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THE USE OF HALAKHIC MATERIALS IN DISCUSSIONS OF PUBLIC ETHICS

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I was saddened to read of the petirah of Dr. Rabbi Baruch Brody z"l, father of Rabbi Shlomo Brody (SBM 2001) and medical ethicist extraordinaire. Dr. Brody's collection Taking Issue was a source of enormous consolation to me during my mother aleha hashalom's illness, and his work continues to influence my thinking. The following dvar Torah is in dialogue with the final essay in that collection, "The Use of Halakhic Materials in Discussions of Medical Ethics".

Dr. Baruch Brody distinguished three ways to use halakhic materials in discussions of medical ethics. I suggest that medical ethics is a particular example of public ethics, or ethical issues that need to be decided communally rather than by autonomous individuals. The three ways are:

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 so far as public discourse is concerned, the same idea often occurs in many different traditions, and we 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 that tradition, and to others who deeply respect that tradition, in the same way that attributing a position to a person will add or detract to its appeal depending on that person's public image.

This is not a bad thing. I do not concede that public moral discourse ought to be completely denatured, and that all arguments about public ethics must plausibly claim to have been immaculately conceived. I do accept that particularist religious arguments are generally out of bounds if they cannot be defended on universal grounds. But I'm not sure that we need to defend them exclusively on universal grounds.

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

Halakhah tends to be much more fully developed with regard to Jews than nonJews. Therefore, one can often claim the authority of Halakhah when one seeks to mandate certain forms of behavior for Jews (#2 above). However, a claim that this behavior is mandatory for an integrated Jewish-nonJewish society will be much less likely to have such formal authority. Instead, it will generally be a projection of how Halakhah might or should develop if it were given authority.

This brings us to the central point of Dr. Brody's article. It is common for Jewish books on medical ethics to extrapolate from the Halakhah to public ethics. But the Halakhah may apply only to Jews! "Authors who use this material for the third use distinguished above may then incorrectly conclude that obligations which are supposed to fall only upon the Jewish people fall upon all people." So one must be very cautious in moving from Halakhah to public ethics.

Dr. Brody humbly gives an example from his own work which he sees as instantiating that fallacy. The question he addressed was whether a married man could undergo gender reassignment surgery over his (female) wife's objection. Among the arguments he made was that under secular law as it then (1981) stood, gender reassignment would automatically terminate the marriage, and that Jewish law had opposed such unilateral termination since Rabbeinu Gershom forbade it in the 11th century. (Note: The argument also assumed a "fault" framework for divorce; contemporary secular "no fault" divorce law in principle allows either party to terminate the relationship unilaterally, without needing recourse to radical surgery or identity shifts. In practice, the New York Times recently published as article on secular agunot, who remain married because their abusive husbands have disappeared and they cannot serve divorce papers on them.)

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 may permit either spouse in a Noachide marriage to end the relationship unilaterally, and Rabbeinu Gershom's decree would have done nothing to change that.

I'm not certain the application was an error. It seems to me that we can distinguish between conclusions that within the Halakhah are justified on particularist grounds, 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. One could not quite argue that it was "under the authority" of Halakhah, but once could go further than "this idea was suggested to me by" Halakhah. But 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").

I think there may be another and more serious methodological problem.

Let's assume that in many cases we can figure out the halakhah for Jews, and the halakhah for nonJews. Dr. Brody suggests that where they diverge, we are stuck, and Halakhah has no role in public discourse.

I think we need to push the question a little further. Why are we stuck? After all, we might argue in many such cases that the law for Noachides rests on universal principles, whereas the law for Jews rests on particularist grounds. If that is 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, and 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 entirely different.

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 "amirah lenokhri", of what Jews can and can't have nonJews do for them on Shabbat. But what if we tried to think of what Shabbat would be like in an integrated society, where the issues are not just *melakhah* but also labor laws, time for family and reflection, and the like? Should the soccer stadiums and/or the malls and/or the corporate law firms be open, or closed? Could such a society have a shared public Shabbat even if Jews were privately forbidden to do melakhah and nonJews were privately obligated to do at least one melakhah?

Shabbat shalom