



December 2010

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Recommended Citation

Statman, Daniel. "Halakha and Morality: A Few Methodological Considerations." *Journal of Textual Reasoning* 6, no. 1 (2010): 7-22. <https://doi.org/10.21220/s2-hgxx-wt32>.

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HALAKHA AND MORALITY: A FEW METHODOLOGICAL CONSIDERATIONS

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Introduction

In recent decades, there has been an ongoing attempt to establish the thesis that morality plays an important role in the shaping of halakha.¹ The

¹ There is an abundance of literature on the relationship between morality and halakha. See, for example, the list of references mentioned in Louis Newman, *Past Imperatives: Studies in the History and Theory of Jewish Ethics* (Albany: SUNY Press, 1998), 238 n. 1. As regards the claim that morality plays a central role in halakha, see, for example, Eliezer Berkowitz, *Not In Heaven: The Nature and Function of Halakhah* (New York: Ktav, 1983); Shlomo Fischer and Amichai Berholz, "Introduction," in *Derekh Eretz [Desired Mode of Behavior], Religion and State: A Collection of Articles and Lectures on Judaism, Government and Democratic Values*, ed. Amichai Berholz (2002), 14 (Hebrew): "The halakhic ruling has an ethical compass that does not allow a contradiction between what appears to be appropriate and what is ruled by Halakha"; Asher Maoz, "Jewish and Democratic Values," in *Ibid.*, 64 (Hebrew): "The concept of human dignity is derived from the Jewish perception of man's creation in God's image...it is from this motif and from the commandment to imitate God's way that many laws pertaining to central human rights are learned: equality between all people, the sanctity of life and the obligation to save life"; R. Avraham Gisser, "The divine Soul Resides Within: On Respect for All Human Beings," in *Ibid.*, 164 (Hebrew): "From the basic values that constitute Jewish Law and from the values that constitute the Jewish way of life throughout history, equality, value and respect for all people are in keeping with the different universal conventions concerning human dignity and with the Basic Law of Human Dignity and Freedom."

thesis is based on two arguments, one from the realm of moral philosophy, the other from the field of legal philosophy. I first present these arguments and argue that they fall short of establishing the desired conclusion. I then try to show that the entire strategy tends to confuse philosophical and historical issues, as well as ideological and jurisprudential ones.²

The point of view taken in this study is that of an observer, not of a participant. I wish to offer reflections on the relationship between morality and halakha as a philosopher or as a researcher, rather than as a member of the halakhic community, i.e. a “halakhist” or a rabbi. From this “external” vantage point, the discussion on the place of moral considerations in halakha is no different from the discussion on the place of moral considerations in other legal systems or on the place of moral considerations according to other religious viewpoints. In all cases, the point of view of the researcher striving for an objective understanding of a practice in light of general models will be different than that of those immersed in the practice under discussion and committed to it. The latter—in our case, makers and interpreters of halakha—will obviously be able to contribute to the discussion, but only insofar as they also manage to take an objective position on their activity, to look at it from the “outside” and not only from the “inside.”

I. Morality as Independent of Religion and Its Place in Halakhah

I mentioned that two arguments are intended to establish the role of morality in halakha: one in moral philosophy, the other in legal philosophy. I discuss the former in the present section and the latter in Section II.

The argument from moral philosophy runs as follows: since morality does not depend on religion, it does not depend on halakha either; hence,

² These two arguments were central to a course entitled “Religion and Morality” that I prepared with Avi Sagi at Bar-Ilan University twenty years ago, and which I have taught many times since. The following discussion, therefore, is self-critical no less than it is critical of others.

it has an independent role within halakha, which means that it can and often does override “regular” halakhic considerations. The argument typically starts with the well-known Euthyphro Dilemma, which asks whether an act is good because God wanted (or commanded) it or whether God wanted (or commanded) this act because it is good in itself. In our book, *Religion and Morality*, we argue that the idea that morality is dependent on religion can be understood in two principal ways: (A) that morality depends on religion for its very existence or validity (“strong dependence”); and (B) that morality depends on religion for its recognition (“epistemic dependence”).³ According to (A), actions obtain positive or negative moral value because, and only because, God commanded man to perform them or to refrain from performing them. According to (B), the moral value of actions is independent of divine command, but without the help of God, human beings would not be able to identify, or fully identify, this value.⁴ The conclusion of our discussion was that both views should be rejected, which means that morality is independent of religion, both in terms of its validity and in terms of human ability to grasp moral truth. To illustrate this point: Cain was under an obligation not to murder his brother although there was no divine command to that effect, and even without divine assistance, Cain was capable of knowing the wrongness of his murderous act. The argument under discussion concludes that just as morality is not dependent on religion, nor is halakha, which presumably leads to the conclusion that halakha can and, in fact, does recognize the independent validity of moral considerations, taking them into account in shaping its norms and in applying them to concrete cases.

However, this line of thinking is clearly defective. Even if it is true that morality is independent of religion, both metaphysically and

³ Avi Sagi and Daniel Statman, “Introduction,” in *Religion and Morality* (Amsterdam: Rodopi, 1993).

⁴ A different version of weak dependence is based on the frailty and vulnerability of moral motivation. On this version, human beings find it hard to follow the dictates of morality without the help of religion.

epistemologically, it might still be the case that Jewish philosophers and *poskim* held the (erroneous) view that morality was entirely determined by divine command. The relation between morality and halakha is not an abstract, theoretical issue, but it rather relates to a specific religious-jurisprudential tradition. The answer to the philosophical question of whether or not morality depends on religion is irrelevant to the question of how Jewish thought or halakha regards morality. The point can be generalized: the philosophical position that is taken concerning the relation between morality and religion cannot in itself ground any claim about the way in which different cultures perceived the status of morality and its role within their religious laws.

In response, one might suggest that we revise the previous argument to make it an historical one using the same general idea. The historical claim would be that, in the Middle Ages as well as later, Jewish philosophers explicitly denied that morality depended on religion.⁵ This denial, so the argument would suggest, must have led halakhists to recognize the independent value of morality and consequently to give it an important place in their considerations. If halakha assumes something like Sa'adia's view about the rationality of the social commandments,⁶ then it might be expected that it exercise a kind of moral-rational judgment that is independent of divine command and of halakhic norms. However, this response is unsatisfactory, because even if we replace the philosophical thesis ("morality is independent of religion") with an historical one ("the Jewish thinkers thought that morality is independent of religion"), it still teaches us very little about the actual role of morality within halakha. Even if most halakhists and Jewish philosophers believed that, in some abstract philosophical sense, morality was independent of God, they might have thought that once the divine commands were issued, these commands bind the *poskim* in a way that leaves no room for

⁵ For a defense of this claim, see Avi Sagi and Daniel Statman, "Divine Command Morality and the Jewish Tradition," *The Journal of Religious Ethics* 23 (1995): 49-68.

⁶ Sa'adia Gaon, *Beliefs and Opinions*, ch. 3, in which Sa'adia claims that the moral/social commandments are determined by reason.

any independent moral deliberation. Even the most stubborn positivists would concede that the validity of moral considerations that serve as the basis for legislation is not dependent on legislation itself. They would just add that from a legal point of view what is binding is the law itself, and not those (moral and other) considerations on which the law is based. Similarly, one might grant that the laws of the *Torah* are based on considerations that are intrinsically valuable, but insist that these considerations carry no weight in the actual making and interpretation of halakha because once the written and oral *Torah* were handed over to the Jewish people, they became uncompromisingly binding, leaving no room for moral or other extra-legal considerations. According to this view, the requirement that halakhists ignore the moral aspect of many laws could be based on the idea that, given the moral and other perfections of God, and given human moral and epistemic imperfection, the best way for human beings to realize justice would be through meticulous adherence to halakha, with no attempt to interpret it (and surely no attempt to *revise* it) on the basis of their fallible understanding.

To sum up: Even if, metaphysically and epistemologically, morality is independent of religion, and even if most Jewish thinkers actually accepted this independence, nothing follows regarding the way in which they perceived the role of moral considerations in halakha or, more importantly, about the role actually played by these considerations in the halakhic activity.

II. Morality, Halakha, and Formalism

The second argument that seeks to establish the independent role of morality within halakha is based on legal philosophy, or, more precisely, on ideas about legal interpretation. The argument attempts to show that halakhic interpretation is non-formalistic, namely, that it relies on human judgment or human discretion. This is in contrast to formalistic interpretation, which does not involve such judgment but is governed by a set of rules, which logically are assumed to lead to clear answers to any

halakhic question.⁷ In the words of Avi Sagi, “Halakhic rulings are determined by reasons grounded in human judgment and understanding. Making an halakhic ruling is not a simple act of applying the written law to reality, but involves a large degree of human discretion. This is true of both halakhic interpretation and legislation.”⁸

The claim is repeated by different authors, and repeatedly illustrated by various examples. I have two comments to make about it. First, the fact that halakha is shaped, among other things, by value-based considerations does not mean that these considerations have moral content, and it certainly does not mean that this moral content is positive. The term “moral” is notoriously ambiguous. It indicates a specific category of reasons—i.e., “moral” versus “non-moral”—and it is in this sense that we say that some problem is a “moral” problem, and not, for instance, an economic or a political one. But it also indicates a positive evaluation within the moral field, such as when one says that “John is a moral human being” or when one says that “the laws of the Torah are moral.” Back to the matter at hand: the fact that halakhic decisions are not a conclusion arrived at by a deduction from a closed system of rules, but that they inevitably involve human discretion and value judgment, does not mean that these considerations necessarily belong to the moral domain, nor does it mean that they have positive moral value. But this is precisely what the proponents of the view under discussion are trying to prove: that halakha is shaped by moral considerations from the moral drawer, so to say, which have positive value.

Second, and more importantly: As a jurisprudential argument, it is simply trivial. To be sure, halakhic interpretation is not a simple act of applying the written law to reality, but this is the case with all legal interpretation, and, in fact, with *any* kind of interpretation. How could anybody today think otherwise, i.e., think that the correct interpretation of literary or legal texts can be reached via some kind of a logical

⁷ Later on I point to a different use of this distinction.

⁸ Avi Sagi, *Judaism: Between Religion and Morality* (Tel Aviv: Hakibbutz Hameuhad, 1999), 292 (Hebrew).

deduction from a set of given rules? Who would seriously deny that legal interpretation involves more than formally “applying” rules? The “formalist” who holds such a position is merely a straw man with whom it would be futile to argue. Note, by the way, that formalism, in the sense discussed here, is not equivalent to positivism, because, as emphasized by Hart, even positivism recognizes that the application of legal rules is not a matter of logical deduction.⁹

If the claim that halakhic interpretation is non-formalistic (in the above sense) is trivial, why is it repeatedly made and why are new examples constantly recruited to illustrate it? It seems to me that the authors who do so have an ideological, rather than a theoretical, motive. Through emphasizing the non-formalistic nature of halakha, they wish to advance a particular approach to halakha, i.e. a moral-liberal-modern one. The logic behind this move runs as follows: various aspects of halakha today evoke moral discomfort—for example, the halakhic approach to the status of women. Revising the relevant laws would be ruled out by a “formalistic” approach to halakha which seems to leave no room for extra-halakhic considerations in the halakhic process. Hence, only a non-formalistic approach to halakha could make room for the desired revisions and reforms, as it allows “meta-halakhic” values in the interpretation of halakha, values such as human dignity, equality, and so on. Such values enable a moral interpretation of halakha where necessary, without undermining its authority. It is no wonder that most authors who emphasize the flexibility of halakha and the value it assigns to moral values belong, sociologically, to modern-orthodox circles and to thinkers on their “left.” It is in their writings that one can find new and, at times, radical proposals regarding the status of women within halakha, the attitude toward non-Jews, etc.

The ideological and polemical nature of the literature under discussion is also evident from the fact that much of it followed events

⁹ H.L.A. Hart, “Separation of Law and Morals,” *Harvard Law Review* 71 (1958), 607-608: “[The application of legal rules] to specific cases in the penumbral area cannot be a matter of logical deduction.”

that raised doubts about the moral character of halakha, a notable example being the assassination of Israeli Prime Minister Yitzhak Rabin.¹⁰ Whereas the claim that the halakhic interpretation is non-formalistic is trivial, the opposing claim, which describes halakhic interpretation as a “simple act of applying the written law to reality,” is so embarrassing that it is hard to believe that anyone seriously upholds it. It is difficult to see how anybody who ever studied halakhic *responsa*, all the more so if he actually composed such *responsa* himself, could think that the determination of halakha is guided by a formalistic system of rules, the correct application of which leads to a single outcome with no need to exercise judgment. The formalists, therefore, seem to be motivated by an ideology just like the non-formalists, though a contrasting one. While the modern-orthodox camp stresses the non-formalistic nature of halakha in order to *promote* various reforms, the ultra-orthodox camp cleaves to its formalistic nature in order to *obstruct* them. The opposition to change stems from a worldview that is against modernity, perceiving it as a threat to religious faith and the halakhic way of life.

The ongoing debate about moral reforms within halakha is, therefore, best understood not as a jurisprudential debate on the nature of halakhic interpretation, i.e., whether it is formalistic or not, but as a normative debate about the proper role of moral considerations within halakha and more generally about the legitimacy and proper nature of reforms in halakha. In this debate, the non-formalistic nature of halakha should be taken for granted, with the realization that, in itself, it does not support any side of the debate.¹¹ Those who oppose reform have to base their

¹⁰ See, e.g., Berholz, *Derekh Eretz*, 9.

¹¹ I made a similar point about the common use of the well-known story of Achnai’s Oven by thinkers from the modern-orthodox stream, and further “left,” according to which the fact that the Torah “is not in Heaven” strengthens the liberal approach to halakha, providing a basis for changes required in keeping with the times. But the fact that human beings have the authority to interpret halakha in accordance with current needs and challenges says nothing about whether it should be interpreted in a liberal or a non-liberal manner. In other words, the assertion that a divine voice (*bat-kol*) cannot influence halakhic ruling is procedural and in itself has no bearing on the desired halakhic policy. See my “Autonomy

opposition on substantive arguments in favor of a cautious and conservative halakhic policy in an era of increasing secularism, while those who support reform need to base their position on substantive arguments in favor of their own policies. Neither side can use the non-formalistic nature of the halakhah as a shortcut to the conclusion that they are advocating.

The analysis proposed here regarding the apparent debate about the formalistic nature of halakha applies also to the debate about the existence of meta-halakhic considerations. Here again, one camp makes a big fuss about the existence of such considerations and emphasizes that halakha comprises not only norms but also meta-norms, while the other camp either denies the existence of meta-halakha or seriously downplays its significance. Not surprisingly, the former group includes the modern-orthodox and those to their "left" while the latter group includes the ultra-orthodox. But, once more, just as with any other legal system, it seems ridiculous to deny that the legal system of halakha contains a meta-halakhic (or meta-legal) plane. That such a plane exists should be taken for granted by all sides in the above debate. What cannot be taken for granted and is indeed a matter of debate is the precise nature of the meta-halakhic norms and their relative weight in comparison to regular halakhic rules.

III. Halakha and Morality from an Historical Perspective

The fact that halakhic interpretation is not a simple deduction from a list of rules and principles is thus obvious. What is not so obvious lies neither in the field of religious or moral philosophy, nor in the field of jurisprudence, but in that of history. I refer to two historical questions: first, to what extent were Jewish thinkers in the past aware of the non-formalistic nature of interpretation? This question refers to the philosophical reflection of halakhists and philosophers on the nature of

and Authority in Achnai's Oven," *Mekhkarei Mishpat* [Bar-Ilan Law Studies] 24 (2009), 639-662 (Hebrew).

halakha. Even if halakhic interpretation is not deductive-formalistic, it may well be the case that at least some halakhists were not aware of this fact, and among those who were aware of it, some might have ascribed different interpretations to it. This question is about the history of halakhic thought or, if you wish, the history of (Jewish) thought on halakha. It comprises two main sub-questions, namely: (a) To what extent, if at all, were Jewish thinkers aware of the fact that halakhic ruling necessarily involves value and moral considerations, and (b) if they were aware of this fact, what meaning did they ascribe to it?

The second historical question is to what extent has halakhic ruling been formalistic in practice. Here I am not using “formalistic” in the sense of a deductive manner of interpretation, as I did earlier, but in the sense of strict adherence to the written law and to precedents, in contrast to a ruling that leaves far more room for values and ideology within halakhic interpretation.¹² In this sense, a non-formalistic stance—or to use the contemporary term, an “activist” stance—is one that encourages a more creative interpretation of the written law, one that gives more weight in legal interpretation to the purposes of law. By contrast, a formalistic approach in the sense under discussion is a conservative approach which requires the courts to behave with restraint and to give decisive weight to the formalistic aspects of the law: to the written law, to procedures, to precedents, etc. Being formalistic or non-formalistic is a matter of degree, and probably every legal system has periods that are formalistic and periods that are less formalistic, as well as judges who are formalistic to a greater or lesser degree. Asking whether halakha is formalistic means asking about the legal policy of different *poskim* in different locations and different periods, asking to what extent they adhered to the letter of the law and to what extent they acknowledged the role played in halakha by values and goals. The only way to answer this question responsibly is by a cautious inductive study of the *responsa* literature, as we are dealing with thousands of rabbis living in different historical contexts, and with an

¹² This is the meaning of “formalism” that Menachem Mautner has in mind in his influential analysis of Israeli law, (*The Decline of Formalism and the Rise of Values in Israeli Law* (Oxford: Oxford University Press, 1993).

endless number of halakhic responses on mundane as well as more dramatic subjects. One might predict with certainty that this study would not result in a yes/no answer. Some *poskim* will be found to be non-formalistic, creative, activist, while others will be found to be formalistic and conservative, preferring the letter of the law over its spirit. As indicated above, halakha seems no different in this sense from other legal systems.

In the attempt to draw conclusions about the degree of formalism in Judaism in general, or even in one specific *posek*, one must be careful not to draw sweeping conclusions from a limited number of cases. A conspicuously non-formalistic decision may serve as the key to understanding the general non-formalistic nature of some legal system, but it could just as well be an exception to the rule that clearly does *not* reflect the general picture.

Note that the characterization of a *posek* as non-formalistic, or as activist, still says nothing about the content of his non-formalistic considerations and, in particular, says nothing about the weight he assigns to positive moral considerations. Halakhic activism, in the sense described above, can be driven by clearly immoral considerations. An example can be found in the attitude of several contemporary *poskim* toward the status of non-Jews in the State of Israel, which is inspired by a racist perception of the difference between Jews and non-Jews. Rabbi Elisha Aviner states that “foreign groups among the residents of the State of Israel” should not be allowed to fill roles of “leadership in our State, of formulating its ideas and in determining ethical priorities,” as this “diminishes or distorts the Jewish-Israeli expression that we uphold.”¹³ Similarly, Rabbi Tzvi Yehudah HaKohen Kook describes the inclusion of Arab representatives in the government as a “non-atonable disgrace and desecration of God’s name.” He states that “the formation of a government that relies on gentiles removes its strong, healthy foundation, and the entire

¹³ Rabbi Elisha Aviner, “The Ethical Problem and the Demographic Problem,” *Artzi [My Land]* 4 (1986): 31-32 (Hebrew).

construction is built on rotten foundations.”¹⁴ This halakhic line expresses a non-formalistic approach which is at the same time an immoral one.

This brings me to the third question within the historical discussion of the relationship between halakha and morality: what weight has actually been assigned to (positive) moral values in halakhic ruling? How wide is the phenomenon described by Menachem Elon of moral norms that constitute “a fundamental, decisive principle for creating and solving halakhic problems”?¹⁵ At times, an explicit mention of moral considerations can be found, when *poskim* say that they take some position *because* it prevents suffering or promotes justice, etc. But such an explicit use of moral considerations is rare. In most cases, one has to read between the lines in order to find the presence of moral considerations, i.e. to speculate about the motives of the *posek* in selecting a specific line of interpretation among several others that were available to him.

Needless to say, those who claim that moral considerations play a significant role in halakha are not referring to *ex post* influence of such consideration, but to *ex ante* influence. They don’t merely say that one ruling or another led, in practice, to a better moral outcome than other possible rulings, but that the relevant *posek* was motivated by a concern for morality and justice.

What follows from these comments is that producing a comprehensive picture regarding the role of moral considerations in halakha is a very challenging task. In light of this challenge, it is easy to understand the temptation to replace the comprehensive study that the project demands by attempts to make generalizations from a limited number of cases, a temptation warned against earlier. To get a grasp of the actual role played by moral considerations in halakha, it is essential to examine a wide variety of cases and to explore the different ways they were treated by a wide variety of *poskim* and commentators. In this

¹⁴ Rabbi Tzvi Yehuda HaKohen Kook, “Forum of Rabbis of Judea, Samaria and Gaza,” *Gilayon Rabbanei Yesha* 12 (1994): 1-2 (Hebrew).

¹⁵ Menachem Elon, “Ethical Principles as Halakhic Norm,” *De’ot [Opinions]* 20 (1962): 62, 67 (Hebrew).

investigation, attention should be paid not only to cases in which considerations such as mercy, justice, etc. did play a role in determining halakha, but also to cases where one would have expected that such considerations play a role but, in fact, they did *not*.

It is interesting to notice in this context that several concepts frequently used to demonstrate the moral nature of "Judaism" actually fulfill a very marginal role in halakha, at least as explicit considerations. Consider, for instance, the belief that humans were created in God's image, very often referred to as one of the foundations of Jewish ethics.¹⁶ A quick search of the Bar-Ilan University Responsa project, however, casts some doubt on this impression. The expression "in God's image" appears only 14 times among the thousands of responses in the above database, and even of these 14, most are not used as a basis for practical guidance!¹⁷ Moreover, in one of the very few responses in which it does play this role, the interpretation suggested is very far from the message promoted by those who emphasize God's image as central to Jewish morality. I am referring to the answer by Rabbi Kook regarding cadaveric dissection in the study of medicine, where he rules that while corpses of non-Jews may be used, those of Jews may not. The reason he offers is that the prohibition against the disfiguring of corpses applies only to Jews because of all creatures, only Jews are truly in the image of God.¹⁸ Regardless of the original intention of the Bible or of the Rabbis ("beloved is man, created in God's image"¹⁹), in the course of history the idea of man as created in God's image might have developed in a way that did not lead to an approach that acknowledges the intrinsic value inherent in all human

¹⁶ See, for example, Asher Maoz, "The Values of Judaism and Democracy" in *Derekh Eretz*.

¹⁷ My thanks to Suzanne Stone, who brought this fact to my attention.

¹⁸ Rabbi Kook, "Responsa, Da'at Kohen," *Yoreh De'ah* 199 (Hebrew). Italics added. Rabbi Eliezer Waldenberg, an esteemed *posek* in medical ethics, quotes R. Kook in agreement in his *Tzitz Eliezer*, Chapter 14, Part 4 (Hebrew).

¹⁹ Mishnah *Avot*, 3:14.

beings, but instead led to the reinforcement of a particularistic, not to say a racist, view²⁰

Most writers who support the claim that morality has a central place in halakha seem to draw on the same, quite limited, list of examples. A prominent example is the Talmudic treatment of the rebellious son, which is indeed a powerful illustration of the potential influence of moral considerations on halakhic interpretation.²¹ Among other things, in this Talmudic discussion (*sugya*), we find the extreme view taken by Rabbi Simon, who interprets the biblical law of the rebellious son in such a way as to make its application unrealistic, basing this radical interpretation on what seem to be moral considerations: “Does the law indeed dictate that because this boy consumed *atertimory* of meat and drank half a lug of Italian wine his father and mother shall deliver him to be stoned? Hence such a thing neither occurred nor ever will be, and it is written only for the purpose of study” (*Sanhedrin* 71a). According to a common interpretation, Rabbi Simon recognizes the contradiction between the biblical law and justice, and he interprets the former in light of the latter. Rabbi Yehuda reaches the same conclusion, probably driven by the same kind of moral motivation, relying on a very creative reading of the relevant verses. Rabbi Yonatan disagrees with both as he cannot accept such a radical interpretation of Scripture. Which approach better reflects the way halakha was shaped throughout history, that of R. Simon and R.

²⁰ Another concept that is used much less than would be expected given the frequency with which it is mentioned is *darchei no'am* (ways of pleasantness), based on the following verse in Proverbs: “Her ways are ways of pleasantness, and all her paths are peace” (Proverbs 3:17). Menachem Elon argued that we can see here “that a certain general moral principle constitutes a decisive, regulating factor in the way that essential halakhic laws are determined and interpreted” (*supra* note 15). However, the Bar-Ilan Responsa database shows that the above expression is mentioned only 27 times and, in most cases, refers not to any moral consideration, but to a book of that name, written by Rabbi Mordecai Halevi in Cairo of the 17th Century. These findings cast doubt of Elon’s conclusion that *darchei no'am* is a “decisive principle in the creation and solving of halakhic problems” (*Ibid.*, 67).

²¹ For a broad analysis of the Talmudic interpretation of this law, see Moshe Halbertal, *Interpretative Revolutions in the Making* (Jerusalem: Magnes Press, 1997), ch. 2 (Hebrew). See also Sagi (*supra* note 8), 294 and Rabbi Eugene Korn, “Moralization in Jewish Law: Genocide, Divine Commands and Rabbinic Reasoning,” *The Edah Journal* 5 (2006): 6.

Yehuda, or that of R. Yonatan? In Avi Sagi's opinion, "It would not be an exaggeration to say that Rabbi Yehuda and Rabbi Simeon's interpretation defeated that of Rabbi Yonatan."²² For my part, I confess that I will be very happy if Sagi's claim turns out to be true, but in order to establish it, much more evidence would be necessary, which is not currently at our disposal. Rabbi Yehuda and Rabbi Simon remind us of the possibilities for moral interpretation of halakha, a very important reminder. Nevertheless, once again, a possibility that was realized on only several occasions in the history of halakha does not allow generalizations about the nature of halakha throughout history, nor about the way halakha is interpreted and applied today.

Conclusion

Contemporary attempts to show that moral considerations play a significant role in the making and the application of halakha tend to confuse philosophical, jurisprudential, historical and ideological issues. Participants in these attempts wish to say something about the nature of halakha as it is actually played out in history and as it is still being played out, but the arguments they recruit to support this conclusion are of the wrong kind. They make philosophical arguments for the independence of morality from religion, which fall short of proving anything about the way particular religious traditions, including the Jewish one, perceive the relation between morality and their revealed law. And they make jurisprudential arguments for the inevitability of human discretion in legal interpretation, which fall short of showing that the kind of non-formalistic reasoning involved in halakha does, indeed, assign special importance to moral considerations.

I thus propose that we release the study of the relation between halakha and morality from both its philosophical and its jurisprudential contexts and regard it mainly as an historical project. One might of course want to talk about some abstract or ideal notion of halakha, but insofar as

²² Sagi, (*supra* note 8), 305.

one wishes to talk about “real” halakha—namely, halakha as a defined historical phenomenon—the only basis for talking responsibly would be one gained after historical research. In other words, what is required for an adequate description of the role of moral considerations in halakha is a careful inductive investigation of the many rulings of *poskim* living at different times and in different places. This investigation should not be subject to any contemporary agenda and should not be carried out on the assumption that there is one true notion of halakha or of Judaism into which all the various findings of this project must fit.

Finally, you may wonder what implications such an historical study might have for contemporary attempts to “moralize” halakha. In particular, might it not *block* such attempts if the findings show a relatively formalistic legal tradition leaving relatively little room for morality? I think not, because the fact (*if* it turns out to be the fact) that, in the past, halakha tended to be formalistic and less hospitable to morality does not mean that this approach must be retained in our times. The same is true of the non-liberal agenda and the possible discovery that, in the past, halakha *was* hospitable to morals and other values. When legal history does not fit a view about what should be done in the present, it is always possible to use the old trick and say that “times have changed.” The normative dispute about the appropriate interpretation of halakha today and the place that should be given to moral considerations within this framework should be kept separate from the historical study of the role that moral considerations played in halakha *in practice*, as well as from the way in which halakhists and philosophers perceived the nature and significance of this role.