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חרות ואחריות

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"Taking Responsibility for Torah"

KAVOD HABERIYOT (HUMAN DIGNITY): PSAK AND PEDAGOGY

Rabbi Aryeh Klapper, Dean

What role should broad moral, ethical, or spiritual principles play in the development of halakhah and the halakhic decisionmaking process?

What role should such principles play in the lives of halakhically observant Jews?

Are the above questions fundamentally the same as each other, or very different?

The Talmud sometimes derives legal details in specific cases from meta-principles that seem rooted in values rather than in formal law. Take for example *דרכי דרכי נעם* (*Her ways are ways of pleasantness*), *הרחק מן הכיעור ומן הדומה לה*, (*Distance yourself from ugly acts and from anything similar to them*), or *לעולם יעסוק אדם בתורה ובמצוות שלא לשמה, שמתוך שלא לשמה בא לשמה* (A person should certainly engage in Torah and mitzvot not for the sake of Heaven, since out of not-for-the-sake he will come to "for the sake." Sometimes the relationship between law and values is embodied in a formal legal equation, such as *גדול כבוד הבריות שדוחה את* (*Great is human dignity, for it pushes aside a Biblical DON'T*), or *כל מקום שיש חילול השם אין* (*One must not apportion dignity to rabbis wherever doing so would enable desecration of G-d's Name*). In other cases, we are given little or no explicit guidance as to how that relationship should play out in practice.

I recently heard a shiur from a wonderful young Talmid Chakham that I understood to be making the following claim. Scholars must take broad principles into account even where halakhah already has something to say. Laypeople, by contrast, should make decisions on the basis of their knowledge of the law, and incorporate broad principles only where they have no governing legal evidence.

Here's a model case. John Buck is walking to shul Shabbat morning in his non-eruvd community. Jane Doe, an elderly woman wearing a headscarf, is a block in front of him. A sudden gust of wind tears the scarf off her head and blows it into the street, in his direction. If he does nothing, it will be blown into traffic and destroyed. If he runs to catch it, he'll have to carry it back to the sidewalk, and it will be awkward if he doesn't carry it all the way to the lady. But what will she think of him if he makes no effort? He could feign an effort. But will she be humiliated by having to walk home bareheaded? His (securely clipped-on) kippah probably isn't big enough for her purposes.

There are a lot of practical, factual, and legal issues in play here. Is the street a Biblical public domain, or is carrying four amot within it only a Rabbinic violation? Will it be more than 4 amot from where he reaches the scarf to the safety of the sidewalk? Will it be possible then to ask her to come get it from him, or to give it to a nonJew to bring it to her? Is it plain that the headscarf was worn for modesty, rather than for comfort? And so on and so forth.

Scholars will presumably have a more sophisticated set of legal tools for analyzing some of these questions, and a more extensive set of precedents. Scholars who are also experienced and competent poskim will also have a set of experiences that generate a nuanced intuition. If John Buck is a scholar, he will bring all those tools to bear on the question of whether this is a case in which concern for human dignity, desecration of G-d's Name, or the risk of inciting anti-Semitism justifies acting in violation of ordinary Shabbat rules, or not.

But what if John is fifteen years old and a mediocre Jewish Studies student? (Or a brilliant Tanakh student uninterested in sophisticated Halakhah)?

Rav Aharon Lichtenstein zt”l famously constructed a case contrasting the reactions of Modern Orthodox and Charedi teenagers to a car owned by a non-Jew breaking down in their neighborhood. The Charedim begin arguing about whether helping was a violation of *lo techaneim* (= *lo titein labem matnat chinam* = do not give them free gifts) - the MOs help without any awareness of the sugya. Rav Lichtenstein preferred helping to arguing, but wished the MO kids knew the sugya.

But there is a sense in which Rav Lichtenstein’s case is too easy. Modern Orthodox teens should have heard of *lo techaneim*, yes, but in the context of being told that it has no application to contemporary Gentiles in any case they are likely to encounter. Talmud Torah is a goal in itself, but Rav Lichtenstein did not want or need them to deliberate before acting, nor would he himself have hesitated.

The same is true in cases that implicate *pikuach nefesh*. Yeshivishe legends even suggest that the greater the *talmid chakham*, the less hesitation in such matters. We do not encourage nuanced reasoning in genuine-life-and-death situations. The principle *ein holkhin b’pikuach nefesh achar harov* (= we don’t need greater than 50% risk to treat a case as involving a threat to life) is understood as license to avoid nuance.

I don’t think we educate the same way about *kavod haberiyot*. Why not? (Why) Do we want John Buck to hesitate before helping?

I can think of two possibilities offhand. The first is that we are much more concerned that *kavod haberiyot* will be massively misused. The second is that *kavod haberiyot* is inherently more complicated than either *lo techaneim* or *pikuach nefesh*.

The first possibility to some extent involves a circularity – people who are worried about misuse likely think it has already been badly misused, while those who support e.g. recent attempts to invoke *kavod haberiyot* with regard to issues of halakhah and gender or sexual orientation will not see much risk.

I think it’s fair to point out that this has at times also been true of *pikuach nefesh*. The Noda B’Yehuda’s responsum about autopsies recognizes that in principle it can justify allowing all medical researchers and manufacturers to work

through Shabbat; to prevent this, he contends that *pikuach nefesh* is halakhically significant only for a *choleh lefaneinu* (a patient who is before us). The jury is out on whether any version of that formulation is practically relevant in the age of the internet. Rav Chaim Hirschensohn used it as at least a *limmud zekhut* (post-facto extenuation) for people who worked on Shabbat rather than lose their jobs during the Great Depression, arguing that unemployment carried with it a significant risk of starvation. Moreover, contemporary halakhic arguments about LGBT issues often cite suicide statistics. So it’s not obvious to me that *pikuach nefesh* and *kavod haberiyot* have radically different risk profiles.

It is true that *kavod haberiyot* carries a more complicated prima facie halakhic profile. *Pikuach nefesh* overrides everything except “the big three” sins, whereas according to Berakhot 19b-20a, *kavod haberiyot* overrides only Rabbinic laws, Biblical laws categorized as monetary, and Biblical violations committed passively. (Possibly there are only two categories, and even monetary laws can only be overridden passively.) It is certainly possible to complicate the issue even further. Many rishonim argue that *kavod haberiyot* overrides some but not all Rabbinic laws; many others argue that it overrides additional categories of Biblical law not mentioned in the Berakhot text. Finally, while Noda B’Yehuda successfully made *pikuach nefesh* a binary category, many *rishonim* argue that *kavod haberiyot* should be paskened on a sliding scale, so that more serious dignity issues justify overriding more serious prohibitions.

But it is a mistake to conflate underlying complexity with the question of whether pedagogic simplicity is possible. I suspect that we could find a way to teach our student John a fairly simple protocol. The core issue is recognizing that we fail when our students are “too frum” to take human dignity into account in their decisions. It would not necessarily be the worst thing in the world if our students decided to see themselves as being *machmir* on *kavod haberiyot* rather than being *meikil* on Shabbat.

So – I suspect the real issue is that we worry not about our students’ capacity for nuance, or their ability to apply the law, but rather that we don’t trust that they share a core understanding of human dignity with those who have primary halakhic authority in their communities. This I think is a real issue, and justifies caution. But in the long run, we have to address that issue directly, rather than having its gravitational pull distort our whole system.