

Letter and Spirit
Evasion, Avoidance, and Workarounds
in the Halakhic System



Michael Scharf
Publication Trust
Yeshiva University Press



MAGGID



Daniel Z. Feldman

LETTER AND SPIRIT

*Evasion, Avoidance, and Workarounds
in the Halakhic System*

The RIETS Hashkafah Series
Rabbi Daniel Z. Feldman, Series Editor

The Michael Scharf Publication Trust of Yeshiva University Press
Maggid Books

Letter and Spirit
Evasion, Avoidance, and Workarounds in the Halakhic System

First edition, 2024

Maggid Books
An imprint of Koren Publishers Jerusalem Ltd.

POB 8531, New Milford, CT 06776-8531, USA
& POB 4044, Jerusalem 9104001, Israel
www.korenpub.com

© Daniel Z. Feldman, 2024

The publication of this book was made possible
through the generous support of *The Jewish Book Trust*.

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system or transmitted in any form or by
any means, electronic, mechanical, photocopying, or otherwise,
without the prior permission of the publisher, except in the case
of brief quotations embedded in critical articles or reviews.

ISBN 978-1-59264-650-0, *hardcover*

Printed and bound in the United States

עמודי תורה

*Dedicated by Mr. and Mrs. Ralph and Judy Herzka in Memory of
Rabbi Yaakov Yitzchak and Esther Herzka*

*Dedicated by
Yaakov and Jennifer Gulkowitz*

In loving memory of our grandparents

Moshe and Liba Gulkowitz
משה בן אהרן - ליבא בת משה אברהם

Harry and Helen Kleiner
צבי יהודה בן יעקב - הענטשא בת משה

Avram and Rozi Mann
אברהם בן ברוך הלוי - בלימא רבקה בת צבי

Zarmeleib and Baila Wieder
יקותיאל יהודה בן משה - בילא בת צבי

תהא נשמתם צרורה בצרור החיים

לזכר נשמת

משה צבי בן יהושע
יוסף שמואל שמעלקא בן יצחק

Dedicated in memory of Emily Carla Blum a"h by Leon Metzger

מחזיקי תורה

In honor and memory of our dear grandparents, whose unwavering dedication to Torah values and way of life continue to inspire us

Jerry ז"ל and Gloria Greenman

גרשון מרדכי בן יהושע מנחם ז"ל וגולדה חסיה בת שמואל צבי

David ז"ל and Esther Schwartz

דוד בן ישראל זאב ז"ל ואסתר וויכנא בת יהודה לייב

Morris ז"ל and Marylin Stadtmauer

משה רפאל בן יהושע ז"ל ומערא בת יואל

Asher ז"ל and Joan ז"ל Cornfield

אשר ליפמן מרדכי בן ר' משה ז"ל ויונינה בת מנחם ז"ל

Sammy and Julianna Schwartz

Dedicated by Warren and Esther Feldman

In honor of their parents

Sol and Minna Feldman

Irving Draznin

Genia Draznin

תומכי תורה

Dedicated in honor of

מורנו ורבנו
הרב הגאון דניאל צבי פלדמן שליט"א

Through his profound teachings, unwavering support, and genuine care, he has transformed all of his talmidim, their families, and communities into true bnei Torah and talmidei chachomim. Rebbe's wisdom and guidance have enriched our understanding of Halacha and inspired us to lead lives filled with compassion, kindness, and humility, inspiring us to strive to be true talmidei chachomim and leaders of Klal Yisroel. We are forever grateful for our Rebbe's lasting imprint on our hearts and the countless brachot he has bestowed upon us.

מְזֻמָּוֹר לְדָוִד ה' מִיִּגְוֹר בְּאַהֲלֶיךָ מִיִּשְׁפָּן בְּהַר קְדִישְׁךָ: הוֹלֵךְ תַּמִּים וּפְעֵל
צְדָק וְדִבְרֵי אֱמוּנָת בְּלִבּוֹ: לְאֶדְגָּל | עַל־לִשְׁנֵי
לֹא־עָשָׂה לְרַעְהוּ רָעָה וְחִרְפָּה לְאִנְשָׁא עַל־קִרְבּוֹ

By Rav Feldman's Talmidim:

David Benhamu	Yaron Kahan	Yedidya Schechter
Sam Cohen	Shim Koshner	Jordan Stebbins
Ezra Cooper	Zanvy Lesnoy	Netanel Tager
Eric Farbowitz	Jordan Levovitz	Jonah Tripp
Omer Galer	Eli Shlomo Litwin	Jonathan Wenger
Caleb Gitlitz	Moshe Nasser	

Dedicated in honor of our Rebbe, Rav Daniel Feldman, who infuses all of his talmidim with ahavas haTorah, yiras shamayim, and middos tovos. We had the privilege of being chavrusas and learning from our Rebbe for three-and-a-half incredible years in his shiur and are thankful to still have many opportunities to learn from him. He taught us how to plumb the depths of Shas, and how it's our responsibility as Torah Jews to treat others with love and respect. We are very blessed to have a Rebbe who teaches us his wisdom with nuance, a touch (or more) of humor, and remarkable patience. We want to thank him for all he has done to set us up for a lifetime mission of being the greatest ovdei Hashem we can be.

*With profound hakaras hatov,
Jacob Saks and Jed Zaslow*

עטרת זקנים בני בני
ותפארת בני אבותם

לזכר נשמת הורינו היקרים והאהובים
שמהם למדנו דרך חיים ואורחות יושד
ובזכותם הגענו עד הלום.

הר"ר מנחם יצחק בן הר"ר יעקב ישראל ז"ל
ומרת רחל לאה בת הר"ר חיים אשר הכהן ע"ה
הר"ר חיים אבא בן הר"ר יוסף ז"ל
ומרת מרים מערה בת ר' יששכר ע"ה

יהי רצון שלא ימוש התורה מפינו
ומי זרע זדענו עד עולם
ונזכה לראות בני ובני בני
עוסקים בתורה ובמצוות.

חיים אשר ומעניא ארלינסקי

נודבים

*In deep appreciation of Rabbi Feldman's
selfless dedication to assisting Agunot*

Josh and Shoshi Ross

In honor of

Rav Daniel shlita and Rebbitzin Leah Feldman

In memory of

HaRav Yaakov Moshe Hacoen Lesin zt"l
Mashgiach Ruchani RIETS 1975–1942

By Hennie and Shimon Wolf



*In honor of Shlomo Greenwald, who lives
Judaism without cynicism – TL*

Sean Weinberg



In loving memory of
Allen and Regina Hurwitz by Dr. David Hurwitz

Dedicated in honor of my parents,

Gabriel and Aliza Sosne,

who live life with purpose and 'אהבת ה'. Their commitment to self-improvement and emphasis on sharing their good with others inspire me to grow.

I am blessed to be a תלמיד of Rabbi Daniel Feldman עמו"ש, whose erudition is surpassed only by his humility and warmth. May 'ה bless him and his family for his dedication to his תלמידים, and may many others similarly benefit from his teachings.

Betzalel Sosne



לכבוד הרב דניאל צבי פלדמן,

ידיד נפשי, חכם ומאיר עיני חכמים בתורה ובתעודה, איש חסד, המסור בלב ונפש לתורה, לומדיה, ולכל בני עמו. אוהב את הבריות ומקרבן לתורה, אוהב ואהוב למטה ולמעלה.

הננו רוצים לסייע למפעלו העצום בחלק קטן וזעיר ולחזק ידו בחידוש ובהבאת כלים חדשים מלאים ישן נושן לתלמידים ותיקים ומתחילים כאחד כספר הפתוח המכבד את הלימוד והלומדים ברעיונות גדולות ונשגבות.

יה"ד שיראה נחת וברכה ממשפחתו, מתלמידיו, וכל מעשה ידיו.

באהבה, הכרה והוקרה,

יצחק ושושנה שכטר

ויוני ושרה לאה, דניאל ואילת, ידידה, נועם ונאוה



Contents

<i>Acknowledgments</i>	<i>xv</i>
<i>Introduction</i>	<i>xxi</i>
1. Evasion, Artifice, or Acceptable Alternative?	1
2. A Possible Formula for Assessment.	19
3. The Prohibition of Interest and the <i>Hetter Iska</i>	27
4. Sales Mechanisms	50
5. The Sale of <i>Chametz</i>	60
6. <i>Shemittah</i> and the <i>Hetter Mekhirah</i>	108
7. The <i>Prozbol</i> and the Remission of Loans	134
8. The Torah's Commandment of Inheritance and Contemporary Practice	159
9. <i>Siyumim</i> : Celebrating the Torah at Times of Restrictions	191
10. The Plight of the <i>Agunah</i> , and Halakhic Pre-Nuptial Agreements	212

11. Conclusion: The Soft Voice of the Spirit	229
--	-----

APPENDICES

I. Opinions in Support of or in Opposition to the <i>Bekhor Shor's</i> Stance on <i>Ha'aramot</i> and Torah Law	235
II. Opinions Regarding Whether One Is Obligated to Formally Waive Civil Rights to Inheritance That Are Not Recognized by <i>Halakhah</i>	238
III. Halakhic, Conceptual, and Philosophical Applications of the Rambam's Position on a Coerced <i>Get</i> and the "Inner Jew"	240
<i>List of Sources</i>	255
<i>Source Index</i>	307
<i>Subject and Name Index</i>	319

Acknowledgments

With deep gratitude to the *Ribbono Shel Olam*, I humbly tender this work to the reading public.

This book is being published through the auspices of Yeshiva University Press and the Michael Scharf Publication Trust. Our projects are carried out under the banner of the Rabbi Isaac Elchanan Theological Seminary, which has the good fortune of being led with wisdom and creativity by Rabbi Menachem Penner, the Max and Marion Grill Dean, and by President Rabbi Dr. Ari Berman, both of whom have always made themselves available to me on a personal level with deeply appreciated guidance, and who have focused attention on the projects of the Press, which have also benefitted greatly in recent months from the efforts of Rabbi Ari Rockoff.

This book, as have been so many of our projects, is produced in partnership with Maggid/Koren, and we greatly appreciate the wonderful work of Rabbi Reuven Ziegler, Rabbi David Silverstein, Taly Hahn, Dr. Yoel Finkelman, and Marc Sherman.

I extend deep thanks to my revered rebbe, Rabbi Hershel Schachter, whose world-famous shiurim I have been privileged to hear and grow from for many years, for all of his influence and counsel, and for his warm and kind encouragement. I express my profound gratitude

Letter and Spirit

to my rebbe, Rabbi Menachem Mendel Blachman of Yeshivat Kerem B'Yavneh, for all of his support, as I also acknowledge the continuing influence of the founding Rosh Yeshiva of Kerem B'Yavneh, Rabbi Chaim Yaakov Goldvicht, z"l. Rabbi Dr. Norman Lamm, z"l, longtime President and Chancellor of Yeshiva University, was a source of support and advice from my earliest days on campus, as has been Rabbi Zevulun Charlop, who served for almost four decades at the helm of the Rabbi Isaac Elchanan Theological Seminary. I thank my senior *chavrusas* and mentors Rabbi Baruch Simon and Rabbi Zvi Sobolofsky for their ongoing support and guidance. A special thanks goes to Rabbi and Mrs. Hershel Reichman for all they have done for me and my family.

Rabbi Mordechai Willig, whom I have been fortunate to hear shiurim from and to draw influence from for many years in many contexts, has always made himself available to advise and assist in all ways big and small, and I am immensely grateful for that, and for so much more. Regarding this project in particular, my gratitude to him is on a whole different level. He has a unique association with much of the subject matter: he is a national teacher on the subject of *mekhirat chametz*, organizing a sale in which dozens of rabbis from the greater New York area participate on behalf of their congregations, and creating instructional materials to educate even beyond that; as the *Av Beit Din* of the Beth Din of America, he is a leading authority on issues such as the *hetter iska* and inheritance law; and he is the co-author of the BDA Halakhic Prenuptial Agreement. R. Willig kindly went over the entire manuscript and provided many valuable observations.

Similarly, my cherished mentor Rabbi Yona Reiss, who shares his erudition and insight on all of our projects, and has done so much toward all of my efforts at Yeshiva, also occupies leadership roles in both the BDA and the Beth Din of the Chicago Rabbinical Council, and I am deeply grateful that he thoroughly reviewed this work, offering a wealth of greatly helpful comments and perspectives.

I thank Mrs. Bella Wexner a"h and, *tibadel l'chaim*, Ms. Susan Wexner, for their generous sponsorship of the Bella and Harry Wexner Kollel Elyon at Yeshiva University, in which I was privileged to learn for

Acknowledgments

four years at RIETS, and to hear shiurim and gain direction from Rabbi Willig and Rabbi Michael Rosensweig.

This project began as a seminar given to fellows of the Wexner Kollel, and I am grateful to Rabbi Neal Turk for his support and encouragement to develop the material into a book. I thank Rabbi Jeffrey Saks, editor of the journal *Tradition*, for his patience and support during the production of this book. I originally wrote about the *hetter mekhirah* at the request of the Rabbinical Council of America, and a version of that presentation appeared in *Tradition* in the Fall 2014 issue; the chapter here is significantly modified from what appeared at that time.

My dear friend Rabbi Moshe Schapiro was constantly available to provide assistance in locating sources and materials with great skill and enthusiasm. I thank Allen Friedman for his help in clarifying aspects of taxation law. My cherished longtime *chavrusa*, Rabbi Yaakov Werblowsky, read the entire manuscript and offered many helpful observations.

I wish to express my appreciation to the administrations of the schools that currently give me the opportunity to teach Torah under their auspices, including President Berman, Rabbi Penner, Rabbi Yosef Kalinsky, and the Rabbi Isaac Elchanan Theological Seminary; Dr. Noam Wasserman, Dr. Moses Pava and the Sy Syms School of Business; as well as to all of the synagogues, schools, and other institutions that have hosted my lectures and classes. And to my students and participants at these institutions, I offer my thanks for listening, for challenging me, and helping me to gain a clearer understanding of all I would hope to teach.

To the wonderful people of Ohr Saadya of Teaneck, and all who have joined with us in various stages throughout the years, I convey my gratitude, and my pride and my appreciation in our shared experiences and endeavors, and the blessing that the future bring only success and happiness in the fulfillment of our goals and aspirations.

I extend a very special thank you to Mr. Terry D. Novetsky, who with great patience, insight, and graciousness with his time made it possible for previous efforts to get to print. I also express deep gratitude to our friends Warren and Esther Feldman, whose generosity, care, and foresight have done so much to further our efforts and those of so many others.

Letter and Spirit

My brother Rabbi Jonathan, who graciously went over the entire manuscript and offered his edits, and his wife Rachel and their family are constant and invaluable sources of love and support. My sister Rebecca, together with her husband Dr. Tal Becker and their family, extends her wise counsel and warm compassion with consistency and devotion, and I am a most fortunate beneficiary.

I extend my profound gratitude to my father-in-law Rabbi Mordechai Feuerstein, for all of his kind support and encouragement, and we will forever be inspired and guided by the memory and the life-work of my extraordinary mother-in-law, Rebbetzin Shaindel Feuerstein, a”h. We are deeply fortunate to have the love and guidance of my wife’s esteemed grandmother, Mrs. Shirley Feuerstein, and of so many beloved aunts, uncles, and cousins, on both sides of the family.

It is an immense blessing that our children are guided by the life and legacy of two sets of grandparents who, following their own parents, placed the vision of *chesed* and societal responsibility at the forefront of all that they ever did, and crowned their many accomplishments with kindness, compassion, and boundless communal service.

Nothing I do would begin to be possible without my wife Leah; and still nothing can begin to be expressed, as her modesty combines with the limitations of language in preventing me from saying even a fraction of what should be said. I will only express my continued gratitude that our children, Adina, Yaakov, Miriam, Shaindel, Tehilla, Bracha Golda, and Meira, have the role model they have in all the ways of life, and that a beacon of *chesed* lights their path.

It is important to emphasize that this work is not one of advocacy, seeking to promote the devices discussed therein. (In the spirit of full disclosure, I do acknowledge that I am a student of rabbis who have crafted and recommended the BDA Halakhic Prenuptial Agreement, and am affiliated with organizations that advocate its use; although in that case also, I have endeavored to present the document in the context of alternatives as well, and alongside the objections of those who have challenged it.) If there is a cause associated with this work, it is that of sincerity in practice, of the unity of letter and spirit, and of the elimination of cynicism, which inflicts so much harm on religious expression.

Acknowledgments

Along the way, there is testament to rabbinic responsibility throughout the generations, the careful considerations of leadership in seeking to maximize religious fulfillment while maintaining awareness of the limitations present upon the people.

It is with this backdrop that I dedicate this work to my parents, to the memory of Rabbi Dr. David M. Feldman z”l, and the honor of Rebbetzin Aviva Feldman, to whom I of course owe literally everything. More specifically regarding publications, my father, with his own writings, was a pioneer in the field of writing English-language books that dealt with advanced rabbinic literature, doing so with clarity, sophistication, and deep scholarship, and thus set a model for so many after him to follow. More personally, he was always ready to give of his time to review my own writings, and would constantly go above and beyond in his attentive assistance.

Even more directly relevant to this project, my parents, over the course of many decades of joint efforts in the rabbinate, sought to uplift and inspire the population while also recognizing the need of meeting the individual “*b’asher hu sham*” (Gen. 27:17), where he or she is at the moment, and also envisioning what could be. With warmth, compassion, sensitivity, and wisdom, they sought to assist both in the realization of potential and the discovery of new potential. As my father has written about the rabbinate, it is “the rabbi’s responsibility and opportunity, during critical moments, to keep our people far from the ‘last temptation,’ in T. S. Eliot’s words, that of ‘doing the right thing for the wrong reason’ – and to point up a right and meaningful reason.” It is this recognition of the vital significance of sincerity and continuing spiritual aspiration, and the corrosive effects of cynicism and dispassion, that is the animating force of this work.



Introduction

The subject at hand is one which, in a sense, cannot be named. To name it is to judge it, both collectively and in its parts, and therein lies the challenge that is to be addressed. Terms such as “evasions” or “workarounds” label the user as derelict in responsibility, deficient in commitment, perhaps even on some level dishonest. Similarly, or more so, “subterfuge,” defined as “deceit used in order to achieve one’s goal.” Even worse are terms such as “loophole,” which implies both an oversight by the system – a near-heretical implication when applied to the Divine Torah – and exploitation on the part of the user; or “legal fiction” which imputes insincerity to both sides. Perhaps some of these negative impressions are justified, perhaps not; either way, usage of these terms prejudges the question and undercuts the investigation before us.

Further, to name the topic of this analysis is to presume that all its components are comparable, and that again shortchanges the endeavor. A fundamental question to be explored is why it is that some of these mechanisms – for serious lack of a better term – enjoy a loftier reputation than do others that are often mentioned in the same breath. Some of these approaches have been widely accepted by the Jewish people; some are harshly opposed; and others are utilized either begrudgingly or only under certain conditions. Understanding these varying receptions is a central goal of this investigation.

Letter and Spirit

In Hebrew, there is a term that is often employed in connection to our subject matter, and it itself contains ambiguity and multiple implications. The word “*ha’aramah*,” in one form or another, appears many times in rabbinic literature. At times, it connotes “evasion,” and imputes the dereliction mentioned above. It is evocative of the passage in the Talmud¹ that contrasts the earlier generations with the later ones regarding their attitudes about tithing their produce. The superior, earlier generations brought their produce into their houses through the main gate, clearly establishing an obligation to tithe. The latter generations would bring their produce in through the roof or the courtyard, thus technically avoiding the obligation that is described by the phrase “I have removed the consecrated from the house.”² The Meiri deduces from this passage that the behavior of the latter generations was technically effective but still forbidden, writing that it is “*assur l’ha’arim*.”³

In other contexts, *ha’aramah* has more of a neutral message to it, suggesting perhaps a “sidestepping,” a path that certainly does not embrace challenge, but maybe because there is a good or at least acceptable reason to avoid that challenge. At times, the Talmud uses this word as part of a recommendation presented without judgment.⁴

Indeed, early commentators suggested that the various forms of the word had sharply different meanings. The Rambam, cited by the *Tosafot Yom Tov*,⁵ asserts that a permissible tactic is called “*aramah*,” while one that is prohibited is called “*mirmah*.” However, the latter word is used in the Torah regarding our forefather Jacob,⁶ when he obtained

1. *Berakhot* 35b.

2. Deut. 26:13.

3. See also *Resp. Rav Poalim*, YD, 5. However, from other sources (*Pesachim* 9a, *Avodah Zarah* 41b, *Niddah* 15b), it seems that this behavior is permissible even if not especially admirable, and the *Talmud Yerushalmi* (*Ma’asrot* 3:1) attributes this practice to *tana’aim*, and it is recorded as permissible in *Mishneh Torah*, *Hil. Ma’asrot*, 3:6.

4. See e.g. *mishnah*, *Ma’aser Sheni* 4:4, although note that the *Talmud Yerushalmi* provides a justification, implying one is needed; see *Mareh Panim* and *Pnei Moshe*, and note the innovative interpretation of *Resp. Chatam Sofer*, OC 62. See also *Shabbat* 117b, where the need for a justification for a *ha’aramah* seems to be in dispute.

5. *Temurah* 5:1.

6. Gen. 27:35.

the blessings from his father; accordingly, he maintains, there must be a difference between Biblical usage and rabbinic usage.⁷

Indeed, the labeling of Jacob's actions as *mirmah*, by his own father Isaac, does draw attention to the potential meanings of that form of the word. Rashi, citing the *Midrash Rabbah*, renders it "*chokhmah*" (as does Onkeles), perhaps understood best as "cleverness." Ibn Ezra, however, takes it as an indication of falseness, prompting a strong objection from R. Ya'akov Tzvi Mecklenberg in his *HaK'tav V'HaKabbalah*, both to the criticism of Jacob and to the notion that Isaac would disparage him in that fashion. In response, he offers a lengthy discourse on the multiple meanings and forms of the word, and marshals scriptural and Targumic evidence that it can have not only neutral but positive meanings. Thus equipped, he sees Isaac's description of Jacob's behavior as an appreciation of a creative strategy that will ultimately bring about the optimal result for all involved (including Esau).

In some of the Talmudic sources, the word is used to represent outright deception, utilized to describe a possible abuse of a situation in which dishonesty will not be detected. For example, the Jerusalem Talmud⁸ discussed the case of one who finds *chametz* in his home after *Pesach*, and claims to have performed "*bitul*," properly disassociating himself from any *chametz* that may have been there, which would save him from any violation and should render this *chametz* now permissible. However, the concern is, apparently, that he did not actually do so – that his claim is a mere "*ha'aramah*," and thus, according to one opinion, policy should dictate that the *chametz* be prohibited regardless.⁹

7. See also *Rashash* and *Yachin* to *Temurah*. See the analysis of the distinction in *Chamudei Yitzchak al HaTorah*, Gen. 27:35.

8. *Pesachim* 2:2.

9. This is the understanding of the *Rosh* (*Pesachim* 2:4) and the *Tur* and *Shulchan Arukh* (OC 448:5). See, however, *Resp. Rashba*, I, 70, and *Chavolim B'Ne'imim*, I, p. 66. Notably, further, there is some debate as to whether the concern is that this instance of *bitul* was false, or, perhaps, this one was legitimate, but a policy must be enacted regarding the possibility of falsehood in the future. While most sources indicate the former understanding, *Resp. Noda B'Yehudah, kama*, OC, 18 (and see also #19) took the latter understanding, and thus ruled that it would not make a difference even if *bitul* could be proven, such as if it was performed in front of witnesses, against the view of R. Ya'akov Reisher (*Torat HaShelamim*, 6, and *Chok Ya'akov* to OC 448).

Letter and Spirit

As the great halakhic decisor R. Moshe Sofer noted in a responsum on the subject,¹⁰ the translation of *ha'aramah* is elusive, as it clearly changes from one context to the next, and necessarily, the attitude changes with it. Moreover, we are dealing with a moving target to begin with, because whether or not the label of *ha'aramah* should even be affixed is generally an open question. This circular phenomenon appears repeatedly in the literature: debate over whether a particular approach is a *ha'aramah*, and if it is, if that is a bad thing in the first place.

Of course, language matters. Regarding this subject, it matters even more. It frames the discussion, and may thereby prejudge it. Further, as we will see, in a halakhic/philosophical version of the observer effect, the judgment may create its own evidence.

See R. Nachman Kahana, *Orchot Chaim*, OC 448:6 and 18. However, R. Avraham Zvi Hirsch, *Resp. Brit Avraham*, OC, 30, understands differently, and suggests that the *ha'aramah* concern here is not to a false *bitul*, but that one will rely only on *bitul* and neglect the full responsibility.

10. *Resp. Chatam Sofer*, OC 62.