

Does Judaism Recognize an Ethic Independent of Halakha?

Class 10

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1. David Shatz, "Ethical Theories in the Orthodox Movement," n. 11

See especially Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakhah?" in *Modern Jewish Ethics: Theory and Practice...* This, I suspect, is the single most cited article in Modern Orthodox writings on how *halakhah* relates to ethics.

2. Steven Schwarzschild, "The Question of Jewish Ethics Today," *Sh'ma* 7 (1976), p. 30

Are modern Jewish legal ethics moral or not? Now, that there would be occasional, and sometimes even serious, inconsistencies between domestic and international legislation in the *halakhah* (or any other body of law), or at least in its interpretation and application, cannot be surprising in the least. Individual statutes and even basic constitutional provisions come into conflict with one another constantly...

'In this context *Modern Jewish Ethics - Theory and Practice*, ed. Marvin Fox, Ohio State University Press, 1975 (but for the editor's introduction, papers and discussions at the July 1972 meeting of the Institute for Judaism and Contemporary Thought in Israel) becomes interesting. Precisely the question of contemporary Jewish moralization or demoralization of Jewish (legal) ethics is raised very sharply.

In a contribution that is already gaining fame "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" Rabbi Aharon Lichtenstein, *rosh yeshivah* of Yeshivat Har Zion [*sic*] in Israel, with his acknowledged credentials of traditional as well as modern Jewish learning, makes essentially one point—that, according to Jewish law, to do no more than what the letter of the law requires is itself a violation of this law (i.e. "the quality of Sodom" (2) and that, to the contrary, to go "within the line of the law" (*middat chassidut* - "the quality of [selfless] righteousness") "is part of the fabric of Halakha." The interested reader should consider the full evidence and analysis as presented in this study. R. Lichtenstein's conclusion is this: "What I reject emphatically is the position that, on the one hand, defines the function and scope of Halakha in terms of the latitude implicit in current usage and yet identifies its content with the more restricted sense of the term (*halakhah*). The resulting equation of duty and *din* (statute) and "the designation of suprallegal conduct as purely optional or pietistic is a disservice to Halakha and ethics alike."

3. רמב"ן ויקרא פרק יט

קדושים תהיו - הוּו פרושים מן העריות ומן העבירה, שכל מקום שאתה מוצא גדר ערוה אתה מוצא קדושה, לשון רש"י. אבל בתורת כהנים (פרשה א ב) (ראיתי סתם, פרושים תהיו. וכן שנו שם) (שמיני פרק יב ג), והתקדשתם והייתם קדושים כי קדוש אני, כשם שאני קדוש כך אתם תהיו קדושים, כשם שאני פרוש כך אתם תהיו פרושים:

ולפי דעתי אין הפרישות הזו לפרוש מן העריות כדברי הרב, אבל הפרישות היא המזכרת בכל מקום בתלמוד, שבעליה נקראים פרושים: והענין כי התורה הזהירה בעריות ובמאכלים האסורים והתירה הביאה איש באשתו ואכילת הבשר והיין, א"כ ימצא בעל התאווה מקום להיות שטוף בזמת אשתו או נשיו הרבות, ולהיות בסובאי יין בזוללי בשר למו, וידבר כרצונו בכל הנבלות, שלא הוזכר איסור זה בתורה, והנה יהיה נבל ברשות התורה: לפיכך בא הכתוב, אחרי שפרט האיסורים שאסר אותם לגמרי, וצוה בדבר כללי שנהיה פרושים מן המותרות. ימעט במשגל, כענין שאמר (ברכות כב א) (שלא יהיו תלמידי חכמים מצויין אצל נשותיהן כתרנגולין, ולא ישמש אלא כפי הצריך בקיום המצוה ממנו. ויקדש עצמו מן היין במיעוטו, כמו שקרא הכתוב) (במדבר ו ה) הנזיר קדוש, ויזכור הרעות הנזכרות ממנו בתורה בנה ובלוט. וכן יפריש עצמו מן הטומאה, אף על פי שלא הוזכרו ממנה בתורה, כענין שהזכירו (הגיגה יח ב) (בגדי עם הארץ מדרס לפרושים, וכמו שנקרא הנזיר קדוש) (במדבר ו ח) (בשמרו מטומאת המת גם כן. וגם ישמור פיו ולשונו מהתגאל ברבוי האכילה הגסה ומן הדבור הנמאס, כענין שהזכיר הכתוב) (ישעיה ט טז) (וכל פה דובר נבלה, ויקדש עצמו בזה עד שיגיע לפרישות, כמה שאמר על רבי חייא שלא שח שיחה בטלה מימיו:

באלו ובכיוצא בהן באה המצוה הזאת הכללית, אחרי שפרט כל העבירות שהן אסורות לגמרי, עד שיכנס בכלל זאת הצוואה הנקיות בידיו וגופו, כמו שאמר (ברכות נג ב) (והתקדשתם אלו מים ראשונים, והייתם קדושים אלו מים אחרונים, כי קדוש זה שמן ערב. כי אף על פי שאלו מצות מדבריהם, עיקר הכתוב בכיוצא בזה יזהיר, שנהיה נקיים וטהורים ופרושים מהמון בני אדם שהם מלכלכים עצמם במותרות ובכיעורים: וזה דרך התורה לפרוט ולכלול בכיוצא בזה, כי אחרי אזהרת פרטי הדינין בכל משא ומתן שבין בני אדם, לא תגנוב ולא תגזול ולא תונו ושאר האזהרות, אמר בכלל ועשית הישר והטוב) (דברים ו יח), שיכניס בעשה היושר וההשויה וכל לפנים משורת הדין לרצון חבריו, כאשר אפרש) (שם) בהגיעי למקומו ברצון הקדוש ברוך הוא. וכן בענין השבת, אסר המלאכות בלאו והטרחים בעשה כללי שנאמר תשבות, ועוד אפרש זה) (להלן כג כד)

4. Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halacha?" in Marvin Fox (ed.), *Modern Jewish Ethics* (Columbus, 1975),

pp. 66-67

The question is not what vestiges of natural morality continue to bind the Jew or to what extent receiving the Torah abrogated any antecedent ethic. It is rather whether, quite apart from ground common to natural and halakhic morality,

the demands and guidelines of Halakha are both so definitive and so comprehensive as to preclude the necessity for – and therefore, in a sense, the legitimacy of – any other ethic... I am of course taking two things for granted. I assume, first, that Halakha constitutes – or at least contains – an ethical system... Second, I assume that, at most, we can only speak of a complement to Halakha, not of an alternative. An ethic so independent of Halakha as to obviate or override it, clearly lies beyond our pale.

p. 68

Essentially, then, the question is whether Halakha is self-sufficient. Its comprehensiveness and self-sufficiency are notions many of us cherish in our more pietistic or publicistic moments... If, however, we equate Halakha with the *din*: if we mean that everything can be looked up, every moral dilemma resolved by reference to code or canon, the notion is both palpably naïve and patently false. The *Hazon Ish*, for one – and both his saintliness and his rigorous halakhic commitment are legend – had no such illusions. “Moral duties,” he once wrote, “sometimes constitute one corpus with Halakhic rulings, and it is Halakha which defines the proscribed and permitted of ethical thought.” Sometimes – but not, evidently, always. There are moments when one must seek independent counsels. Recognition of this element rests upon both textual and practical evidence. In this setting, I presume little need be said with reference to the latter. Which of us has not, at times, been made painfully aware of the ethical paucity of his legal resources? Who has not found that the fulfillment of explicit halakhic duty could fall well short of exhausting clearly felt moral responsibility?... Even the full discharge of one’s whole formal duty as defined by the *din* often appears palpably insufficient.

pp. 76-77

This exposition [on various Medieval authorities and whether they see *lifnim mishurat hadin* as obligatory and/or actionable or not] is open to two obvious objections. First if *lifnim mishurat hadin* is indeed obligatory as an integral aspect of Halakha, in what sense is it supralegal?... What distinguishes its compulsory elements from *din* proper? Secondly, isn’t this exposition mere sham? Having conceded, in effect, the inadequacy of the halakhic ethic, it implicitly recognizes the need for a complement, only to attempt to neutralize this admission by claiming the complement had actually been part of Halakha all along... These are sound objections; but they do not undermine the position I have developed. They only stimulate its more precise definition.

pp. 78-79

Din consists of a body of statutes, ultimately rooted in fundamental values, but which at the moment of decision confronts the individual as a set of rules. It is of course highly differentiated, numerous variables making the relevant rule very much a function of the situation. Yet the basic mode is that of formulating and defining directives to be followed in a class of cases – it is precisely the quality of generality that constitutes a rule – and applying them to situations marked by the proper cluster of features . . . Metaphors that speak of laws as controlling or governing a case are therefore perfectly accurate. *Lifnim mishurat hadin*, by contrast, is the sphere of contextual morality. Its basis for decision is paradoxically both more general and more specific. The formalist is guided by a principle or a rule governing a category of cases defined by n numbers of characteristics . . . The contextualist, by contrast, will have nothing to do with middle-distance guidelines. He is directed, in theory at least, only by the most universal and the most local of factors – by a minimal number, perhaps as few as one or two, of ultimate values, on the one hand; and by the unique contours of the situation at hand, on the other. Guided by his polestar(s), the contextualist employs his moral sense (to use an outdated but still useful eighteenth-century term) to evaluate and intuit the best way of eliciting maximal good from the existential predicament confronting him. A nominalist in ethics, he does not merely contend that every case is phenomenologically different. That would be a virtual truism. He argues that the differences are generally so crucial that no meaningful directives can be formulated...

p. 83

Traditional halakhic Judaism demands of the Jew both adherence to Halakha and commitment to an ethical moment that though different from Halakha is nevertheless of a piece with it and in its own way fully imperative. What I reject emphatically is the position that, on the one hand, defines the function and scope of Halakha in terms of the latitude implicit in current usage and yet identifies its content with the more restricted sense of the term. The resulting equation of duty and *din* and the designation of supralegal conduct as purely optional or pietistic is a disservice to Halakha and ethics alike...

For those who prefer definitive answers, let me conclude by saying: Does the tradition recognize an ethic independent of Halakha? You define your terms and take your choice.

5. Eugene Borowitz, “The Authority of the Ethical Impulse in ‘Halakha’” in *Through the Sound of Many Voices* (1982), pp. 156–71.

[The question often addressed to him, that if Halakha is ethical] “why do you not then fully embrace rabbinic teaching as developed over millenia and as amplified in unbroken tradition today?”

To many Jews today, the Torah’s ethical behests come with such imperative quality that they can consider them properly heard only when they are accepted categorically. To qualify their functioning as substantially as do the spokesmen of contemporary Rabbinic Judaism must be seen by them as requiring less than what God now demands of the people of Israel.

6. Gerald Blidstein, “On Human Dignity in Rabbinic Law” (Hebrew), *Annual of Jewish Law*, 9–10 (1982–3), 128

The talmudic concept *kevod ha-beriyot* is known as a concept with significant halachic consequence, expressed, among other ways, in the principle, “Human dignity is so great that it overrides a biblical prohibition.” This concept serves a function in the Talmud, is interpreted in halachic literature throughout the generations, and is applied in responsa literature. The purpose of this article is to assess the significance and impact of this concept and its corollaries – their meaning, scope, and stature. And we may already sharpen the question that confronts us: how it should happen that the halachic impact of the concept of *kevod ha-beriyot* is... so modest, apparently across all times and locales.

7. Hazon Ish, *Emunah U-Vitahon*

Moral duties are at times synonymous with halakhic rulings, and Halakha determines moral right and wrong...

Human beings do not decide what is robbery and injustice, only the laws of the Torah do. Any act opposed to these laws is robbery, even if human beings agree with it, and any act within these laws is a fulfillment of justice, even if contrary to human views...

All their actions [of the established teachers against the new ones] would be guiltless, had Halakha ruled in their favor and allowed them to prevent the new ones [from working], and the new ones would [then] be guilty. . . . But now, that the ruling is that "the jealousy of scribes increaseth wisdom," and this is considered a higher principle than the livelihood of private people, the guests [new teachers] have followed the Halakha, and those opposing them "spill innocent blood. . .

Human beings do not decide what is robbery and injustice, only the laws of the Torah do. Any act opposed to these laws is robbery, even if human beings agree with it, and any act within these laws is a fulfillment of justice, even if contrary to human views.

8. J. David Bleich, “Is There an Ethic Beyond Halakhah?” (1985, selections)

Is there a standard of *lifnim mi-shurat ha-din* or is the sole moral standard that of *din* itself? The answer to the question thus formulated is obvious. Rabbinic literature is replete with references to ethical norms described as *lifnim mi-shurat ha-din*. The very juxtaposition of the two categories constitutes an acknowledgement of standards of *lifnim mi-shurat ha-din* which are not coextensive with *din*...

Having assimilated the concept of *lifnim mi-shurat ha-din* to *din* itself, we are now in a position to pose the second question: “Does Judaism recognize an ethical standard beyond the eight categories herein enumerated?”

The question of whether or not there exist ethical standards in addition to the eight earlier enumerated categories of *lifnim mi-shurat ha-din* can itself be formulated in two distinct ways:

1. Does Judaism recognize a subjective morality? Is there room in Judaism for accommodation of the moral demands advanced by individual conscience? To that question the answer must be an emphatic no. Indeed, the question is unequivocally answered in the negative by R. Ovadia Bartenura in the opening section of his commentary on *Ethics of the Fathers*... 2. However, precisely the same question can be reformulated in a second manner: Is there a natural morality which is discoverable by reason? The content of such a moral system might well be coextensive with the content of dogmatic ethics but might yet be endowed with independent validity. That such a concept exists is manifest in biblical verses such as “Shall the Judge of all the earth not do justice?” (Genesis 18:25). Nevertheless, an affirmative answer to this question does not dispose of the issue. The concept of natural morality must be distinguished from the concept of natural law.

III. This then leads us to a final reformulation of the original question. Is there an ethic beyond the recorded Halakhah? To this the answer is: Of course! To the extent that *da'at Torah* is a cognitive discipline that is precisely what it endeavors to explicate and it is precisely for this reason that Halakhah is an art rather than a science...

Recognition of the inherent difficulties associated with a concept of natural morality leads to a position which can best be described as halakhic formalism or halakhic positivism. Such a position recognizes the norms of Halakhah as constituting the sole constraints upon human conduct. In turn, a system of this nature makes possible improvisation of devices such as a *prosbul*, *heter iska*, carefully drafted testaments to avoid statutory principles of inheritance, etc. This is not necessarily to condemn such legal constructs as being tainted with any degree of immorality. But, such a position does lead to a moral stance, which permits an individual to take advantage of any loophole in the law which may present itself and to do so without feeling any degree of culpability based upon an ultimate moral concern.”

9. Yeshaya Leibowitz, *Judaism, Human Values and the Jewish State* (p. 18)

The Torah does not recognize moral imperatives stemming from knowledge of natural reality or from awareness of man's duty to his fellow man. All it recognizes are Mitzvot, divine imperatives... [Ethics is the] atheistic category par excellence.

10. ר' עובדיה מברטנורא מסכת אבות פרק א משנה א

משה קבל תורה מסיני - אומר אני, לפי שמסכת זו אינה מיוסדת על פירוש מצוה ממצות התורה כשאר מסכתות שבמשנה, אלא כולה מוסרים ומדות, וחכמי אומות העולם ג"כ חברו ספרים כמו שבדו מלבם בדרכי המוסר כיצד יתנהג האדם עם חבריו, לפיכך התחיל התנא במסכת זו משה קבל תורה מסיני, לומר לך שהמדות והמוסרים שבזו המסכתא לא בדו אותם חכמי המשנה מלבם אלא אף אלו נאמרו בסיני:

11. Daniel Statman, comments on the APJ blog (2012, accessible <http://www.theapj.com/wp-content/uploads/2012/04/Statmans-opening-comments.pdf>)

Rabbi Lichtenstein invests a lot of effort in analyzing the attitude of halakhists to cases in which compliance with formal halakhic obligations is less than perfect from a moral point of view such as when the din permits actions which are inconsistent with justice or humanity. But the more disturbing dilemmas, both theoretically and practically, arise in cases in which the din seems to demand such actions, for example, when it discriminates against women or against non-Jews, when it punishes children for the sins of their parents (as in the case of mamzerut), when it supports (if indeed it does) a very harsh ethic of war. I'm pretty sure that, in such cases, Rabbi Lichtenstein would not support an interpretation of the din in a way that would guarantee its compatibility with morality.

12. Moshe Halbertal, *Interpretive Revolutions in the Making* (בהתהוותן פרשניות מהפכות), 1997)

השאלה המרכזית בדיון זה היא מהו מקורו של השיקול הערכי – האם הפרשן רשאי לשלב ערים, המבוססים על האינטואיציות המוסריות שלו, הוא משלב אותם רק אם קיימת להם הצדקה פנימית שנובעת מהטקסט עצמו? אם הוא אינו תולה אותם בכתוב, איזה צידוק ניתן לספק לשילובם בהליך הפרשני? (ד' 179)
ברצוני להתמקד באלה המנסים להוכיח את הטשטוש הקיים בין פנימי לחיצוני... בעמדות אלו ניתן יהיה למצוא צידוק רחב יותר לשימוש בשיקולים ערכיים של הפרשן. (85-184)
על טקסט קדוש מופעל עקרון חסד בלתי מוגבל. המחויבות של הפרשן כלפיו היא כך שיואר באור הנכון והטוב ביותר, זאת מפני שמקורו האלוהי אינו מאפשר טעות או סטייה מן הצדק, חובת ההצלה של הטקסט מטעויות או מעיוותים היא מוחלטת ומלאה. (91-190)

14. Shlomo Zuckier, Revisiting the Possibility of an Ethic Independent of Halakha in the Thought of R. Aharon Lichtenstein,” Paper presented at JLA-Revel Conference, 03.27.17

This attempt to bridge the ethical-Halakhic gap, to have his cake and eat it too, is characteristic of Rav Lichtenstein's project. As we see from his integration of Torah and general studies, of Torah and army service, of humanistic and spiritual pursuits, and of course the integration of Halakha and ethics, Rav Lichtenstein's goal has always been “to redouble our educational efforts to integrate and inculcate the dual thrust.” When the stakes are as high as they are here, it would be unthinkable *not* to encounter his characteristic philosophy of integration!

By staking out the middle position, Rav Lichtenstein situated this article at the crux of the discussion, making it “the single most cited article in Modern Orthodox writings on how Halakha relates to ethics,” in David Shatz's opinion. Many have followed his lead in writing on these matters, including a silent consensus of those who largely agreed, and some who diverged on some detail or other but generally preserved the overall structure – for example, Rabbi JD Bleich, Shubert Spero, Walter Wurzbarger, and others.

The prominence of this piece, preserved through time, can be attributed to two main factors. First, its self-consciousness, clearly pointing to dissenting positions on the various sides and situating itself in the middle. This allowed the ensuing 40 years of literature to primarily work out the details, given the range of opinions already substantially laid out. Second, the overwhelming majority of significant sources were in the 1975 article, with little to be added in subsequent literature. Truth be told, it would be hard to recognize this discourse independent of Rav Lichtenstein's contributions.