Rabbi May I? Taking Responsibility for Psak in a Post-Feminist Age
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A few years ago, I had the good fortune to be invited for jury duty, and the even greater fortune to survive the selection process and find myself serving as a juror for a Federal drug trial for two weeks. The case was straight out of fiction: the four defendants had masqueraded as New York City police officers in order to put a fake sting on a drug transaction. Much to their surprise, the defendants discovered only too late that the drug dealer they were trying to bust was actually a federal agent from the Drug Enforcement Agency pretending to be a drug dealer. The evidence against the four defendants was not equally strong, and in the end we convicted all four of attempted armed robbery, and one of them for conspiracy to acquire cocaine with intent to distribute. It was difficult to come out with such a mixed verdict, but the key difference was a confession that could be used only against the person who uttered it. That guy got a very long mandatory drug sentence while his co-conspirators got off with much lesser sentences for attempted robbery.

After the verdict was read, the jurors were sent back to the deliberation room to await the presiding District Court judge, who wished to thank us for our service. My fellow jurors were excited about the opportunity to speak with the judge and—when the judge arrived—shouted out in unison and without prior coordination the same question: "did we get it right?"

This questioning of the judge felt like students looking in the back of the teacher's copy of the math textbook to make sure they got the answer right and I realized that the impetus behind the question both intellectually and psychologically points to the strange

relationship between knowledge, truth and responsibility in the American jury trial experience.

The practice of American law often operates within what I would call a fallacy of law as truth. What I mean by this is that despite the fact that all the participants in a legal drama are fully aware of the fact that American law is a construct shaped by precedents over a long period of time and subject to the whims of multiple authors and interpreters, lawyers and judges pretend that there is a single entity called “the law.” It is almost as if this law is personified and has agency such that a lawyer can say that “the law” demands that you side with my client or a judge can write that “the law” wants to be fair to all ethnic groups. Even legal academics are not above this fallacy; certain types of scholars will write articles articulating a uniform philosophy of law on the basis of many disparate cases even in different areas of law and different jurisdictions. Sometimes, American legal practitioners are aware of the fallacy under which they operate but employ it because it is productive value and sometimes they are unaware of the fact that it is a fallacy at all.

As a juror in a courtroom, though, one cannot but be affected by the fallacy. Within the courtroom, the jury is socialized to believe that the trial is about the pursuit of a single true and correct ruling demanded by “the law.” Each lawyer turns to the jury and attempts to convince it that the law requires the jury to find for their client or for the state. In other words, each side presents its case as if “the law” compels the jury unequivocally to find for it. The presence of the presiding judge further socializes the jury into this notion of a single legal truth by occasionally interrupting the proceedings to decide on minor bits of procedure—sustained or overruled.

Thus when it comes time for the jury to reach a verdict, it is possible as a juror to think that the process is like a test in school: there is a correct answer which they are expected to try to figure out. The jury deliberates on the opposing narratives of what "the law" demands before deciding which one is the single truth.

If we reflect on these issues further, though, we can realize that the very process of the trial is evidence that the fallacy of a single legal truth *is* a fallacy. If each side can frame its case through an interpretation of the law that finds unequivocally for its interests it should be clear to us that the notion of a single legal truth in American law is always just a productive heuristic device.

In fact, if the purpose of the trial would be to determine the correct answer, the American system should eliminate the jury completely. Since the judge is better schooled and usually smarter than the aggregate juror, we would be more likely to get the correct answer if the judge figured it out on her own. If we had a math competition and needed to get the correct answer, would we have the expert teach a novice and have him answer the question or would we have the expert answer the question herself?

What is the purpose of a jury? One purpose is to dissipate some of the power that had historically been located in a judge's hands. Now if law was just a computation, it wouldn't so much matter that the law was in one person's hands; but since determining a legal ruling involves subjectively choosing from among multiple options, there is a significant degree of subjectivity involved in such an act and that subjectivity is dangerously empowering. So the American system relieves the judge of the power to rule and hands that power to a jury of one's peers. In the course of doing that, the structure of judge and jury makes manifest the distinction between the legal fallacy of a single legal

truth and the reality of a subjective determination of a verdict from among multiple options. In other words, while the jury may think that its purpose is to figure out the one true legal answer, *the very structure of a jury system testifies to the fact that they have more than one possible choice*. Moreover, because the jury system relieves the judge of this subjective choice it places responsibility for that choice squarely on the jurors. This means that whereas the judge through her rulings from the bench contributes to the fallacy of a single truth and to justice as an exercise in figuring out what “the law” requires, the jury symbolizes the fact that a verdict requires someone to take responsibility for multiple options within the law. The trial jury embodies the taking of responsibility for a legal choice.

A juror’s responsibility is no light matter. Jurors must weigh the evidence and bear in mind that a decision to convict could ruin a man or woman’s life, while a decision to acquit could have disastrous consequences for the community. It is sometimes easier for jurors to think of their role as determining “the law” as truth so that they do not have to feel the responsibility of their choice. But when you issue a mixed verdict that puts worldly realities at odds with legal truths, the burden of one’s responsibility is often too much to bear. My fellow jurors turned to the judge because they wanted him to reassure them with the voice of law as truth that they had done good, but also because they wanted to share or dump the responsibility for their choice back on the judge.

Allow me now to segue from U.S. law to Jewish law, from the jury trial to the setting of a petitioner asking a rabbi for a *Psaq*—a ruling on an issue of Jewish law. Within this setting we need to think again about the interplay of knowledge, truth and responsibility.

Traditionally, people turn to their rabbis with questions because these are the people with the knowledge to resolve them: they speak the language of Jewish law. Like the American legal discourse the Jewish legal discourse also operates with the fallacy of a search for a single decisive answer to the posed question. The responsa literature much like American case law relies heavily on prior precedent to resolve new questions and in the process often piles up sources to support a single approach that will answer the question, leaving alternative or even contradictory materials by the wayside.

One would imagine, even, that Jewish law would be more inclined to engage in such an assumption of the law as a singular truth because of the theological belief that the primary canonical texts of Jewish law are divinely authored. Since Jewish theology believes that a single God laid the foundation for Jewish law, it would certainly follow that Jewish law assumes that a given legal ruling is a stand-in for God's command: the single truth is God's wish. I know many people who believe that when their rabbi instructs them in a specific practice, that instruction is the word of God speaking through God's human agent.

Despite this assumption based on Jewish theology, the nuts and bolts of Jewish legal writing present a different image. The Mishnah, the earliest uniform code of Jewish law is remarkable in the world of legal statutes because it codifies disagreement, citing multiple and even contradictory opinions on a given topic. In one place, the Mishnah even explicitly notes that minority opinions have been codified to enable later decisors to overrule earlier received traditions. It is hard to make a notion of a single divine truth cohere with the idea that one law applies now and another tomorrow.

One of the most popular Talmudic stories, the oven of Akhnai story, is directly relevant for this question. To summarize, the setting of the story is the rabbinic study hall during the time of the tannaim. Midst a heated debate surrounding the purity of a certain oven (pun intended) one rabbi, R. Eliezer says that the oven is pure while the other rabbis says the oven is impure. To prove that his own position is the one true position R. Eliezer invokes the supernatural. Several miraculous events take place, each one demonstrating that the divine court sides with R. Eliezer. But rather than submit to these heavenly proofs and concede defeat, R. Yehoshua proudly declares that the law is not in heaven.

In this story there is a single divine truth but the law is decided in contradiction with that truth. The story disconnects the quest for decisive law from God's role as law's originator. What's more, by turning God's into the minority voice, the story establishes that the law does not speak in a single voice even though it ultimately must act decisively as if it does. (elsewhere in the rabbinic canon, debate is understood as multiple divine truths, but within this story, the winning position is decidedly not divine—it disagrees with the divine).

In light of the Oven of Akhnai story, we can understand that even though many petitioners and rabbis consider their interaction and the rabbi's ruling in terms of the pursuit of a single divine truth, there is room within the tradition for another understanding of *Psaq*. I would like to suggest that we think of *psaq* less in terms of truth and more in terms of responsibility.

We approach rabbis with our questions both because of their knowledge base and because of their traditional willingness to take responsibility for our religious practices. This is a heady thing to ask of rabbis—to live with the responsibility for our decisions,

and increasingly rabbis are less inclined to do so. [I recently attended a meeting of Midwestern rabbis in which one rabbi said explicitly that he finds it difficult to be responsible for the rulings he is compelled by halakhah to issue.] Our rabbinical schools sometimes discourage rabbis from taking responsibility, instructing them to call other more senior or more knowledgeable rabbis with their questions. Even rabbis who make decisions are often more comfortable thinking of their *psaq* as mere computation so as to absolve themselves of the subjectivity that goes into reaching a certain answer. By thinking of *psaq* as truth the rabbi is often more comfortable with the burden of responsibility.

But we live now in a different age. The Enlightenment ushered in an era of personal autonomy that was only truly fulfilled when applied to the entire population by the feminist movement. Enlightened individuals nowadays bristle at the notion of patriarchy, patrimony and the absence of choice. The notion of arranged marriages, for example, is anathema to Modern Orthodox Jews though we are often only two or three generations removed from that practice. The Hasidic Rebbe as a figure responsible for all of life's questions is an antiquated figure for Modern Orthodox Jews, and the analogous notion of *Daas Torah* within the Haredi world is also widely panned within Modern Orthodoxy. And yet, despite the general desire for personal autonomy, we still all too often ask our rabbis to bear the burden of responsibility for our religious actions.

A few months ago I gave a talk returning to Blu Greenberg's famous "rabbinic will halakhic way" maxim in order to reassert that message within a call for women rabbis. Despite my strong affinity for the maxim, I think the maxim itself needs to be revisited because we are living in a time in which we no longer need to ask our rabbis to

bear all of our religious responsibilities—to take the hits for our desire for halakhic change. We've come along way as feminists and now need to take the next step and accept full autonomy for our own religious lives. As more and more of the laity have become knowledgeable and the gap between rabbis and laity has narrowed, it has become possible for us to turn to our rabbis as knowledge resources but to relieve them of the burden of a final ruling. *We can turn our rabbis into courtroom judges and ourselves into jurors.*

To exemplify this call to responsibility I would like to examine the halakhic question of women making הבדלה. At the outset I want to note that most of the literature written on this topic is interested in the question of women's obligation but not women's performance; in other words, *posqim* generally consider the question of women's obligation in הבדלה in order to determine whether the men in their lives need to or can perform this ritual on behalf of women. I am interested here in discussing the possibility of women's equality in the performance of this ritual to suggest that women are as obligated as men and can perform the ritual on behalf of men.

The Babylonian Talmud, that venerable prime source of Jewish legal rulings, does not explicitly discuss the question of women's making הבדלה, but it does discuss the question of women making קידוש , and הבדלה is often subsumed under the general category of קידוש: as one marks the entry of Shabbat, the other marks its departure.

At Berakhot 20b the Talmud cites three amoraic positions. The Palestinian scholar R. Ada bar Ahava says simply that women are biblically obligated in Kiddush. This position is interpreted by Abaye to mean that they are only rabbinically obligated, a preposterous interpretation that is challenged, without response, by Abaye's

contemporary Rava who shores up R. Ada's original position by explaining the basis for the biblical obligation. Though women are often exempted from time-bound positive commandments, there is an analogy within Shabbat between positive and negative commandments because of the myth that the word זכור from the Exodus version of the Decalogue and the word שמור from the Deuteronomy version of the Decalogue were uttered simultaneously. Thus within the context of Shabbat, women are obligated in all positive time-bound commandments. In his halakhic digest hilkhot, R. Yizhaq Alfasi (Rif) connects R. Ada with Rava, leaving Abaye out completely and establishing that women are biblically obligated to say Kiddush.

Elsewhere in the Babylonian Talmud we can reconstruct a passage from medieval citations that no longer appears in our Talmud printed editions or even our manuscripts but originally appeared in some versions of the Talmud. At Nazir 3b-4a within an internal debate in the laws of Nazir that is not relevant for our discussion, we find the Talmud engaged in a game of pin the verse on the law; for those of you who are not familiar, the Talmud often finds itself ping-ponging back and forth within rabbinic debates to ask how each side in the debate midrashically reads each biblical verse that the other side reads for its position. In this case, the Talmud asks what R. Shimon does with a verse regarding the Nazir that his disputants make great use of and the Talmud answers that he uses that verse to prohibit even the wine used for ritual purposes to fulfill a command. At this answer the Talmud asks that if the wine in question is for Kiddush and Havdalah then the Nazir couldn't possibly abstain from those because the oath of revelation at Sinai when זכור את יום השבת was commanded predates the vow of abstinence from such wine and in general halakhah proclaims all such vows against the Torah null and void. There is no

doubt that the question assumes that both Kiddush and Havdalah are biblically obligated. The reconstructed text, though, makes the basis for this obligation explicitly connected to the Decalogue: deriving the basis for Kiddush from the verse itself and the basis of Havdalah from the inclusion of the word particle *es* which is often considered unnecessary and therefore marked for interpretation.

Even without the reconstructed part of the text one can see that Kiddush and Havdalah are equated and that both are considered to have biblical force.

[Before continuing I want to note that there is no greater concentration of the legal fallacy of singular truth than the determination of an obligation's biblical or rabbinic force. Throughout the commentarial and responsa literature, medieval and modern rabbis act as if the force of a commandment is already determined and the only issue is figuring out from the disparate sources the nature of that force. But so many of our so-called דאורייתא laws are demonstrably rabbinic in articulation and it is clear that concern with the question of a law's force while relevant for the Talmud becomes much more essential for later decisors who use the answers to such questions as the basis for making certain priorities within the law. Rather than assuming a naivete on the part of our most learned rabbis I assume that these intellectuals were aware of the fact that their own study was not only uncovering but determining the biblical or rabbinic force of a given precept or prohibition.]

As one can see from Maimonides treatment of Kiddush and Havdalah in his Yad Hahazaqah, the default position is that Kiddush and Havdalah are biblically mandated ritual parentheses around Shabbat marking its entry and exit. As the Maimonidean

commentary *Maggid Mishnah* points out on this passage, Maimonides would certainly say that the obligation of Havdalah falls equally on both men and women.

The issue of women's saying Havdalah became more complicated in the 16th century on the basis of a 14th century source. In his commentary to the Tur, R. Yosef Karo cites an argument about the practice of women's saying הבדלה. Beit Yosef cites the provencal 14th century scholar R. Aharon Hakohen of Lunil's *Orhot Hayyim* to say that women should not recite הבדלה for themselves because הבדלה is not connected to the observance of the Sabbath prohibitions, but the rabbis connected it to a verse. There is no end to the confusion behind this position. First, one must assume that Orhot Hayyim has the missing section of Talmud Nazir because that is the only place הבדלה is connected to a verse. But in that context, the entire question of the pre-existing vow only makes sense if הבדלה is biblical? Second, the language is odd; if the obligation for women is rabbinic, why shouldn't they make הבדלה for themselves much as they say ברכות all the time for things that are only rabbinically obligated? Beit Yosef doesn't comment on either of these confusing features of *Orhot Hayyim*, instead invoking the 13th century Spanish scholar Rabbenu Yonah of Gerona who says, like Maimonides implies, that as women are obligated in Kiddush they are also obligated in Havdalah.

It is clear from his placement of Rabbenu Yonah that R. Yosef Karo prefers his legal position, and in Shulhan Arukh he makes that preference explicit by reordering the material. Employing Rabbenu Yonah's language R. Yosef Karo says that women are obligated in Havdalah just as they are obligated in Kiddush, but notes that there is a dissenting opinion.

If Shulhan Arukh consisted of just R. Yosef Karo's rulings, there would be no question that women could recite Havdalah for themselves and for men. But the ashkenazic gloss on Shulhan Arukh, the 16th century R. Moshe Isserles decides to split the difference between the two opinions cited by Beit Yosef by suggesting that women should not recite Havdalah for themselves, but should hear Havdalah from men. In so doing Rema borrows the language of Orhot Hayyim but where Orhot Hayyim seems to suggest that a woman alone should not recite Havdalah because it's a ברכה לבטלה, a blessing in vain in light of her *lack of obligation*, Rema creates a compromise that says a woman *is obligated*, but in a unique circumstance *cannot fulfill her own obligation*, but should hear the performance of a man.

Rema's position demonstrates what is at stake in the choice to think of *psaq* as single divine truth or multiple human responsibility. Rather than functioning as a responsible poseq and choosing between the two positions, Rema suggests that both can be satisfied if women make sure to fulfill their obligation by hearing הבדלה said by a man.

This kind of compromise is unfortunately becoming all too common with contemporary *Psaq* as rabbis who conceive of *psaq* as divine truth are paralyzed into resolving their conflicts by attempting to satisfy all positions—a *humra* of the month approach. But this flight from responsibility is not the mark of a good *poseq*.

A rabbi friend of mine visited R. Shlomo Zalman Auerbach before he died and in the course of conversation the question of crackers came up. For reasons I don't want to get into, one could make an argument for crackers to get one of two different blessings before eating: מזונות or המוציא. R. Shlomo Zalman told my friend that he makes a מזונות on crackers, whereupon my friend said that he makes sure never to eat crackers without

some bread, allowing him to make המוציא on the bread to cover both. R. Shlomo Zalman quipped to my friend: "I guess that makes you frummer than I."

One of the biblical matriarchs, Rebecca, is the model for psaq as responsibility even within a notion of law as divine truth. After she encourages Jacob to trick his father Isaac for the blessing intended for Esau as the older brother, Jacob demurs, saying, "maybe my father will touch me, and I will be in his eyes as a charlatan and bring upon me curses rather than blessings." Rebecca's answer is the model of feminist responsibility. Even when the risks involve a divine curse, Rebecca takes responsibility: עלי קללתך בני: "your curse shall be on me my son." True religious leadership is a willingness to take on spiritual responsibility.

Rema's compromise is like the decision never to eat crackers without bread—it is at bottom a failure to take responsibility that is in the end irresponsible and here's why. Often women are not in situations where they can hear הבדלה from men. By calling their own ability to make הבדלה into question *Orhot Hayyim* creates a need to choose between obligation and no obligation. Rema's compromise creates a situation in which women are obligated but cannot, or believe they cannot, fulfill their obligation. In my childhood, I remember staying with a friend for Shabbat; when Shabbat ended they called his grandmother on the phone so she could hear הבדלה. Now the question of הבדלה by phone is quite problematic, but in a world in which a woman is obligated to hear הבדלה from a man but lives alone, what other option is there?

The aftermath of Rema's compromise is that even in the homes of Orthodox women who make Kiddush for their families, I have not encountered any in which the woman makes הבדלה. A few years ago, I lived near a university where a conference was

held at which a woman made הבדלה for everyone. The local Orthodox rabbi who was in attendance informed all who asked that neither men nor women had fulfilled their obligation to say הבדלה through her recitation.

But I would argue that there is plenty of room within halakhah to determine that women are biblically obligated to say הבדלה, that that obligation is equal to that of men, and that they can make הבדלה for men. In fact, within his discussion of this issue *Arukh Hashulhan* makes the observation that for the majority of decisors it would be possible for women to make הבדלה for men. And yet, few if any rabbis have made this choice. While they could easily side with Rambam, R. Yonah, Maggid Mishnah and Mehaber against Orhot Hayyim and Rema rabbis have generally chosen not to do so. Within a model of *psaq* as uncovering the single divine truth a decision to side with one side against a loud disagreeing voice is a spiritual risk that one's choice is against "the law"—against God. But if we recognize that *Psaq* can also be understood in terms of taking responsibility for a choice among multiple options we have the ability to ignore those positions that do not support our practice and take responsibility for that choice.

[Though it is not here the forum to enter into an entire discussion of participatory services I think it is important to explain how my argument affects that hotly contested contemporary issue. When Rabbi Mendel Shapiro wrote his original article on the topic he wrote it along the lines of a contemporary American Law Review piece which only exacerbated his attempt to construct a single-truth argument permitting the practice. Along the way, Shapiro wanted to argue that every layer of Jewish law—rabbinic, medieval, modern—can provide support for the practice. In my opinion, though the piece is excellent, this type of argument opens itself up for critique—a critique that has recently

emerged. Several articles have now come out in response to Shapiro and much of the critique has focused on a specific reading of a certain Rishon or Aharon. In my view, though, such attacks miss the point. Shapiro's article provides a wide audience with access to the knowledge necessary to take responsibility for its practices. One need not satisfy every halakhic opinion; the existence of rabbinic texts justifying the practice allows a community to take responsibility for its own practices and follow that position. Because the counter-argument cannot eradicate all support for participatory minyanim, they do not pose a challenge to their continued implementation.]

As an ordained rabbi, I could stand before you and issue a *psaq* allowing women to make הבדלה for themselves and their male friends and family, but such a notion of *psaq* presumes that the person with access to halakhic knowledge needs to take responsibility for the actions of others. In my model I have provided each of you with the knowledge you need to take responsibility for yourselves and license yourselves to make that choice.