

ANALYSIS AND SYNTHESIS IN HALAKHIC META-ETHICS

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As one who thinks about Judaism from the practitioner's point of view, I must live with the tension between analytic and synthetic impulses. The outlook Statman subjects to devastating critique is synthetic: it attempts to create a uniform Jewish philosophy of ethics on the basis of halakhic dicta. His critique discloses that the statements and data usually appealed to are fragmentary; more importantly, the authors of these texts are not preoccupied with the general questions posed by the typical contemporary philosopher.

The most obvious reason is that halakhic literature is legal literature. The content of law is connected to morality but not identical to it. Law often does not prohibit or enjoin actions that morality condemns or requires. Moreover, legal reasoning may refer to moral considerations or incorporate moral reasoning, but it characteristically appeals to legal enactments and their interpretation. Hence, explicit or implicit moral argument will generally enter legal discourse as *obiter dicta*, or in situations where ordinary legal reasoning hits a snag.

Why would anyone resist Statman's conclusions? The most obvious reason is that halakhic study is central to Jewish religious culture. It is thus

natural to conflate the two realms and to assume that the legal realm ought to supply answers to ethical questions and even to meta-ethical theoretical inquiry.

For example, it is common for contemporary believers in religious revelation to think about the relationship between revelation and general ethics. This is both a logical and psychological question of signal importance. It often plays a role in arguments over the value and truth of religious belief. It is not at all clear why this question should occupy halakhic discussion in a systematic way. One can suggest legal implications of this inquiry (How reliable are an atheist's avowals in particular situations?), and one may then attempt to decide the issue on the basis of logical inferences or psychological analysis. But juridico-psychological questions about reliability and trustworthiness occur regarding a variety of witnesses and litigants whose statements are not automatically accepted in circumstances where they have a motive to lie or little impetus to tell the truth. These laws surely deserve investigation for their possible philosophical implications and for the clues they offer with reference to the outlook implied by the Halakha. Yet they are not as focal to Halakha as they are to philosophy of ethics and religion, and to think otherwise is to grant them a disproportionate role which leads to a distorted picture of the whole.

Statman further claims that an eagerness to read values into the halakhic literature often serves a particular ideological agenda: namely, the insistence that Halakha is moral and that moral principles should therefore determine Halakha even at the cost of radical reinterpretation. Against this, he argues that while the halakhic corpus reflects values—assuming even a minimal degree of coherence, how could it not?—but that these are not necessarily moral values, as defined by the advocates of this position.

Let me call attention to a class of laws in which the classical rabbinical literature, without exception, avows a lenient orientation, and in which those who seek underlying ethical principles in Halakha find ready ammunition: the case of the classical Talmudic *aguna*. The husband has disappeared—is he dead or alive? Halakha requires evidence of death, but

the laws of evidence are relaxed to allow forms of testimony that would not be recognized in other cases. This is not a matter of hypothesis: the Talmud states explicitly that the rabbis chose leniency regarding the *aguna*. Throughout the centuries, rabbinic authorities have exhibited ingenuity in order to permit remarriage in such cases and have not hidden their motives in doing so.

But are these motives moral? If morality is defined in utilitarian terms, as the promotion of human interests and desires, the optimal solution would be a relaxed view of marital status, perhaps an “Enoch Arden” law which would declare the husband dead after the passage of a sufficient time. Such a solution is impossible within Halakha: only the presumption of death or divorce can dissolve the marriage. Misapprehension about the wife’s freedom to remarry would pave the way to adultery and stigmatize the offspring of the second, invalid union, and these are outcomes to be prevented at all costs. By relying on standards of testimony less formal than required in other cases, the Talmudic rabbis take the risk, albeit an improbable one, that the woman will remarry adulterously, despite the strong imperative to avoid such an outcome.¹

Clearly, the value system in which the Halakha operates is one that balances the inviolability of the marriage relationship and the horror of adultery, however unintended, on the one hand, with the desire to allow remarriage, on the other hand. The contemporary liberal would champion the tendency towards leniency as the application of an ethical principle, but would be hard put to explain why such enormous effort is required to achieve the leniency: Why should inadvertent adultery be so consequential and horrendous? Why should decisors be so concerned with technicalities when common sense tells us that the husband is most likely dead and the fear of error is therefore remote? The common liberal explanation is that the rabbis, and the Halakha, share liberal moral priorities, and do not genuinely identify with the complex value system

¹ An additional strand in the discussion is the notion that, because the stakes are so high, the woman herself can be expected to exercise a high level of discretion in relying on the juridical leniency.

implicit in the sources, but are inhibited about overturning the sources, and thus are reduced to clever legal maneuvers that subvert the original law.²

The advocates of an implicit ethical system within the Halakha are not only selective about the substantive values underlying halakhic discourse. As Statman notes, they are also vague about the conception of ethics they appeal to. In the case of the Talmudic *aguna*, the grounds for leniency are presumably the irremediable hardships consequent upon her leading a solitary life. This would seem to presuppose the view that undeserved suffering should be prevented *ceteris paribus*. Does this make Judaism utilitarian? Is there any philosophy that gives no weight whatsoever to the prevention of useless pain? Likewise, there is no doubt that considerations of fairness or universalizability play some role in halakhic deliberation. The presence of such considerations does not make Judaism Kantian or Rawlsian. While the dominant systems of ethics today define the ethical as an arena of social relations, the scope of Halakha embraces the totality of human life, of which “what we owe one another” is only one part.

It is not merely that the regnant systems of ethical philosophy are derived from non-Jewish sources. Take the popular definition of *mishpatim* as laws that human reason would arrive at independent of revelation. This criterion is “authentic”: it appears in rabbinic literature. Yet I doubt that any decisor would avow the principle of acting on the principles he would have adopted in the absence of revelation. Most likely those intuitions, all things being equal, play a role in halakhic judgment. Nonetheless, they are ancillary to the faithful interpretation of the law. Even if we list the inchoate, implicit, unconscious values in the mind of the *posek*, these are

² This problem is sharper in the modern context where improved communications would seem to increase the likelihood that an unlocated husband is indeed deceased rather than missing. This consideration, however, does not pertain to the value system of the Talmudic law, or even to the question of formalism — since, as Statman asserts, all legal systems are formal — but rather to the role of Talmudic precedent or the “rigidity” of its application. Here one may plausibly maintain that rabbinic authorities, on their own, allow the fact of rapid global communication to simplify the process of ascertaining death, yet, constrained by pre-modern legal formulations, must laboriously construct their rulings within the limits of those formulas.

likely to be a mixture of “natural moral intuitions” and values derived from the practice and study of Halakha itself. Returning to the example of the Talmudic *aguna*: the *posek* who must respond to conflicting imperatives—sympathy for the suffering of the chained wife, the desire to relieve extreme hardship, against the sanctity of marriage and the horror of erroneously disregarding its bonds—may indeed be influenced by his overall sense of rightness independent of revelation, but this motivation is only one strand in his thinking. And unlike the proponent of the view criticized by Statman, the halakhist is unlikely to distinguish absolutely among these motives, or to assign those that are altruistic or utilitarian or justice-driven, and so on, the label “ethical” to the exclusion of others.

All of this is a roundabout way of asserting that the underlying values in halakhic deliberation and its conclusions are unlikely to be derivable from any deductive system of ethics. This should not be surprising given that halakhic study has always proceeded from data and practice rather than from abstract principles and that the data are ultimately derived from positive divine revelation. A full account of the ethical content and deliberative principles of Halakha require, and await, the painstaking local investigation on the ground that Statman proposes. Because Halakha is grounded in practice, and because Halakha addresses the totality of human existence rather than certain other-regarding relations, the results of such investigations are more likely to be accommodated within the framework of a “loose” pluralistic richly descriptive virtue ethics, than within the confines of any contemporary deductive system.