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## A Reply

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## A REPLY

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My thanks to Professors Carmy, Kellner, Rosen, Schoenfeld, and Stone for taking the trouble to read my paper and to offer their comments. I feel very encouraged by the fact that all of them seem to accept the main thesis of the paper. Their comments are all very helpful, and in what follows, I shall address at least some of them and use the opportunity to further clarify the views expressed in my paper.

A central point in my paper is that the question regarding the role of moral considerations in halakha is first and foremost an historical one, which should be kept separate from ideological and jurisprudential issues. I noted that providing a reliable answer to this question is no easy task, and several of the respondents added further difficulties to those already mentioned in the paper. In particular, they emphasized the difficulty of defining what would count as a moral consideration in the relevant sense, and of deciding how we might know that some *posek* or other was motivated by moral considerations. Insofar as moral considerations are regarded as external to halakha, it has been noted that the distinction between what is external and what is internal to halakha is far more problematic than often thought (see especially Rosen and Stone).

These are all important points. Indeed, what does it mean to talk about morality as determining, or playing a role in determining, halakha? One

possible answer would be that such a role is played every time considerations with moral *content* are introduced, even if they are embodied in explicit halakhic rules. According to this answer, the application of the laws about visiting the sick, for instance, would be a case of “moral interpretation,” of morality “playing a role” in determining halakha. However, this broad use is not the one usually assumed in the contemporary debate on the role of morality in halakha (and it is not the one I myself had in mind). Those who argue that morality plays a role in determining halakha have in mind cases in which *poskim* rely on moral considerations to reach a certain decision, even though opposing halakhic considerations exist—considerations that would make it perfectly reasonable to reach a different *less moral* ruling. The case of *aguna*, discussed by Carmy, would serve as a good illustration. The standard laws of testimony require two witnesses; hence, if only one witness testifies that a man is dead, that should not suffice to release the wife from the marital bond. If, nevertheless, the rabbis ruled that one witness could suffice, this would be a case in which a moral consideration, a sense that it would be unjust to prevent the wife from remarrying, determines halakha because (a) the rabbis could have easily ruled otherwise, and (b) their actual ruling was influenced by a moral consideration (this time a rather explicit one).

The reason why supporters of the view that morality plays a role in halakha focus on the latter understanding and not on the former, broader one has to do with the ideological agenda that underlies their view. Since their aim is to encourage *poskim* to give more weight to moral considerations in contemporary halakha (in issues such as feminism, the attitude towards non-Jews and so on), they are particularly interested in cases in which, according to their understanding, *poskim* took the moral path in interpreting halakha even though a different path existed which was no less reasonable (and often more reasonable) as a reading of the relevant sources.

As several of the respondents have noted, more needs to be said about what, in my view, falls within the rubric of “moral considerations.” I definitely do not mean explicit reference to ethical theories, such as

utilitarianism or contractualism, nor reference to moral philosophers, such as Kant or Rawls. Such explicit reference to theories, or to philosophers, is virtually non-existent in the halakhic literature. Nor do I mean cases in which the adjective “moral” (*mussari*) is explicitly referred to in statements such as “from a moral point of view, such and such a solution is preferable.” The word “*mussari*,” as the term for the (modern) Hebrew translation of “moral,” hardly ever appears in the halakhic literature.<sup>1</sup> For the purpose of the present project, we would do better giving up abstract notions such as morality or ethics, and focusing instead on concrete notions such as the alleviation of suffering, the prevention of injustice, and, more generally, inhumane and merciful behavior. These moral considerations need not be explicitly mentioned, and usually they are not. In most cases, the suggestion that some *posek* relies on them must be based on an analysis of his ruling which shows that (a) there are other readings which would fit the letter of the law very well, and (b) the fact that the *posek* opted for his own reading is best understood as a sign of the importance he ascribes to moral considerations. As Mark Rosen rightly notes, “the historical researcher will be left to draw inferences from silence.”

I am not suggesting that, in cases of moral interpretation, the *posek* explicitly raises some moral consideration of the kind just mentioned and uses it to override the force of more “formal” halakhic considerations which would otherwise lead to a less moral result. In other words, and just to be absolutely clear about this, it is not as if the *posek* explicitly positions morality against halakha and gives priority to the former. Rather, in most cases, he is motivated (in various degrees of self-awareness) by moral considerations to adopt one of several possible interpretations of the entirety of the relevant halakhic material which is pertinent to the case at hand. Spotting the traces of such considerations is a daunting job which requires textual sensitivity and a deep understanding of the relevant halakhic material. And even when armed

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<sup>1</sup> For an exception, see R. Uziel, *Mishpetei Uziel*, 2:61.

with such sensitivity and understanding, there is a constant danger of the reader interpreting the texts according to his or her own view on the role of morality in halakha.

Rosen and Stone press the question of whether the moral considerations I refer to are internal or external to halakha. This is a central question in jurisprudence, but it is independent of the question regarding the actual role of moral considerations, in the sense just alluded to, in the shaping of halakha. For the purpose of answering this last question, one need not assume any particular answer to the former. In particular, it is not the case that if moral considerations are seen as internal to halakha, à la Dworkin or any other view, then the fact (if indeed it is a fact) that they play a significant role in halakha becomes trivial. The notion that within the realm of halakha, moral considerations play a significant role is not trivial at all, and it encourages certain thoughts about the interpretation of halakha today (more on such thoughts below). The same is true if it turns out that moral considerations play only a minor role in halakha.

Menachem Kellner is troubled by the “source” of the value considerations that underlie halakhic decisions. Again, there is a long jurisprudential story to tell here which I cannot relate, so for the present discussion, let me offer the following response: from the point of view of the *poskim*, the considerations they refer to hardly ever feel external. To utilize Rosen’s nice metaphor, the considerations that flow through the halakhic conduits are “domesticated” in a way that enables the rabbis to feel that they are simply applying the principles and rules embedded in the Torah.<sup>2</sup> However, from the point of view of the external observer, be she an historian or a sociologist, the fact that some rabbis opt for one reading of halakha while others opt for a different reading is explained by

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<sup>2</sup> One is reminded of Dworkin’s argument about the famous Elmer case (a person murdering his grandfather in order to inherit him). Although there was nothing in the letter of the law to prevent Elmer from receiving his inheritance, the majority decided that he would not inherit his grandfather. However, says Dworkin, “the dispute between the majority and the minority was not about whether judges should follow the law or adjust it in the interests of justice. ... It was about what the law was, about what the real statute the legislators enacted really said” (Ronald Dworkin, *Law as Empire* [Cambridge: Belknap Press, 1986] 20).

“external” factors that have to do with the culture within which the rabbis live and with the idiosyncratic character of each of them.

Deborah Schoenfeld discusses the possibility that “formalistic” principles, such as the principle that saving life takes priority over almost any other halakhic consideration, “are just a different way of thinking through ethical questions.” I agree that principles like this reflect a moral decision, in the sense developed above; the rabbis could have easily ruled otherwise, and what underlies their decision is the importance they assigned to a fundamental ethical value (human life). However, I suspect that my use of “formalistic” is different than hers. Schoenfeld uses “formalistic” as a feature of principles, while I use the term mainly as a feature of legal, and in particular halakhic, *interpretation*. Formalistic interpretation is one that ascribes relatively high importance to “internal” legal values, such as stability, conformity and predictability, often at the expense of substantive values that the legal system endorses. Accordingly, a non-formalistic interpretation is one that assigns more importance to substantive values, including moral ones, over and above internal legal values.<sup>3</sup> Whether, and to what extent, interpreters of halakha can be characterized as formalistic or non-formalistic cannot be answered *a priori* by some philosophical or jurisprudential argument, but, as I argued at length, must rely on a careful investigation of halakhic decisions and decrees (*takanot*).

Given the fact that the halakha is not a closed system with clear rules of deduction, and given, as a result, that there is ample room for interpretation on moral or other grounds, does this lead, as Kellner asks, “to a situation where anything goes”? Well, probably not *anything*, but a great deal indeed, especially if the interpretive moves are gradual and if they accord well with the social, economic and cultural conditions of their

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<sup>3</sup> I thank Suzanne Stone for mentioning the rich discussion about formalism in contemporary legal theory by people such as Ernest Weinrib. My sense, however, is that this discussion would not be helpful in illuminating the current debates about halakha and morality, which evolve around two notions of formalism: The one just mentioned in the text, and (more often, unfortunately) the caricature one according to which legal/halakhic interpretation is a semi-logical exercise.

times. Kellner is right that “only in retrospect” can we know that an interpretation which might have seemed unthinkable for earlier generations turned out to be “legitimate.” Just to illustrate, consider the case of *ribbit*, interest due on a loan, which is prohibited again and again in the Bible and is regarded as a serious sin. Yet the prohibition is a dead letter today in all orthodox circles. In real life, everybody pays interest on loans from their banks and receives interest on their investments. Or consider the gap between the unequivocal biblical injunction to get rid of all *chametz* (leavened products) on Passover and the actual practice by which almost all *chametz* is kept, definitely in factories and storehouses but also in private homes. Many observant Jews sell their pasta and pizza to a non-Jew and feel perfectly comfortable keeping them in their homes during Passover and consuming them once the festival is over. Who would have believed at the time when the laws of Exodus were given, and even later in the Talmudic period, that this would be the fate of the biblical commandment that “there shall no leavened bread be seen with thee, neither shall there be leaven seen with thee, *in all thy borders*” (Exodus 13:7)?

Mark Rosen proposes to reframe my inquiry from an historical one to a cultural one. The differences between these two proposals are “subtle,” as he notes, though I am sympathetic to the possibility that tools developed in the study of culture might prove helpful in the study of the moral aspects of halakha. I would, however, raise one marginal reservation. Since Rosen and I agree about the importance of an historical study regarding the role of moral considerations in halakha, it seems misleading to talk about a shift from *history* to *culture*. As I read his proposal, it concerns the methodological paradigm we should use in studying *the history* (as well as the current state) of halakha. In my paper I laid down no other paradigm, which makes me even more open to Rosen’s suggestion.

Finally, Rosen raises a powerful and rather obvious question about my project, which I am ashamed not to have noticed myself. If, as I say in the end of the paper, the study of history does not tie our hands regarding the future, and if it leaves everything open about the role *poskim* could

assign to moral considerations in halakha today, then “what is the point of reframing the academic project”? If the reframing has no implication, no *nafka mina*, to use the Talmudic expression, what difference does it make? Why bother?

I would like to offer two thoughts in response. First, even if there were no *nafka mina*, no practical implications to my proposal, it would still seem to me very important to get to the truth (or as close to it as we can) regarding the role of morality in halakha. In writing this paper, my aim was to salvage this inquiry from its ideological uses (and misuses) in contemporary Judaism, to try to be clear about what could be meant by the claim that moral considerations play a role in halakha, and to examine how this claim could be confirmed (or refuted). As a philosopher, a good understanding of the relation between morality and halakha would make me happy even without any practical implications.

Second, I might have overstated the claim. Though the historical study does not tie the hands of the *poskim*, it does put some constraints on the decisions they can make at a given point in time. Legal systems in general and Jewish law in particular tend to be conservative. They obviously undergo changes and reforms, but these are gradual, cautious and slow. Thus, if the entire legal history on some topic has taken one route, then taking a different one will be hard, and it will not be easily accepted by the legal system or by the public. However, if the legal history of some topic is more ambivalent and includes several voices, then it would be easier for a contemporary court to rely on some historically less dominant voice as a basis for reform.<sup>4</sup> The same is true of the relation between the history of halakha and the normative question regarding how to shape it nowadays. If the historical inquiry shows that moral considerations had a central role in halakha, in the sense explained above, that would offer some help to rabbis who may like to follow this path today, and it would

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<sup>4</sup> Cf. the famous mishna in *Eduyot* 1:6: “Why is mention made of the opinion of an individual in connection with that of the majority to no purpose? In order that if one were to base his argument on tradition he could be answered that his tradition is in accordance with the opinion of that and that individual.”



enhance the chances of having their decisions accepted and followed. By contrast, if the historical inquiry shows otherwise, that would make this path harder to take. Either way, there will be a need to bring up *arguments* for taking a more formalistic and traditionalist line of interpretation or for giving more room to value, in particular moral considerations. The Torah is not in Heaven, nor is it captive to history. It is there for the rabbis of each generation to interpret and apply according to their best understanding of the letter of the law, its spirit, and the circumstances within which they operate.