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Mark Rosen
Kent College of Law

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REFRAMING PROFESSOR STATMAN'S INQUIRY: FROM HISTORY TO CULTURE

MARK ROSEN

Kent College of Law

Professor Statman's excellent paper "propose[s] that we release the study of the relation between halakha and morality from both its philosophical and its jurisprudential context and regard it mainly as an historical project" (par. 26). Yet, though Statman elevates the importance of historical practice, he is unwilling to cede authority to it: "The fact (if it turns out to be the fact) that, in the past, halakha tended to be more formalistic and less hospitable to morality does not mean that this approach must be retained in our times. ... [I]t is always possible to use the old trick and say that 'times have changed.'" (par. 27) One might be led to ask: what, then, is the point of Statman's reframing of the academic project? If historical practice regarding the relationship between halakha and morality doesn't determine what should happen going forward, why reorient study to a historical inquiry?

I am very sympathetic to Professor Statman's overall project, and to the concerns that (I think) animate it. But I think it wise to reframe the inquiry. Doing so can answer why and to what extent history matters, and it can pay other dividends as well. In the end, my conclusions do not differ much from Professor Statman's; the reframing I suggest both reinforces

the importance of the inquiry Statman proposes and sidesteps potential methodological obstacles that attend Statman's proposal. In short, what follows is intended to be a constructive critique of Professor Statman's stimulating paper.

I. External vs. Internal

As I see it, one of the main problems with the project as currently framed is that it appears to treat morality as being external to halakha.¹ To be sure, Professor Statman inherits, rather than creates, this dichotomy between halakha and morality.² But retention has costs. The basic problem is that moral considerations are internal to halakha in at least two ways. This poses challenges to the historical project as it is currently stated.

A. *Halakhic Conduits for Moral Considerations*

First, many halakhic categories can function as conduits for moral considerations. Examples include *darche no'am*, *bi'tzelem elokim*, *kavod ha'brivot*, *shalom bait*, *kol yisrael arevim zeh-bi-zeh*, *kiddush hashem/ chilul hashem*, *vi'chai bahem*, and *ayt laa-sot*.³ What characterizes such conduits is that they have broad, open-ended language that the traditional halakhic corpus has not transformed into a rule-like legal test.⁴ They can accordingly absorb what philosophers term "moral considerations." A similar phenomenon is found in American constitutional law. One generally does not find mention of John Rawls in judicial opinions, but Rawlsian concepts

¹ See, e.g., Statman speaking of "meta-halakhic" norms and considerations.

² As he notes, there is an extensive modern literature that concerns the relationship between morality and halakha. See Statman, n.1.

³ This is not meant to be an exhaustive list. Another possibility is the passage from the Torah that "you shall guard them [the *chukim* and *mishpatim*] for they are your wisdom and your understanding before the eyes of the nations, who will hear about all these *chukim* and will say 'only a nation that is *chacham* and *navon*, a great nation like this'" (Deuteronomy 4:6).

⁴ For an example of broad language that traditional halakhic materials have made quite rule-like, consider the instruction that people not perform "work" on the Sabbath.

can enter legal discourse through such (American-specific) conduits as “due process” and “equal protection.”

Halakhic conduits operate in two ways. First, they can impose halakhic obligations (either affirmative or negative) with respect to actions that otherwise would have been unregulated by the halakha.⁵ Second, they can serve as a countervailing consideration that modifies, or may even override, what otherwise would be halakhically required.⁶

Are the “moral” considerations imported through such conduits internal or external to halakha? The best answer is both.⁷ Even if a moral consideration genuinely originated outside of Judaism, importing the foreign-born concept through a halakhic conduit domesticates that concept and thereby internalizes it in halakha in two meaningful respects. First, domestication gives it legal authority as a matter of positive law. Second, domestication allows the foreign concept to be adapted so that it coheres with its new host-culture. For these reasons, domesticating the foreign moral concept through a halakhic category transforms it (or at least has the potential of transforming it) into what is fairly described as an “internal” halakhic consideration.

B. Morally-informed Halakhic Rules

Second, moral considerations sometimes directly shape the meaning of halakhic rules themselves. Professor Statman provides an example of this when he discusses Rabbi Simon's and Rabbi Yonatan's approaches to the rebellious son, suggesting that moral discomfort with a command that parents kill a rebellious son led to the creation of a series of unattainable preconditions.

⁵ *Hilul ha-shem* and *darche noam* frequently operate in this way, for instance.

⁶ Consider in this regard God's prevarication to Abraham concerning Sarah's words upon hearing that she was to become a mother in old-age. Rashi's explanation that this is justifiable on grounds of *shalom bais* presumably means that this consideration overrode what otherwise would have been required on grounds of the duty of honesty.

⁷ To be sure, some of these potential conduits may in fact draw their content exclusively from within Jewish texts and tradition; these matters can be said to be purely internal.

C. Implications

Now let us look back at Professor Statman's proposal. If it is true that halakhic categories can function as moral conduits, and that moral considerations sometimes directly shape the meaning of a halakhic rule itself, then it will be difficult to ascertain the "role of moral considerations in halakhah as a historical phenomenon." "Moral considerations" will be forthrightly identified as such in *responsa* only if the halakhic decision-maker is aware of, and candid about, the fact that he is importing an external moral consideration through a halakhic conduit. But he may not be so aware, and, furthermore, nothing in the halakhic system demands "candor" on his part even if he is. Accordingly, and frequently indeed, *responsa* won't explicitly identify "moral considerations," and the historical researcher will be left to draw inferences from silence.

But there is an even greater difficulty in aiming to discern the "role of moral considerations in halakha." Insofar as domesticating the foreign moral considerations may internalize the consideration so that it genuinely becomes part of the halakhic system, the line between internal halakha and external moral considerations may be conceptually incoherent. The line between halakha and moral considerations is likewise indistinct, if not incoherent, where moral considerations shaped the halakhic rule itself. Fortunately, it is unnecessary to disentangle the question of whether a moral consideration that has been imported through a halakhic conduit, or that has shaped a given halakhic rule, is "internal" or "external" to halakha. Instead, academics can usefully undertake an alternative inquiry, described below in Part II, that captures what I believe motivates Professor Statman's project while sidestepping the methodological challenges just mentioned.

II. From History to Culture

Rather than aiming to historically document the role of morality in halakhic decision-making, it may be better to view halakha as an aspect of "culture" and to focus research on the dynamics of cultural change. After culture is defined in Part II.A., Part II.B. will explain how Professor Statman's proposal can be usefully reframed. Part II.C. spells out the

benefits of reframing the research agenda, and Part II.D. provides a crucial caveat.

A. Defining "Culture"

There are multifarious definitions of culture, but for present purposes, let us use a simple tripartite model: cultures provide the resources for (1) *identifying* a set of values to which its members are dedicated, (2) determining what subset of those values will be at the forefront of its members's minds (determining the values' *salience*), and (3) deciding how these values, which typically are incommensurable, are to be *harmonized* when they come into conflict or, stated a bit differently, how much *weight* a particular value has.

Under this model, Judaism, Islam, Catholicism, and American constitutional law all can be usefully thought of as distinct "cultures." Accurately describing each culture at any point in time requires attentiveness to all three elements of the tripartite model. For instance, President Bush's post-9/11 claim that Koranic passages extolling peace prove that Islam is a religion of peace purported to assess Islamic culture by taking account only of Step 1. This is faulty reasoning, because accurately describing contemporary Islamic culture(s) requires attentiveness to Steps 2 and 3. A true understanding of Islam must account for peace's salience, as well as how peace is harmonized when it conflicts with other Step 1 values that are identified by the Islamic tradition. Similarly, one cannot draw any conclusions as to Catholic culture's view of pacificism by looking only to New Testament passages which state, for example that "though we live in the world we are not carrying on a worldly war, for the weapons of our warfare are not worldly"⁸ or that "[n]o soldier [of Christ] gets entangled in civilian pursuits, since his aim is to satisfy the one who enlisted him."⁹ After all, for hundreds of years the Catholic Church permitted the value of pacificism to be outweighed by

⁸ 2 Corinthians 10:3-4 (Revised Standard Version).

⁹ 2 Timothy 2:4.

the goals of recapturing the Holy Land from the Moslems, conversion, and *bellum Dei* (a “war of God”).¹⁰

To provide another example, a person who today claims that the essence of American constitutional culture is captured by the Contract Clause, which forbids states from impairing the obligation of contracts,¹¹ would be flatly wrong. This is because although the Contract Clause certainly is part of the written Constitution even today (Step 1), the Clause has virtually no salience (Step 2) and carries little weight (Step 3) when it conflicts with a countervailing value such as regulating to pursue the common good.

Cultures can change when there are shifts at any of the three steps. Changes at Step 1 can occur in three ways. First, a wholly new value can emerge by culture-specific modalities of formal amendment—by a legitimate prophet, for example, or through a constitutional amendment. Second, what is fairly described as a new value may be said by the culture to always have been present, though until now under-appreciated. Third, an already-existing Step 1 value can be reinterpreted so that it encompasses what in all fairness can only be described as a new Step 1 value. Though shifts at Step 1 do indeed occur, they are dangerous to cultures. This is because continuity with the past is a *sine qua non* of culture, and changes at Step 1 are explicit disruptions with the past. Probably for this reason, changes at Steps 2 and 3 account for much, perhaps most, of the *de facto* change in cultures. For example, to draw once again from American constitutional law, the Contract Clause had great salience and weight in the nineteenth century; it was the second most heavily litigated constitutional provision at that time, and state legislators regularly debated whether bills under consideration comported with the Contract Clause. Conversely, what is among today’s most salient constitutional values—free speech—had virtually no salience or weight as recently as the early twentieth century, when states regularly banned

¹⁰ For a valuable discussion, see Christopher Tyerman, *God’s War: A New History of the Crusades* (Cambridge: Belknap Press, 2002), 27-51.

¹¹ U.S. Const. Art. I, §10.

speech they thought had a “bad tendency” in respect of shaping citizens’ perspectives and behaviors. The *de facto* changes concerning both the Contract Clause and the Free Speech Clause have taken place at Steps 2 and 3.

B. Undertaking a “Cultural” Analysis of Halakha

My guess is that much of what Professor Statman is trying to capture can be more readily accessed through the rubric of “culture” rather than a “history” of moral considerations in halakhic decision-making. It would be interesting to learn if there have been new Step 1 values introduced (and, if so, if they correlate with what Professor Statman calls “moral considerations,” though documenting the connection definitively would likely be difficult for the reasons discussed above). But I would expect that most of the action would occur instead at Steps 2 and 3, i.e., changes in the salience and weight of the various “moral conduits” that always have been part of halakha.

Let me provide two examples. Consider first that the Chafetz Chaim’s magisterial work *Shmirat HaLashon* probably can be understood as an effort to effect change at Step 2 by augmenting the salience of a set of values embodied in the laws of *lashon ha’ra* that had receded from Jewish culture at that time. A natural question that flows from framing the issue in this way is whether the Chafetz Chaim succeeded. This question, in turn, suggests a way in which the research agenda stimulated by Professor Statman’s paper may usefully be augmented: there are materials beyond “high culture” legal *responsa* that should be consulted, including popularizing halakhic compendia and the *drashes* given in synagogues and yeshivot, if one is to accurately assess “cultural” shifts in halakha. Second, consider an intriguing recent essay by Rabbi Dr. Nathan Cardozo.¹² Cardozo critiques contemporary halakha for not affording individual Jews the possibility of “respond[ing] as an *individual* to the

¹² See Nathan Lopes Cardozo, “On the Nature and Future of Halakha in Relation to Autonomous Religiosity,” *Conversations* 66 (2010).

Torah's demands."¹³ Speaking of the "need for personal autonomy," Cardozo suggests that "we perhaps permit, and even encourage, people or communities to decide *themselves* that of the many opinions in the Talmud they would like to follow."¹⁴ Cardozo enumerates some of the halakhic changes he contemplates and suggests that they can be halakhically justified under *hora'ath sha'ah*, *lemigdar milta*, or *et la'asoth Lashem*.¹⁵ Cardozo's fascinating proposal can be readily characterized within the cultural model. Driving the proposal is his understanding that there is an "overwhelming need for human distinctiveness" and a "need for personal autonomy," "needs" probably coming from post-Enlightenment understandings of personhood and that have become entrenched in general culture. Cardozo implicitly assimilates these needs into the established Jewish category of *kavod ha briot*¹⁶ and then uses the above-mentioned halakhic categories (*hora'ath sha'ah* and so forth) as "moral conduits" for these considerations. In terms of the cultural model, Cardozo's use of halakhic moral conduits corresponds to a shift at Step 2 (or even plausibly may be characterized as a near Step 1 alteration). His willingness to permit congregations and perhaps individuals to make certain halakhic decisions on their own, in light of the aforementioned shift at Step 2, itself constitutes a change at Step 3 insofar as he is willing to harmonize *hora'ath sha'ah* with an array of liturgical obligations in a novel manner.

C. The Payoff of Shifting from History to Culture

There are several benefits to reconceptualizing the project in cultural terms. First, doing so better focuses attention on what researchers should

¹³ Ibid., 75.

¹⁴ Ibid., 76.

¹⁵ See Ibid., 77-9.

¹⁶ "Each individual is an entire world, and no two human beings are identical in their psychological make-up, religious needs or experience of God. One can only encounter God as an individual. What, after all, is the purpose of my existence if not to relate to God differently from my neighbor? To imitate what others do in their service of God is to demonstrate that there is no reason for me to have been born" (Ibid., 75).

look for: not references to Kant or Rawls, but (more likely) open-ended, long-present concepts (expressed in Hebrew and Aramaic) that serve as “moral conduits.”¹⁷ Second, the cultural model carries with it both a framework for identifying change as well as an expectation that change has occurred (and will continue to do so). Third, the cultural model helps explain why, and to what extent, history matters: notwithstanding the model’s openness to change, the very notion of culture presupposes significant *continuity* with the past. Fourth, and relatedly, cultural change frequently (though not always) occurs slowly, in a piecemeal fashion, and the model facilitates recognition of the process of change, something that cultures typically tend to downplay. Fifth, and finally, the cultural model suggests that the changes in Judaism may be illuminated by considering change that has occurred, and is occurring, in *other* cultures as well.

D. A Caveat

The proposed “cultural” agenda does not exhaust the places where “moral considerations” may indeed be relevant: when moral considerations influence the interpretation given to a halakhic rule. For example, it may plausibly be claimed that some such considerations led the Rabbis to rule that the biblical injunction of “an eye for an eye” refers to monetary compensation rather than talionic punishment.¹⁸ The Talmudic discussion does not explicitly reference moral considerations, however, but instead ostensibly turns solely on textual exegesis. Accordingly, scholars interested in Professor Statman’s proposal would have to rely on inference and speculation to tie the exegesis to the exegete’s pre-interpretive moral sensibilities. My proposal does not improve upon (but nor does it worsen) this difficult component of Professor Statman’s proposed research agenda.

¹⁷ I am quite certain that Professor Statman intends his proposal to direct researchers in the same direction.

¹⁸ See b.Baba Kama 83b-84a.

III. Conclusion

At the end of the day, the differences between framing Professor Statman's proposal as a "historical" or "cultural" project are subtle but, I think, important for the reasons provided above. I am thankful to Professor Statman for penning a most stimulating essay, which has sparked the friendly (and hopefully useful) amendments that I have offered here.