

Bruchim Podcast – EPISODE 8

Episode 8-Ethics and Jewish Law Part III

In the third part of this four-part series, Eli and Max are joined by the moral philosopher Jeff Helmreich. After getting him up to speed on the conversation, Jeff complicates matters by introducing a fifth option to the menu alongside the concept of “Heavenly Halacha.” A discussion of the famous Talmudic story of the “Oven of Akhnai” follows. Jeff then talks about the process he went through when deciding to circumcise his son and articulates his position, which ends up being a version of the third option.

Show Notes

Eli’s film, Cut:

www.cutthefilm.com

Sam Lebens book:

<https://a.co/d/7HCrWzx>

Jeff’s Review of the Lebens book:

https://www.cambridge.org/core/journals/religious-studies/article/abs/samuel-lebens-the-principles-of-judaism-oxford-oxford-university-press-2020-pp-xviii-352-750010000-hbk-isbn-9780198843252/80958BDE0851BCC4A63E7EE50E9E3693?utm_campaign=share_aholic&utm_medium=copy_link&utm_source=bookmark

Rabbi Aharon Lichtenstein’s Essay:

<https://www.etzion.org.il/en/philosophy/great-thinkers/harav-aharon-lichtenstein/does-jewish-tradition-recognize-ethic>

The Oven of Akhnai Story:

https://www.sefaria.org/Bava_Metzia.59b.1?lang=bi&with=all&lang2=en

Eliyahu Ungar-Sargon:

This is the *Bruchim Podcast*, the only podcast in the world dedicated to Jews who think differently about circumcision. (music)

Welcome back to the *Bruchim Podcast*. I'm your host, Eli Ungar-Sargon. And joining me today from New Haven, Connecticut, is our Director of Education, Max DuBoff. Max, always great to talk to you.

Max DuBoff:

Eli, it's so good to be here once again. I've really been enjoying this series.

EU-S:

And from Irvine, California, our special guest today is Jeff Helmreich.

Jeff is an Associate Professor of Philosophy and Law at U.C. Irvine, where he works on ethics and legal philosophy. And Jeff and I have done a podcast together for more than a decade now called *Four Cubits*. I am proud to call him a friend, and honestly, I can't think of a better person to have on to keep us honest on this topic.

Welcome, Jeff.

Jeff Helmreich:

In that case, I feel bad, but thank you. It's great to be here. Great to talk to you again.

EU-S:

Gentlemen, two ethicists and a filmmaker walk into a podcast. (laughter) Sounds like the beginning of a bad joke, but here we are. Welcome to the *Bruchim Podcast*.

JH:

I can only imagine what kinds of great conversations we'll get into with an intro like that, Eli.

EU-S:

If you're listening to this, this is the third part in a series that we've been doing on the relationship and the conflicts between ethics and halacha, or Jewish law. And Max, if you don't mind catching Jeff up a little bit on what we've talked about so far.

MD:

Definitely, yeah. So we've had two great conversations so far. In the first one, we laid out four possibilities for the relationship between ethics and halacha, Jewish law.

So briefly, first, that ethics and halacha can conflict and halacha trumps.

Second, ethics and halacha can conflict and ethics trumps.

Third, that ethics and halacha can conflict and they both trump sometimes.

And then fourth, that ethics and halacha can't conflict.

And then we talked a bit about our perspectives on those possibilities.

And then in the second conversation, we really dove deep into a view by Rabbi Ethan Tucker that seems like it's of the fourth variety, that ethics and halacha can't conflict. And we looked at its application to circumcision and talked about whether it really is a view of that sort.

And today, we'll have plenty more to discuss on this general theme of the relationship between ethics and halacha.

EU-S:

Thanks so much, Max. So Jeff, talk to me a little bit about how you feel about the way we're framing this conversation. And then, of course, I'm going to ask you what camp you fall in.

JH:

So that's a great setup. I'm really glad to be part of a conversation like that. Sounds awesome.

I wonder if those four possibilities exhaust the space. So this is a kind of slightly geekier thing to say, but there are a couple of ways to complicate the picture, I think.

There are those who might argue that ethics and halacha are independent normative domains and there is no metanormative domain that adjudicates between them.

So, yes, they can conflict. And according to halacha, halacha trumps when they conflict. According to ethics, ethics trumps when they conflict. And there is no larger sort of system that answers the question. They're just independent normative domains.

And I mention that because in the law, this is one of the possibilities you sometimes work with. Laws do not take themselves necessarily to be instrumentally justified. They take themselves to be authoritative. You do it because I said so.

And very often halacha, at least on its face, seems to take that form. This is the halacha. So you do it. You don't do it because, well, halacha serves a better world and it's a just world and it's a beautiful system and a symphony and we need to uphold every part.

Ultimately, you're doing halacha not only because it has normative weight, but because it has authority, which is because I said so-ism about it.

And that means that the question, why is this justified? What justifies it? And how is it outweighed by other considerations? is at least in its own terms off the table.

So there are those possibilities where these domains do not have something to adjudicate between them.

MD:

Just to see if I understand the sort of position that you're laying out as a possibility. This is quite helpful. So is the thought that there might be no fact of the matter, which one trumps because ethics and halacha are not the sort of things that could trump each other?

JH:

That's one way to diagnose what happens when they don't, when they can't be resolved between them, when a clash between them can't be resolved. But that's not the only way. Right. So it could just be. No, ethics does trump, according to the ethicist. Halacha does trump, according to halachist.

But there's nothing sort of above both that determines which one trumps.

MD:

Right. So then one problem I think we run into is the question of are both of them making demands on our lives in a relevantly similar way? Right. Because I take it that both ethics and halacha are asking us to act. Right. And we can't

act in multiple ways. So it seems like the sort of position that you're laying out as a possibility is, I think, a very helpful one.

But unless we then have some kind of principle of how to actually act, how to be in the world, then it's a position that would lead to more stalemate than being able to live an authentic Jewish life or something like that.

JH:

I fully agree. It's exactly right. I think it is a stalemate position, but it's one of the positions I think is on the menu.

MD:

That's one of the views on the menu.

JH:

It is a stalemate. And – but it raises a question that comes up a lot with discussions of halacha, which is: is halacha ethical? Is it? Aaron Lichtenstein has a paper on this, and others.

Is halacha, does it subsume ethics so that when the Torah and Torah law says you can't tell Lashon Hara, but there are these exceptions, like if it's to save a life or or if it's to shame someone who needs shaming or who knows what – is this a halachic dispute, or is this outside the domain of halacha and it's just in this other thing called ethics that halacha may have nothing to say about?

And I actually don't know. My sense would be that there's a great deal of ethics that even according to the Torah and the oral law and the written law, there's a great deal of ethics that is not taken to be part of halacha. And there's various evidence of that. I see various support, places of support for this. One is that the Torah tends to evaluate and Jewish sources tend to evaluate the ethics of people, independent of whether they received any commandments.

So Amalek is vilified for its monstrous behavior in the desert. That's quite clear. They weren't given any particular dictates or laws against that kind of, you know, that against, you know, they're taking – it's supposed to be something that decency would have dictated and that they would have known about. You know, Abraham is taken to be great for having figured out that God's decree is, you know, maybe God's decree, maybe what he's pronouncing, what he's planning, what he's dictating, but it's not ethical.

And Abraham protests it with Sodom and Gomorrah for that reason, because he recognizes that ethics is an independent standard by which to measure what is directly coming as God's decree.

I think for these kinds of reasons, I see ethics as almost necessarily in principle outside or at least potentially beyond the scope of halacha, and that even Judaic sources accept this.

MD:

Yeah, good. But wouldn't you say that there are some cases where the Torah asks us to do something or forbids us from doing something that we really do take to be what we should do or shouldn't do respectively?

So, for example, you know, the Torah on many interpretations seems to prohibit gay sex, right? And, you know, most of us today think that that's something that we really ought not to prohibit, right?

So unless you have a way of changing the halacha such that you think that that's not applicable, it really does seem like there's a conflict between ethics and halacha, right?

JH:

Yes.

MD:

At least one that we can feel and maybe we can resolve it, but we feel that conflict and certainly between what we might call the Torah and ethics, even if later halacha builds on the Torah in important ways.

JH:

I think that's absolutely right. There are cases where they, because they are normative domains that each demand of us, our behavior, they can conflict. And I think it's expected that they will at times conflict.

But even here, there's nuance because you might want to distinguish between the heavenly halacha and the earthly halacha.

By heavenly halacha, I mean, and here I'm borrowing from ideas. So from my friends and colleagues, Aaron Segal and Sam Lebens. Sam Lebens has a book called *The Principle of Judaism* just came out.

MD:

I'm a big fan of Sam's work. Yeah.

JH:

Oh, okay. So Sam's – I just reviewed it for religious studies. It's a book called *The Principles of Judaism*.

MD:

He's had a few books lately, including the apologetics work for Corin's Press as well.

JH:

The apologetics, so...

MD:

No, no, you're not using apologetics in a negative way, but sort of defending some form of Orthodox Judaism in some kind of intellectually rigorous way.

JH:

There's a distinction between what the correct halachic answer is to halachic questions as halachic decisors decide them. So you're faced with a question.

Listen, I won't have enough food unless I eat this questionable chicken that might be unkosher in some way. Rabbi, what do I do?

And, you know, the rabbi might come up with an answer. Well, how many chickens do you have? Or, you know, did a rabbi bless it in this way? Does it have this with the lungs or that? There's different things they might do. Do you know this about the person who slaughtered it?

When you're in that mode and you're deciding what the answer is, what you're pursuing is not what is – what legally am I required to do? Because legally

you're required to do whatever the rabbi learns out and decrees. That's very easy.

But when the rabbi is deciding what to decree and is checking the sources, you might see that what they're investigating in that moment is heavenly halacha, which is to say what halacha ought to be when the best, most informed legal decisor learns it out.

What is the actual halachic truth of the question about the chicken, given all the considerations, including the ethical, including the poverty, all of that.

Then there's the practical halacha, the earthly halacha, which is once the rabbi learns it out earnestly and sincerely and decides it, then he's given a psak, a decree, a ruling. And that ruling is, for all intents and purposes, the halacha. That's what you're supposed to follow, what the rabbi or whoever it is, or whatever the process is. Once the process has been followed with integrity, its conclusion is what you follow.

The problem is these are two different things. One is the practical deliverances of a procedure or process is one thing. But then there's the internal search for the truth of the matter that is part of that process. And that's a totally other thing, because there's no reason that they...

And when someone like Ethan Tucker says it's a problem for halacha to conflict with ethics, I mean, to say the procedural halacha can't conflict with ethics is just crazy, because procedures are in the hands of humans and humans are fallible. Humans can get things wrong all the time.

But if someone said the heavenly halacha can't conflict with ethics, the halacha as it should have been decided if they were really fully all-knowing and fully informed decisors doing it instead of fallible humans. That I think is a more serious position, one I would take more seriously.

MD:

Yeah, Jeff, this is a really interesting position and I want to push back on it a bit, because I would say that halacha is always and only ever embedded in context already. Halachic questions aren't coming from nowhere. They're coming from the particulars of human experience and Jewish experience.

And that's why we have the Midrash write about the angel saying, "Why are you giving the Torah to these flawed human beings?" And God says to the angels, "Do you need to be told not to murder?"

This idea is that halacha actually is meant for the messiness of human life in a way. And I think that actually suggests that we might have more conflicts with halacha.

So I would say that what you're calling the heavenly halacha is not really a form of halacha. It might be something that we'd want to say about God or something of that sort. It might be a sort of way of thinking or an ideal that we might work towards in some ways, but it's certainly no guide to halacha, not a replacement for halacha.

EU-S:

I just want to add also that in the sort of schema that you just outlined, there was a place for ethics at the table, which – again, I'm going to start pressing you to locate you in one of our categories, but it seems to me like at least in the way you conceive of this sort of dual system, ethics does have a place at the table, which is interesting.

JH:

Yeah. So although I wanted to early on lay out a place for ethics to have independent normative force, independent of halacha altogether, it's no question. Halacha is not a neatly separable topic. It's pretty much whatever it is Jewish law requires. And Jewish law is whatever Judaism requires. It's not actually especially legal or particularly legal. It's how you apply the commandments to particular things. And it could include ethical considerations. It often does.

But I want to insist on this, and I realize this is not an easy sell, but even when you're dealing with the messy nitty gritty of a particular case – I'll give an example.

So when we had Aaron, my first – my son, we made the mistake of watching *Cut*, Eli's movie, just before – about a month or so before the circumcision.

EU-S:

Mistake! That's the perfect – that's the perfect time to watch it.

JH:

No, no, no. This is a good. Don't worry. This is a great review. This would be as – you can blurb this. Yeah.

MD:

And if you haven't seen Eli's movie yet, go watch it!

JH:

By the way, the DVD retails for – it was especially at, especially my wife, it was very moving and very disturbing. And I started, we start to have our doubts.

And I said, I remember talking to Eli, I told other people, I think like, look, the way to fulfill the mitzvah is based on this, you know, this stuff in Genesis about Abraham, a sign being made, a piercing, it seems, being done on the foreskin. Can we fulfill the commandment in that way without going all the way towards outright removal of the foreskin?

I mean, I'm sorry to get detailed about it, but that's, we were really thinking coming, is there some way to count as having fulfilled what is being directed of us? What's being demanded of us in a way that at least incorporates more of the ethical and other concerns about, about removing the foreskin

You know, and I had some pretty sterile hole punchers at home and I had some, I wanted to really get into the possibilities here. And here's what I want to say about that. What I was asking at that moment – what is the heavenly halacha actually require? What if every rabbi in every stage had interpreted everything correctly, would they have said, “I don't know, they've made a lot of mistakes over the years and we're, we're in some level, we're committed to them, some of them were bound by them, but let's forget all that. If they had thought everything up right and read everything out right, learned everything out right, what might they have said about what I'm allowed to do so as to incorporate both concerns?”

And I wanted to know if there was that possibility. Now I knew what the actual dictates of any recognizable halacha procedure would produce today. I was just trying to work my way around it. And what I was looking for was something that I think exists, which is what is the actual halacha truth of the situation?

Now the situation could be in a context, Max, as you just said, it could be in a human experience, it could be in a very messy, complex, nitty gritty of human experiences and conflicting factors and concerns and interests.

But about all those conflicting concerns and interests, there is a correct, necessarily, the procedure depends on this, presupposes – a correct heavenly answer that we're trying to figure out.

And the result of figuring out of course produces an earthly answer, which is the ultimate decree, the ruling, and then the following, and then the following in a way that's predictable in a way that's transparent, in a way that transmits to the next the next case.

But up until that moment, there's this magical time where you're still trying to figure out the truth. And it's the same kind of truth that you might say Moses and God were trying to work out.

By the way, I made another mistake, which is I took Eli to be a rabbi and asked him the answer. And he said, "Leave the boy alone. Don't touch him."

EU-S:

I stand by my statement. But that's,

JH:

I just forgot to check Eli's credentials, because he's not a rabbi. Thank God.

EU-S:

I stand by that ruling. And it's a shortcoming on your part, Jeff, that you didn't realize just how high of a level of a rabbi I actually am in the heavenly realm of halacha.

JH:

I see. So you have heavenly smicha.

EU-S:

That's right.

JH:

You've been ordained by the heavenly court. Wonderful.

EU-S:

I mean, not in the actual world, but in this heavenly realm that you're hypothesizing, I definitely have smicha.

JH:

And you're implying, of course, that I don't.

EU-S:

I'm implying that if a person comes to a person with heavenly smicha and asks them a question, they owe it to them. They are, nay, obligated to them to give them the truth.

JH:

And would you have advised Abraham to not be touched?

EU-S:

Would I have advised Abraham not to be touched? Abraham can do whatever he wants to his own body.

JH:

All right.

EU-S:

He was 99. It's all good.

MD:

I mean, there's a lot to say about sort of what the role is of rabbis in halacha versus the role of non-rabbis. But, you know, Jeff, I think maybe one way of putting some of what you're talking about is this question of when and how do we change halacha? What guides our priorities when we're thinking about

halachic change? And to have the authority to make changes in normative halacha.

JH:

Exactly.

MD:

I mean, and I think that there's a bit of a problem, though, for your idea of heavenly halacha, and it's the oven of Achnai story. So, I mean, you know, there's a lot of ways to read this story. This is Bava Metzia 59b, I believe:

“We learned in a Mishnah there in Keilim, if one cut an earthenware oven width-wise into segments and place sand between each and every segment, Rabbi Eliezer deems it ritually pure, and the rabbis deem it ritually impure. And this is known as the oven of Akhnai.

Why is it called Akhnai? Rav Yehuda said in the name of Shmuel, because the rabbis surrounded it with their statements like a snake and deemed it impure.

The sages taught on that day when they discussed the matter. Rabbi Eliezer retorted with all the possible answers in the world to support his opinion, but the rabbis did not accept his argument.

Rabbi Eliezer said to them, "If the law is according to my opinion, this carob tree will prove it." Suddenly, the carob tree he was pointing at was uprooted from its place and moved 100 cubits and some say 400 cubits.

The rabbis said to him, "We don't adduce proof from a carob tree."

Rabbi Eliezer said to them, "This stream will prove it."

Suddenly, the waters of the stream he was pointing at turned around and started flowing in the opposite direction.

The rabbis said to him, "We don't adduce proof from a stream."

Rabbi Eliezer said to them, "If the law is according to my opinion, the walls of this study hall will prove it."

Suddenly, the walls of the study hall started to cave in and fall.

Rabbi Yehoshua scolded the walls and said, "Students of Torah wisdom are engaged in legal battle here. Stay out of it."

The walls did not fall out of respect for Rabbi Yehoshua, but they also did not straighten, out of respect for Rabbi Eliezer, and they remain on an incline to this day.

Rabbi Eliezer came back and said, "If the law is according to my opinion, it will be proven from heaven."

Suddenly, a divine voice rang out and said, "Why are you contradicting Rabbi Eliezer? Don't you know that the law follows his opinion in all matters?"

Rabbi Yehoshua stood on his feet and said, "It is not in heaven."

What is the relevance of this phrase from Deuteronomy? It is not in heaven in this context.

Rabbi Yirmiah says that since the Torah was already given at Mount Sinai, we do not accept legal rulings from a divine voice, for God had already written in Exodus, "Incline after the majority opinion."

Years later, Rabbi Natan encountered Elijah the prophet and asked him, "What did God do when Rabbi Yehoshua issued his declaration about the Torah not being in heaven?"

Elijah said to him, "God was smiling and saying, 'My children have triumphed over me. My children have triumphed over me.'"

JH:

I think it's a great story for this, but it illustrates, I think, what I'm trying to say, which is – notice, at no point in this debate does anyone say the rabbis are correct or that Eliezer was incorrect. What they're saying is, once the argument about correctness is done and there's a deadlock, we need a procedure for safeguarding it precisely because in every other case after this, there won't be a heavenly voice. So we need a procedure once the argument is over.

But if anyone took this story to mean there's no heavenly truth in the first place – it's a human truth or it's man-made, there's no one truth, it's pluralistic – all that crap, if anyone went that way, then the whole story would make no sense to begin with because there would be nothing to argue about in the beginning. There would be nothing to have an argument about because the truth would be determined by the majority. We should just right now draw straws or we should have an argument about what the majority is going to think.

But that ignores the fact that the majority or the minority is supposed to have an opinion about something. And that something that they use to come to a majority opinion or to come to a minority opinion can't be what the majority is going to think. It can't be anything procedural, can't be anything especially human.

It's just what does the oven actually hold? What is the actual status?

So the argument was about, has to be about, has to always be about, the actual truth or untruth metaphysically about the oven's purity or impurity. And the point of the story is that, and we're not going to get an answer to that.

So we need a procedure. Because eventually, you try to come up with the answer, you do the best you can. But then when you're at a deadlock, we need some way. If you're going to wait for a heavenly voice, if you're going to defer to heavenly truth all the time, then arguments will never have a way of resolving and halacha does have to apply in the earth.

So we need a procedure.

But don't ever make the mistake of thinking that what you do to do that procedure isn't to find the procedure-independent heavenly truth. Independent of humans, independent of procedure, heavenly truth is the only thing that the procedure itself needs you to be looking for. In fact, if you're

looking for anything but that, the procedure itself doesn't work. Does it make sense?

EU-S:

Yeah, I think it makes a lot of sense. What I would really appreciate if you did for our audience is articulate your position of how to deal with situations in which ethics and halacha conflict.

And also tell us which of the four positions or some other unarticulated position you actually agree with.

JH:

But Max, you brought up the story, and I didn't mean to dominate your reading of it. So if you have a different reading or understanding of it, please.

MD:

No, it's great. I'm really in a lot of ways persuaded by what you're saying, that it's really important that the conversation is trying to get at something deeper when they're making these arguments about the purity of the oven to begin with.

It sounds to me, though, like you're separating the role of God as truth-maker, as halacha-maker, or something like that, from the role of God as supporter of Rabbi Eliezer in the story. And I'm not convinced maybe by that distinction, but I think that the broader point that you're making is something that I can get on board with, and that is really important to keep in mind throughout a lot of the rest of our discussion.

And really, whenever we approach these issues about ethics and halacha, that we all have to be trying to get at some kind of shared goal when we're engaging in halachic discourse.

And I don't think we've, in this conversation, yet articulated what exactly that goal should be, but it is important that we're engaging in this pursuit together, and that that goal has to be idealized in some way in order to be applicable in a lot of cases and to guide our halachic thought.

JH:

Yes, perfectly put. That's beautifully put.

And it's a paradox in a way, because it's a human procedure whose integrity depends on, at least for part of that procedure, acting as though we're doing something independent of any human procedure. The procedure's integrity depends on forgetting procedure for a moment and just trying to figure out some spiritual truth.

To answer your question, Eli, in the conflict with ethics, I think that the heavenly, the stage at which we determine, let's say we're all, because Eli, at least, came out as a rabbi.

EU-S and MD:

[laughing]

JH:

Let's say we're all rabbis, right? We're all decisors. And we're trying to figure out, listen, we've got this God who, in his infinite wisdom, which we can possibly comprehend, has commanded this thing about piercing the foreskin. What should be the procedure for that? What should be the rule for that? What should be acceptable for that? And we might say, if it turns out that there's an unethical way to do this or an ethically problematic way to do this, that certainly counts against it.

The Torah, whose truth we're trying to divine here, to derive here, has plenty of considerations and factors. Halacha has plenty of factors we can appeal to. There's plenty of precedents that take suffering into account, that take harming people into account, that take ways of peace in the world. And we'd incorporate that.

We'd incorporate other cases and do some casuistry here. And by the way, this type of pursuit has some presuppositions, one of which is that – it's a point that Avi Sagi makes – that halacha is a unity. It's a human thing, but it's a unity. There's one overall – it's an all-things-considered question. What do the sources on balance say to do in this case? It's not like, well, Leviticus says this, Deuteronomy says this. Do you want to be Leviticus about this? Do you want to be Deuteronomy?

No, you don't do that. Or, you know, Gittin says this, you know, Bava Metzia says that. Yerushalmi says this, Bavli says that. You don't do that. You treat it

all – and this is somewhat artificial, I admit – as a unity, all favoring or contributing to unbalance the all things considered answer to what to do in this case. And in that set of considerations, ethics must come into play because it just does. It's part of the Torah. It's part of a law. And it often does in a lot of these cases. And it will figure.

Things change once that process has already been undertaken. And now we have a ruling, and it's a ruling that comes from someone designated by the process to be authoritative.

And now we have a problem because the authorities have already spoken. The Achnai's oven story happened already, and the majority rules trumped. And now we're like, okay, you can't pierce the foreskin. You got to actually remove the whole thing. That's the procedure. That's what the procedure delivered. That's the authority, for better or worse.

Now there's a different question. First of all, the procedure is human, and humans get ethics wrong all the time.

EU-S:

Okay, hang on, hang on. Before we move on in your description here, I just need to bring everyone's attention to something, which is that you are placing the authority of the decision-making in the past, as opposed to conceiving of it as an ongoing process.

Am I getting that right?

JH:

Yes. No, no. Yes and no. Yes, the past decision-making has authority.

But no, it's not opposed to being an ongoing process.

This, I mean, so Max asked, how do we change halacha?

EU-S:

– You're describing it as a kind of precedent then, that it has some kind of weight.

JH:

Yeah, it's a process. And depending on whether you're J. David Bleich or Joel Roth, you might have a different view of what that process is. But it's a process.

And it's a process that, if the Achnai's oven stands for anything, stands for the fact that there is a procedure that once the procedure is followed, has a certain authority that can't be undone by re-arguing the case as though the procedure hadn't been done.

But that procedure, that process allows for change. It just allows for change in the same way that it allowed for a ruling in the first place, just through a process, through the right people deciding and learning out in the right way, voting under the right conditions.

The process has both a form of discovery and a form of adjudication. The discovery part seeks the heavenly truth, but the adjudication part and the procedural part ultimately involves vote-taking, tallying, credential checking, all that annoying, you know, compromised stuff of any human legal system.

But that system doesn't prevent change. So, you know, when the rabbis felt that the death penalty stood to be abused, they wanted on the one hand to preserve the death penalty – it's in the Torah – but they were worried that the Torah death penalty, the heavenly truth that says that in principle, someone actually guilty of murder should be put to death, it's liable to be applied in cases where someone who's not guilty of murder is put to death. And we have to put in all these safeguards, which pretty much amounted to making it almost never applicable.

Now, we require two witnesses and they have to be eyewitnesses directly. They can't even see somebody coming out of a cave with a sword dripping in blood. No, there's gotta be direct, you know.

EU-S:

Yeah, so the rabbis, yeah, they legislated it out of existence.

JH:

In effect, or almost out. Or the story of the rebellious child, a child with something like, today might be called opposition defiance disorder, you know, it's a child who's just completely uncontrollably violent and disobedient. They

found a way, you know, the Torah did recognize the category and in principle said these children can be killed or can be, I forget what the ruling was, but they can be banished or whatever.

But in practice, the rabbis were afraid to apply this, over-apply this to cases of just, you know, bratty kids. So they basically legislated it out of existence.

The ability to do that remains.

EU-S:

Wait, wait, wait, wait, wait, but before we get on, that statement is a non-Orthodox statement, because if you were to speak to someone, I would say the vast majority of people who think about this from an Orthodox perspective, they would say we once had the ability to make changes like that, but one of the defining characteristics of an Orthodox approach to Jewish law is the belief that we no longer have the same latitude to make changes, right?

JH:

No, that I disagree with. I think that's, that

EU-S:

Max, am I making this up?

MD:

No, no, no, I mean, I, Eli, I mean, you're bringing up, you're bringing up good points. I mean, I agree that what Jeff is saying is fundamentally not a standard Orthodox approach.

Jeff, you raised a distinction a while back that I really appreciated and I want to return to. If I'm understanding correctly, you were saying that we can distinguish between issues that are in the Torah, maybe moral issues that are in the Torah, and moral issues that arise in interpretation of the Torah.

Is that something that you were asserting? 'Cause I think there's something to that, right? Now, there's a further question: are those of a different status, right? Because clearly both of those are then moral issues in the halachic system that we inherit, but it might be the case that some of those we can rectify more easily than others.

I think that would be a coherent position, even though that's probably not my position.

JH:

Yes, that is the position, or that is something I was trying to say. By moral issues in the interpretation, what I mean is moral problems with the way it's interpreted.

There can be conflicts between what the Torah itself, or the heavenly halacha, I've been calling it the heavenly truth we're trying to divine – what that demands of us can be morally problematic, perhaps, though that is a deep and difficult question and presents all kinds of crises of faith.

And then there's a separate question: how it's interpreted and applied by various past people, or present people – that raises moral issues and conflicts. And I do think those are different, and how we deal with them, how we respond to them, how we try to wrestle with them are different.

MD:

Yeah, I mean, I think that those are really helpful points. I mean, and definitely part of the question is going to be what the status of the Torah is with respect to its divinity, what kind of revelation it is, how timeless that revelation is.

So maybe, Jeff, I'll just ask you straight up: do you think the Torah is fundamentally a human document, a divine document, somewhere in between, and how does that impact the sort of interpretation you're giving here?

JH:

So yeah, that's a hard one.

MD:

You don't have to answer that if you don't want -

EU-S:

Yes, you do. Yes, you do have to answer that!

MD:

You do have to answer it. So I'll say, I think that impacts it a lot, right? Because if the Torah is a fundamentally human document, and that's ultimately what I think. It has authority over us and it relates to the divine, but it is a document shaped by humans. And we can talk about divine imprimatur, we can talk about what makes sense for Jews at different points in history, and how that relates to us today.

But if the Torah is a product of its time in a particular way, then we shouldn't expect that the Torah is going to be morally perfect.

But, that doesn't mean that the Torah doesn't have some pull over us either. And then the question becomes, well, what does that pull consist in? And there's a lot we can say about that.

So I'm really curious to hear your perspective on this, Jeff, because Eli and I have also talked about this in our previous episodes, which I hope our listeners will have already listened to, or will go back to after this.

EU-S:

Yeah, and Jeff, I had to answer this question, so you sure as hell have to answer this question.

MD:

[laughing] Yeah, Jeff, answer the question. (No, I'm kidding.)

JH:

I reject the conclusion and the inference. Well, both of those.

MD:

All right, all right.

JH:

– Just because you had to answer it. So first of all, by actually just being– –

EU-S:

I had to – Jeff – do you know what it's like for me to wade into theology? It is not a comfortable place for me, and I did it for the sake of this podcast.

JH:

Thank God, no, I don't know what it's like. Thank God I don't know what it's like. I'm not about to find out.

But here, all right, so let me answer. To be totally honest about it and not to stall, I don't know for sure. I'm really not sure about how much of the Torah, you know, where it comes from entirely. But I think that you can take it to have a divine source without thinking that every word of the five books as it's currently printed is from that source.

This is all something that Sam in *The Principles of Judaism* tries to lay out. And you wouldn't know it to look at him. He has a big beard and, you know, looks like kind of like a Hasidic looking.

But in fact, there are people even within orthodoxy who say, look, we have to take the Torah as – at least the heavenly Torah – as what is divinely demanded of us and divinely given or delivered to us. But even as it was transcribed, first by Moses the human, then as it was collected and edited and redacted by other humans, and who knows what else? We don't know.

All kinds of process by which the document we have might've been produced and altered and edited and tinkered with. So there's room for saying there is a core truth here that we take to be divine and normative and all that.

And then there's the document. And the document might have been, not all of it might be a product of its time in some respects and might be a product of human fallibility in some respects. We have to, I think, acknowledge, it's very hard, I think, to avoid that conclusion. People do, but it's hard to.

But I do think when we wrestle with a theological question, we can distinguish between trying to figure out what the actual halachic normative authoritative divine truth is here, as compared to what various sources, documentary sources, maybe even parts of the written Torah -- certainly part of the oral Torah – suggest or seem to say we should do.

There is a realm in which we can be even more pure than that and try and figure out what is really being demanded of us here. To talk this way is to admit

of a category where there's some maybe heavenly or divine or some just purely authoritative, normatively binding truth about what ought to be done.

Should we circumcise in some way? If we're going to eat meat, should it be in this way or that way? What role should this or that have in our lives?

Some of the answers we find in what we take to be the Torah are supposed to be, I think, not seen as just, well, that's what the past leaders decided for whatever their reasons. And now we respect the integrity of the process, so we're going to go with it as much as we can.

On some level, I think, for it to be religious, I think we do have to be taking ourselves to be dealing with a greater truth than that. But I don't think it's necessarily identical with what's written in the document called the Torah.

EU-S:

Jeff, in our first conversation, Max articulated a very personal position that he has with regards to these issues in which he made a distinction between meaning and truth, in which meaning is something that he gets from halachic frameworks in his life, but he separates it almost categorically from ethical truth. And I'm wondering – first of all, Max, did I get that right? And also, Jeff, what do you think about that?

MD:

Yeah, that sounds correct to me.

JH:

I need to hear more. I'm not getting it yet.

MD:

Yeah. So, I mean, here's one way of putting it, right? That halacha doesn't aim at truth, right? That when we're engaged in trying to figure out halacha, we're not trying to figure out some kind of metaphysical fact about the world, which sounded like maybe it was some of your position about halacha earlier?

JH:

Yes. Yes.

MD:

But rather, my position is that when we're engaged in halacha, we're trying to figure out something like: what does God ask of us? And then, how can we live an authentic Jewish life or something like that?

How can we find meaning of the world? How can we live a good life, right? And part of what living a good life is, is that it's a meaningful life. And halacha helps us achieve that by structuring our lives in certain ways. But of course, a good life is also subject to all sorts of ethical constraints. And so, that's part of why I think that halacha and ethics can't ultimately conflict.

JH:

Can't ultimately?

MD:

Yeah, I hold that position. But then the thought is that living ethically alone isn't all that we want out of a good life, and halacha really helps us get there.

EU-S:

Max, by the way, used to be in my camp, which is camp number two in our schema, which is that, of course, halacha and ethics can conflict, and ethics trumps. But he has abandoned my camp now for the warm waters of they can't conflict.

JH:

Ha ha ha. So, I think heavenly halacha most of the time can't conflict and can't deeply conflict. And if it can conflict, there is a meta-normative truth within either heavenly Torah or heavenly halacha that says, "Go with ethics."

But that's much rarer and much more difficult and much more problematic than the cases where I think they can conflict, which is the deliverances of halacha, the procedure, the output of the procedure.

And I do think – I like the idea that ultimately halacha is not a purely abstract pursuit of certain metaphysical truths like, you know, the actual metaphysical kosherness or not of some, you know, piece of some item or the actual

impurity or not of some oven, that it's about living a certain way and it leads to a way of life and leads to a more meaningful way of life. And I think that is true.

But I think the paradox is that it is only true if that's not the reason you take necessarily only to be doing it. So, I think that if kashrut, for example, being kosher, leads to a more meaningful life or leads to a certain kind of discipline, it only does so if you do it on its own terms, quite apart from the instrumental value you're taking from it.

So, this is where I think New Age religion might go wrong, which is -- yeah, religion leads to meaningfulness, and transcendence, but it doesn't do that if you're doing it to get to transcendence and meaningfulness. It's sort of like for it to play the role it plays, it needs to be taken to be independently true. I think that's just the way it works. Again. So, I think that we are asking a metaphysical question when we answer something that's kosher, even if a benefit of asking is that it gives us a meaningful life.

And when we ask what's required of us circumcision-wise, I think the same thing. We're asking a metaphysical question. What is this actual weird Torah dictate? What is ultimately, what was intended to be required of us?

I think that, again, Torah values are not identical to halacha for all the reasons I've been saying. And one of those values you see with Abraham, who's, I think not coincidentally, the person who had the brit milah, the first circumcision, but he also, like when a Torah dictate seemed to be monstrous to him, he did not feel obligated to pursue it. And even when he did, I don't think he's, I think there's a reason why Moses is even more highly elevated in the Torah than Abraham, because Moses, when Abraham couldn't come up with a good legal argument, he was silenced.

Moses, when he was told, "I'm going to destroy all the people and they deserve it," Moses didn't care if he had a legal argument. He was going to argue against the monstrous conclusion, period, using whatever he can. He was going to tell God, "You're going to have bad PR. God, you're going to suffer. God, you're going to have a bad..."

Moses was the highest ideal. When he was bothered ethically by the dictates of what God wanted, he challenged it.

And I think if I were in cases where I, if I thought circumcision, as it's currently practiced, was actually ethically abominable, and I thought I was going to give real severe harm to my child, I wouldn't have done it. I would not do it. I would

say, "Look, I know what halacha demands. I don't know if halakha allows me an exception here, and probably I'll be sinning, but you know, sometimes you got to take one. You know, sometimes you got to bite the bullet. Sometimes you take a sin, and I will take the hit, the halachic hit.

Maybe even I'll lose a, you know, place in the next world. Who knows? I'll take the hit to avoid doing something monstrous, and I take as my idol, my model in that, Abraham and Moses, and the general halachic and Torah tradition of challenging, of saying, "God, you can't really mean this. You wouldn't mean this."

It's only because I didn't think that ethically about circumcision in particular that I didn't go that route. But had I—and even there, I was moved enough by the kind of considerations that you all raise to try to come up with a way to have my cake and eat it too, and see if there's a way I can do something less than outright, you know, circumcision, as it's now practiced – to try and do what was done in the Torah, trying to find a way to have it both ways.

If I couldn't, I think I was going to end up saying, "Look, look, if I don't think this is ethically a travesty, I can live with it." But if I did, had I believed, had I viewed circumcision the way, for example, you do, Eli, I wouldn't have done it.

I would not have done it. But I don't know if I would have thought I was permitted, or within my halachic rights not to do it. I just wouldn't have done it anyway.

MD:

Yeah, good, Jeff. So what I'm hearing is that you and I—at least I won't speak for Eli—agree on at least one significant point, which is that ethics serves as a check on halacha, right? And then we can disagree about, you know, what's ethical or unethical in specific circumstances, and that's a really important thing to do as well.

But it sounds like you're at least strongly rejecting the idea that halacha sometimes or always trumps ethics.

JH:

That's right. I am rejecting it. I'm not saying that halacha itself concedes this. Halacha may not on its own terms. But tough on it when it conflicts, I think, dramatically with ethics, not only do I favor ethics, but I think even Judaic

sources on balance favor ethics. Judaic sources also suggest that one should hesitate to do something one finds ethically monstrous, even if halacha seems to dictate it.

There's different levels of that. So, for example, killing somebody who might be innocent, I think, was an emergency, and they had to come up with ways to legislate around that.

Having a ritual process that seems to subordinate one gender over another or seems to subordinate one orientation over another, that's a problem. But that might be the kind of problem where we work more slowly to change the system. It's not asking me to discriminate against a woman or a gay person, thank God, in some way. If it were, I wouldn't do it. I simply wouldn't do it.

But changing the process so that it itself doesn't even symbolically subordinate one gender or one orientation over another, I think that that's an imperative thing. And it needs to be done for all the reasons that the Orthodox rabbis have done it in the past in some cases.

But that's different from cases where I have to actually mutilate my son or I have to, you know, in those cases, if it's ethically monstrous, I think ethics certainly serves as a counterbalance to a counterweight to halacha. I wouldn't say – to say it's a check makes it sound like judicial review or something. I think it serves as a counterweight to halacha – and one that wins.

Eli Ungar-Sargon:

Next time on the *Bruchim Podcast*...

Jeff Helmreich:

Just the fact that it is a change, a bodily change, to which the person didn't consent is enough for you to consider it a rights violation.

Eli Ungar-Sargon:

Yes, it's a permanent body modification. So it's a rights violation. It's also a violation of another right that I think is very important, which is the right to self-determination.

JH:

Okay, so here's, I guess, another place where we disagree. And it's good because it's not a merely empirical disagreement. There I disagree with you on the normative upshot of what you're saying; I don't agree about this right. But I do agree that if there were such – first, that such a right could be talked about independent of harm. And I agree that if there were such a right, harm would not be the defining factor, or even the kind of harm (I'm calling it a harm) that Max is referring to, that I'm calling an expressive or dignitary harm. Max is talking about a non-harm wrong. But even that – you're saying beyond that, there's just a right to bodily integrity.

EU-S:

That's right.

JH:

Right to bodily non-alteration by us by an outsider without your consent.

Max DuBoff:

Yeah. And one possibility that Ellie could go for in addition would be that a loss of some kind of healthy tissue or something like that constitutes a harm, even if it's not experienced as such, because of some kind of lost potential. Right? It doesn't need to be that someone is worse off, but rather if they're losing out on something, that could be construed as a harm, depending on your notion of harm.

EU-S:

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