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"Taking Responsibility for Torah"

THE ETHICAL ADVANTAGES OF LAW OVER ETHICS

By Rabbi Aryeh Klapper

Once upon a time, Western Jews boasted about our devotion to halakhah in the context of explaining the superiority of our religion to Christianity. We were the people of law, made of rigid and ironclad rules, while they had mere ethics, inevitably flexible and flabby. Law can resist the wiles of the yetzer hora in a way that ethics never can.

This specific form of theological braggadocio went out the historical window for at least two good reasons. First, we learned a lot more about Christianity and its many varieties. Second, the entry of Islam into the conversation and competition.

The existence of good reasons does not exclude the existence of bad reasons. The bad reason we stopped making this claim is that we lost confidence in the ethical value of law. We stopped understanding why law is generally sturdier than ethics and therefore can lead to better ethical results than ethics alone.

This essay is an effort at reviving our recognition and appreciation of the advantages halakhah has over ethics, for internal Jewish purposes. I will make two arguments. Neither is a claim of general superiority; I only wish to show that law is better for some purposes. I should clarify that what I mean by law is not a set of rules that are enforceable by others. Rather, I mean by law a self-enforced commitment to behave on the basis of a rule that a society accepts as binding, rather than deciding each case that comes up pointilistically.

The first argument is that law is more capable of hardheaded realism. Consider for example the **law** of the attractive female captive. From an ethical perspective, there's room for a lot of hand-wringing about what the Torah allows. Just about no one thinks that acting on the permissions granted by the Torah here would be a good idea. Just about everyone is happy that contemporary international law prohibits many actions that the Torah permitted. But in conflicts where international law is not enforceable, perhaps captive women would benefit if the combatants felt themselves religiously bound by specific, realistic rules, and perhaps the Torah's rules are the maximum that can realistically be sustained, or at least that could have been sustained at the time it was given.

Of course, the rules have to be deeply grounded in ethics to have any positive impact.

The second argument is that law prevents slippery slopes. Deciding case by case, sentiment and self-interest are difficult to resist, and then sentimental and self-interested decisions become precedential exceptions that prevent adherence to any principle.

This point is by way of introduction to a Facebook post I made on August 20th, which read in part:

Rabbi Yoni Rosensweig wrote recently:

"One of the claims we hear is that there are no innocents there, and collective punishment is both fitting and ethical. The opposite claim is that Israel may be right in its aspiration to get rid of Hamas, but they are not only hurting terrorists, but non-combatants as well.

Both perspectives accept the basic dichotomy: innocent/non-innocent." I agree that this dichotomy is misleading.

However, Rav Yoni seems to be arguing that for certain halakhic/ethical issues we should demand more than innocence from civilians in a war zone, we should demand righteousness. IMHO we can and should always demand more than innocence from human beings; but human beings don't lose all their rights and privileges because they don't live up to our demands, or G-d's.

Therefore, I think the reverse; we may and must require far less than innocence. For most purposes, nothing short of absolute and legally demonstrable guilt matters at all in terms of how we treat other human beings. That's why I disagree with Rav Yoni's conflation of "noncombatant" and "innocent". (By the same token, the corollary, that combatants are legitimate targets because they are "guilty", is profoundly wrong. The distinction between combatants and noncombatants has nothing to do with guilt or innocence, IMHO.)

Rav Yoni Rosensweig was kind enough to reply publicly, even though, to avoid distracting him from his important work in the area of mental health, I had not tagged him:

Rabbi Aryeh Klapper, I am sorry to come late to the party, since you did not tag me I completely missed the post. Forgive me for a late (and short, I promise) response to an issue which has all but fizzled out by now.

Do we disagree? I have no idea. Maybe we do, maybe we don't. I think your point of trying to reinstate the binary is valid, but only if we're talking about a binary set of actions. So, if you're talking about "kill - not kill", or "purposefully starve - don't purposefully starve", I'm fairly certain you and I can reach an agreement.

But I'm sure you know (and if not, then I'm sharing with you) that there is a range of results when a military action is at play. And there, I believe, my spectrum is extremely valuable. There could be those we set out to kill, and those that are killed by accident. There could be those that are starved intentionally, and those that are unfortunately affected by a necessary blockade. There could be suffering, sickness, displacement, pain, discomfort, lack of sleep, etc etc etc. And here, too, different degrees of intentionality, and different levels of severity.

I believe that for some of these results, yes - if a person is innocent of direct crimes, but not righteous, it doesn't require of me to ensure that all of the above are spared him. Some of them he has earned. And here the binary skews the picture.

Here is my tardy response.

Rav Yoni Rosensweig, I really appreciate your replying, and your reply. I'll try to lay out my position and where I think you might be understood or misunderstood as disagreeing. I'll look forward to any clarification you offer.

We agree that that the innocent/guilty binary is appropriate in some cases and not in others. We agree that the cases you lay out can be divided along two axes: intentionality and severity. But I think that your typology of cases actually requires slipping in a third axis, "directness". Here's why:

You give two examples where the innocent/guilty binary is appropriate in the context of military conflict: "kill vs. not kill", and "purposefully starve - don't purposefully starve". I think you mean that only the absolutely guilty can be killed or purposively starved. However, you argue that an array of lesser outcomes can be inflicted on people who are guilty but not absolutely so. These seem to include unintentional killing and intentional but incidental starvation to death.

As I wrote, I don't think that innocence/guilt is the correct axis along which to evaluate "kill vs. not kill" in the context of war. Soldiers are not definitionally guilty, on either side; civilians, certainly adult civilians, are not definitionally innocent, on either side. The nature of war is that in some way it suspends or overrides the ordinary prohibitions against bloodshedding, for both sides, regardless of the rights and wrongs of each side.¹

I also don't see a difference in either intentionality or severity between shooting someone to death and starving them to death. The difference seems to be an issue of directness.

I agree that directness is a legitimate ethical axis. The issue is whether directness interacts with "guilt" in the sliding-scale way you suggest, so that, for example, it might be unethical to starve someone to death who isn't absolutely guilty, but its ethical if they're a lot guilty.

I am often a proponent of sliding-scale halakhic decisionmaking, or what I call analog as opposed to digital psak. But my opinion, FWIW, is that halakhah doesn't support sliding-scale guilt when the context is killing, of whatever kind. I get that from reading the Talmud's rationale for prohibiting killing

another to save yourself, "Who says your blood is redder than mine?", as a purely rhetorical question with no correct answer. I think, as did Rav Chaim Brisker, that it applies to all methods of killing, regardless of directness.

The weakness of sliding-scale halakhah is its susceptibility to slippery slopes.

Chazal understood that there are plausible and even compelling reasons to think one person's blood is redder than another's. Relative innocence is perhaps the easiest way to justify killing someone else to save your own life. Human beings, and human societies, can't be trusted to make such judgements without bias. Making all human lives equal in absolute law will yield a better ethical outcome than allowing people to make case-by-case value decisions. It matters that we translate the ethical claim of human equality into a legal ban on killing.

Killing is halakhically unique. It's where Chazal decided to establish a rule that strives toward being utterly rigid and uncompromisable. I'm open to a more detailed conversation about whether lesser consequences might be appropriately correlated with guilt and innocence. Obviously there are many other factors that have to be considered, such as the extent to which halakhah incorporates international law, and if we want to speak concretely about Israel and Gaza, we'd have to first establish some common understanding of what is happening on the ground.

Thank you again for engaging. It is always a pleasure to learn with you. May our conversation help heal some of the breaches that have arisen within klal Yisroel as the IDF strives to protect us against terrible external threats.

בברכה הוקרה והכרת הטוב
אריה קלאפפער

Shabbat shalom!

¹A possible halakhic comparison, in the sense that it demonstrates that a person who is religiously authorized to use lethal force may nonetheless be killed in self-defense, is Rav Yochanan's dictum on Sanhedrin 82a that Zimri was permitted to defend himself with lethal force against Pinchas.

אמר רבה בר בר חנה אמר רבי יוחנן:

הבא לימלך - אין מורין לו.

ולא עוד, אלא ש

אם פירש זמרי והרגו פנחס - נהרג עליו;

נהפך זמרי והרגו לפנחס - אין נהרג עליו, שהרי רודף הוא.

Said Rabbah bar Bar Channah said Rabbi Yochanan:

If one comes to ask (whether they can act as a zealot) – we do not rule for them.

Not only this, but

if Zimri disengaged sexually and then Pinchas killed him – Pinchas is executed;

If Zimri turned about and killed Pinchas – he is not executed, because Pinchas is a pursuer.

The straightforward reading of this statement is that Zimri has a right of self-defense even while he is sinning.

However, as you are certainly aware, many commentators limit this to situations where in the immediate circumstance of Pinchas' attack it is impossible for Zimri to disengage in time to stop Pinchas from killing him, or (I think it necessarily follows) where it is clear that Pinchas will not stop regardless. It's not clear how that standard would apply in this or any war.

One might also argue that Zimri has the right of self-defense only because Pinchas could not be instructed by beit din to kill him. If so, Zimri would not be evidence for a soldier's right of self-defense against a soldier fighting a *milchemet mitzyab*.

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