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JEWISH LAW AND PUBLIC ETHICS: CAN RELIGIOUS RULES GUIDE DIVERSE COMMUNITIES?

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Consider this situation: Orpah is a pregnant nonJewish woman studying for Orthodox conversion process. She receives sad news: continuing the pregnancy could kill her. She calls her rabbinic sponsor for guidance. The answer she receives is that halakhah *obligates* Jewish women to abort in such circumstances. But halakhah *forbids* non-Jewish women to abort in the same circumstances. What should she do?

Orpah responds that she's ready to convert tomorrow. But the rabbi won't allow that; what if she's converting to save her life and not out of sincere religiosity? He also says that he'll drop her as a candidate if she aborts while not Jewish. What should Orpah do?

Let's turn the question around: Should Orpah's rabbi have known that he was wrong, because this outcome is impossible? Is what makes it impossible the Catch-22 that Orpah is in, or rather the general moral problem of requiring a nonJew to take risks that a Jew need not take?

Cases like Orpah's are rare. But the same issue comes up when we're making policy for a diverse society. Can Jewish legal thinking contribute to public policy for integrated communities of Jews and non-Jews?

Three Ways to Use Jewish Law in Public Discussion

Dr. Baruch Brody z"l's essay "The Use of Halakhic Materials in Discussions of Medical Ethics" lays out three ways to use Jewish law in public ethical discussions:

1. **Take ideas from Jewish law** that can be defended on universal grounds
2. **Require certain behaviors for Jews,** but not for nonJews
3. **Claim to represent "the Jewish view"** on public policy issues

Dr. Brody thought the first way was fine. Public discussion shouldn't care where an idea came from so long as the argument for accepting it does not depend on its origin.

I think Dr. Brody was mostly right, but sources do matter. When people know an idea comes from a tradition they respect, they're more likely to support it. It's like how knowing who said something affects whether we believe it.

The second way seems a nonstarter in a democratic society. And the third way is also a nonstarter if "the Jewish view" is the second way.

Jews who want to participate in public ethical conversation as Jews therefore tend to cherrypick traditional sources that yield the same outcomes for Jews and nonJews.

Misusing Jewish Sources

But here's a problem: Jewish law constantly makes choices. That means that you ca pull ideas out of Jewish texts and use them to reach conclusions that Jewish law has long-since rejected. What if the weight of tradition supports reaching different outcomes of Jews and nonJews?

Also, Jewish law has much more detailed rules for Jews than for non-Jews. There are almost no direct rules for integrated communities where Jews and non-Jews live together. When we make arguments about how such communities should work based on Jewish law, we're really guessing how Jewish law might develop in these new situations.

A Real-life Example

Dr. Brody gave an example from his own work where he thinks he made this mistake. In 1981, he was discussing whether a married man could have gender reassignment surgery over his wife's objections. He made the following argument against allowing the surgery: Under the law at that time, gender reassignment would automatically end the marriage. Having the surgery therefore conflicted with Jewish law, which since the 11th century has accepted Rabbeinu Gershom's ban on divorce against the wife's will.

Later, Dr. Brody decided this argument was wrong. The ban only applied to Jews (maybe only Ashkenazic Jews). Jewish law might still allow non-Jewish spouses to end their marriages unilaterally.

I'm not sure Dr. Brody was necessarily wrong. We can separate Jewish law into two types:

- Rules based on **particularist grounds** (like specific interpretations of Torah text that apply only to Jews)
- Rules based on **universal grounds** (ethical principles that should apply to everyone)

If Rabbeinu Gershom's rule was based on universal grounds, then it would be fair to bring those ethics into public discussion.

The problem is that Jewish legal reasoning usually doesn't make this distinction clear. Rules can even move from one category to the other over time.

What to Do When Rules Differ

Dr. Brody suggested that when Jewish law gives different rules to Jews and non-Jews, Jewish law can't help with public policy. But maybe we don't have to give up.

Here are two other approaches:

Option 1: Maybe the rules for non-Jews (called Noachide law) are based on universal principles, while the rules for Jews are based on particular Jewish obligations. If so, Jews should advocate for public policy to follow Noachide law, while allow Jews to follow their own rules as a matter of religious freedom.

Option 2: Maybe the rules for Jews represent the ideal for societies that accept Torah as binding, while the Noachide law reflects concessions to the political reality of most societies. If so, Jews should advocate for public policy to follow the Jewish rules whenever that seems politically possible.

A Third Possibility

Both options above assume that Jewish law for mixed communities must be either Jewish law or Noachide law. But maybe that's wrong. Maybe Jewish law for an integrated society would be different from both.

Think about Sabbath rules. As usually understood, Jewish law is completely different for Jews and non-Jews regarding Sabbath. Jews are forbidden to perform any of 39 categories of *melakhah*, while nonJews are obligated to perform at least one of them on every Shabbat.

Usually, we think about how these groups interact only when Jews need nonJews to do things for them on Sabbath. But what if Sabbath makes ethical demands, not just religious ones? What if it has implications for labor law? Could a mixed society have a shared public Sabbath even though Jews and non-Jews would have different and conflicting private obligations?

Individual vs. Community Decisions

Some ethical issues should be decided by communities. Others should be left to individuals. Libertarians think individual choice should be the default. Other political philosophies give communities more authority.

Maybe Jewish law should adopt libertarian principles to avoid facing the challenge of making policy for a mixed society

But even libertarians agree that issues of communal defense must be decided as a community. If you belong to a community, you have to accept the community's decisions about military spending and when to fight. Otherwise, you're freeloading—taking benefits without accepting responsibilities.

The More You Take, The More You Owe

Non-libertarians argue that community membership is a sliding scale. The more benefits you get, the more you have to accept community decisions. For example, if you accept government healthcare, you can't refuse to pay the part of your taxes that funds procedures you think are wrong.

Libertarians see government benefits as a trap. Liberals respond that this puts too much emphasis on "freedom from" instead of "freedom to." They argue that many good things can only be achieved when everyone works together through government.

American Jews and Our Obligations

American Jews have derived huge benefits from being part of American society. We plan our lives around having a social safety net even if we don't use it directly. When Jewish communities separate themselves into enclaves, they often end up depending more on government money, not less.

This means that we're unavoidably involved in making important moral decisions together with nonJews. In fact, as full citizens in a democracy, we're obligated to participate in our society's moral decision-making.

To do this well and honestly, we need to think carefully about whether and how Jewish law can form the basis for our policy positions in a community that includes both Jews and non-Jews.

Beyond America

The same basic problem exists for Jews in Israel, though a Jewish-majority state that doesn't accept Jewish law as binding creates special complications.

A more limited version of the problem exists for Israel in the international community. Israel and its supporters have to make arguments about military ethics using universal principles. Arguments that yield different rules for Jews and non-Jews obviously won't be considered in international discussion. So we need to think carefully about how we understand and apply Jewish laws of war.

Conclusion: Benefits and Dangers

Jewish law can be a gold mine of ethical insights for public policy. But it can also be a minefield. The Bible says: "God's ways are straight; good people will walk in them, while rebels will stumble."

Notice that even the rebels haven't completely left God's ways. Maybe the key to being righteous is recognizing that the straight path is full of stumbling blocks.

Shabbat shalom!