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WHAT ROLE SHOULD HALAKHAH PLAY IN CONVERSATIONS ABOUT VACCINATION PRIORITIES?

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Jewish medical ethics are not the same thing as Jewish medical Halakhah. Understanding this principle will prevent a great deal of confusion as we participate in the national discussion about who gets which COVID vaccine first. It may also jumpstart desperately overdue conversations within the halakhic community.

There are at least two reasons for the difference.

The first reason is that Halakhah currently does not address societies in which Jews and nonJews share responsibility.

In his article "The Use of Halakhic Material in Discussion of Medical Ethics," Rabbi Dr. Baruch Brody z"l argued that halakhic material is properly used either as "a source for ideas about medical ethics that can be defended independently of their origins," or as "a basis for mandating certain forms of behavior for Jews." We get into trouble when we use halakhah as "the basis for claims about the Jewish position on disputed topics in medical ethics."

Why? On many of these issues, formal halakhah allows or even requires Jews and nonJews to follow different rules, and to be treated in accordance with different rules. Dramatic gaps can be constructed on issues such as abortion, self-defense, and prioritization. Halakhah rarely if ever directly addresses an integrated society of Jews and nonJews.

We can react to this reality in two very different ways.

One approach is to hunker down and focus on protecting the rights of Jews to act and be treated in accordance with our own values. Both pragmatically and morally, this should lead us to ally with other groups seeking to protect their own particularistic choices. However, this approach can raise difficulties when the particularistic beliefs of different groups conflict, for example, when Jews find themselves in Catholic hospitals or vice versa. This defensive approach also limits our ability to participate in the "universal" conversation about medical ethics. If everyone adopted the same approach, such conversations would be reduced to power politics.

A second approach is to systematically adopt interpretations of halakhah that minimize outcome differences between Jews and nonJews. U.S. Constitutional law has the idea that legal distinctions are subject to different levels of scrutiny. Distinctions subject to "strict scrutiny" essentially go extinct. If we adopt "strict scrutiny" as the standard for evaluating distinctions between Jews and nonJews in Halakhah, Dr. Brody's objection largely goes away.

The question is whether we can do so with integrity, and in a way that still speaks for and to our own community.

I think the answer is largely yes. This sort of work is illustrated in Dr. Benjamin Friedman's superb Duty and Healing, which developed out of his work as the medical ethicist for a secular hospital. It underlies the inspiring and growing work of halakhically committed hospital chaplains in the United States and Israel. The works of some great contemporary poskim are often consistent with this approach, whether intuitively or consciously.

Here's a very simple illustration. As understood by rabbinic tradition, the Torah may discuss abortion in two contexts. The first, Genesis 9:7, includes abortion with the category of *shefikhut damim* = bloodshedding or homicide. The second, Exodus 21:22, appears to regard abortion as a property tort: "*He shall certainly be punished in accordance with (the amount) that the husband of the woman imposes on him.*"

Genesis 9:7 precedes the giving of the Torah at Sinai, and is a classic source for the Seven Noachide Commandments. Exodus 21:22 comes after Sinai, and therefore applies only to Jews. It is therefore possible to argue halakhically that abortion is homicide for nonJews, but merely a property tort for Jews. This can lead fairly easily to the conclusion that abortion to save the life of a mother is mandatory for Jews treating Jews, and forbidden for Gentiles as both providers and recipients.

On the other hand, Exodus 21:23 appears to be a continuation of 21:22, and if so, it also regards abortion as a capital crime: "*you must place a nefesh (perpetrator) in place of a nefesh (victim).*" Such a reading is encouraged by a rabbinic statement on Sanhedrin 59a that establishes a scrutiny regime: "There is nothing that is permitted to Jews but forbidden to Gentiles." We can therefore say that 21:22 addresses only **negligent** abortion, whereas 21:23 addresses **deliberate** abortion, and the law is the same for Jews and Gentiles in both cases.

Alternatively, we can argue that the passages in Genesis and Exodus are addressing abortion at different stages of pregnancy, but that the law is the same for Jews and Gentiles at each stage.

Alternatively, we can argue that the interpretation of Exodus as including abortion is a minority position. This raises broader methodological issues about how to pasken Noachide law. For most of halakhic history, Gentiles have not asked rabbis such questions with intent to be bound by the answers. Noachide

groups in the United States now ask such questions to Orthodox rabbis in the United States, and perhaps the answers they receive will eventually be regarded as highly authoritative. For now, the material is skeletal compared to the record regarding halakhah for Jews.

The second reason that Jewish medical ethics and Jewish medical halakhah are different is that Halakhah and ethics may not be the same thing, period.

Rav Aharon Lichtenstein zt"l in his highly influential "Is There an Ethic Independent of Halakhah?" concluded that the title question was semantic. His discussion centered around two kinds of religious obligations that seem not to be governed by formal religious law.

Some such obligations are described as *lifnim mishurat hadin*, further in than the line of the law. These may reflect limits on the extent to which the Torah can legally (as opposed to religiously) obligate people to "do the right thing." These limits may depend on variables such as social status. A great deal of intellectual work is necessary to clarify the difference between "non-legal religious obligation" and "legal non-enforceable religious obligation."

A second such obligation might be called "the Nachmanidean penumbra." Nachmanides argues that because human situations are infinite, a finite account of the law cannot cover them all in detail. The law therefore provides us with broad abstractions accompanied by more-and-less detailed illustrations. It generally develops toward increasing detail, and infinite length, although there are countermovements such as Maimonides' Mishneh Torah. Where the abstractions have been left undeveloped, obligation exists but is regarded, in an undefined way, as different than ordinary law. This is true in areas as diverse as interpersonal ethics (*naasitem hayashar vehaton*), Shabbat (*shabbaton*), and holiness (*kedoshim tihyu*)

Rav Lichtenstein's underlying assumption seems to be that ethics and law are each the same **kind** of religious obligation because they require obedience to a universalizable standard of behavior. The specificity or enforceability of the obligations are accidental rather than essential to their nature.

The Nachmanidean approach also allows for a theory that ethics is a stage preliminary to halakhah. When new questions arise, until a line of clear precedent is developed, people have the freedom to choose any of the halakhically possible outcomes on the basis of considerations other than formal legal reasoning and authority. (The extent to which that freedom is generally constrained by precedent is a topic for another time.)

The Rav took a radically different approach in "Halakhic Morality." I hope to address his position at length elsewhere; for now, a few brief quotes suffice to demonstrate my point: "For *pesak halakhah* would imply standardization of practice, a thing which would contradict the essence of morality." Unlike halakhah (as the Rav portrayed it), living ethically demands subjectivity and individual expression: "The moral life rather expresses a personal

act of dedication, reflecting the uniqueness of the dedicated." Nonetheless, the Rav's thesis might yield the result that developing a code of "ethics" for a community actually is by definition the realm of formal halakhah.

A diametrically opposite approach is suggested by Rabbi Moshe Tendler in his article "בעיות בקדימה בהצלה: תקציב הצבורי ודיחוי" *נפש מפני נפש*, printed in *Sefer Kavod Harav* (cf. Tendler MD. Rabbinic comment: Triage of resources. *Mt Sinai J Med.* 1984;51(1):106-109. h/t Rabbi Jason Strauss). Rabbi Tendler contends that ordinary halakhah is directed at individuals; the calculus for communal decisionmaking is very different, and generally has not been codified. He draws the specific implication that communal halakhah can and perhaps must consider the interests of people who exist only statistically, such as children who have not yet been conceived. But his argument opens the possibility that communities are in principle given much broader discretion than individuals when making decisions specifically about life and death issues.

An approach with similar consequences is tentatively advanced by Rabbi Shlomo Zalman Auerbach (Minchat Shlomo 2:82 1st Edition. h/t Yehuda Gale via Rabbi Aaron Levy, Rabbi Mordechai Torczyner). Rabbi Auerbach suggests that public health campaigns may suspend or transcend ordinary halakhah in the same way that as a *milchemet mitzva* = mandatory war, and entitle the community to apportion risk to individuals in ways that would otherwise be halakhically forbidden.

Suspending halakhah, or transcending it, does not *chas vechalilah* mean that Torah has nothing to say about a subject, or that human beings have no religious obligations in such circumstances. But it may mean that Torah conversations about communal policy should be different than halakhic conversations would be.

We are long overdue for serious conversations about halakhah for communities where Jews and nonJews share responsibility, and for serious conversations about the interrelationship of halakhah, ethics, and public policy. In the coming weeks, many shiurim will be given within the Jewish community addressing issues of COVID vaccinations, and those shiurim will presumably affect our contributions to the national discourse in the US, Israel and elsewhere. Let's hold our teacher and ourselves to this standard: to affect an integrated society, Torah has to address Jews and nonJews alike, and it has to be aware that communities are not just individuals writ large.

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