Does Halakha Evolve? Thoughts on Speciation and Sectarianism

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The practice of halakha changes. Every shift in materials, technology, economic structure, and political framework necessarily creates new practical halakha. Can plastics be kashered? Is the completion of an electrical circuit forbidden on Shabbat? May Jews own stock in a corporation that serves hametz in its cafeteria over Pesah? How should we relate to a secular but Jewish State? What are our responsibilities in a secular multi-faith democracy? No matter what answer one chooses, any unprecedented situation creates unprecedented practical halakha.

The fact of practical change, however, can be explained in many different ways. One can argue for the existence of an unchanging, abstract halakha, and understand practical change as the assignment of new cases to existing categories: Are plastics ceramics or glass? Conversely, one can argue that halakha has no necessary trans-temporal identity, and is merely whatever the Jewish people decide it is at any given moment. Plastics may be ceramics today and glass tomorrow, and a category unto themselves the day after, and the day after that the question may seem wholly irrelevant to religious life.

Modern Orthodoxy is driven in part by a valorization and hyperawareness of change, by identification with “There cannot be a House of Study without creative contribution” (BT *Hagigah 2b)*, far more than with “The new is forbidden by the Torah” *(Mishnah Orlah* 3:9 as creatively repurposed by Hatam Sofer). We therefore must grapple seriously with the profound theological and practical challenges posed by the acknowledgement of change, including the following:

1. The legitimacy of our worldview and the authority of our halakhic interpretations are grounded in the claim that they represent a current embodiment of a living tradition extending back to Sinai. Change raises the question of identity: If we are not thinking and

practicing the same way as our ancestors, what justifies our claim to be their Torah heirs? The power of this question is roughly proportional to the radicalness of the halakhic and hashkafic changes we acknowledge.

2. In the absence of a recognized central authority, change in our community inevitably happens piecemeal and haphazardly. What maintains us as a community when our thoughts and practices vary widely? To what extent should change be limited by the desire or necessity to have all members of our community be able to eat together, pray together, recognize each other as Jewish, and so forth?

3. Change raises the question of standards. If conformity to the past is not necessary, how do we distinguish legitimate from illegitimate changes? Might this be an issue of quantity as well as quality? Is this a decision we make with complete autonomy, or are we to some extent constrained by the opinions of other Torah communities that we acknowledge as legitimate even while we disagree with them profoundly? Must we sharply distinguish ourselves from Conservative Judaism's theories of change, or can we say that we disagree only with its application of those theories, or even that change is not necessarily a point of denominational disagreement?

4. Change increases responsibility. Rabbis who proclaim the immutability of halakha can, when confronted by moral challenges to halakha as it stands, proclaim their deepest sympathies and yet contend that they cannot change anything. Acknowledging change means that the status quo has much more limited deference, and that critiques, even those rooted in externally derived values, have more force. This has been brought home to me many times at events related to *agunot*.

Modern Orthodoxy urgently needs a persuasive theory and compelling rhetoric of halakhic change to deal effectively with these issues. We have a great deal of philosophic work to do before we get there. My goal in this article is to advance the conversation by addressing some implications, strengths, and weaknesses of a rhetorical device that is often understood as representing a theory: the assertion that "halakha evolves."

Why is saying "halakha evolves" different than saying "halakha changes"? Theories are often embodied in metaphors, and metaphors for liberal arts subjects are often drawn from science (which itself relies more on metaphors than is commonly acknowledged). For at least the past 150 years, the most popular scientific metaphor for change has been Darwin's Theory of Evolution. Saying that "halakha evolves" implicitly makes the claim that the process of halakhic change shares vital characteristics with the process of biological change that Darwin described and sought to explain.

But this metaphor needs to be interrogated to see what it means, and whether it is true and useful either intellectually or rhetorically.

A fundamental challenge to the intellectual usefulness of the evolutionary metaphor is that scientific theories are descriptive and predictive, whereas a theory of halakha will in addition be prescriptive.

Any claim about how halakha has developed in the past carries with it the implicit argument that similar development should be expected *and approved* in the future. This confusion between facts and values, between "will be" and "ought," is familiar from Social Darwinism, and theorists of halakha should not fall prey to it.

A fundamental challenge to the rhetorical usefulness of the evolutionary metaphor is that it (deliberately) alienates those who reject evolutionary science from our halakhic community. "Halakha evolves" has the effect of connecting the acceptance of halakhic change with willingness to engage contemporary science. This is good for morale, and builds support within our community, which has little outward tolerance for obscurantism. But I suspect that it also creates a bias against our position among people who have ranged themselves against macro-evolutionary biology, and makes them less willing to consider our position legitimate.

Why should this matter? Darwin famously sought to account for the origin of species. Speciation classically occurs when two populations with a common ancestry diverge to the point that they can no longer interbreed. There are two potential halakhic analogues to this process:

a. when scholars from two halakhic camps no longer allow each other's ideas to fertilize their Torah conversations
b. when the halakhic positions of two halakhic communities lead them to forbid intermarriage with each other.

Each of these, I submit, should be avoided—the halakhic locus for my contention is the prohibition of *lo titgodedu*, "Do not form factions." So we might be better off keeping these two issues separated.

It must be noted that the interbreeding standard for speciation can be challenged in a variety of ways. Claddists focus on the extent of genetic difference rather than on the compatibility of genitalia, and many intuitively distinct species, such as lions and tigers, turn out to be biologically compatible and reproductively separated only by practicality, such as incompatibility of habitat or waking hours. It is not clear to me which concept of speciation is the best analogy to the halakhic factionalization that the Torah opposes.

Now scientific theories themselves change (evolve?) over time, and this has been particularly true of the Theory of Evolution. For example: Is evolution gradual, as Darwin himself thought, or characterized by "punctuated equilibrium," that is, by long periods of stability interrupted by brief periods of dramatic change, as Stephen Jay Gould proposes? Clearly, "halakha evolves" will have very different implications depending on which version of the theory one adopts as metaphor.

My sense is that most users of the phrase intend it gradualistically, as a way to respond to concerns that proposed changes might snowball. But that approach did poorly explaining the fossil record, and it might do as poorly explaining the history of halakha. Perhaps we are living in the midst of a halakhic equivalent of the Cambrian explosion. It is not obvious to me that we should only legitimate incremental change, or that all the changes currently being considered within Modern Orthodoxy are incremental.

Darwin's theory became much more attractive once it was paired with Natural Selection, or "survival of the fittest," as its causal mechanism. Natural selection is often taken to suggest that change over time inevitably works out for the best, as only those mutations that increase "fitness" survive. So too, we might think, halakhic change is always for the good over time, as the negative changes will die out and the positive changes will reproduce, and overall the halakha that emerges will be fitter.

But this is a misunderstanding of both science and halakha. Survival of the fittest is a tautology: It cannot independently predict anything, as we cannot know in advance what is fittest. Moreover, short-term fitness often leads to medium-term extinction. Halakhic Judaism is not parallel to the entire arena

of life, nor even to the animal kingdom; it is at most a species, and thus every mutation puts it at risk of extinction. Biological evolution is horribly inefficient, and can afford to be, but halakha does not have the same luxury.

The second great modification of Darwin came with the discovery of genetics. This field itself has been in almost constant flux, but here are two ongoing developments that I think are significant for the halakhic analogy. First, the connection between genotype and phenotype grows ever more complex—the same gene or set of genes can find radically different expression depending on environment and a whole set of iterative genetic "switches." Second, mutations more and more seem predictable, in the sense that we know which proteins in which places on the DNA strands are most likely to be replaced, and by which other protein. This means that wholly new "mutations of first impression" are extremely unlikely.

Put together, these developments suggest that even radical changes are rarely unprecedented, and that significant biological changes are rarely the result of a single mutation. If halakhic change is analogous to biological change, then "halakha evolves" is not a good description of what happens when a particular halakhic responsum drives a social change. On the other hand, the recognition that an organism with a fundamentally stable genotype can, under the right circumstances, produce radically different phenotypes might provide a very useful analogy to halakhic change: "Even that which a veteran student will rule in the future in the presence of his teacher was already said to Moses at Sinai" (Yerushalmi *Peah* 2:4).

Genetic change occurs in two ways: recombination through sexual reproduction and mutation. The intellectual analogue of sexual reproduction is serious, open-minded conversation. A culture in which students can have only one teacher, or learn in only one school, will produce the equivalent of inbreeding. At the same time, a specific genetic combination, especially if many of the genes involved are recessive, will often survive only if it is given the opportunity to reproduce for some time in an isolated breeding group. To what extent is Modern Orthodoxy an established subspecies whose health will be enhanced by mingling its genes with a larger population, and to what extent does it yet need to be sheltered?

Mutations happen all the time, but particularly harmful mutations are often the result of extreme environmental pressure, such as radiation. Some mutations are helpful when carried but harmful when expressed, or helpful in some environments but damaging in others. If the analogy is valid, we should be careful to distinguish halakhic changes that arise from unending regular engagement with Talmud Torah, and those that reflect engagement with external thoughts and realities, and perhaps be more suspicious of the latter. Or perhaps we should see *takkanot* as radical mutations, and interpretations as new expressions of the existing genome. Perhaps viral insertion and symbiosis leading to incorporation have halakhic analogues as well.

Regardless, a fundamental failing of the analogy may be that halakhic change is not, cannot be, and ought not be blind. I might argue that Modern Orthodox halakha should be seen instead as the product of an expertly supervised breeding program.

In sum: The evolutionary analogy can be intellectually stimulating, but it does not serve as shorthand for a compelling account of halakhic change. We must also acknowledge that where the analogy seems apt, its implications may challenge rather than support the legitimacy of particular Modern Orthodox innovations.

A variety of other analogies may yield more consistently authentic and useful results. Within the realm of science, for example, the Copenhagen model of quantum mechanics, in which only probabilities exist before the act of measurement "collapses the wave-function," seems to me a useful and true way of describing the relationship of halakha decision-making, or *pesak*, to abstract study of halakha. The idea that the self is constructed via narrative, that we are the same people we were as infants because

we can tell coherent stories using the word “I” throughout, may be very helpful in determining the parameters of change. But these and others have yet to be effectively exploited and synthesized.

Out of a vast array of intellectual resources, a Modern Orthodox conception of halakhic change awaits formulation.