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HALAKHA AND LEGAL THEORY

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Professor Daniel Statman takes clear-eyed aim at one of the most intractable questions for academic researchers of halakha: the role moral considerations play in its development. This question has become all the more entangled over time as academic researchers argue whether the correct theoretical paradigm to use in analyzing halakha is religion or law. To Statman's great credit, he pursues both paradigms, as well as introducing a much-needed historical dimension to the inquiry. I will confine my comment to the legal paradigm.

Statman's argument runs as follows: To claim that halakha is not formalistic is trivial, because we all now know that legal interpretation—indeed, any interpretation—is an evaluative activity and not mere deduction from rules. Nonetheless, this does not mean that individual halakhic jurists, even perhaps most, did not hold a different picture of halakha. They may, in fact, have thought law in general or halakha in particular was a formalist endeavor. In other words, they thought they were deducing decisions from rules and not importing independent moral considerations into their judgments. Other halakhists, by contrast, may have held a view of halakha as allowing or even requiring conscious resort to values, perhaps tacitly embracing some version of Hart's distinction between closed and open-textured rules or tacitly embracing some version

of Dworkin's theory that law is comprised not solely of rules but also of more fluid and open- ended principles reflecting the law's aims and ends. Accordingly, Statman proposes that researchers stop trying to resurrect from the historical dustbins the few parade examples that seem to conform to their vision of how halakha ideally should operate—a risky endeavor in any event because the tradition knows of cases where values openly play a decisive role but those values are decidedly racist—and get down to the hard work of engaging the actual history of halakhic jurisprudence by retrieving the various theories of halakha individual jurists in fact held. This work must be undertaken inductively because rabbinic jurists rarely articulated their philosophy of law.

Statman's programmatic statement couldn't be more timely nor, given my own effort to expand awareness of Anglo-American legal theory within both Mishpat Ivri circles and the various disciplines of Jewish Studies, more congenial. In urging researchers to concentrate on the question of whether individual halakhists held a formalist picture of halakha or whether they thought the doing of halakha required resort to moral considerations, and to put aside the researcher's more "sophisticated" understanding of the act of interpretation as well as the researcher's personal aspirations for halakha, Statman draws at once on three important distinctions within legal theory: external versus internal point of view, descriptive versus normative theories of law, and particular versus general jurisprudence.

Historians tend quite naturally to adopt the viewpoint of an outside observer of the legal system. In this way, they seek to describe the way law responds to and is a mirror of the social world around it. Yet, even though legal theory is also a descriptive project, legal theorists most often pursue what has come to be known as the internal point of view, that is, the point of view of the participants who are committed to the legal system. The historian thus sees law as a social fact, while the legal theorist understands law primarily as a cognitive and normative activity, which therefore must be understood and described from within. Although judges rarely announce their conception of law and, indeed, may not be aware of theory altogether, they invariably have a tacit understanding or

mental picture of law in the background. This is precisely what legal theory aims to make explicit. What counts, then, is the participant's point of view, which may not conform at all to the modern researcher's understanding of law. More precisely, what counts is the participant's view not only of law in general (general jurisprudence) but of halakha in specific (particular jurisprudence), and the two need not necessarily correspond. Finally, legal theories can be normative and not only descriptive of past and present practice. Dworkin, for example, while purporting to describe the phenomenology of adjudication in a common law system, is also setting forth a normative theory of law as it ought to be. This is the third distinction on which Statman relies in pointing out that it is not necessary to distort the record in order to win an ideological battle: halakha may have proceeded on one path, but that trajectory could always change as new normative theories of halakha are propounded and adopted.

Still, I think it is important to clarify precisely what is at stake. Pursuant to Statman's formulation, the problem in one sense devolves into conscious resort to values versus subconscious resort to values. Statman claims at the outset that legal interpretation is evidently an evaluative activity. Logically, then, those who adhere to a formalist picture of law are self-deluded about what they actually do. This is the gist of the legal realist critique: formalism is an empty disguise for the exercise of political or moral judgment. Thus, what is at stake is not judgment informed by moral values but, rather, whether halakha explicitly acknowledges moral reasoning as a source of law. And this leads to the second way in which what is at stake may be less than meets the eye: moral considerations may be viewed as a legitimate ground for actual rulings even if they are not technically viewed as a legitimate legal source. Indeed, within academic circles, this issue often dissolves into a fight over nomenclature. Does one describe resort to moral considerations as "extra-halakhic" or as part of the doing of halakha? These two issues are inextricably entangled. Thus, as Haim Shapiro and Yair Lorberbaum point out in their analysis of the Soloveitchik-Hartman debate over the status of Maimonides' "Epistle on

Martyrdom,"[1] Soloveitchik, who holds a formalist view of law in general and halakha in particular, measures the "Epistle" by formalist standards and finds it wanting as "law." Hence, Maimonides's citation to moral considerations is "extra-halakhic." For Hartman, who takes the position that moral values are part of halakha in general and for Maimonides in particular, the "Epistle" is "halakhic." Similarly, both Haninah Ben-Menachem[2] and Christine Hayes[3] point, in different ways, to rabbinic authority to depart from rules. As Hayes puts it, the rabbis were prepared to discard the "right answer" (*din*) in the face of the "best answer," in which values predominate and explicitly so.

Moreover, for all the old talk of formalism as naive, there is a lively, contemporary discussion within legal scholarship about the morality and creativity of formalism. The claim that legal reasoning is a species of interpretation, rather than rule application, is still very much contested, while the characterization of rule application as mechanical is a polemical term invented by formalism's opponents. Formalism is evaluative but, crucially, its evaluative criteria are internal to law, reflecting law's inner morality. Thus, some of the most sophisticated defenders of formalism, such as Ernest Weinrib, are not positivists but, rather, are closely aligned with natural law theory. Nor is formalism antithetical to creativity. Both characterizing the facts and identifying the appropriate rule can be highly complex and imaginative acts. Analogical reasoning—the imaginative leap of "this is like that"—is, after all, a form of metaphor. Indeed, one of the more interesting aspects of R. Isaac Halevi Herzog's effort to renew halakha in light of democratic ideals lies precisely in his bold and creative analogies.

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[1] See Yair Lorberbaum and Haim Shapiro, "Maimonides' Epistle on Martyrdom in the Light of Legal Philosophy," *Dine Israel* 25 (2008): 123-169.

[2] See Haninah Ben-Menachem, *Judicial Deviation in Talmudic Law* (New York: Harwood, 1991).

[3] "See Christine Hayes, Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis," *Dine Israel* 25 (2008): 73-121.

Finally, I want to underscore the importance, but also the complexity, of the task Statman urges. If we wish to assess the role of moral considerations in halakha, values, too, must be approached genealogically. As William Ewald observed in his call for a comparative jurisprudence, often values "are not a priori, unhistorical, abstract moral reasons but, rather, historically and culturally inherited moral sentiments which shape the subjective attitudes of participants in the legal system."[4] I applaud Statman for so clearly articulating this new agenda and calling for the historian and legal theorist to work together.

[4] See William Ewald, "Comparative Jurisprudence (I): What Was It Like to Try a Rat?" 143 U. Pa. L. Rev. 1889 (1995).