic of his interpretation,³⁴

³² See the commentaries of Tosafot on *Berakhot*, Tosefot ha-Rosh, Rashba, and Meiri, ad loc. *Rabi* suggests three possible explanations: (1) R. Akiva was reciting his personal *Amida*, and the restriction on bowing only applies in public prayer; (2) He was reciting the ineffable name of God during his prayer, which required him to bow, and such bowing is permissible; (3) He was engaged in voluntary supplications, not the formal *Amida*.

³³ *Tosefot Rabbenu Yehuda Sir Leon*, op. cit., p. 356. The requirement to stand straight when reciting God's name follows the ruling of Rav in *Berakhot* 12a and *Yerushalmi Berakhot* 4:1. This ruling carries with it a number of difficulties, seeing as in the Temple, as per the Yom Kippur *Musaf* service, it was precisely upon the *mention of God's name* that the assembled would fall on their faces. Why then would it be required to stand straight when reciting God's name in a benediction? See the discussion in Blidstein, "Prostration," n. 52.

³⁴ This includes all those authorities who interpret that R. Akiva was not reciting the *Amida*. In addition, see *Sefer Mitzvot Katan*, glosses of Rabbenu Peretz, *mitzva* 11, and n. 84: "I, the young one, heard that one may bow on Rosh Hashana and Yom Kippur even at the end and the beginning of the blessings [not just the middle], and I agree." He goes on to justify this view based on a straightforward reading of the *Mabzor Vitry*.

his ruling was incorporated into the standard codes of Jewish law and was accepted as the normative halakha.³⁵ The safeguard principle was now redefined, as Ri saw no problem in restricting its application in order to allow for the popular custom. However, there were many authorities, besides Rabbeinu Tam and his coterie, who were not concerned by the *baraita's* restriction, and waived it entirely in favor of the custom of praying while bowing during the High Holy Days. They include Maimonides, Nahmanides, and Rashba.³⁶

The Criticism of R. Yair Hayyim Bacharach

Even though the Ri's redefinition of the principle became normative among Ashkenazic Jews, there were those who rejected it, and, despite the authority of the codes, interpreted the rabbinic enactment against bowing according to its original intention as they perceived it. Representative of this group of scholars is none other than R. Yair Hayyim Bacharach, who writes in his *Shulhan Arukh* commentary, *Mekor Hayyim*, as follows:

Were it not for [the fact] that I know my shortcomings and lack of knowledge, and recognize [that someone in] my place is not worthy enough to dispute [the views of] famous authorities, I would say that [bowing] even in the intermediate segments of the blessings is objectionable. [The reason that this fact is not explicitly stated in the *baraita*] is because it is not customary to bow in the intermediate [sections of a blessing], ... [and the subsequent references to the bowings of the high priest and the king] come to teach us that "not everyone who wishes to assume the reputation of a God-fearing person may assume it" (*Berakhot* 16b), and accept the stringency of adding additional bowings like the high priest, and certainly not if he wants to bow in new places [in the service] for which there is no precedent, for we are concerned by [the dual problems of] presumptuousness and uprooting the words of the Sages.³⁷

³⁵ See *Shulhan Arukh Orach Hayyim* 113:1–2 and 582:4 and commentaries.

³⁶ See *Mishne Torah, Hilkhot Tefilla* 5:15, end; on Nahmanides, see the report of Ritva in *Hiddushei ha-Ritva* Rosh Hashana, 293 (see n. 24 above); on Rashba, see the reports of his disciple R. Joshua Ibn Shu'eib, *Derashot* II (Machon Lev Sameach, 1992), 495, and indirectly, his disciple R. Hayyim ben Samuel of Toledo in *Tzeror ha-Hayyim* (Jerusalem, 1966), 82, whose description of the mode of prayer on Yom Kippur is identical to that of Ibn Shu'eib.

³⁷ *Shulhan Arukh, Orach Hayyim* with the commentary *Mekor Hayyim* (Machon Yerushalayim, 1982), 90–91.

He upholds the original interpretation of the *baraita* as prohibiting bowing in any part of the *Amida* except for the four places that are mandated. For him, if the venerated custom of bowing on the High Holy Days is not in keeping with the rabbinic enactment as originally understood by the Tosafists, then the custom must be discarded. His insistence on the integrity and application of the “safeguard principle” is entirely consistent with the way he applies it in the responsum on the daughter’s kaddish.

Different Interpretations

While R. Bacharach was adamant about the strict application of the safeguard principle as originally understood, later Ashkenazic authorities displayed more flexibility in its application. The frequent references in *Mekor Hayyim* to *Shenei Luhot ha-Brit* by R. Isaiah Horowitz, otherwise known as Shelah, demonstrate his high regard for the work and its author. While Shelah posits that the early authority R. Yeruham holds the view that indeed *any type of voluntary bowing at any point in the liturgy is forbidden*,³⁸ Shelah does not concur, and permits much wider individual initiative:

However, bowing during petitionary prayers that are not formal benedictions, or even bowing in the intermediate portion of formal blessings is permissible, for it is not the particular manner of bowing [i.e., at the beginning and the end of a benediction] that the Sages ordained [and thus prohibited adding to].

Shelah reports that he received a ruling from his teacher, R. Solomon b. Judah of Lublin (d. 1591), that one should bow while saying the words “we bow in worship,” in *Alenu*. The latter further argued that a worshipper who does not bow is considered a nonbeliever and one who offers false testimony. The same logic applies to the optional early morning recitations that include the phrases “Come let us bow in worship and bend the knee,” and “We will bow down to your Holy Temple,” since bowing is mentioned. Whenever one declares in the context of a prayer of any kind that “we bow,” one is not only allowed to bow, but is obligated to do so.³⁹ By and large, these rulings of the Shelah were accepted by later authorities and became the accepted practice in Ashkenazic communities.⁴⁰ For him, the Talmudic guidelines that limit expression within the formal structure of the *Amida* are to be followed, but outside of that

³⁸ *Toledot Adam ve-Hava, netiv* 11, part 3 (Venice, 1553). This ruling was adopted by the Vilna Gaon in his commentary to *Shulhan Arukh*, ad. loc.

³⁹ R. Abraham Maimuni offers the same argument in *Sefer ha-Maspik*, op. cit., 141.

⁴⁰ See *Encyclopedia Talmudit*, op. cit., 266–267 and notes.

defined framework the worshipper is given the freedom of self-expression.⁴¹ He clearly does not extend the scope of the safeguard principle as far as R. Bacharach.

Conclusion

While R. Bacharach ruling's on the daughter's kaddish stands on its own, independent of the analogy drawn from the *baraita* in *Berakhot* 34a, he nevertheless sought support from a Talmudic text, and found it in the "safeguard principle." He likened his strict reading of Ri's restriction on bowing in the *Amida* to the attempt to change the traditional practice of limiting the recitation of mourner's kaddish to men, by this time a venerated liturgical institution. However, many, if not most, early (and later) authorities, while not specifically dealing with the daughter's kaddish, disagreed with such a literal understanding of the safeguard principle, and allowed for greater individual expression in prayer. R. Bacharach anticipated reservations about the relevance of his source-text and was aware that his ruling might be seen as arbitrary by those who did not concur either with his ruling and/or his proof text, such as the Sages of Amsterdam, or for that matter, his contemporaries who permitted daughters to say kaddish as long as it was outside of the synagogue.⁴² The safeguard principle is absent from the responsa that argue both for and against the daughter's kaddish. Later authorities would indeed cite responsum 222 as their point of departure, but without citing the analogy to the safeguard principle. They would find other reasons to either object to the daughter's kaddish or to approve of it.

It remains for us to provide some perspective upon this ruling in the context of R. Bacharach's halakhic corpus. Let us begin with Isadore Twersky's description of the genesis of R. Bacharach's collection of responsa:

After rehabilitating himself, he decided to publish a collection of selected responsa entitled *Havvot Yair*. His creativity and outlook are embodied in this selection. The precise way in which he characterized the contents is important; the volume contains (a) answers to questions which were addressed to him in his early years; (b) questions which he submitted to

⁴¹ The *Shelah's* reading of the sources is, for the most part, adopted by R. Bacharach. The latter agrees that one should bow whenever mentioning the words "we bow" in the liturgy, against the restrictive reading of R. Yeruham (*Mekor Hayyim*, *ad. loc.*). However, in his commentary on *Orah Hayyim* 57 he questions the propriety of the custom of bowing at *Barechu*, based on his reading of the *baraita* in *Berakhot* 34a.

⁴² See note 28 above.

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his teachers and their responses to him; (c) his novella and insights growing out of his own study or out of difficult practical situations in which he found himself from time to time. *This means that he had great flexibility in molding the volume; it was not a mere register of correspondence.*⁴³

For R. Bacharach, then, his ruling on “the unusual thing that happened in Amsterdam” fits into the third category, and was significant enough for him to record for posterity. What was its significance?

Perhaps it was an example of women’s increased involvement in public ritual. In the seventeenth century, social contact between men and women was viewed with considerable alarm, and there are instances where communal and halakhic authorities attempted to restrict women’s involvement in public ritual. Jay Berkovitz noted that “these sources reflect a range of concerns about the involvement of women in public ritual, the intermingling of the sexes at liminal moments, and the disorderly conduct of public rites.”⁴⁴ A woman reciting kaddish, even in a private home, might represent an inappropriate involvement in public ritual which should be prevented.

However, there may have been an additional factor at play here, related to the genesis and development of the orphans’ kaddish. The kaddish first appeared as part of public prayer in the Geonic period and was recited exclusively by the prayer leader. At some point during the late Middle Ages orphans were encouraged to lead the services during their year of mourning so that they could recite the kaddish, which would benefit the soul of the departed parent. It also became customary to lead the service yearly on the day of the *yahrzeit*. This became problematic, since there was often more than one orphan in a community to officiate at the one and only communal service. A complex set of local rules were set forth in each community to establish which mourner had priority on any given day. Minors and those unable to serve as prayer leaders were given the opportunity, either individually, or as a group, to recite a special collective “mourner’s kaddish” that was added to the end of the service. It was difficult to maintain the necessary but tenuous balance so as not to disenfranchise the mourners. The addition of a new element, the daughter’s kaddish, was likely to disrupt this balance and might give rise to a host of other innovations—“everyone will build his own altar”—that could wreak havoc upon this delicate situation. As Shyowitz observes: “Orphans were

⁴³ Isadore Twersky, “Law and Spirituality in the Seventeenth Century” (op. cit.), 453–454 (emphasis added).

⁴⁴ Jay R. Berkovitz, *Rites and Passages: The Beginnings of Modern Jewish Culture in France, 1650–1860* (University of Pennsylvania Press, 2004), 51.

competing with one another for the chance to recite the kaddish, and communal leaders had to devise increasingly elaborate systems in order to determine who would take precedence in doing so.”⁴⁵ R. Bacharach was one of the halakhic authorities who had to deal with this dilemma. For instance, he asks in *Mekor Hayyim*,⁴⁶ what if the deceased had no sons or no progeny at all? What if there were no surviving children, but there were grandsons. Could the grandsons say kaddish? Did it make a difference if the grandsons were sons of sons or sons of daughters of the deceased? What was the status of relatives or an outsider paid to say kaddish? Did they ever have priority over other mourners?

These are just some of the questions that he raised. There was no universal practice, and no two communities resolved these issues in exactly the same way. With all the competing claims to recite the kaddish, each community struggled to achieve a delicate balance to maintain order and civility in its synagogues. This issue may have influenced R. Bacharach’s ruling on the daughter’s kaddish, for an irregular minyan for women outside of the synagogue might spread and generate similar solutions for men.

Postscript: A Mistaken Source Reference

It might even be possible that R. Bacharach not only anticipated opposition to his ruling, but even provided his readers with the source text used by his opponents. There is a puzzling reference in responsum 222 that requires clarification.

Havot Yair was first published by the author in Frankfurt am Main in 1699.⁴⁷ At the end of the volume, the author added nearly four full pages of what he called “omissions and source references.” The printers of the 1856 Lemberg edition inserted all the material in square brackets where it belonged in each respective responsum. The editor of the 1997 Jerusalem edition, R. Shimon Kotess, describes the significance of this material:

The crowning glory of the Lemberg edition are the notations of the author’s source references, which are inserted in the text itself in square

⁴⁵ Shyowitz, “You Have Saved Me from the Judgment of Gehenna” (op. cit.), 51. The preceding analysis is a synopsis of the development of the mourner’s kaddish based on the relevant responsa and codes, most of which are found in Shyowitz’s footnotes.

⁴⁶ *Mekor Hayyim* II, 174–175.

⁴⁷ I viewed a copy of the *editio princeps* in the possession of the Bar Ilan University library.

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brackets and small letters. These notations are the tools for understanding R. Bacharach's Torah; they enable the reader to follow and clarify the sources used by the author. Often they are the sole clues to understanding the author's intention in places where he abbreviated his remarks and mentioned various rabbinic statements and laws with non-specific references; the source references permit the student to check the quotations at their source and thereby understand the author's intention.⁴⁸

R. Bacharach added one such source reference to our responsum. At the end of the *editio princeps*, on page 271, after the words "his daughter should say the kaddish," he inserts the following reference: "See the Responsa of Rabbi Samuel de Medina, *Orach Hayyim* 6."⁴⁹ In the Lemberg edition, this reference was correctly inserted between the words "his daughter should say the kaddish" and before "the sages and *parnassim* of the congregation did not object." This is where it appears in all subsequent editions. Could it be possible that R. Bacharach inserted a reference to a source that substantiated the lenient position of the sages of Amsterdam with whom he disagreed? Upon perusing the aforementioned responsum of de Medina, one finds that it deals with an unrelated issue, namely, a dispute between Maimonides and Rabad regarding an *eruv tavshilin* that was eaten before Shabbat, and has no relevance to the issue at hand. It seems that this source-reference was entered incorrectly by R. Bacharach himself, in the appendix to the first edition, and transposed to the square bracketed comment in the Lemberg edition, a fact that no one seems to have noticed.

It is tempting to suggest that the author intended to cite another responsum of de Medina, number 34 (in older editions number 35), regarding an Ashkenazic congregation that questioned the propriety of changing its prayer ritual to the Sephardic custom. Bernard Septimus devoted an entire study to this responsum, in which he discusses the confrontation between Ashkenazic and Sephardic congregations in the Spanish diaspora and the pressure exerted upon Ashkenazic communities to change their synagogue ritual, including adopting Sephardic *piyutim* instead of those of Kalir, which amounted to abandoning an ancient and

⁴⁸ See Responsa *Havvot Yair*, footnote 3, p. 9 (translation mine)

⁴⁹ R. Samuel de Medina (1506–1589), known by the acronym *Maharashdam*, rabbi, halakhic authority, and communal leader of Salonika, was the accepted halakhic authority both in his own and succeeding generations for European Turkey and the Balkans.

honored custom.⁵⁰ R. Samuel de Medina rejected the primary argument of those who opposed the change, namely, the force of ancestral custom. Septimus writes: “De Medina quickly rejected this argument: In his view, ancestral custom [*minhag avot*] is only obligatory when an infraction of the law is involved.” The principle that a custom does not have the authority to override a prohibition is well-known; but de Medina went further and argued that this is the *sole limitation* on altering a custom, and he argues that there is no problem with changing a standing custom as long as there is no prohibition involved. For one who wants to change old customs, or institute new ones, this ruling was a boon.⁵¹

If this was the responsum to which R. Bacharach was referring, then perhaps he meant to imply that the sages and *parnassim* of the Amsterdam community relied on de Medina’s ruling to approve the new practice of a daughter’s reciting the mourners kaddish, for it entailed no infraction of the Law. After all, if de Medina was willing to let an entire community change its ancestral custom of prayer, their entire *nusah ha-tefilla*, might it not seem reasonable that he would permit modifying the mourner’s kaddish and allow a daughter to say the kaddish for her father in the relative privacy of the deceased’s home?

The above analysis is admittedly speculative and conjectural. However, it illustrates the attitude of a major sixteenth century Sephardic authority toward changing the prayer rite, an “honored custom of Israel,” and demonstrates the latitude that he allowed both to individuals and communities to exercise “self-expression” and adopt an entirely different *siddur tefilla*. It is entirely possible that R. Bacharach made an oblique reference to this Sephardic ruling in anticipation of objections likely to be voiced by Ashkenazic *posekim* to women’s recitation of kaddish.

⁵⁰ Bernard Septimus, “Linguistic Ideology and Cultural Hegemony: A Responsum of R. Samuel de Medina, Its Sources and Implications” [Hebrew] in *Rishonim va-Aharonim: Studies in Jewish History Presented to Avraham Grosman* (Merkaz Zalman Shazar, 2010), 293–308.

⁵¹ Septimus, 295, and fn. 9.