

Thoughts on the Thinking Jew's Rabbi: A Review Essay of "Gray Matter: Discourses in Contemporary Halachah," by Rabbi Chaim Jachter

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Though written in deceptively simple English, this is an important book that charts significant ground. As one who earned the highest rabbinical ordination, *yadin yadin*, R. Jachter is a Modern Orthodox rabbi who addresses contemporary halakhic issues in this volume, and concurrently teaches the Orthodox lay person about classical Jewish law. Like those of the late sainted R. Moshe Feinstein, R. Jachter's essays are written on two rhetorical levels. For the learning layperson, R. Jachter presents information, policy, concepts and the workings of the halakhic mind and does so in simple, superbly crafted prose; for the halakhic decisor, R. Jachter raises and addresses methodological issues of gravity with an eye to negotiating the tensions created when halakhic norms and conditioned expectations conflict, requiring the *poseq* to render an unambiguous decision.

The title confronts the reader with a subtle *double entendre*. “Gray matter” is what the Torah decisor must use when applying timeless principles to timely questions. But it also characterizes the area in which he works: unlike the *Shulhan Arukh* or *Mishneh Torah*, which are normative *compendia*, *responsa* case law deals with the gaps in the law—where issues are neither black nor white, but must be framed in shades of gray. In this review essay, I examine the halakhic reality emerging from R. Jachter's construction as a model for the serious Jew who has the piety to be Orthodox and the integrity to be modern.

Rabbis Ephraim Grunblatt and Mordecai Willig, two leading decisors whose views are generally accepted in

both the Modern Orthodox and “*yeshivah*” worlds, pen the approbations that grace this volume. R. Jachter is concerned with halakhic seriousness, intellectual integrity, and the building of a working consensus within the larger Orthodox world. His sensibilities are also clearly modern, and this combination occasionally raises conflict. When arriving at a decision, R. Jachter applies four considerations: (1) the *de jure* limits of Jewish law, defined by statute recorded in canonical texts; (2) the development of interpretation and application of those sources in Jewish decision making; (3) the *de facto* consensus of decisors through the ages; and (4) the claims made by Orthodox Jews in the conditions of modernity.

R. Jachter is a member of the *Bet Din* of Elizabeth, NJ and a recognized expert in Jewish divorce, a messy, unpleasant yet critical area of Jewish law. Jewish law requires that the husband initiate Jewish divorce proceedings by commissioning the writing of the *get*, or divorce document. (The word *get* is derived from the Babylonian *gittu*, meaning document.) Since a husband must willingly commission the divorce, any implication of coercion raises controversy. R. Jachter deftly cites the canonical instances where Jewish law requires and coerces divorce. Coercive divorce was accepted in most instances in the gaonic tradition, the immediate inheritor of talmudic tradition. Maimonides also ruled (*Mishneh Torah, Hilkhos Ishut* 14:8) that coercion is appropriate. *Tosafot* and Rosh (R. Asher b. Yehiel) rule restrictively, and for R. Jachter their rulings are normative because they reflect accepted consensus.

In theory R. Jachter's Judaism is defined and bound by the oral Torah's canonical documents, i.e., legal *midrash* and the Babylonian and Jerusalem Talmuds. In practice, these documents have been subject to differing interpretations and applications by post-talmudic authorities who presided over communities that on occasion added to or subtracted from talmudic norms. The rabbis who endorse these changes have themselves assumed virtual canonicity. Though he allows authoritative documents to define the issue at hand, R. Jachter defers to the canonicity of the post-talmudic consensus, paying thereby his dues to join those determining rabbinic consensus. When R. Jacob Tam legislated the shunning of the recalcitrant husband, his innovation became authoritative and hence an acceptable instrument for obtaining the husband's necessary authorization for the writing of the *get*. But sometimes the views of authoritative sages are rejected, as in the case of R. Moses Isserles' concept of conditional marriage (in R. Isserles' comment on *Shulhan Arukh, Even ha-Ezer* 157:4). One objection made to R. Isserles' conditional marriage construct is that a man does not want his sexual relations to be unrecognized by Jewish law, and therefore the betrothal, but not the marriage (*nesu'in*), may be conditional. But the original context of that talmudic rule involves a man who has relations with his ex-wife, and the rule would not necessarily apply to other cases. Moreover, there is considerable medieval opinion that this principle applies only when the man engaging in such relations his religiously observant. R. Jachter concludes his discussion by listing the great rabbis who formed the consensus that conditional marriages in practice may not be condoned.

As noted above, when understood against the gaonic tradition, *halakhah's* canonical statement regarding coerced divorces is more lenient than current consensus. The tosafists taught in northern Europe and Rosh in Christian Spain, where the Roman Catholic Church provided a religious ethos that opposed divorce. Once this antipathy to divorce entered the northern European Jewish ethos, the inertia of popular religion penetrated halakhic sensibilities. Yet R. Jachter cites R. Isserles, as an authority who supports coercion in certain instances, thereby politely, powerfully, and deftly deflecting those who argue that our tradition no longer supports coercing a recalcitrant husband to commission a *get*. He could have chosen to ignore R. Isserles (as he did with regard to conditional marriage), but for R. Jachter coercion remains theoretically valid.

To facilitate Jewish divorces of marriages that are hopelessly broken, leading Israeli and American rabbis have developed a prenuptial agreement that provides financial incentives to induce a recalcitrant husband to divorce his wife. Jewish tradition does not authorize this instrument, which is an innovation, but neither does Jewish law forbid it. R. Moses D. Tendler argues that the *ketubbah* is precisely this instrument, and he has created an English version of the *ketubbah* to render the document legal, realistic, and meaningful. But R. Jachter told me in a communication that he has reservations regarding R. Tendler's instrument and prefers an alternate version.

R. Jachter cites R. Isserles, who permits monetary inducements to the issuance of a *get*, which he does not regard to be coercive, without considering him as a legitimating precedent. Citing contemporary authorities, R. Jachter rules that prenuptial agreements that provide inducements for a husband to authorize the writing of a *get*, while an innovation in usage, are fully consistent with the letter of Jewish law. A rabbinic consensus endorsing the new instrument is required for this innovation to be legally acceptable.

When a Jewish divorce cannot be obtained that would end the marriage, it has been suggested that the principle of *ha'afka'at qiddushin*, or nullification of the marriage, be invoked. While according to the Talmud, rabbis have the right to invoke the nullification principle of "*kol ha-meqaddesh al da'at de-rabbanan meqaddesh*" ("one who betroths necessarily does so by consent of the rabbis," permitting the rabbis to reserve the right to nullify the betrothal where warranted), in practice this was invoked only in the instance of unethical conduct on the part of the husband in initiating the marriage, or when the husband sent and subsequently nullified the *get*, allowing his wife to receive what she in good faith error believes is a valid instrument of divorce. R. Jachter maintains that only a supreme court, or a "central, recognized rabbinical court," may invoke this device.

R. Jachter also suggests that the mechanism for solving the *agunah* problem today is already in place within Jewish law, but the consensus of the Orthodox rabbinate must be obtained before it can be used. Following R. David Hoffmann (*Melammed Leho'il* 3:51) that only a Sanhedrin or similar universally recognized court may invoke this far-reaching principle, R. Jachter implicitly

concedes that the nullification of marriage may be a valid instrument to end hopelessly broken marriages retroactively. Yet recognizing that the instrument's invocation will not be accepted, he argues that the responsible decisor can act only within the limits of communal consensus.

The responsible and respected decisor, however, may be able to move the consensus by raising issues for discussion. Both R. Jachter and R. Hoffmann are Orthodox accommodators who accept modernity positively, and both recognize that most Orthodox decisors do not share that sensibility. But in order to maintain one's *bona fides* in the professional halakhic community, a probing, probative restraint is sometimes a judicious necessity.

R. Jachter goes to great pains to distance himself from the *bet din* of Rabbi Emanuel Rackman, which utilizes nullification to solve the *agunah* issue. The Orthodox jurist, R. Menahem Elon, also advocated nullification of marriages as a means to solve the *agunah* crisis. Both Rabbis Elon and Rackman study Jewish law historically, while R. Jachter and the community of decisors study Jewish law conceptually and socially. The historical record is "scientific," distant, and (ideally) objective: history does not preach or prescribe. How one translates the "is" of empirical description into the "ought" of normative prescription requires attention not only to the positive law of the statute, but also to the real sensibilities of the committed community for whom the law is to be applied. Neither Rabbi Elon nor Rabbi Rackman is recognized as a halakhic authority for many Orthodox Jews; their suggested innovation jars the community of the committed. Since the decisors who possess communally acclaimed recognition reject nullification, its implementation, for most Orthodox rabbis, remains untenable. And if R. Rackman's proposal is in fact not accepted by the Orthodox community, it cannot be an effective instrument in solving the *agunah* crisis. Peter L. Berger taught that information in the social sciences and humanities is significant only if there is a population that considers the information to be important. In matters of personal status, a communal consensus is an overriding consideration when trying to preserve the unity of the Jewish people. Without a consensus, a ruling will be ineffective, and hence, invalid.

R. Jachter adopts the view of R. Moshe Feinstein, who

dispenses with the need for a *get* in cases of civil marriage and Jewish marriage ceremonies performed by non-observant clergy. For Rivash (R. Isaac b. Perfet), the notion that one does not engage in non-marital intercourse applies only to those who observe the rules of family purity. For Maimonides, the doctrine applies only to observant Jews. R. Jachter therefore dismisses the dissenting stricture of R. Yosef Eliyahu Henkin, who regards stable conjugal unions to be marriages that would require a *get*. R. Jachter cites but does not develop the legal doctrine of R. Avraham Shapira, who holds, to paraphrase R. Jachter's rendering, that "a couple is not halakhically married if the man and woman do not intend to marry according to Torah law." This is the legal equivalent of the doctrine that whoever marries with *qiddushin* does so with the consent of the rabbis. By choosing a non-halakhic venue for their liaison, however permanent, the union is not a *qiddushin* union that requires a *get* for its dissolution.

R. Moshe Feinstein ruled that if a wife gave a ring to her husband as a gift after he betrothed her with a ring, "there is no act of *qiddushin*." R. Jachter cites R. Chaim Soloveitchik, who contended that the marriage ritual alone does not render the marriage valid, since intention is also required; inasmuch as a double ring ceremony can create confusion, "the marriage is not effective." Most authorities contest this logic, reasoning that once the woman accepts the wedding ring in the presence of proper witnesses, she is married. I suspect that Rabbis Feinstein and Soloveitchik may have rendered innovative rulings to distance uninformed but well-meaning Orthodox laypersons from the influence of non-Orthodox rites that reinforce non-Orthodox habits and heretical theologies. R. Jachter himself witnessed a video of a traditional Conservative rabbi who instructed the groom to give a ring to his wife as an expression of marriage and the bride to give a gift ring to her husband as an expression of love. He assumes that (a) R. Feinstein would recognize this ceremony to be valid, albeit with disapproval, and (b) "traditional Conservative rabbis may actually be functioning within Jewish law," but (c) one does not make this ruling public because of the concern that lay people might be misled by uninformed or unbelieving non-Orthodox clergy.

Like most Orthodox centrists, R. Jachter is a "strict constructionist" when responding to innovative stringencies. R. Feivel Cohen ruled that a pregnant woman whose

water breaks becomes a *niddah* and “this is the accepted protocol among halakhic authorities.” Deftly and firmly, R. Jachter observes that most authorities do not accept this ruling, which enjoys no precedent whatsoever in classical halakhic literature. Only when uterine blood is present is the woman a *niddah*. A strict constructionist response to this view would require that R. Cohen be censured for (a) for misrepresenting the law, (b) speaking falsely about accepted protocol, and (c) imposing on Jews a folk culture analogy that serves no demonstratedly constructive purpose. Ever the gentleman, R. Jachter implies, but does not explicitly state, that R. Cohen violated the canons of Jewish legal interpretation. As a consensus builder, R. Jachter can ill afford to alienate decisors with whom he might have to collaborate.

Two authorities whose views R. Jachter never challenges are Rabbis J. David Bleich and Aharon Lichtenstein. While these two authorities reflect different sensibilities, they are both passionate in their commitment to Jewish law. When a Yeshiva University rabbinical student asked the latter sage if it is permissible for a husband to assist his wife in childbirth since his physical contact with her is not affectionate [*derekh hibbah*] (and therefore outside the scope of the prohibition on contact with a *niddah*), R. Lichtenstein responded that the contact is indeed affectionate and is therefore forbidden. R. Jachter correctly notes that all contact between a man and his wife during *niddah* is prohibited. Neither R. Jachter nor R. Lichtenstein discusses the husband assisting his wife in this situation wearing surgical gloves. Any prohibition in this instance would be rabbinic rather than biblical, and in cases of *tsa`ar*, pain, or danger, rabbinic prohibitions are usually waived. Furthermore, while the contact of a husband with his wife in a hospital may be *derekh hibbah*, Maimonides ruled [*Mishneh Torah, Hilkhhot Issurei Bi'ah* 21:1] that the contact forbidden by law is *derekh ta'avah*, with erotic intent.

R. Jachter notes that most authorities permit a husband to be present with his delivering wife in the same room with “varying degrees of enthusiasm.” Traditional culture did not know the practice, and conditioned habits of modesty often color decisors’ rulings. True to form, R. Jachter notes that (a) there is no explicit talmudic restriction, (b) contemporary women want the comfort of their husbands’ presence, and (c) there are great rabbis who do permit the practice. In this essay, R. Jachter outlines conditions for legitimate innovation within

Orthodoxy: (a) there must be no halakhic impediment in talmudic literature, (b) there must be a pressing need to allow a reconsideration of accepted usage and a return to the letter of the law and (c) a collegial consensus among Orthodox rabbinic authorities must be obtained.

In discussing women’s assuming leadership roles, R. Jachter first notes that according to the *Sifre* and Maimonides (*Mishneh Torah, Hilkhhot Melakhim* 1:5), Jewish law requires the appointment of a king but forbids the appointment of a queen. Maimonides extends this prohibition to exclude women from any leadership position. R. Jachter, and R. Feinstein in his permissive ruling allowing a woman to be a *kasbrut* supervisor, observe that the *Sifre* did not authorize the Maimonidean extension. Unaddressed by R. Jachter are the facts that (a) *Midrash Tanna'im* did make the Maimonidean extension, but (b) *Midrash Tanna'im*, while reporting the views of early *tanna'im*, is not a canonical authorized midrash. Only after demonstrating that this rather uncharacteristic Maimonidean ruling is not explicit in canonical sources does R. Jachter then outline the views of major halakhic authorities who disagree with Maimonides, among them R. Chaim David ha-Levi and his mentor, R. Hai Ben Zion Uzziel. Noting that R. Yehudah Amital accepted this permissive view when allowing a woman to run for the Knesset on the Meimad list, R. Jachter pointed out that R. Kook would not be so permissive. But again acting as a gentleman, R. Jachter did not mention that R. Kook also opposed women’s suffrage, showing thereby that even a great rabbi will be the product of the ethos of his age.

Once more citing R. Amital, R. Jachter argues that a Talmud scholar must also serve as a soldier in Israel. Levites, to be sure, are exempt from military service and based on *Mishneh Torah, Hilkhhot Shemittah ve-Yovel* 13:13, Maimonides is frequently interpreted as ruling that Talmud scholars are exempt as well. This ruling is cited in order to justify the exemption of *yeshivah* students from serving in the Israeli army. In our times, however, when there is no *urim ve-tummim* and hence no possibility of a discretionary war (which could be declared only in accordance with a signal from the *urim ve-tummim*), the dispensations from service, which apply only in a discretionary war, are inoperative. In the case of a *milhemet mitsvah*, or obligatory, defensive war, the exemptions do not apply, and even the bride and groom are explicitly obliged to serve (*Sotah* 44b).

R. Jachter cites several authorities that justify the exemption of *yeshivah* students. R. Eliezer Waldenberg advances the curious hypothesis that the learning of the students enables the soldiers to succeed. But the aggadic passages that condemn the conscription of Torah scholars obviously refer to the now inoperative optional war. R. Jachter concludes his discussion with R. Lichtenstein's claim that one ought to serve in the army because by doing so one observes many Jewish laws.

R. Jachter cites R. Avraham Sherman's claim that military service in the Israeli army undermines young people's religiosity, and, by implication, must be avoided. Because consensus is so critical in R. Jachter's practical halakhic approach, he avoids challenging those Orthodox who raise the concern that exposure to a non-Orthodox environment will undermine communal loyalty and faith, even though their restrictive position regarding military service for both men and women in an obligatory war contradicts explicit talmudic law.

R. Jachter is an internationally renowned expert on the laws of *eruv*. He is the authority whom I consult when questions arise regarding my own community's *eruv*. An *eruv* may be placed only where there is no public access area as a matter of Torah (rather than rabbinic) law, that is, no *reshut ha-rabbim de-oraiyta*. Some post-talmudic authorities, namely Rashi and *Halakhot Gedolot*, reconstruct the talmudic definition of a public access area with the claim that (a) only when 600,000 people are present is an area designated as public access, and (b) only in such areas is construction of an *eruv* precluded. Neither the Talmud nor Maimonides' code provides for this innovation. R. Lichtenstein conceded to R. Jachter that this view "is among the most singularly difficult opinions of Rishonim in all *halakhab*." In his *Tosefta Ki-Feshuta* (tractate *Shabbat* p.2), R. Saul Lieberman expressed amazement at this unconventional interpretation. Nevertheless, R. Isserles and early Ashkenazic culture adopted this opinion, as do most latter-day Ashkenazic authorities. Even the *Mishnah Berurah*, which recognizes the problematic nature of the 600,000 people theory, merely urges pious people not to rely on the leniency of community *eruvim* but declines to rebuke those who rely on the lenient view.

Otherwise strict rabbis rely on this and other leniencies, such as considering door openings, or *tsurot ha-petah*, to be the legal equivalent of walls even though the Talmud

requires that a private access area (within which carrying on the Sabbath would be permitted) be more enclosed than open. R. Sha'ul Yisraeli rules that an *eruv* can be permitted in metropolitan Tel Aviv, taking into account the contiguity of housing and not municipal boundaries (a modern invention) and the *tsurat ha-petah* leniency. In addition, the presence of gentiles and non-Jewish residing within the *eruv* is, according to Jewish law, sufficient to nullify it, but this concern may be dismissed, it is argued, by "purchasing" rights from a mayor. R. Jachter realizes that the popular consensus position violates the plain sense of canonical law, but since Jewish law *de facto* follows the rabbinic consensus, he operates within that consensus.

This same recognition of the prevailing culture appears in his discussion of the second day of Jewish holidays in Israel and his discussion of women reading the *Megillah* for men. R. Jachter cites R. Joseph Caro, who rules (*Avqat Rokheil* 26), based on observation, that diaspora residents visiting Israel must observe two festival days, citing the practice of great rabbis that he had observed. R. Tsevi Ashkenazi (*Hakham Tsevi*) rules that the second day of *yom tov* has no significance in Israel, and its observance there violates the biblical prohibition against adding to the Torah. R. Jachter observes that this is a minority view that nonetheless has support. He does not evaluate the logical merits of the case, and instead defers to the great authorities who espoused these differing views. R. Jachter prefers the compromise approach of the Soloveitchik family, which has been reported in more than one version. In this view, one must observe the strictures of both holiday and weekday. Generally, when in doubt regarding rabbinic law one would be lenient. R. Jachter's result suggests that one must accept the cogency of R. Ashkenazi regarding the prohibition of adding to the Torah, but one must show respect for and observe the view of R. Caro, which reflects the majority view. Left unaddressed is why one honors a consensus position if it is less logical, unless one defines the post-talmudic consensus as canonical, and why, if there is no sitting Sanhedrin to vote on the matter, the majority view must be correct.

R. Jachter's treatment of women's *Megillah* readings reflects the same social and textual concerns. He rules that it is "inappropriate" for women to read the *Megillah* for men, because an early authority, *Halakhot Gedolot*, ruled that women have the obligation to hear, but not to

read the *Megillah*. As in the case of the *eruv* R. Isserles adopts *Halakhot Gedolot's* position. A minority of rabbis forbid women to read the *Megillah* even for women.

R. Jachter realizes that if he is to maintain integrity he may not outlaw a woman's reading of *Megillah* for men, because the Talmud (*Rosh Ha-Shannah* 29a; *Arakhin* 2b-3a) rules women share the obligation of *Megillah* equally with men. The *Tosefta* (*Megillah* 2:7) rules that women are exempt from the obligation. When the *Mishnah* and *Gemara* disagree with the *Tosefta*, the rules of legal interpretation require that the less authoritative *Tosefta* be dismissed, and not harmonized in a fashion that undermines the plain sense of the Talmud.

Halakhot Gedolot rules that the two opinions, the Talmud's and the *Tosefta's*, must be harmonized. This suggested harmonization supports popular religion culture, but it does violence to the plain sense of the canonical statute. In order to canonize the withdrawal of a woman's liturgical license granted by the Talmud, *Halakhot Gedolot* innovates an entirely new blessing for women to recite, "*lishmo`a megillah*" ("to hear the *Megillah*"). This puts in the mouths of women a declaration that a woman's obligation regarding the *Megillah* is unequal to that of a man. Like R. Isserles who endorses this view, *Halakhot Gedolot* views communal taste as the authoritative equivalent of the canonical document.

It is claimed that the *Megillah* ought to be read in a *minyan*, and that women "might" not count in such a *minyan*. These two claims are unattested in canonical Jewish writing, but by innovating and then applying these innovative requirements, *poseqim* are able to defend the withdrawal of a woman's right that offends the accepted expectations of men. By ruling that women's *Megillah* readings are "inappropriate" but not forbidden, R. Jachter contends that, strictly speaking, women may read for men but that the evolving consensus regards the practice with disfavor.

Together, *Halakhot Gedolot's* ruling regarding women's *Megillah* blessing and his redefinition of the access area definitions constitute a more radical deviation from antecedent usage than R. Rackman's approach to marriage nullification. One has a right to disagree with R. Rackman, yet it is distressing that rabbis are rude to him. The author of *Halakhot Gedolot* experienced no such mistreatment, yet his decision regarding the public

access areas was no less innovative. It seems even less justifiable on the basis of pure law, for if one relies on his view regarding carrying on the Sabbath in a communal *eruv*, one is likely a public desecrator of the Sabbath according to Maimonides' close reading of the talmudic text.

Ultimately, a Jew who has the courage to be modern and Orthodox should not defer to "traditions" that violate canonical tradition. The ruling forbidding a woman to read the *Megillah* for men, with its attached new blessing, is an innovation that would be considered heresy were it suggested by a non-Orthodox rabbi. Similarly, R. Sherman's comments regarding exempting *yeshivah* men (and, for that matter, women) from national service, assumes that Jewish law is for elements of the Orthodox a projection of communal sensibilities, and not the recorded will of God. R. Feivel Cohen's claim that a woman's breaking of water is the equivalent of *niddah* is simply a bald misstatement of *halakhah*. R. Waldenberg's claim that the *yeshivah* student's learning helps the army succeed in its efforts seems to be a social judgment violating an explicit norm of oral law.

Someone who takes God and Torah seriously, who leads a Modern Orthodox life with religious integrity, must look into the holy books before looking over his shoulder and investing current consensus with authority. Jewish law must be determined by the textual record. If the entire *Sanhedrin* makes an error, the ordained sage who knows better is forbidden to obey the Sanhedrin's ruling. R. Jachter knows that it is forbidden to separate oneself from the community, and he has made a pragmatic judgment that good is achieved by working with maturity, restraint, modesty, and realism within the Orthodox consensus. He raises questions and contradictions, and he offers a legitimate, prudent, and respectful way to negotiate these contradictions. His disciplined, careful, humane analysis of Jewish law negotiates the ideals of God's statutes, the realities of the historical record, and the conditioned habits—both mental and behavioral—of Orthodox Jews in order to sanctify the gray matter of Orthodoxy in our time. That remains his contribution to Orthodoxy.

Gray Matter: Discourses in Contemporary Halachah by Rabbi Chaim Jachter is available from the distributor, Israel Book Shop, at e-mail address irbkshp@aol.com, phone 732-901-3009, or fax 732-901-4012.