

## **The Status of the Heresh and of Sign Language**

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שאלה

What is the status of the deaf, in particular those who communicate via sign language? May sign language be used in place of speech in liturgy and halakhic activities (such as matters of personal status)?

תשובה

### **Introduction**

Historically, the deaf have experienced great prejudice in human societies. Regrettably, they have suffered disdain and oppression: they have been disenfranchised from education, religion, and commerce as well as excluded from regular interactions among individuals. Their opportunities for individual advancement and fulfillment have often been thwarted, and their intellectual abilities have been regarded with disdain. Rarely were the deaf seen as equal to those with hearing.

In our tradition, sensitivity to the disabled in general and to the deaf in particular is exhibited in certain laws.<sup>1</sup> At the same time, certain regulations, stemming from a lack of knowledge about

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*The Committee on Jewish Law and Standards of the Rabbinical Assembly provides guidance in matters of halakhah for the Conservative movement. The individual rabbi, however, is the authority for the interpretation and application of all matters of halakhah.*

<sup>1</sup> Surveys of the status of the heresh in Jewish law may be found in *Encyclopedia Talmudit*, s.v. "Heresh" and "Heresh, shoṭeh ve-kaṭan"; Judith Z. Abrams, *Judaism and Disability: Portrayals in Ancient Texts from the Tanach Through the Bavli* (Washington: Gallaudet University Press, 1998), *passim*; J. David Bleich, *Contemporary Halakhic Problems: Volume 2* (New York: Ktav, 1983), pp. 368-375; Avraham Steinberg, *Encyclopedia hilkhatit refuit* (Jerusalem: Falk Schlesinger Foundation, 1991), 2.531-583; Steinberg, *Encyclopedia of Jewish Medical Ethics*

the cognitive abilities of the deaf, are seen by deaf Jews as reflecting indifference and callousness. This ambivalence, between the humane and the seemingly derisive, is demonstrated in passages of midrash and liturgy as well. While sensitivity to the disabled is increasing in contemporary society, it is hardly new to Jewish communities, and advocating respect for the deaf naturally develops from the values espoused by our tradition.

While we may wish to cite only those elements of Jewish tradition that espouse sensitivity, we must not overlook the anguish of our deaf community members who read parts of our tradition with dismay and disappointment and who hope for a more compassionate and respectful response from us. It is especially the exclusion from communal activities that originated in a misunderstanding of the intellectual capacity of the deaf that is most hurtful and most in conflict with the currents of compassion for those marginalized from society customary in our tradition and the vast improvement in the education, integration, and advancement of the deaf during the past two centuries. Even where certain restrictions arose in halakhah, such as in areas of commerce, probably out of a desire to safeguard the deaf from being defrauded, such protectionism, if it is to be understood as such, or prejudice, if understood less generously, must be replaced with respect. We must grapple honestly with the halakhic association of the deaf with the mentally incapacitated and not ignore or whitewash how demeaning it is. Rabbi David Feldman wrote two decades ago:

I think that the word *heresh* ought to be abolished from our modern vocabulary. We ought to create a new Hebrew word for the deaf, or for the hearing impaired. That will help sever the nexus, break the connection between deaf people today and the terrible categorization of the *heresh* with either the *shoteh* or the *katan*.<sup>2</sup>

It is our sacred task to regard the deaf with respect and make our communities, synagogues, schools, and camps accessible to the deaf.

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(Jerusalem: Feldheim, 2003), pp. 280-297 (The entries in Steinberg's encyclopedias are not identical: the entries in the English publication are updated but abbreviated versions of the Hebrew ones). Unfortunately, the citations in Tzvi Marx, *Disability in Jewish Law* (Jewish Law in Context; London: Routledge, 2002), are often incorrect, rendering his work problematic.

<sup>2</sup> David Feldman, "Deafness and Jewish Law and Tradition," in *The Deaf Jew in the Modern World* (New York: Ktav, 1986), p. 23.

### Classical Rabbinic Views of the Deaf<sup>3</sup>

Classical rabbinic texts demonstrate an ambivalent approach to those who cannot hear, a status denoted as *heresh* (חרש).

The Talmud in b. Hagigah 2b defines a *heresh* as an individual who is placed alongside the categories of the *shoteh* (mentally confused)<sup>4</sup> and the minor because the *heresh* himself is mentally incapacitated.

חוץ מחרש שוטה וקטן כו'. קתני חרש דומיא דשוטה וקטן, מה שוטה וקטן - דלאו בני דעה, אף חרש - דלאו בר דעה הוא.

*Except the heresh, the shoteh and the minor etc.* [Our Mishnah] speaks of the *heresh* similarly as of the *shoteh* and minor: just as the *shoteh* and minor lack understanding, so *heresh* [means] one who lacks understanding.

The continuation of the passage defines the *heresh* as a deaf-mute<sup>5</sup>, one who cannot hear and does not use language. It then qualifies this definition by distinguishing the individual who can either speak or hear but not both from one who can neither hear nor speak.<sup>6</sup>

חרש שדיברו חכמים בכל מקום - שאינו שומע ואינו מדבר... המדבר ואינו שומע - זהו חרש, שומע ואינו מדבר זהו אלם, זה וזה הרי הן כפקחין לכל דבריהם.

<sup>3</sup> Terminology presents a possibly intractable dilemma. The term “deaf-mute” is a term appropriate for the historical sources analyzed in this teshuvah, but it can be construed today as offensive. In fact, finding any wording that is not demeaning is difficult. “Deaf,” “hearing impaired,” “hearing disabled,” or other such language assumes that the person without hearing has a negative characteristic. The language itself implies that the person so described is flawed. This negative connotation must be repudiated, and the dignity of the deaf community must be respected. See M. Miles’ review of Marx’ book (in *Jewish Perspectives on Theology and the Human Experience of Disability* (Binghamton: Haworth Pastoral Press, 2006), pp. 249-254. In this teshuvah when addressing classical rabbinic sources, I will use the transliterated term *heresh* in place of the term “deaf-mute” refer to the deaf who do not speak, and where the term *heresh* is used to refer to the deaf who do use speech, I will so specify.

<sup>4</sup> The exact denotation of the term *shoteh* may be “mentally deranged” or “mentally incapacitated”. See the conflicting characterizations in Alexander Kohut, ערוך השלם (Vienna: Menorah, 1926), 8.62b-63a. See also Rabbi Reuven Hammer, “תשובה בעניין טקס בר/בת מצווה לילדים, מפגרים”, תשובות ועד ההלכה, כרך ד, 12-13.

<sup>5</sup> The term “mute” can mistakenly convey that the deaf who do not speak cannot physically use their voice box. This is rarely, if ever, the case. Human beings learn to use their voice box by hearing others use theirs: if individuals do not hear, it would be natural for them not to use their voice box, even though it is unimpaired. (personal communication of Alexis Kashar and Naomi Brunnlehrman)

<sup>6</sup> Confusingly, the term *heresh* is retained for the one who can speak but not hear.

The *heresh* of whom the sages spoke is one who can neither hear nor speak....One who can speak but not hear is termed *heresh*; one who can hear but not speak is termed *illem*. Both are deemed of sound mind regarding all matters relating to them.<sup>7</sup>

The clear implication is that those who cannot hear and do not speak, in sharp distinction to those who can hear but do not use speech and those who cannot hear but do use speech, are not of sound mind. They are disqualified, excluded, and re-categorized as being unable to conduct themselves as equal to other human beings. It is their lack of speech alone that differentiates them and bars them from being considered lucid (termed בר דעת in a number of rabbinic texts).

In isolated areas of life, a *heresh* was permitted leniencies to allow him/her to undertake activities that a hearing individual who was deemed competent could enjoy. For example, Mishnah Yevamot 14:1 allows a *heresh* to contract a valid marriage or divorce by using gestures to communicate his wishes.

כשם שהוא כונס ברמיזה, כך הוא מוציא ברמיזה.

Just as a *heresh* can enter a marriage via gestures, so too can he divorce via gestures.

This rabbinic enactment allowed a *heresh* to marry or divorce by a special rabbinic enactment. However, a severe reservation was attached to this dispensation: an individual who was a *heresh* could not act independently on his own behalf but needed to be under the supervision of a hearing person. His gestures and, thereby his wishes, had to be acted upon by a hearing person.

In other areas, severe restrictions were placed upon a *heresh*. The most onerous was that a *heresh* was excluded from all the mitzvot. The exclusion is stated most clearly in the halakhic exposition on the celebration at the Temple in Jerusalem. The Mishnah in Hagigah 1.1 begins:

הכל חייבין בראיה חוץ מחרש שוטה וקטן וטומטום ואנדרוגינוס ונשים ועבדים שאינן משוחררין והחגור והסומא והחולה והזקן שאינן יכול לעלות ברגליו.

All are obligated to appear [at the Temple in Jerusalem on the three pilgrimage festivals] except a *heresh*, a *shoteh*, a minor, a hermaphrodite, androgyne, women, slaves who have not been emancipated, the lame, the blind, the ill, the elderly who cannot ascend to the Temple Mount on his own feet.

An analogy has been implicitly drawn between the requirement for priests on duty at all times at the Temple and the requirement for lay Jews to appear at the sanctuary on the pilgrimage festivals.<sup>8</sup> For priests to be able to officiate at the Temple in Jerusalem, they had to be of

<sup>7</sup> A person who can speak but not hear or who can hear but not speak is deemed fully competent.

<sup>8</sup> Abrams, *Judaism and Disability*, pp. 49-57.

unblemished body, pure of lineage, and in a state of ritual cleanliness. The requirement for an unblemished physical form was extended to all Jews on the three pilgrimage festivals. The rabbis, however, recognized that while those whose physical imperfection exempted them from the requirement to be present at the Temple, they could participate in the mitzvah of rejoicing<sup>9</sup> because their physical flaw did not reflect an inner flaw, a mental incapacity. Their cognition was intact and, therefore, they possessed the ability to fulfill a mitzvah intentionally. They were required to partake in the mitzvah of rejoicing, even if they were exempted from the mitzvah of appearing at the Temple. Such was not the case with the *heresh*, the *shoteh*, and the minor, who were not required even to rejoice.

הכל חייבין בראייה ובשמחה חוץ מחרש המדבר ואינו שומע ואינו מדבר שפטור מן הראייה ואע"פ שפטור מן הראייה חייב בשמחה ואת שאינו לא שומע ולא מדבר ושוטה וקטן פטור אף מן השמחה הואיל ופטורים מכל מצות האמורות בתורה

All are required to be seen [at the Temple in Jerusalem on the three pilgrimage festivals] and to rejoice, except the *heresh* who can speak but not hear or who can hear but not speak: they are exempt from being seen [i.e. from the requirement to appear at the Temple in Jerusalem]. But though exempt from being seen [appearing at the Temple], they are required to rejoice. However, those who can neither hear nor speak, those who are *shoteh*, or those who are minors, are exempt even from rejoicing since they are exempt from all the mitzvot of the Torah. (b. Hagigah 2b)

The *heresh*, the *shoteh*, and the minor were exempted from all the mitzvot, including the mitzvah of rejoicing on the festival. What is striking is that the only physical disability included among those exempted from the mitzvot is being a *heresh*. The rabbis associated mental impairment with the *heresh*; the rabbis did not impute any intellectual impairment to those with any other physical disability.

The association of the *heresh* with mental impairment is reflected in many rabbinic texts. Let a few examples suffice. A *heresh* was excluded from the minyan for liturgy that was required to be recited in the presence of a minyan. The Shulhan Arukh. O.H. 55:5. states:

חרש המדבר ואינו שומע, או שומע ואינו מדבר, הן כפקחין ומצטרפים. אבל מי שאינו שומע ואינו מדבר, הרי הוא כשוטה וקטן.

The *heresh* who can speak but cannot hear or who can hear but cannot speak are of sound mind and can join [as part of the minyan], but the one who cannot hear or speak is like the *shoteh* and the minor.

Again, a *heresh* is placed in the same category as those with mental deficiencies.

Because a *heresh* was considered to be lacking in intelligence, a *heresh* was not considered to be responsible for the commandments, and because a *heresh* was not responsible for the mitzvot, a

<sup>9</sup> The mitzvah of rejoicing was defined as partaking in a meal prepared from a particular sacrifice offered at the Temple.

*heresh* could not fulfill the mitzvot on behalf of others in ritual observances. A *heresh* could not serve, for example, as the *mezammen* for *birkat ha-mazon*.<sup>10</sup> This particular exclusion is a striking example of the scope of the exclusion for those who cannot hear and do not speak because *birkat ha-mazon* was a *berakhah* for which those who otherwise were not deemed responsible for the mitzvot could form their own *zimmun*.<sup>11</sup>

A *heresh* was precluded in halakhah from serving as a witness. Two reasons were given: 1) a *heresh* is like a *shoteh* (Tosefta Shevuot 3:8; M.T., *Hilkhot Edut*, 9:11); and 2) a witness must be able to testify orally before a *beit din* and must be able to hear the questions and warnings of the judges (Tosefta Shevuot 3:8; M.T., *Hilkhot Edut*, 9:11; Kesef Mishneh idem; S.A., H.M. 35:11). The only exception to this is a woman testifying about the death of her husband so that she can remarry, a case in which a woman's testimony, even a woman who is deaf, is to be accepted.

The source for the two reasons for the exclusion of a *heresh* from serving as witnesses is Tosefta Shevuot 3:6. It mandates that witnesses be able to fulfill the requirements of the scriptural verse -- a witness must be able to hear, and that necessity prevents a *heresh* from serving as a witness:

ושמעה להוציא את החרש או ראה להוציא את הסומא או ידע להוציא את השוטה אם לא יגיד ונשא  
עונו להוציא את האילם אילו דבר הראשונים

The text states "When he has heard a public curse (against anyone who withholds testimony)" (Lev 5:1) in order to exclude the *heresh*; "[and although able to testify as one who has either] seen" in order to exclude the blind; "[or] known [of the matter]" in order to exclude the *shoteh*; and "he does not offer testimony, so that he bears his guilt" in order to exclude the mute. These are the words of the early sages.

The discussion has excluded the *heresh*, the blind, and the mute (who can hear but do not speak) based on their specific physical limitation that hinders them from fulfilling the mandate of the verse. However, the continuation of the Tosefta places the exclusion of the *heresh* and the *shoteh* side by side. This association implies that the *heresh* and the *shoteh* belong to the same category: those whose mental functioning is too impaired for them to serve as witnesses.

ר' עקיבא אומ' ודרשת וחקרת ושאלת היטיב וכי יש דורשין לחרשים ויש חוקרין לשוטים  
Rabbi Akiva says, "You shall inquire, investigate and ask diligently" (Deut.  
13:15) -- can they inquire of the deaf? Can they investigate the *shoteh*?

Later halakhic sources employ both of the Tosefta's reasons. M.T. *Hilkhot Edut* 9:11 bases the exclusion on both the categorization of the *heresh* as mentally incapacitated and the *heresh*'s inability to hear and speak:

<sup>10</sup> A *heresh* (as well as the *shoteh*) who is deemed to have the *kavannah* to recite *birkat ha-mazon* was permitted to be included as part of the three or ten people of the *zimmun*. See S.A. O.H. 199.10.

<sup>11</sup> S.A. O.H. 199.6.

החרש כשוטה שאין דעתו נכונה ואינו בן מצות, ואחד חרש מדבר ואינו שומע או שומע ואינו מדבר, אע"פ שראייתו ראייה מעולה ודעתו נכונה צריך להעיד בבית דין בפיו, או שיהיה ראוי להעיד בפיו, ויהיה ראוי לשמוע הדיינים והאיום שמאיימין עליו, וכן אם נשתתק אע"פ שנבדק בדרך שבדקין לענין גיטין ונמצאת עדותו מכוונת והעיד בפנינו בכתב ידו אינו עדות כלל, חוץ מעדות אשה לפי שבעיגונה הקילר.

The *heresh* is like the *shoteh*, whose mind is not sound and who is not responsible for the *mitzvot*. [This applies] both to the *heresh* who can speak but does not hear and to the *heresh* who can hear but does not speak. Even if his eyesight is excellent and his mind is sound, he must give his testimony by [speaking with his] mouth, and if he is able to give testimony by [speaking with his] mouth, he must be able to hear the judges and the warning with which they warn him. This is the case even with one who lost his ability to speak, even though he has been checked in the manner that is done with regard to *gittin* and his testimony is pertinent and he can testify via writing, his testimony cannot be accepted at all, with the exception of a woman who is an *agunah* in whose case did they relax [the requirements for testimony]

The Rambam has applied this exclusion not only to the *heresh* but also to any individual who has lost either speech or hearing.

Categorizing the *heresh* with the *shoteh* marginalizes the *heresh*. They cannot participate in Jewish culture at all. By contrast, those with other physical disabilities are restricted only when their particular physical limitation prevents them from participating in a particular act: their impairment hinders them from specific practices.<sup>12</sup> A blind person cannot chant Scripture for the congregation because the person who does so must read the actual text.<sup>13</sup> But outside of activities that require sight, the blind can participate. Not so for the *heresh*. Their physical disability disenfranchises them completely. They are thoroughly excluded because their disability is associated with a mental incapacity, not solely a physical limitation.

These limitations arose from the inability of the rabbis to determine the mental functioning of the *heresh*.<sup>14</sup> In order to be a fully functioning individual in the realm of halakhah, the rabbis determined that a person must have sound cognitive ability (דעת). They designated three types of

<sup>12</sup> Abrams, *Judaism and Disability*, pp. 124-125. *Contra* Shlomo Auerbach, 'Nispaḥ le-“Teshuvah be-inyan yeladim mefagerim”', *Moriah* 11, issues 9-10 (1982), 65-66.

<sup>13</sup> M. Megillah 4:6. See also Rabbi Daniel Nevins, “The Participation of Jews Who Are Blind in the Torah Service,” on Rabbinical Assembly website and in *Jewish Perspectives on Theology and the Human Experience of Disability*, pp. 27-52.

<sup>14</sup> Abrams, *Judaism and Disability*, p. 125.

individuals as having compromised cognition, the *heresh*<sup>15</sup>, the *shoteh*, and the minor. The individuals in this category were precluded from participating in the halakhic system unless it could be proven that in particular cases the specific individual involved does in fact have sound cognitive ability. A minor for example is taught to observe mitzvot as his cognitive ability develops.<sup>16</sup>

The rabbis' quandary about the *heresh* emerges from their inability to determine the mental function of a *heresh*. This impasse comes to the fore in b. Yevamot 113a-b, where two issues are interrelated: 1) Terumah must be intentionally separated from other produce, and the question arises as to whether terumah separated by a *heresh* reverts to the status of unconsecrated produce, and 2) if a man had intimate relations with the wife of a *heresh*, it is debatable as to whether he would be required to offer the sacrifice of *asham talui* because the marriage of a *heresh* is valid only according to special rabbinic enactment. The rabbis are unsure about the mental status of the *heresh*. Some rabbis argue that if a *heresh* separates terumah from other produce, even though he was prohibited ab initio from doing so, his separation of terumah could be considered valid ex post facto because it is possible that he had the mental capacity to do so with the proper mental intention. Therefore, the terumah which he separated cannot revert back to unconsecrated status. With regard to marriage of the *heresh*, the rabbis are unsure about its source of authorization. If a *heresh* were allowed to marry only by special rabbinic enactment, then the consequences in a case when another man who was intimate with the *heresh*'s wife are that the other man did not transgress and therefore did not have to offer a particular sacrifice, the *asham talui*. However, some rabbis argue that the offender does need to offer the *asham talui* because the source for a *heresh* contracting a marriage might be the same as for all Jews, not any special enactment by the rabbis, because a *heresh* has the same mental capacity as other Jews do.

בעא רב אשי מ"ט דר' אלעזר מיפשט פשיטא לי' דחרש דעתא קלישתא הוא ומיהו מספקא לי' אי דעתא צילותא אי לאו דעתא צילותא ולעולם חדא דעתא הוא או דלמא פשיטא ליה דדעתיה קלישתא ולא דעתא צילותא הוא והכא היינו טעמא כיון דעתים חלים ועתים שוטה למאי נפקא מינה להוציא אשתו בגט אי אמרת חדא דעתא הוא כקדושין כך גירושין ואי אמרת עתים חלים ועתים שוטה קדושי מצי מקדש גרושי לא מצי מגרש מאי תיקו:

Rav Ashi asked: What is Rav Eleazar's reason [for not permitting the terumah that a *heresh* has separated to revert to unconsecrated status and for requiring an *asham talui* for intercourse with a *heresh*'s wife]? Is it obvious to him that the *heresh* is weak in cognitive ability? Perhaps, he is doubtful as to whether [the *heresh*'s] mind is sound [and therefore the *heresh* can understand the proceedings and so his separation of terumah is valid and his marriage is not only valid according to rabbinic enactment] or not sound [and therefore the *heresh* cannot understand the proceedings and so his separation of terumah is invalid and his

<sup>15</sup> As noted in note 6, the terminology is confusing because the term *heresh* is also used for the deaf who can speak. However, b. Hagigah 2b, as discussed earlier, considers such a person as lucid. It would appear that in general the term *heresh* without any qualification refers to those who cannot hear and who do not use speech.

<sup>16</sup> See, for example, m. Sukkah 3:15; t. Hagigah 1.2-3.

marriage is at most valid through rabbinic enactment], though [in either case] his cognitive ability is always in the same condition [the *heresh's* mind is always in the same condition, unlike the mentally incapacitated who might be lucid at times].

Or perhaps, he has no doubt that the [*heresh's*] mind is weak and never lucid. [Rav Eleazar's doubt] here is due to this reason: Because [the *heresh*] may sometimes be in a normal state and sometimes be in a state of mental incapacity.

In what respect would this constitute any practical difference? [It makes a difference in respect to] releasing his wife by a letter of divorce. If you grant that his mind is always in the same condition, his divorce [would have the same validity] as his betrothal. If, however, you contend that sometimes he is in a normal state and sometimes he is in a state of mental incapacity, he would be capable of valid betrothal, but he would not be capable of giving divorce [because he might be of weak mind at that time, in which case his divorce would be invalid]. What [then is the decision]? This remains undecided.

The confusion of the rabbis about the mental capacity of the *heresh* extends to divorce. In extending a divorce, the *heresh* must be in the same mental state as when the marriage was contracted.<sup>17</sup> If a *heresh* were intermittently lucid or impaired, the divorce could not be executed because it would be unclear whether at the moment of divorce the *heresh* was lucid. If the *heresh* were always in the same mental condition, the divorce could be executed. The quandary the rabbis face was that they simply could not determine what the mental capacity of a *heresh* at all. They could not determine the mental state of a *heresh* and, therefore, could not decide the issues before them. Although this discussion is about Rabbi Eleazar's position, it ends in genuine confusion over the cognitive state of the *heresh* because the rabbis cannot refute either line of reasoning and determine whether a *heresh* was mentally incapacitated or not.

The bewilderment of the rabbis in determining the mental capacity of a *heresh* impelled them to rule that a *heresh* not only lacked hearing but also sound cognitive ability and to associate a *heresh* with the *shoteh*, marginalizing the *heresh*. This is in sharp contrast with those with other physical disabilities, who are restricted only when their specific physical impairment inhibits them from participating in an activity: their limitation hampers them from specific practices. Otherwise, they enjoy the same status as other Jews because their mental acuity is deemed to be the same. Not so for the deaf who do not communicate via speech.

### The Deaf in the Modern Period

Starting in the nineteenth century in western Europe, significant advances were made in the education of the deaf, and their soundness of their cognitive ability became evident.<sup>18</sup> By the

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<sup>17</sup> See m. Gittin 2:6 for the expression of this general principle.

<sup>18</sup> It must be emphasized that the transformation was in the understanding of hearing people, who came to understand that, contrary to the assumptions that they had about the deaf, the deaf have sound cognitive ability.

middle of the century, a number of Jewish communities had established schools for the education of deaf children. Among halakhic authorities there has been a slow drift toward recognizing the full inclusion of the deaf as being of sound mind. The nascent sensitivity to the disabled, at work sporadically in previous halakhic literature, has begun to be a point of orientation for decision-making.<sup>19</sup>

Rabbi Simcha Bunim Sofer (1842 - 1907, Pressburg) reports in his book *Shevet Sofer*, E.H. 21, that his father, Rabbi Abraham Samuel Benjamin Sofer, had visited the school for the deaf in Vienna and had been very impressed by the abilities of the students he saw there. He expressed his doubts as to whether the exclusion of the deaf from responsibility for the commandments truly applied to people who had received such training.

ושמעתי כמה פעמים מאמ"ו מאוה"ג זצ"ל שאמר שהוא מסופק אם אינם מחוייבים במצות וכאשר  
הי' בוויינן בקשו ממנו המורים בבית חינוך החרשים שיכבד אותם בכבודו לראות בעיניו מעשה אומן  
נפלא שלהם והי' משתומם מהדברים אשר ראה שם מה שלמדו אלו החרשים ואינם מדברים עד  
שעלה ספק זה בלבו אם אינם בר דעת גמור ומחוייבים במצות

I heard a number of times from my father who would say that he was doubtful that they were not responsible for the mitzvot. When he was in Vienna, the teachers in a school for the deaf asked him to visit to see with his own eyes their wonderful training. He was so astonished by what he saw there in what they taught the deaf who do not speak that he began to doubt that the (deaf) were not of sound mind and (therefore they should deemed to) be responsible for the mitzvot.

Rabbi Alexander Samuel Heilprin (1825-1904, Brody, Lvov) addresses the case of a deaf person who had gained an education at a special school that enabled him to read, to understand speech through a special skill (lip reading), and to engage in commerce. He writes in *Rosh Hamizbeah*, 14:

נלענ"ד דזה דוקא בחרש שאינו יודע מה שמדברים אליו, ומה שיודע ומבין הוא רק מכח רמיזה, וכיון  
דדעתו קלושא אינו משיג מעצמו אלא עד מקום שידו ושכלו מגעת להבין מעצמו, אבל מאחרים אין  
בכחו לשמוע ולהבין הדבר ביתר שאת, לא כן החרש המלומד לראות בכח הראות את הדיבור היוצא  
מפי הדובר עמו, ואם אחרים מדברים עמו להבינו מלאכת מחשבת הוא מתבונן עי"ז שהמורה מדבר  
עמו להשכיל אותו להעלותו עלי סולם החכמה ועי"ז יבין אשר לא ידע עד הנה, איש כזה כו"ע מודו  
שהוא בכלל פקח גמור

It seems to me that (the statement that a heresh is not of sound mind) applies only to a heresh who does not know what they are saying to him, and what he does understand is only from gesture. Since his mind is weak, he does not understand on his own except to the extent to which his hand and mind reaches to understand

<sup>19</sup> However, it does appear that many of these early schools for the deaf educated children who were not born deaf but who lost their hearing due to illness after having learned to speak. See Richie (Shmuel) Lewis, "מעמד שפת הסימנים בהלכה בכלל וכאקט ליטורגי בפרט, ריכ"ל העם רואים את הקולות": מעמד שפת הסימנים בהלכה בכלל וכאקט ליטורגי בפרט, (unpublished rabbinic thesis, Schechter Institute for Jewish Studies, 1995), p. 56. Cf. p. 6.

on his own. But he does not have the ability to hear and understand a matter from others properly. Quite the opposite is the educated deaf-mute, who can see visually the speech of the one addressing him. If others speak with him, he comprehends it via the special skill which a teacher has taught him in order to advance him in intellectual abilities and by means of which he gains knowledge of what he did not know previously. Everyone agrees that such a person is of completely sound mind.

Rabbi Isaac Herzog (1888 - 1959, Poland, England, Israel) argues that by means of education the heresh can no longer be considered in the category of the mentally incapacitated in his collection of responsa *Heikhal Yitzhak*, E.H., volume 2, siman 47:

בלימוד הזה שלא היה נמצא בימי חז"ל יצא מכלל אינו בן דעת, ועכ"פ ספק הוא, ואין ראיה מהא שכתוב וניכר שדעתו נכונה ומיושבת עליו, שזה הלימוד המודרני רפואה גמורה

With this education that was not available in the days of the classical sages, (the heresh) has exited from the category of one who is mentally deficient, and in any case, it is doubtful. There is no better proof than what (this deaf-mute) writes, from which it is apparent that his intelligence is totally sound. In fact, modern education is (equivalent to) complete healing (from his deafness).

In these responsa, these authorities recognize that the education that the deaf have received has enabled them to interact more fully with the hearing, demonstrating the soundness of their cognitive ability. However, while Sofer and Herzog were favorable toward conferring a change of status on the deaf, they hesitated to issue such a ruling. The idea remained just as a dormant possibility in Sofer's mind. Herzog concludes that he cannot issue a blanket ruling because he holds to the principle that where any doubt remains, he must rule stringently. Helprin limited his ruling to a single individual in the case of halitzah.

The belief that deafness indicates a lingering mental incapacity abides. Rabbi Moshe Feinstein (1895 - 1986, Belarus, New York) surmises from the Rambam's comment on the linkage between the deaf and the ability to speak that the lack of ability to hear signifies that there is a defect in the intelligence of the deaf.<sup>20</sup> However, those with the ability to speak and thereby to interact with other human beings can make up for the deficit. However, Feinstein holds to Rambam's ruling that one who can speak but cannot hear may not sell real estate by arguing that while being able to speak makes up for the deficit in intelligence, it does not confer the sharpness needed for real estate transactions. In Feinstein's ruling, the assumption remains that deafness signals a defective intelligence.

The presumption that deafness is a symptom of a flawed intelligence continued to prevail in the non-Jewish community. In spite of the significant advances made in educating the deaf, enabling them to become more integrated into the society of the hearing in the 19th and 20th centuries, the

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<sup>20</sup> *Igrot Moshe*, E.H., part 3, siman 33.

disparagement of the intellectual abilities of the deaf continued. Sign language was maligned as a broken version of a spoken language or a rude pantomime. It was claimed that sign language dreads and avoids the abstract and exhibits grammatical disorder and illogic. Only in 1960, did a professor of linguistics at Gallaudet University (then College), William C. Stokoe, Jr., publish the first analysis of a sign language as an ordered system governed by syntax, having invented a description system for sign language.<sup>21</sup> Two linguists, Edward S. Klima and Ursula Bellugi, proved in 1979 that sign languages are as complex, abstract and systematic as spoken languages: they are intricately structured languages with highly articulated grammar.<sup>22</sup> They are controlled by the same part of the brain as spoken languages and are mastered in developmental stages like spoken languages.

Often enough, the estimation of the intellectual ability of the deaf has been measured by whether and how much they are able to interact with the society of the hearing. For more than a century, controversy swirled over whether teaching deaf children sign language (manualism) or oralism (speaking and lip-reading) was preferable. Some advocates championed sign language as the basis for the unique culture of the Deaf, while others supported oralism as the way for the deaf to be integrated into society. The pendulum has swung back and forth; nonetheless, this consideration, that the deaf be valued by how well they interact with those who can hear, demeans those who are deaf.

In 2009, the National Association for the Deaf in the United States issued a statement emphasizing that deafness does not imply maladjustment:

Many deaf and hard of hearing people straddle the "deaf and hearing worlds" and function successfully in both. There are many people with implants who use sign language and continue to be active members of the deaf community and who ascribe to deaf culture and heritage. There are many deaf and hard of hearing individuals, with and without implants, who are high-achieving professionals, talented in every imaginable career field. They, too, are successfully effective parents, raising well-adjusted deaf, hard of hearing and hearing children. As citizens, they continue to make contributions to improve the quality of life for society at large. Deaf and hard of hearing individuals throughout the ages have demonstrated psychological strength and social skills when surviving and

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<sup>21</sup> *Sign Language Structure: An Outline of the Visual Communication Systems of the American Deaf* (Studies in Linguistics, Occasional Papers 8; Buffalo: University of Buffalo, 1960). See also his intriguing *Language in Hand: Why Sign Came Before Speech* (Washington, D.C.: Gallaudet University Press, 2001).

<sup>22</sup> Edward S. Klima and Ursula Bellugi, *The Signs of Language* (Cambridge: Harvard University Press, 1979).

overcoming society's misconceptions, prejudices, and discriminatory attitudes and behaviors, thus attesting to their resilience, intelligence, and integrity.<sup>23</sup>

### The Status of the Deaf in Halakhah in Contemporary Times

We as Jews are heirs of a tradition that at times exhibited sensitivity toward the disabled, but at times certain regulations and statements were made that may appear to be callous, especially by the members of our communities who are disabled. The deaf in particular were stigmatized by being relegated with those lacking full cognitive ability. We must seek to redress this misconception and to re-educate ourselves and our communicates.

The Committee on Jewish Law and Standards will no longer hesitate in recognizing the cognitive ability of the deaf. We rule that the prior record of discrimination against the deaf be reversed due to the increased understanding and awareness of the cognitive ability of the deaf among the hearing and due to the advancements in the education of the deaf. The categorization of the deaf as mentally incapacitated is to be revoked, and they are to be considered completely lucid.

It is impossible to find precedents for the use of sign language in classical rabbinic literature or in later halakhic literature since sign language did not exist during most of the time period during which this literature was composed. However, Rabbi Richie (Shmuel) Lewis argues that we can find a number of instances in which rabbinic sources apparently broadened the conception of language beyond speech and we can utilize them as the basis for recognizing sign language as a means of communication equal to speech.<sup>24</sup> In m. Gittin 7.1, the case of a man who married a woman while he was able to speak then, after having become mute, wanted to divorce her is addressed:

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<sup>23</sup> This statement originated in the introduction of cochlear implants in the early 1990's, provoking discord among the deaf. However by 2000, an attitude of inclusiveness prevailed in deaf community in the United States, the impetus for the statement issued by the National Association for the Deaf. A cochlear implant has allowed the deaf to attain a sense of sound by converting sound into electrical signals received by cells near the auditory nerve. A microphone worn behind the ear picks up sound, and a processor converts the sound into a radio signal that is transmitted through the skin to an implanted receiver. The radio waves are then converted into electrical signals that are transmitted along electrodes along the auditory nerve. [See "Cochlear Implants: To Hear Again", *Scientific American* (June 2003), 82-83; Jane E. Brody, "For Some Who Lost Their Hearing, Implants Help," *The New York Times* (October 3, 2006); Michael Chorost, *Rebuilt: How Becoming Part Computer Made Me More Human* (Boston: Houghton Mifflin, 2005), *passim*; Jay R. Lucker, "Cochlear Implants: A Technological Overview," in *Cochlear Implants in Children* (Washington, D.C.: Gallaudet University Press, 2002), 45-64; and Arlene Romoff, *Hear Again: Back to Life with a Cochlear Implant* (New York: League for the Hard of Hearing, 1999), 248-249]; תחומין, "השתל הקוכלארי והגדרת החרש בהלכה", 24 (2004), 173-176.

<sup>24</sup> Lewis, "וכל העם רואים את הקולות", pp. 60-62. Rabbi Lewis offers the example of m. Gittin 7.1.

נשתתק ואמרו לו נכתוב גט לאשתך והרכין בראשו בודקין אותו שלש פעמים אם אמר על לאו לאו ועל הן הן הרי אלו יכתבו ויתנו:

If a man lost his speech and they said to him, "Should we write out a bill of divorce for your wife?" and he nodded his head, they must test him three times whether for "no" he meant "no" and for "yes", he meant "yes". Then they may write it out and deliver it

The mishnah allows gestures as a means of communication: the soundness of his mind is tested when he is asked a few simple questions. His nodding can substitute for a speech command to a scribe. This dispensation becomes the normative halakhah for this situation.<sup>25</sup> The man's nodding is more than a substitute for a word. The gesture indicates an inner state, the man's intention, and while this privilege is very limited, it does demonstrate that at times the rabbis were flexible with the concept of speech, allowing a gesture (albeit far from the sophistication and multi-dimensionality of sign language) to be equivalent to a speech-act. This privilege was not limited to divorce. In a text we have already discussed, Mishnah Yevamot 14:1, a man deaf from birth who does not use language can contract a valid marriage or divorce by using gestures to communicate his wishes.

כשם שהוא כונס ברמיזה, כך הוא מוציא ברמיזה.

Just as a *heresh* can enter a marriage via gestures, so too can he divorce via gestures.

In this case, the rabbis extended the privilege across a great conceptual divide, from an individual whose lucidity was not questioned, who was not deaf but who lost the ability to speak, to an individual who was deaf and did not speak. The rabbis understood that what was needed was not speech, but a means of communication. In these limited cases, gestures were sufficient

Sign language is far beyond the gestures permitted in these two examples. Even pantomime, gesturing more advanced than nodding yes or shaking no is an ad hoc creation in a particular instance of physical gestures used to convey a message, usually desires (e.g. food, water, silence). In pantomime, the motioner points to objects or persons and draws pictures in the air. Sign language and speech, in distinction to pantomime, both involve abstraction and generalization.

Both speech and sign language utilize basic units (morphemes) to which meaning is attached arbitrarily because they have nothing intrinsically connected to that which they signify.<sup>26</sup> Speech consists of a limited set of sounds, repeatable and consistent, expressing conceptions, and the individual sounds that convey meaning are distinguished by articulation, pitch, duration and rhythm. Sign language is a limited set of motions that are repeatable and consistent and that

<sup>25</sup> M.T. Hilkhot Gerushin, 2:14; Tur, E.H, 121; S.A. E.H., 121:5.

<sup>26</sup> Ferdinand de Saussure, *Course in General Linguistics*.

express conceptions. The motions of sign language are distinguished from one another by the position of the hand(s), the movement of the hand(s) in relation to the body, and the orientation of the hand. Both speech and sign language consist of elements dynamically varied as they move through time.

Sign language, therefore, is a means of communication equal to speech. It fulfills all the communicative functions that a language does. It meets what halakhah needs in a means of communication used in halakhic proceedings: sign language imparts that the signer comprehends and acquiesces to an act and does so in a manner that can clearly be seen and discerned by witnesses.<sup>27</sup> It can be used in matters of personal status, such as marriage and divorce, and it can be used in rituals such as *brit milah* or *brit kodesh* by the parents or *mohel* (and *kehillah*) and *pidyon ha-ben* by the parents or *kohen*.

Can sign language be used liturgically? While our liturgy consists of fixed texts, they can be recited in any language. There are few reservations to this freedom. The set pattern of a blessing (מטבע ברכה) is not limited to a single language, but it requires that at the very least the declaration of divine sovereignty must be included.<sup>28</sup> The Shema can be recited in any language but the recitation must be done in a specific way:

הקורא את שמע ולא השמיע לאזנו יצא רבי יוסי אומר לא יצא קרא ולא דקדק באותיותיה רבי יוסי  
אומר יצא ר' יהודה אומר לא יצא

The one who recites the Shema but not loudly enough for him to hear, he has fulfilled his obligation. Rabbi Yose says: he has not fulfilled it. If he recited it without clearly pronouncing the letters, Rabbi Yose says: he has fulfilled his obligation. Rabbi Judah says: he has not fulfilled his obligation. (m.Berakhot 2:3)

The rishonim defined the requirement as *הוציא* or "articulated with his lips"<sup>29</sup> or *בשפתיו*, "uttered with his lips,"<sup>30</sup> not as meditating on them internally. This standard was applied not only to the Shema but extended to *birkat ha-mazon*, *Shmoneh Esreh*, and other blessings.<sup>31</sup> So the mouth must move, but it is not necessary for the words to be loud enough to hear or pronounced clearly.

In his analysis of the propriety of sign language in liturgy, Rabbi Lewis concedes that identifying a halakhic source that allows for gestures to take the place of articulating the Shema and other

<sup>27</sup> Lewis, "וכל העם רואים את הקולות", p. 44.

<sup>28</sup> S.A. O.H.114

<sup>29</sup> Rabbenu Yonah, Alfasi Berakhot 12a.

<sup>30</sup> Rosh, Berachot, chapter 3, siman 14.

<sup>31</sup> S.A. O.H. 62, 101, 106 and 185.

liturgical prayers is impossible, for such a source is lacking.<sup>32</sup> He argues that since it is clear that the deaf who communicate via sign language are deemed to be of sound mind because sign language is clearly a means of communication equal to speech, we must ask ourselves a question in the realm of the ethical and social, whether we want to include the deaf who communicate via sign language in the halakhic way of living.

Let me offer an alternate argument, equally trenchant: articulating the Shema (or other liturgy) with the movement of the mouth is more than simply embodying the physical act of speech. By following the halakhic requirement to recite prayers aloud, even if too softly to hear, we are propelling ourselves to focus on our prayers. We are centering ourselves and concentrating in a way distinct from reading a fixed text quietly and internally to ourselves. The physical gestures of speech impress us to concentrate.<sup>33</sup> If the physical act of moving our mouths in speech does so, the gestures of sign language do so even more. Sign language is, therefore, a perfect substitute for oral articulation in prayer and may be used to fulfill the requirement for the physical articulation of the words of the Shema.

Among liturgical activities, the Torah reading is a special case. Unlike other liturgical requirements, it is a mandate upon a community, not upon an individual, and the blessings were instituted to honor the congregation, not to satisfy a liturgical requirement of the reader or the congregants.<sup>34</sup> The Torah must be read from a scroll, and the question arises as to whether a sign language minyan may read Torah in sign language as a fulfillment of a community's obligation for the public reading of Torah. This will be treated in a forthcoming appendix to this teshuvah.

Sign language may therefore be used in liturgy. A deaf person called to the Torah who does not speak may recite the berakhot via sign language.<sup>35</sup> (If a deaf person does so in a minyan that otherwise uses speech, it is suggested that a means to communicate to the hearing that the deaf person is reciting the berakhot be employed: some possible ways to do so might include an announcement about the use of sign language by a person honored with an aliyah or the learning of the appropriate signs by the congregation). A deaf person may serve as shaliah tzibbur in sign language in a minyan whose medium of communication is sign language. Furthermore, since sign language can be used to fulfill a halakhic requirement, those who hear and use speech and

<sup>32</sup> Lewis, "וכל העם רואים את הקולות", p. 64.

<sup>33</sup> An example from outside the realm of liturgy illustrates this well. If a person wants to count a large number of objects, looking at each object sequentially and thinking a number usually, if not inevitably, leads to losing the count and having to start over. However, if a person mouths the numbers in counting, that person is far less likely to lose count, a clear demonstration of the effectiveness of mouthing words, even if too soft for hearing.

<sup>34</sup> See the extended analysis in Nevins, "Participation of Jews who are Blind in the Torah Service," 6-9.

<sup>35</sup> This is not analogous to a person called to the Torah who wishes to recite the berakhot in English because a person who can read English aloud can easily read the transliteration of the berakhot.

who also know sign language may enter a gathering of deaf Jews who are using sign language and fulfill the liturgical mitzvot via sign language without having to repeat the prayers orally.

The deaf, like those with other limitations, are restricted only when their impairment inhibits them from actively carrying out a particular task. The average person cannot testify to a medical judgment -- only a physician or medical scientist can. The blind cannot chant Torah for the congregation because the person who chants Torah must read the actual text.<sup>36</sup>

Certain mitzvot require a specific sound. The sound of the shofar must be of a certain tone and rhythm<sup>37</sup> and, therefore, an individual who cannot hear cannot blow it on behalf of others.<sup>38</sup> However, listening to the sounding of the shofar is not limited to hearing the pitch: the sounding of the shofar can be sensed through its vibrations.<sup>39</sup> A deaf person who senses the sounding of the shofar through other senses is having an authentic experience of the mitzvah. We must innovate ways for the deaf to sense/hear the shofar.

A final thought: The Torah states that "Do not curse the deaf nor put a stumbling-block before the blind." (Lev 19:14) It is the responsibility of our communities, synagogues, schools, and camps to draw on the essence of this mitzvah in making our communities welcoming and inclusive of the deaf.<sup>40</sup>

### Summary

In our tradition, certain halakhot develop out of sensitivity to the deaf, while other halakhot display attitudes and approaches that the deaf experience as regarding them with

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<sup>36</sup> Nevins, "Participation of Jews Who are Blind in the Torah Service."

<sup>37</sup> See m. Rosh Hashanah 3.3.

<sup>38</sup> Rabbi Yehiel Michael ha-Levy Epstein, in *Arukh ha-Shulhan*, O.H., 789:6, argues that the requirement is to blow the shofar, not to hear the shofar, and therefore suggests that a person who cannot hear is obliged to blow the shofar (but without the blessings since he is ruling against the *Shulhan Arukh*).

<sup>39</sup> Rabbi Lynn C. Liberman suggested the idea that the deaf could fulfill the mitzvah of hearing the shofar through senses other than hearing and offered an example of how we can sense sound even without hearing: if we are in a car next to another car on the road whose sound system is at a volume much too high, even with our windows closed, the thumping of the music can still be heard. (private communication)

<sup>40</sup> I would like to thank the following for their invaluable help during the course of writing this teshuvah: Naomi Brunnlehrman (Jewish Deaf Resource Center), Rabbi Elliot Dorff, Rabbi Gilah Dror, Robin M. Feder (Central Institute of the Deaf, St. Louis), Rabbi Douglas Goldhamer (Hebrew Seminary of the Deaf), Alexis Kashar (Jewish Deaf Resource Center), Rabbi Richie Lewis, Rabbi Lynn C. Liberman, Rabbi Daniel Nevins, Hazzan Emanuel Perlman, Rabbi Edward Romm, Ellen Roth, and Rabbi Jay Stein.

indifference and disregard. These attitudes and approaches stem from an inability to determine whether a deaf person who did not speak had a mental capacity along the lines of an individual without disabilities. This inability caused the rabbis that rule that the deaf lacked not only hearing but cognitive ability and to correlate them with the mentally incapacitated. However, in the modern period, significant innovations in the education of the deaf and in the attitudes of the hearing have demonstrated their full mental capacity, yet halakhic authorities have been hesitant to apply this recognition to altering the halakhic determination of the mental capacity of the deaf. The Committee on Jewish Law and Standards rules therefore that the deaf are of the same ability as those without disabilities and that the terrible categorization of the deaf as mentally incapacitated be reversed. Sign language is undoubtedly a language, a means of communication equal to speech and satisfies what halakhah needs to have communicated in matters of personal status. The requirement that certain liturgical units, such the Shema, must articulated is met by the physical motions of sign language.

קסב

The Committee on Jewish Law and Standards rules that the deaf who communicate via sign language and do not speak are no longer to be considered mentally incapacitated:

1. Jews who are deaf are responsible for the mitzvot.
2. Our communities, synagogues, schools, and camps must strive to be welcoming, accessible, and inclusive.
3. Sign language may be used in matters of personal status (weddings and divorce proceedings) and may be used in rituals such as *brit milah* or brit kodesh by the parents or *mohel* (and *kehillah*) and *pidyon ha-ben* by the parents or *kohen*.
4. Sign language may be used in liturgy. A deaf person called to the Torah who does not speak may recite the berakhot via sign language. A deaf person may serve as shaliah tzibbur in sign language in a minyan whose medium of communication is sign language. Furthermore, since sign language can be used to fulfill a halakhic requirement, those who hear and use speech and who also know sign language may join a minyan of deaf Jews who are using sign language and fulfill the liturgical mitzvot via sign language without having to repeat the prayers orally.
5. Sign language may be used for tefillot, such as the Shema and shmoneh esreh, that must be articulated.