Halakhah And Morality
The Case of the Apostate City

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It is generally assumed, as a moral matter, that it is wrong to punish innocent people. So Abraham argues with God when he considers destroying Sodom and Gomorrah, "Wilt thou also destroy the righteous with the wicked?" (Genesis 18:23). One is puzzled, therefore, by the passage in Deuteronomy prescribing collective punishment for an apostate city, a city in which the inhabitants are seduced into worshiping other gods. If, upon investigation, the charge of idolatry is well-founded, Moses will order his people:

Thou shalt surely smite the inhabitants of that city with the edge of the sword, destroying it utterly, and all that is in it, and its cattle with the edge of the sword. And thou shalt gather all the spoil of it into the midst of the open place of the city and shalt burn with fire both the city and the entire plunder taken in it. (Deuteronomy 13:16-17)

This passage does not mention any explicit distinction between the wrongdoers and the innocent. Is everyone put to death, the worshipers and the minority that did not worship, or not? What about the families of the wrongdoers? The minors—are they punished or not? The dilemma is strengthened when, in regard to the property of the city, the text takes pains to stress the inclusion of "all the spoil of it" and the "entire plunder taken in it." Yet there is no explicit mention of the different categories of people living in the city.

The destruction of the apostate city appears to be collective punishment for idolatry. According to this reading, the usual constraints of warning and evidence that govern trials of individual idolaters do not apply. Apparently, this is not a trial, not a legal procedure, but a declaration of war against a rebellious city. Though modern commentators have so understood the passage, the Midrash Tannaim opted to limit the scope of the punishment by utilizing an inherent ambiguity in the text. Prior to the passage quoted above, Deuteronomy 13:15 reads: "[T]hen shalt thou inquire, and make search, and ask diligently; and behold, if it be truth, and the thing certain, that such abomination was done among you." The Midrash inquires: "Such abomination was done among you. Why was this said? Since it says, 'Thou shalt surely smite,' I hear both the righteous and wicked, therefore Scripture said: 'Such abominations were done among you'... only those are guilty." ¹

The Midrash explicitly considers and rejects the option of collective punishment implied by the verse "Thou shalt smite." Only the idolaters are to be put to death and not the righteous. According to the Midrash, verse 15 which commands inquiry and diligent search qualifies the verse immediately following "Thou shalt smite." The Midrash exploits the requirement of careful inquiry in order to reduce the collective tone implied by the language of war in the

¹Midrash Tannaim to Deuteronomy 13:15.
This interpretive dilemma stems from a deep tension in the biblical material itself, where different and arguably contradictory attitudes appear on the issue of collective punishment. The rule of individualized punishment on this question is captured in Deuteronomy 24:16, as invoked by Abba Hanan. King Amazia behaved according to this approach (II Kings 14:6): Jeremiah restated the same principle (31:28–29); and Ezekiel paraphrased it (18:2–4). As opposed to these passages that strengthen the value of the individual, the Bible contains many passages that seem to merge individual in a social or familial collective. According to some translations of passages in Exodus, the expression poked 'avon is rendered as "punishing the iniquity" and thus we encounter the proposition: "I the Lord thy God am a jealous God, punishing the iniquity of the fathers upon the children unto the third and fourth generation of those that hate me" (Exodus 20:5). Moreover, the Bible includes instances of collective punishment. Jacob's sons kill the males of Shekhem in revenge for Hamor's deeds. David turns over Saul's sons to the Gibeonites for the sins Saul committed against them when he broke Israel's sworn oath, and Joshua stones Achan's whole family for Achan's sin of stealing from the devoted property: "And Joshua took Achan the son of Zerah ... and his sons,  

"in Midrash Rabba to Numbers the conflict between collective and individual punishment in the Bible gave rise to a daring and rare moral argument between Moses and God: "When the Holy One, blessed be He said to him 'Visiting the iniquity of the fathers upon the children,' Moses said to him "Sovereign of the Universe! Many are the wicked who have begotten righteous men. Shall the latter bear the iniquities of their fathers? Their worshipped images, yet Abraham his son was a righteous man. Similarly Hezekiah was a righteous man, though Ahaz his father was wicked. So also Josiah was righteous, yet Amon his father was wicked. Is it proper that the righteous should be punished for the iniquity of their fathers?" The Holy One blessed be He, said to him: 'You have taught me something! By your life I shall cancel My words and confirm yours, as it says "the fathers shall not be put to death for the children, neither shall the children be put to death for the fathers." And by your life, I shall record these words in your name; as it says, "According to that which is written in the book of the law of Moses, as the Lord commanded."" (Numbers Rabbah, Hugat 19:33). See also Exodus 34:7.

rest of the passage. According to the midrashic reading, the requirement of inquiry signals a paradigm of individualized trials rather than one of war against a collective entity. Following this daring interpretation of the passage, the halakhhah demands that witnesses and evidence be brought against each of those who are put to death, as in any other trial. The conflict between these two themes, trial and war, and the choice for the trial paradigm appears in Maimonides' description of the case in his Laws of Idolatry:

But if they [the inhabitants of the city] persist in their folly the Court charges all Israel to organize an expedition against them. They lay siege to, and wage war upon them till the city is taken by storm. After it has been taken a large number of tribunals is set up to try the inhabitants. Any one against whom two witnesses come and testify that he worshipped idols, after having been warned is set apart.

So far we have discussed the distinction between the righteous and the guilty in the city at large. Does the same distinction apply within the family? What rule applies to children whose fathers have sinned together with the majority of the city? Relying on the phrase, "the inhabitants of that city," some sages ruled that even the children should not be spared. Abba Hanan challenges this generalization by relying on another verse from Deuteronomy which sets the grounds for the principle of individual responsibility within the family: "Fathers shall not be put to death for children neither children put to death for fathers; every man shall be put to death for his own sin" (Deuteronomy 24:16). According to Abba Hanan, the principle of individual responsibility applies to the apostate city and, therefore, the children should not be put to death.

Sifrei on Deuteronomy 94. This version of the Sifrei appears in the Vatican and London manuscripts of the Sifrei and not the others. See concerning that issue, Sifrei L. Finkelstein edition, p. 155 note 5.
and his daughters... and stoned them with stones" (Joshua 7:24–25).

Faced with these and other contradictions in the biblical text, biblical scholars have suggested several solutions. The first of two prominent approaches claims that biblical law underwent a process of internal development; contradictions stem from a breach between an earlier layer, when collective punishment was still customary, and later developments favoring individual responsibility. The rule in Deuteronomy "every man shall be put to death for his own sin," is considered a later addition, coming after the erosion of the family and the patriarchal status of the family head. Internal contradictions are thus resolved by assuming an internal process of historical development.

Contrary to this approach, Moshe Greenberg claims that biblical law is consistent across history. Even in earlier legal annals of the Torah there are no records of retributory punishment such as for instance, killing a killer's son in return for his having killed somebody's minor child, which appears in the Hittite laws and Hammurabi code. In criminal law, the principle of personal responsibility is hence ancient and accompanies biblical law from its inception. Regarding the instances of collective punishment found in the Bible, Greenberg claims they are not in the purview of criminal law, rather they are limited to cases such as idolatry where God's honor is directly and gravely injured.

Among the cases that Greenberg mentions is the apostate city. Whether we adopt the developmental approach or Greenberg's thesis, the interpreter confronting the biblical material faces this dilemma: On the one hand, the Bible declares the principle of individual punishment; on the other hand, the biblical material reveals a practice of collective punishment.

At the fork of this interpretive dilemma, we find the enigmatic passage on the apostate city. Whether the passage should be read as collective punishment depends on the prior question whether Deuteronomy 13 stands for a strong presumption of individual responsibility. This presumption would imply that Deuteronomy 13 states the rule, all cases of collective responsibility therefore count as isolated exceptions. Abba Hanan asserts that this is the halakhah and therefore applies the general rule of individual responsibility to his interpretation of the apostate city. On the whole, rabbinic opinion follows Abba Hanan and limits other possible cases of collective punishment accordingly.

Yet the fact remains that both the paradigms of collective punishment and individual responsibility coexist. How, then, does an interpreter decide which is to follow? Perhaps collective responsibility is the rule and Deuteronomy 13 the exception. Can a rabbinic interpreter make an explicit moral argument for the individualistic paradigm and then postulate it as the norm in order to limit the scope of collective punishment? If in the end the interpretation rests on moral criteria, we witness the way in which moral arguments invariably assert themselves in the interpretive creation of the Halakah.

To gain historical perspective on this problem, let us reflect on a medieval debate between Rabbi Meir ha-Levi Abulafia of Toledo, Spain, known as Ramah or R. Meir, and Rabbi Aaron ben Meshulam of Lunel, Provence. The debate centers on Maimonides' treating the destruction of the apostate city as a clear case of collective punishment of families: "If a majority of the inhabitants worshipped idols, the wives and children of the idolaters are slain with the sword" (Laws of Idolatry IV:6). Maimonides ruled that the children are put to death and extended the punishment to the sinners' wives.

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The inclusion of the sinners' wives is particularly puzzling since it is not mentioned in any previous rabbinic source. Moreover it is hard to understand Maimonides' distinction between the women and the rest of the righteous people in the city who, in his view, are saved.

The debate is worth noting, was carried out against the background of far-reaching theological disputes. R. Meir had initiated a polemic against the growing influence of Maimonides' *Mishneh Torah*. His criticisms centered on passages in *Sefer haMada'tah*, the first book of the Code, where Maimonides codified an extremely spiritual notion 'olam haba' [the world to come] in accordance with the Aristotelian conception of the eternity of the soul. This notion of the eternity of the soul implied a denial of bodily resurrection. R. Meir, himself an early admirer of Maimonides, became irritated by Maimonides' widespread impact and decided, after agonizing, to declare an open war against the great master. Because, at the time, Lunel was the center responsible for the diffusion of the *Mishneh Torah* throughout Europe, and because its scholars kept an ongoing written correspondence with Maimonides, R. Meir decided to begin his campaign by recruiting the support of Lunel's scholars. He therefore wrote to this school first and this correspondence developed into what became known as the "resurrection controversy," the first among the controversies on Maimonides that divided European Jewry.7

R. Meir realized that Maimonides' Code was perceived as almost infallible in Lunel. He decided therefore to add to the main criticism concerning the resurrection doctrine twelve additional reservations to different halakhot in the Code: in the context of the controversy these reservations seemed minor but their aim according to the Ramah was to prove that even in the *Mishneh Torah* "there is no grain without chaff." The scholars of Lunel however were offended by Ramah's tone and one of them, R. Aaron, sought to rebut R. Meir's criticisms point by point. One of these points was Maimonides' ruling on the collective punishment of children and wives in the apostate city.

Specifically, R. Meir challenged Maimonides' position on the fate of women and children. In regard to the wives' punishment, R. Meir asks the scholars of Lunel:

Moreover it is puzzling that he [Maimonides], said to slay the children and the wives with the sword. These women, who are they like? If they did worship idols, they are themselves like others in the apostate city, and if they did not, is it right that X will sin and Y will be punished? If we save the garments of the righteous women because they are as their bodies we should most certainly save the women themselves.8

Thus R. Meir invokes two arguments for saving innocent wives from punishment. First, the straightforward moral argument: an innocent wife should not be punished for her husband's sin. Second, from a passage in Sanhedrin 112a providing that women's garments are to be saved like their bodies, generates an *a fortiori* argument: if the garments are saved, so too the women. Next R. Meir turns to sparing the children:

And he also said, that all the children are destroyed. Far be it from God to commit evil! And where does it say that minors are guilty that we are making this one guilty.... And if you say because it is written "destroy the city and all that is in it." [my reply is:] In the case of the stubborn and rebellious son, Scripture does not exclude minors either. But do we find the Talmud asking how do we know that minors are exempt? . . . I wonder where does

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7For an extensive description of Ramah's role in the controversy, see B. Sephus. *Hispanic Jewish Culture in Transition* (Cambridge, MA: Harvard University Press, 1982).

Scripture condemn minors, since it mainly tends to exempt them.

Against the ruling by Maimonides stating that the children are put to death, R. Meir Abulafia makes a strong moral claim — far be it from God to commit evil. As in the previous case, he first states a moral argument and then cites evidence from the Talmud. In his summary, R. Meir Abulafia rules out the attempt to draw conclusions from the generalized formulation of the biblical language which, in his view, does not apply to minors. As the ruling on the stubborn and rebellious son excludes minors despite the absence of explicit restrictions in the Torah, so should this approach be enforced in the case of the apostate city.

R. Aarón ben Meshulam of Lunel replied to R. Meir Abulafia’s allegations regarding both cases — wives and minors. I will focus on his statement on minors:

As for your great astonishment at the words of the Rabbi our teacher [Maimonides], who stated that the children are slain with the sword, you say: “Far be it from God to commit evil! Where have we found that minors are condemned that we condemn this one.” And your thoughts were amazed and your ideas bewildered. Wherefore your wonder and amazement? Open your eyes and see the congregation of Korah who, with their wives and children, were swallowed up alive by the earth. And look at the people of Yabesh-Gilead who failed to come to Mitzpah, who were slain with their women and children and, if the men sinned how did the women and children sin? And it also says about Saul “let seven men of his sons be delivered to us, and we will deliver them up to the Sword” and if Saul sinned, how did his sons after him sin? But this is because the Holy One, blessed be He, judges idolatry and oaths and the profanation of His name with great severity, and destroys and annihilates all so that the rest may see and hear, since man loves his younger more than himself. 9

R. Aaron mocks R. Meir’s moral outrage against Maimonides’ rule: isn’t the Torah itself full of collective punishment? R. Aaron therefore interprets the ruling on the apostate city, in light of the collective punishment meted out to Korah and his congregation, to the men of Yabesh-Gilead, and to Saul’s sons, all of them biblical passages. Relying on these instances he concludes that the wives and children of idolaters are also punished collectively. In defending Maimonides, R. Aaron assumes a paradigm of collective punishment as normal, and applies this paradigm to the women and children of the apostate city.

R. Meir, for whom the assumption that minors are never condemned was self-evident, did not retract after R. Aaron presented him with these biblical examples. In his reply to R. Aaron he defined all these cases as either ad hoc rulings or heavenly decreed deaths from which no generalization can be made: “As for the cases of Yabesh-Gilead and the Gibeonites, these were ad hoc rulings. Since the court may punish beyond the letter of the law in order to erect a fence around the Torah.” According to R. Meir the norm—which also applies to the case of the apostate city—is individual punishment. Everything departing from this norm should be treated as an isolated exception. The controversy between R. Aaron and R. Meir does not center on whether there are cases of collective punishment in the Bible, but on whether these cases constitute the norm rather than the exception.

R. Meir’s moral argument is explicit — “far be it from God to commit evil.” In this starting point of his argument against collective punishment there is no reference to philological and linguistic considerations, and the collective

9For a similar justification of the collective punishment concerning idolatry, see Maimonides’ own explanation in The Guide of the Perplexed 1:54.
tone of these verses is restricted. A moral argument served as a criterion of choice between two interpretive possibilities, and as such it had an effect on the halakhah emerging from that interpretive process. Considerations internal to the text are insufficient to support this process of interpretation. Both options of individual responsibility and collective punishment find support in the text. In this type of case, the criteria for interpretation lie beyond the text in moral principles.

Although the principle of individual responsibility is declared in Deuteronomy 24, the Bible itself does not furnish the criteria with which we can rank this principle against the textual evidence of a practice of collective punishment. This ordering is done by the interpreter in assuming a general principle that guides his interpretation. For R. Meir, the general principle is individual responsibility; for Maimonides it is the imperative of total war against idolatry.

In this case as in many others the relationship between Halakhah and morality comes into relief where moral arguments serve as a criterion of choice between different interpretive possibilities. Because halakhic interpreters are keen in discovering and creating textual ambiguities, thus creating interpretive options, we should remain open and sensitive to the infusion of moral principle by way of interpretation.