

Tinok sh’Nishba (The Captured Child)

Part I – Various Groups of Jews

The Significance of Being a Part of *Yisrael*

The starting point in understanding the Torah perspective towards evildoers is the *Mishnah*¹, which states –

“All of *Yisrael* have a portion in *Olam Haba* – the world to come.”

The Rambam² spells out just how far reaching this is –

All of the wicked, [even those] whose transgressions *are greater* [than their merits] are judged according to their transgressions, but are granted a portion in *Olam Haba*, for all of *Yisrael* have a portion in *Olam Haba*.

As clear as that sounds, the *Mishnah* then continues – “And these are the ones who have *no* portion in *Olam Haba*...” and proceeds to list those without a portion.

How can that be understood? If, as the Rambam explains, even those whose transgressions are *greater* than their merits have a portion in *Olam Haba*, then who could possibly be excluded?

The language of the *Mishnah* is – “All of *Yisrael* have a portion in *Olam Haba*.” “*Yisrael*” refers to the Jewish *nation* which has a special quality of connection to both Hashem and *Olam Haba*. The various cases listed in both the *Mishnah* and the Rambam (of those without a portion in *Olam Haba*) are people who have separated themselves from this national and metaphysical entity called “*Yisrael*.” Many of those are Jews who don’t have a proper belief in the foundations of Judaism. For example, among those who the Rambam³ tells us have no portion in *Olam Haba*, are *minim* (deniers of some essential aspects of G-d), *apikorsim* (denying prophesy or G-d’s knowledge of man’s actions), and those who deny the authenticity of the Torah.

The Rambam⁴ explains that whoever does not believe in the foundations of Judaism is called an *apikores* and judged like a non-Jew. This is also the *p’sak* (ruling) of the *Shulchan Aruch*⁵.

In addition to these non-believers are those whose *actions* demonstrate their disconnect from the Jewish nation. The main examples of these are *mumar l’hach’is*, *mumar l’kol haTorah*, *meshumad*, and *mechalelei Shabbat b’farhesia*, all of whom we will define and discuss shortly.

Not only will these non-believers and severe transgressors be limited in terms of *Olam Haba*, they will also be limited in terms of how the rest of the Jewish community relates to them in *this* world.

¹ *Sanhedrin* 10:1

² *Hilchot Teshuva* 3:5

³ *Hilchot Teshuva* 3:6

⁴ *Hilchot Shechita* 4:14

⁵ *Choshen Mishpat* 266:2

Many of the verses dealing with the interpersonal *mitzvot* contain the word *rei'acha* – your friend and neighbor (as in *v'ahavta l'rei'acha kamocho* – love your neighbor as yourself, *amitecha* – your nation (as in *hoche'ach tochi'ach et amitecha* – give correction to your nation), or *achicha* – your brother (as in *lo tisna et achicha bilvavecha* – don't hate your brother in your heart). While these interpersonal obligations still apply even towards many transgressors, some of the more serious categories of transgressors are no longer considered to be *rei'acha*, *amitecha*, or *achicha* in terms of our obligations towards them. These terms are understood specifically in terms of those that are doing *mitzvot* properly, as in – your brother or nation in regard to *mitzvot*.

The Rambam concludes this list with a key clarification: One loses his portion in *Olam Haba* only if he does not do teshuva (spiritual return back to Hashem). If he does do teshuva, however, even in private, then he *will* have a portion in *Olam Haba*⁶.

Mumar L'hachlis (A Brazen Rebel)

Someone who rejects the Jewish nation, joins an alternative religion, or *brazenly* violates the *mitzvot* is defined as a *mumar l'hach'is* – a deliberate rejector of Hashem and His *mitzvot*⁷. So too, someone is considered a *mumar* if he practices idolatry⁸ or consistently violates a particular transgression, not because he has a natural desire for it, but as an act of rebellion⁹. He may be a Torah believer who could just as easily have done something permissibly, but nevertheless, chose to contemptuously do it in a prohibited fashion. It is as if he says that there are only 612 *mitzvot*. Since he thereby subjects all the *mitzvot* to his own judgment, he is effectively denying the Divine origins of the Torah, and is consequently considered to be a *mumar l'kol haTorah* – an apostate in relation to the entire Torah¹⁰.

One would be permitted to speak *lashon hara* (negative speech) about him, one would not have to return his lost object¹¹, and seemingly, one would be exempt from the mitzvah of *lifnei iver* (not to place a stumbling block) towards him¹². Not only is one not required to love him; it is, in fact, a mitzvah to hate him¹³. Some, however, say that despite this, one is still obligated in the mitzvah of *tochacha* (correction or rebuke) towards such a person, i.e., to reach out to him if there is a chance that he will respond positively¹⁴. One is not required to judge him meritoriously¹⁵, one would not be required to lend him money¹⁶, and if one did so, one would be allowed to charge him interest¹⁷.

⁶ *Hilchot Teshuva* 3:14, 4:6

⁷ Rambam *Hilchot Teshuva* 3:9

⁸ Rambam *Hilchot Avodat Kochavim* 2:5

⁹ Rambam *Hilchot Teshuva* 3:9, *Biur Halacha* 1:39

¹⁰ Rambam *Hilchot Teshuva* 3:9

¹¹ *Choshen Mishpat* 266:2

¹² *Shach*, *Yoreh De'ah* 151:6

¹³ *Avot d'Rebbe Natan* 16:5

¹⁴ *Tanna d'vei Eliyahu Rabba*, chap.18

¹⁵ *Shaarei Teshuva* 3:218

¹⁶ *Yoreh De'ah* 251:1

¹⁷ *Tosfot Avodah Zara* 26b

Generally, one is not obligated to give him charity¹⁸, and one should not redeem him from captivity¹⁹. Finally, one should not mourn him when he dies²⁰.

However, in any situation where a person's status as a *mumar* is in doubt, one would have to be stringent and fulfill all of these interpersonal *mitzvot* towards this person, since this is a doubt about a Torah-mandated obligation. The status of being a *mumar* affects many other *mitzvot* as well.

***Mechalelei Shabbat b'Farhesia* (A Public Shabbat Desecrator)**

One who *publicly* violates Shabbat is also considered to be like a non-Jew²¹ because it is as if he is denying that Hashem created the world. This is tantamount to idolatry²², regardless of whether he actually believes in idolatry or not²³. Since Hashem gave us the Shabbat as a sign and a covenant between us and Him, violating the Shabbat in public is far more consequential than failing to observe any other mitzvah²⁴. Shabbat so strongly identifies the Jewish People, that by defying it, the transgressor has removed himself from the Jewish nation²⁵ and denied the fundamentals. As terrible as it is when a person does any other transgression, only violating Shabbat is considered an act of heresy²⁶.

Rav Asher Weiss, therefore, writes –

It seems simple that being *mechalel Shabbat b'farhesia* – would also forbid one's *shechita* (ability to slaughter), wine and *eidut* (testimony).

It seems that a *mechalel Shabbat* is compared to a non-Jew and an idolator, not merely because of the stringency of Shabbat, but because this is throwing off the yoke of Heaven, and denying the fundamentals [of Judaism]. There is, therefore, a logic that this should also be the case with a Rabbinical violation of Shabbat. And, in fact, the *Chayei Adam* writes, "A Jewish *mumar* or *rasha* who is *mechalel Shabbat b'farhesia*, even only Rabbinically, is considered like a non-Jew."

Most, however, hold that a *mechalel Shabbat b'farhesia* with Rabbinical prohibitions is *not* a *mumar*.

And the *Pitchei Teshuva* even says that only *chilul Shabbat* which is *chayav kareit* (has the penalty of being cut off) would cause one to be considered a *mumar*.

Why is it necessary that the *chilul Shabbat* be *b'farhesia* – i.e., either in front of ten Jews, or where it is clear that it will become publicized?

¹⁸ *Tosfot Avodah Zara* 26b

¹⁹ *Yoreh De'ah* 251:1

²⁰ *Rambam Hilchot Avel* 1:10

²¹ *Tur, Orach Chaim* §385

²² *Rambam Hilchot Shabbat* 30:15

²³ *Igrot Moshe, Yoreh Deah* 2:5

²⁴ *Rambam*, end of *Hilchot Shabbat* 30:15

²⁵ *Chatam Sofer, Choshen Mishpat* §195

²⁶ *Igrot Moshe, Yoreh Deah* 4:58

The *Chatam Sofer*²⁷ quotes others who learn this from the case in the Torah of the one who was killed for gathering wood on Shabbat, which was specifically a public transgression.

In contrast to this, the *Igrot Moshe*²⁸ explains that it is simply more brazen to violate Shabbat publicly.

There are, however, a number of mitigating factors in terms of viewing public violators of Shabbat as non-Jews.

The *Baal Ha'itur*²⁹ only considered a *mechalel Shabbat b'farhesia* to be a *mumar* if it was with agricultural work.

Rebbe Akiva Eiger³⁰, and the *sefer Machanei Chaim*, both maintain that [one would only be considered to be a *mumar*] if he was *mechalel Shabbat* in front of Jews who were themselves *shomrei Shabbat* (Shabbat observant).

And some say that one would be considered to be a *mumar* only if people testified about his public *chillul Shabbat* in front of him in *Beit Din*.

The *Igrot Moshe*³¹, however, writes that even if one were *mechalel Shabbat* in front of other *mumarim*, he would still be considered to be a *mumar*.

Another exemption is if one would be embarrassed to violate Shabbat in front of a prominent person, even though he would not refrain in front of others. He would then not be judged as a non-Jew, and he would also not be judged as a *mumar* for the entire Torah³².

Rav Shlomo Zalman Auerbach³³ writes that this would also be the case if one were embarrassed to violate Shabbat around one's parents. If, however, one was merely refraining from *chilul Shabbat* to be polite, and not because of embarrassment, then we might not be able to be lenient.

Rav Aharon Feldman holds that this also applies to any secular Jew who is visiting an observant household. If, while in that house, he would be careful to not deliberately violate Shabbat, then he would not have the status of a deliberate Shabbat violator.

All together, these requirements make it very difficult to declare anyone to be a public Shabbat desecrator as far as considering him to be like a non-Jew.

The most significant change with this entire issue has to do with the enormous shifts within the Jewish (and even non-Jewish) world in the past two centuries. During most of Jewish history, public Shabbat desecration was rare, and was dealt with very severely.

²⁷ *Likutim* 6:83

²⁸ *Orach Chaim* 1:33

²⁹ *A Daat Yachid* – singular opinion

³⁰ *Yoreh Deah* 264, the beginning of *Hilchot Milah*

³¹ *Yoreh De'ah* 1:70

³² *Torat Chaim – Eruvin* 69a

³³ *Halichot Shlomo* 3:325

This began to change at the beginning of the 1800s, during the *Haskalah* (Enlightenment). This led to a change in how those who violated Shabbat were viewed, since this was often committed as a result of ignorance or simply due to the difficulty in finding jobs which allowed Shabbat observance. Subsequently, many violated Shabbat simply because they had been brought up with a very limited concept of what Shabbat was.

An additional factor in the halachic status of unaffiliated Jews is the difference between an environment that is mostly observant and one that is not. Breaking Shabbat is only considered to be an act of rebellion if most people in the community are keeping it. Otherwise, it is the ones that are keeping Shabbat who seem to be separating themselves from the majority.

Independent of all this, the opinion of many *Poskim* is that the whole concept of viewing *mechalelei Shabbat b'farhesia* as non-Jews, is only a Rabbinical designation. On a Torah level, they retain the status of a *Yisrael gamur* (complete Jew) – *Mahari Asad*, *Maharshag*, the *Tzitz Eliezer*, and Rav Ovadia Yosef. There are, however, many who argue on this³⁴.

It should also be noted that, even when we compare these transgressors to non-Jews, there still exist many differences between them and non-Jews. First of all, they can certainly do teshuva and get rid of that status entirely³⁵. But even if they don't do teshuva, we will circumcise their children, even on Shabbat³⁶. Just as with a *mumar l'hach'is*, we will break Shabbat to save their lives³⁷, and their *kiddushin* (ability to get married) is valid in every aspect³⁸. And, finally, we apply to them the concept – *Yisrael, af al pi sh'chata, Yisrael hu* – A Jew, even if he transgresses, is always a Jew³⁹.

***Mumar L'tei'avon* (One who Rebels from Desire)**

A separate category from these particularly severe ones is a *mumar l'tei'avon*. This is one who violates an *issur* (prohibition) simply because it wasn't available in a permissible manner. It is an act of desire much more than a sign of rebellion⁴⁰.

A *mumar l'tei'avon* is someone who transgresses, not out of disbelief, but just to satisfy his own financial, sensual, materialistic desires, or other needs⁴¹.

Alternatively, he may opt out of a mitzvah because it poses effort or challenges that he is not willing to deal with⁴². Such a person is not considered comparable to a non-Jew⁴³. The mitzvah to love one's fellow Jew will still apply to him⁴⁴. Someone who does not

³⁴ *Maharsham, Daat Torah, Arugat HaBosem*

³⁵ *Rema, Yoreh Deah 268:12*

³⁶ *Shevet Levi 4:134:4*

³⁷ *Seridei Eish 2:11*

³⁸ *Tur, Even HaEzer 44, Yabia Omer, aleph, Yoreh Deah 11:4*

³⁹ *Sanhedrin 44a*

⁴⁰ *Rashi – Chulin 3a, Avoda Zara 26b*

⁴¹ *Biur Halacha §39*

⁴² *Rashi, Chulin 3a*

⁴³ *Rambam – Hilchot Shechita 4:14*

⁴⁴ *Yad Rama, Sanhedrin 52b*

fulfill certain *mitzvot* simply because he does not care enough would also not be considered to be like a non-Jew. Although we are exempt from some obligations towards a *mumar l'tei'avon*, we are certainly required to save his life and to return his lost articles. It is also forbidden to charge him interest. There is a dispute whether one is obligated to sustain him and to give him charity.

According to Rav Moshe Feinstein, American Jews who violated Shabbat by going to work, but who were otherwise observant, were in this category of *mumar l'tei'avon*. In the absence of knowing what a person's motivations are, we presume that they are motivated by non-ideological reasons (making him only a *mumar l'tei'avon*) and not by a desire to rebel against Hashem⁴⁵.

The Rambam⁴⁶ writes that an expert slaughterer who is a *mumar [l'tei'avon]*... is fully able to slaughter. The only requirement is that a reliable Jew must check his knife... for it can be presumed that he may not trouble himself to check it.

According to Rav Ovadia Yosef, the wine that was touched by such Jews remains kosher. In fact, the challenge to earn a livelihood is so great that several *Rishonim*⁴⁷ actually consider one who transgresses out of concern for his livelihood to be an *onnes* (forced by circumstances)⁴⁸.

Many of the responsa of Rav Moshe Feinstein dealing with this issue concerned a generation that had come to America from European backgrounds, and had arrived at least nominally Orthodox and Shabbat observant. Today, of course, many Jews are more than one generation removed from their Orthodox roots. This serves as an additional reason to be lenient.

Although the strict principles mentioned previously (that a *mumar* is considered to be like a non-Jew, etc.) do not apply to a *mumar l'tei'avon*, nevertheless there are other laws which do apply. As we pointed out, the Torah uses the word *rei'acha*, *achicha*, or *amitecha* with respect to various interpersonal *mitzvot*. The *Mishnah Brurah*⁴⁹ is unsure whether a *mumar l'tei'avon* is included within these various categories.

In general, if we see a Jew violate an *issur*, like eating non-kosher meat *b'meizid* (willfully), but we don't know whether he did this *l'hach'is* or *l'tei'avon*, we judge him as a *mumar l'tei'avon*, to establish his *chezkat kashrut* (presumption of innocence)⁵⁰.

⁴⁵ *Igrot Moshe – Yoreh Deah 5:5*

⁴⁶ *Hilchot Shechita 4:14*

⁴⁷ *Ramban, Rabbeinu Yona, and the Rivash*

⁴⁸ *Yabia Omer, aleph, Yoreh Deah 11*

⁴⁹ *Siman 608 in the Biur Halacha*

⁵⁰ *Ketav Sofer, Choshen Mishpat §20*

