

Parsha Ponders

Mishpatim | January 31, 2019 | 26 Shevat 5779

*Inconclusive consent*¹

ואל-אצילי בני ישראל לא שלח ידו ויחזו את-האלקים ויאכלו וישתו

[Hashem] didn't send His hand against the dignitaries of the Children of Israel, [although] they had seen G-d and ate and drank²

After detailing various monetary and ritual laws, the Torah returns to the story of the Divine Revelation at Sinai. As the Jews were receiving the Torah, the dignitaries of the Jewish People feasted; they ate and drank. While this normally could have been justified, they were in front of the Divine Presence. The environment commanded a very high level of awe and respect. A public feast wasn't appropriate at that moment, and the Torah rebukes them for it. These dignitaries could have been wiped out at that moment, but Hashem had compassion and spared them, so as to not ruin the celebratory event of the giving of the Torah³. Instead, the dignitaries were later punished with death when they complained unjustifiably⁴. What's hard to understand is that these dignitaries weren't average people. They were very pious and learned. Shouldn't they have had the proper sensitivity for the occasion? How could they shamelessly feast in front of Hashem's presence?

There's a possible way to justify their actions. The Jewish people accepted the Torah by famously saying נעשה ונשמע, we will do and we will listen⁵. It showed an exceptional level of faith, as they were proclaiming that they will do whatever Hashem commands, even before hearing what it is they will be obligated to follow. However, this declaration wasn't entirely voluntary. *Chazal* teach us⁶ that Hashem took Mount Sinai, flipped it over like a vat over their heads, and told them to accept the Torah. In those circumstances, it was practically impossible to decline. The Jews then⁷ declared נעשה ונשמע. We see that it was an acceptance under duress. This acceptance should be similar to the law a transaction with inconclusive consent, known in *halacha* as *asmachta*.

A case⁸ of *asmachta* which the *gemarra* discusses⁹ involves a case where someone lends their friend some money, and accepts their friend's expensive land as collateral. The lender tells their friend that they have three years to return the money, otherwise they'll get to keep the field. The borrower agrees. There is a dispute¹⁰ if the lender acquires the field in the case where the time passes and there was no repayment. Even though the borrower agreed to potentially lose his field, he assumed he would be able

¹ Based on Chasam Sofer Al HaTorah to Exodus 24:11

² Exodus *loc. cit.*

³ Rashi to verse 10

⁴ Numbers 11:1

⁵ Exodus 24:7

⁶ Shabbos 88a; Mechilta D'Rabbi Yishmael Masechta DeBeChodesh § 3; Mechilta D'Rashbi to Exodus 19:17; Midrash Tanchuma Noach § 3. For more sources, see the link in the next note

⁷ There's a major dispute how *Chazal* could say the Jews were forced to accept the Torah when the Torah says they openly declared their willingness. The Chasam Sofer seems to be understanding like the Mechilta D'Rashbi *loc. cit.*, which says that they only said נעשה ונשמע due to the duress of the mountain over their heads. For other approaches to this contradiction, see <http://parshaponders.com/shavuot-5778-part-one>

⁸ A common case of possible *asmachta* is that of gambling. Each party commits to give money if they lose, but they're really hoping that they'll win. When they end up losing, their parting of their money isn't really wholehearted, and the transaction may not have been binding

⁹ Bava Metzia 65b

¹⁰ Ibid 66b

to repay the loan. At the time he agreed to this arrangement he wasn't wholeheartedly committed. Therefore, there is room to say that he never actually intended to "sell" his land for the loan he received.

Rav Papa in that dispute proposes a way to determine what the borrower's intention was at the time the arrangement was made. If the lender finds the borrower on the day of the deadline enjoying a nice pint of beer, this shows his present state of mind. The fact that he doesn't have the money to repay the loan, and isn't frantically scrounging around for cash, shows that he is perfectly content to give up his land to the lender. We can therefore conclude that his original consent to the arrangement was valid.

We can use this indicator to justify the actions of the dignitaries. They accepted the Torah under the duress of having a mountain held over their head. It could have been concluded that their acceptance wasn't wholehearted, similar to the case of *asmachta*. The dignitaries intended to show that they genuinely wanted to accept the Torah. They therefore ate and drank with joy and celebration, to show that they were content with what had transpired. If so however, why are they rebuked, and later punished?

After Rav Papa proposes this indicator of consent, the *gemarra* rejects it by saying that perhaps the borrower is drinking beer because he is anxious and depressed that he is about to lose his field. He is trying to get drunk to alleviate his worries. We therefore cannot conclude that he wholeheartedly agreed to lose his field if he couldn't repay the loan.

So too by the dignitaries. Right before they later complained unjustifiably against Hashem, the Torah says that the Jewish people journeyed from the Mountain of Hashem¹¹. There's a *Midrash* which says¹² that the Jewish people ran away from Sinai like schoolchildren run away from their classes. The Jewish people had had enough, and they were worried they would receive more laws. Their later actions, including those of the dignitaries, showed that the acceptance of the Torah wasn't entirely sincere. As such, the dignitaries' acts of celebration with food and drink was really in order to alleviate their anxiety. It therefore was inappropriate for the occasion, as they were in front of the Divine Presence. Consequently, they were later punished when the time was more appropriate.

Good Shabbos

¹¹ Numbers 10:33

¹² Brought by Ramban to verse 35 and Tosafos to Shabbos 116a s.v. פורענות. The Chasam Sofer for some reason says that Rashi brings this *Midrash*. For more on this *Midrash*, see <http://parshaponders.com/behaalosecha-5777>