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Center for Modern Torah Leadership



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"Taking Responsibility for Torah"

MINING A MINEFIELD: HALAKHAH AS A SOURCE OF PUBLIC ETHICS

By Rabbi Aryeh Klapper

Imagine an intermarried couple facing a tragic situation in which the non-Jewish wife's life is at risk if she continues her pregnancy. Let's situate her at the outset of a conversion process. She calls her Orthodox rabbinic sponsor for an ethics consult. The rabbi responds that abortion to remove a risk to the life of the mother is mandatory for Jews but forbidden for non-Jews. The woman expresses her willingness to convert immediately, but the rabbi is unwilling to accept a commitment made under such duress. On the other hand, the rabbi is clear that she will not be accepted for conversion afterward if she chooses to abort.

The above Catch-22 is hypothetical, but poskim regularly face situations where halakhah can be understood to impose contradictory mandates on Jews and non-Jews. In just about all such cases, the disparate outcome can be avoided by paskening like certain viable halakhic positions and against others. The question is whether/when to treat a disparate outcome as a *reductio ad absurdum* that demonstrates the incorrectness of the halakhic reasoning or decisionmaking that led up to it.

This challenge is magnified when we move from deciding for individuals who associate with us voluntarily, to advocating for communal policies in a multifaith society with the power to tax and imprison. Can halakhic discourse be the basis for public ethics in the context of an integrated community?

Dr. Baruch Brody z"l's essay "The Use of Halakhic Materials in Discussions of Medical Ethics" distinguishes three ways to use such materials:

- 1) as a source of ideas which can be defended independently of their origin
- 2) as a basis for mandating certain forms of behavior for members of the Jewish faith who are perceived as bound by Jewish law
- 3) as the basis for claims about the Jewish view about disputed topics in public ethics.

Dr. Brody sees the first way as nonproblematic. If an idea can be defended without reference to its origin in halakhah, of course it has a place in public discourse. Academics should footnote appropriately. But the same idea may arise in or can be extracted from multiple traditions, and public discourse should be indifferent as to which tradition suggested the idea to any particular person.

I suggest that footnotes matter in public discourse as well. Claims that a position is well-rooted in a particular tradition make

it more appealing to people who identify with or deeply respect that tradition, in the same way that attributing a position to a person adds to (or detracts) from its appeal depending on that person's public image. Rambam famously enjoins us to "Accept the truth from whoever said it", and Chavot Yair frequently quotes Aristotle's injunction to "Love friends, but love truth more". Nonetheless, I think both would acknowledge the legitimacy of using alignment on previous issues and character evaluation as a heuristic for deciding among opinions. The fact that a position aligns with halakhah therefore legitimately matters in public discourse.

This being so, it is important to recognize that one can draw ideas out of the halakhic corpus and use them to reach conclusions that halakhah in practice rejects, has never implemented, and possibly has never contemplated implementing. These must be footnoted differently than ideas which emerge from the halakhah as an overall and practiced system. This distinction may parallel Rav Aharon Lichenstein zt"l's distinction between ideas that have the authority of a specific halakhist and those that derive from the substantive content of that halakhist's work.

Moreover, Halakhic tradition tends to be much more fully developed with regard to Jews than non-Jews, and there is almost no halakhic precedent directly covering integrated communities. Halakhah-based arguments for how such communities should behave are projections of how Halakhah might or should develop if it were given authority.

Dr. Brody humbly gives an example from his own work which he sees as instantiating the error of extrapolating from halakhah for Jews to public ethics. He discussed whether a married male could undergo gender reassignment surgery over his female spouse's objection. One argument against permitting the surgery was that under secular law as it then (1981) stood, gender reassignment would automatically terminate the marriage, and Jewish law had opposed unilateral termination since Rabbeinu Gershom banned it in the 11th century. (Note that contemporary secular "no fault" divorce law allows either party to terminate the relationship unilaterally.)

Dr. Brody contends that applying the Cherem d'Rabbeinu Gershom was an error, because it applied only to Jews (perhaps only to Ashkenazim). It cannot serve as the basis for a claim that Judaism or Jewish law oppose unilateral divorce outside the

context of the Jewish community. The Torah and halakhah may still permit either spouse in a Noachide marriage to end the relationship unilaterally.

I'm not certain his application was an error. We can distinguish between conclusions that within Halakhah are justified exclusively on particularist grounds, such as legal exegesis of the Torah, and those that even within Halakhah are justified on universal grounds. If the halakhic tradition understands the Cherem to be motivated by an ethical sensibility, then it would be legitimate to bring that ethical sensibility to the public discourse. (I acknowledge that the halakhic process is usually murky as to whether a particular principle can be justified without a particularist appeal, and laws can move over time from one category to the other = "*chokification*" and "*mishpatification*").

However, I want to raise another fundamental methodological challenge.

Dr. Brody suggests that where the halakhah for Jews and nonJews diverges, we are stuck, and Halakhah has no role in public discourse. Why are we stuck? We might argue in many cases that the law for Noachides rests on universal principles, whereas the law for Jews rests on particularist grounds. If so, our public ethics position should follow Noachide law, with a standard argument that the law should allow a religious conscience objection. In other cases, we might argue that the law for Jews represents the ethical ideal, while Noachide law is a concession to the reality of most societies. Our public ethics position would then follow the halakhah-for-Jews in any society ethically advanced enough to make it a live option.

Both these models assume that the Halakhah for integrated societies must fundamentally be either the halakhah for Jews, or else Noachide Law. But perhaps this binary is incorrect, and the Halakhah for an integrated society would be different from that for either society separately.

As an analogy: In the realm of Shabbat, halakhah as-it-stands is utterly different for Jews and nonJews. We think of the two societies as intersecting for Shabbat purposes mostly in the realm of what Jews can and can't have nonJews do for them on Shabbat. But what if we think of Shabbat as making ethical and not just religious demands, with implications for labor law? Could an integrated society have a shared public Shabbat even if Jews were privately forbidden to do any *melakhab* and nonJews were privately obligated to do at least one *melakhab*?

Some ethical issues are properly decided communally. Others are best left to individuals. Libertarians make individual decisionmaking the default, while other political philosophies narrow the sphere of individual moral autonomy more or less. Perhaps halakhah should adopt libertarianism to avoid the issues I've raised.

But even libertarians concede that public defense is properly decided communally. Belonging to a community entails accepting the responsibility to acknowledge the authority of that

community's decisions on defense spending and training, and on when to fight. Otherwise, one is being a free-rider, which is a moral failure on par with "What's mine is mine, and so is what's yours".

Nonlibertarians may argue that belonging to a community is a sliding scale; the more benefits you receive, the broader your obligation to accept communal decisions. For example, if one accepts government-based health care, one cannot withhold the percentage of one's taxes that one calculates pay for abortions one considers immoral. Libertarians therefore regard government benefits as a honey trap. Liberals respond that this wrongly prioritizes freedom-from over freedom-to, as many moral goods can only be maximized in a collective with an expansive social contract.

American Jews and Jewries receive substantial benefits from membership in the American collective. The vast majority of us don't ever consider the possibility of not accepting them. We plan our private lives and subcommunities around the existence of the "safety net" even if we don't directly depend on it. Attempts at social separation generally lead to greater dependence on government money, sometimes ironically paired with self-serving libertarian rhetoric.

We are therefore ineluctably enmeshed in making vital moral decisions together with nonJews. Because we are full citizens in a democracy, I believe that this obligates us to participate genuinely in communal moral decisionmaking. Doing so effectively and honestly requires us to think hard and clearly about whether and how the content of halakhah can and should be the basis for our ethics-based policy positions in a community that comprises both Jews and nonJews.

Much the same is true of Jews in Israel, although a state with a Jewish-majority population that does not accept halakhah as authoritative raises special issues.

A much, much more limited and complex version is true of the State of Israel in the international community. Yet Israel and we who support Israel necessarily advocate in the context of a universalist discourse about military ethics, and arguments that yield disparate outcomes for Jews and nonJews have no plausible role in that discourse. So we also need to think hard about how we relate to and determine the halakhot of war.

In summary: Halakah can be an ethical gold mine for Jewish public ethics, and also a minefield. "The ways of Hashem are straight; the righteous will walk in them, while the *posh'im* will stumble in them". Note that the *posh'im* have not left Hashem's ways. One key to righteousness may be recognizing that the straight road is full of stumbling blocks.

Shabbat shalom!

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