

**Between Ethics and Jewish Law:
Torat Ha-Melekh and the Moral Problems of Contemporary Halakhic Discourse**

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Abstract

This essay focuses on Rabbis Yitzhak Shapira and Yosef Elitzur's *Torat Ha-Melekh*¹ (2009). Through an examination of the book's arguments and conclusions, I seek to show how a halakhic discourse which relies solely on Jewish sources, and disregards, even deliberately rejects, what it conceives as "external" sources, can lead to radical and ethically problematic halakhic rulings, which not only permit, among other things, the deliberate killing of little children and complete innocents, but also understand this act to be the fulfillment of a positive commandment. Furthermore, I seek to show the failure of the halakhic and meta-halakhic critiques of *Torat Ha-Melekh* and argue for the necessity of a much more comprehensive paradigm shift in contemporary halakhic discourse.

In the first part of this essay, I provide basic background about the authors and the book. In the second part, I follow the book's six chapters and summarize its main arguments and rulings. I believe it is important to do so for two main reasons: First, it provides the reader with the necessary background for better appreciating and understanding the critique to follow.

¹ Yitzhak Shapira and Yosef Elitzur, *Torat Ha-Melekh: Berure Halakha Be-Inyane Malkhut U-Milhamot: Diney Nefashot Bein Yisrael La-'Amim*, Second ed., vol. 1 (Lev ha-Shomron: Yeshivat Od Yosef Chai, 2009).

Second, as far as I am aware, an English translation of *Torat Ha-Melekh* has yet to be published. By translating the book's main arguments into English, I hope to raise awareness regarding the book and its problematic and radical arguments outside of Israel and the Hebrew-speaking academic circles. In the third part, I discuss some halakhic and meta-halakhic critiques of the book. In the fourth and last part of this essay, I put forth my own argument regarding the failure of both halakhic and meta-halakhic critiques of the book.

“... one should accept the truth from whatever source it proceeds.”
Maimonides, *Eight Chapters* 1

Introduction and Background

In a conversation titled “Gaza, the IDF Code of Ethics, and the Morality of War”, which took place at the Jewish Theological Seminary (JTS) in November 2014, Moshe Halbertal was asked by JTS’ Chancellor Arnold Eisen about the role of Jewish sources in the Israel Defense Forces’ (IDF) Code of Ethics, which Halbertal helped to formulate. While Halbertal did quote several Jewish sources that are consistent with the Code’s principles, he emphasized that the authority over matters of ethics and laws of war should not ultimately be “in the hands of rabbis.” Halbertal concluded his answer with the following words, “I have yet to find one monstrous act that you cannot justify by quoting a verse.”² This essay picks up on Halbertal’s statement and seeks to explore it through focusing on Rabbis Yitzhak Shapira and Yosef Elitzur’s *Torat Ha-Melekh* (2009) as a case study.

The full title of the book is *Torat Ha-Melekh: Berure Halakha Be’-inyene Malkhut U-Milhamot* (The King’s Torah: Halakhic Clarifications Regarding Matters of Kingdom and Wars). The first and only (to date) volume to be published is titled *Diney Nefashot Beyn Yisrael La’amim* (The Laws Pertaining to Relations between Jews and Non-Jews in Matters of Life and Death). The authors are Rabbi Yitzhak Shapira and Rabbi Yosef Elitzur of Yeshivat Od Yosef Chai. The Yeshiva is located in the West Bank settlement of Yitzhar, under the spiritual leadership of Rabbi Yitzhak Ginsburgh. Od Yosef Chai is known for its right-wing political views, as well as for its ongoing conflict with Israeli authorities over the contents of its teachings and the involvement of its students and staff with violent acts against Palestinians and Israeli

* I thank David Ellenson for his insightful comments on an earlier version of this paper. Of course, I take full responsibility for this paper’s assertions as well as for any errors that may appear below.

² The entire conversation between Eisen and Halbertal can be found in <https://www.youtube.com/watch?v=6jnnMeBZT9E>

soldiers. Israeli Security Services and media have linked the Yeshiva and its students to ultra-nationalistic groups, such as “the Hilltop Youth” and “Price Tag.”³

Rabbi Yitzhak Ginsburgh (born 1944, St. Louis, Missouri) – who is known for his support of the Goldstein massacre in the Cave of the Patriarchs (stating that “revenge is a natural spontaneous reaction ... a sort of moral law”) –⁴ is described by Tomer Persico as a representative of a specific kind of neo-Hasidism, a theological offshoot of Chabad Hasidism, which offers a “radical interpretation” of its mystical doctrine. “Inspired by a romantic and expressivist ethos,” Persico writes, “Ginsburgh molds an organismic and monarchial ideal of the nation, led by the messiah and subject to (Ginsburgh’s interpretation of) the laws of the Torah.”⁵ I shall elaborate on Ginsburgh’s worldview and influence on the authors of *Torat Ha-Melekh* below.

Rabbis Yitzhak Shapira and Yosef Elitzur are both disciples of Ginsburgh. Elitzur is known for his right-wing opinions, and for his calls for violent acts against Palestinians and Israeli security services.⁶ Following the publication of *Torat Ha-Melekh*, both Shapira and Elitzur were arrested on charges of incitement and possession of racist materials by the Israeli police. Ginsburgh, in addition to Rabbis Yaakov Yosef and Dov Lior, who have given their approbations (*haskamot*) to the book, were summoned for questioning. After Yosef and Lior

³ See, for example, Chaim Levinson and Amos Harel, “Shin Bet Urges Israeli Government to Halt Funding of West Bank Yeshiva” (*Haaretz*, September 27, 2011); Tovah Lazaroff, “Education Ministry Closes Part of West Bank Yeshiva” (*The Jerusalem Post*, November 1, 2011); Yoav Zitun, “IDF Takes Over Extremist Yeshiva in Yitzhar” (Ynet, November 4, 2014).

⁴ Yitzhak Ginsburgh, *Kuntreis Barukh HaGever*, 17-18, quoted in Tomer Persico, “Neo-Hasidic Revival: Expressivist Uses of Traditional Lore,” *Modern Judaism* 34, no. 3 (2014): 297.

⁵ *Ibid.*, 296.

⁶ See, for example, Yosef Elitzur, “*Arvut Hadadit – Ha’astrategya*”, in *Hakol Ha’yehudi* 16, December 14, 2009, 13-21.

failed to show up for questioning, they were detained by the police as well. Eventually, in May 2012, the Israeli State Attorney declared that none of the rabbis were to be indicted.⁷

I. The Main Arguments of *Torat Ha-Melekh*

- *Introduction:*

In their introduction, the authors quote Menahem Mendel Schneerson, the Lubavitcher Rebbe, and declare that their goal is to achieve “true and whole redemption” and bring “God’s kingdom on earth.” They seek to provide “tools of repair” (*kelim de-tikkun*) for Jewish law, which will allow “the penetration of the light of [God’s] will [*ratzon*] in a repaired way to the [divine] vessels, so that the deeds [of God’s followers] are directed [*mekhuvanim*], and the will [of God] becomes actualized.”⁸ This Kabbalistic terminology of the authors here supports the claim of a clear and direct influence of the neo-Hasidic worldview of Ginsburgh, on which I elaborate below.

- *Chapter One: The Prohibition on the Killing of a Non-Jew*

The authors of *Torat Ha-Melekh* begin by stating that the Noahide prohibition on murder, as it appears in Genesis 9:6, “Whoever sheds the blood of man, by man shall his blood be shed,” is relevant only in cases in which a non-Jew kills another non-Jew. Following Maimonides,⁹ they argue that the Mosaic prohibition on murder, “You shall not murder,” (Exodus 20:13;

⁷ See “Rabbi Yitzhak Shapira suspected of incitement against non-Jews”, Eli Senyor (*Ynet*, July 26, 2010); “Rabbi Yaakov Yosef detained for questioning”, Yair Altman (*Ynet*, March 3, 2011); “Torat Hamelech Authors Won't be Indicted”, Elad Benary (*Arutz Sheva*, May 25, 2012).

⁸ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 15. All translations from the original Hebrew are mine. Sometimes the sentences in the original Hebrew are too long to be translated into English as they are. Therefore, in such cases I changed the structure and shortened the sentences to make the translations more readable. All biblical translations are from the New JPS Translation (Second Edition).

⁹ *Mishneh Torah*, Sefer Nezikin, Rotzeach u'Shmirat Nefesh, 1:1. The authors rely on the versions in which we read: “Whenever a person kills the soul of another person *from Israel*, he transgresses a negative commandment as it says ‘thou shalt not murder’.” (my emphasis)

Deuteronomy 5:17) is only relevant in cases in which a Jew kills another Jew. Therefore, they conclude that it is impossible to deduce the prohibition on the killing of a non-Jew from this verse.¹⁰

Following Maimonides again,¹¹ the authors distinguish between three “degrees” of non-Jews: (1) *Ger toshv*, a non-Jew who undertook observing the Noahide Laws: It is considered a commandment to secure their wellbeing and it is prohibited to kill them. (2) Non-Jews who do not wage war against the Jewish people: It is prohibited both to save them from dying and to kill them. (3) Non-Jews who do wage war against the Jewish people: This is the case in which the authors are interested, and this is what they seek to clarify in their book.

The first chapter is followed by an appendix, which contains a long discussion regarding the halakhic principle of *likha midey*. This principle holds that whatever is prohibited for non-Jews is prohibited for Jews as well.¹² This principle seemingly contradicts the authors previous conclusion, for it argues that Jews are obliged to the Noahide Laws no less than non-Jews. However, after their long discussion, which includes an “inner” (*penimi*) Hasidic-Kabbalistic explanation by Ginsburgh, the authors argue that the principle of *likha midey* is *external* to halakha and is not applicable in all cases, particularly in cases where a specific commandment obliges Jews to do something which is forbidden for non-Jews.¹³

¹⁰ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 17-18.

¹¹ *Mishneh Torah*, Sefer Ha-Mada, ‘Avodah Zara, 10:1-2.

¹² See B.T., Sanhedrin, 59a.

¹³ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 28-48, especially 35.

- *Chapter Two: The Killing of a Non-Jew Who Transgresses the Noahide Laws*

Following the Babylonian Talmud¹⁴ and Maimonides,¹⁵ the authors conclude that “a non-Jew who transgresses one of the seven Noahide Laws shall be executed.”¹⁶ However, they note that according to a *brayta* in the Babylonian Talmud, it is prohibited both to save the life of non-Jews who do not wage war against Jews, and to actively kill them.¹⁷

The authors present four interpretations to resolve this apparent contradiction: (1) According to Nahmanides, the prohibition against killing non-Jews is relevant only in cases in which one cannot be sure if the non-Jew actually transgresses the Noahide laws.¹⁸ (2) The Ritva (Rabbi Yom Tov Asevilli), however, presents a much more pragmatic reason. According to him, this prohibition is rooted in the desire to avoid hostility (*'eyvah*) between Jews and non-Jews.¹⁹ (3) According to *Rabbenu Yonah* (Rabbi Yonah Gerondi) and the *Taz* (*Turei Zahav*, Rabbi David ha-Levi Segal) this prohibition derives from the sages (*mi-de-rabanan*), while no such prohibition derives directly from the Torah (*mi-de-'orayta*).²⁰ (4) The *Beit Yosef* (Rabbi Joseph Karo) interprets this *brayta* not as a *prohibition* against the killing of non-Jews, but merely as a *permission* not to kill them.²¹

The authors understand this interpretation by the *Beit Yosef* to be problematic and contradictory to several previous sources. They suggest that if it is possible to explain the importance of the Noahide Laws to the non-Jew, so he or she will repent, it is “better to choose

¹⁴ B.T., Sanhedrin, 57b.

¹⁵ *Mishne Torah*, Sefer Shoftim, Melakhim u' Milhamot, 9.

¹⁶ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 49-50, 55-56. The authors also argue that every Jew who sees a non-Jew transgresses the Noahide Laws is allowed to kill him, without the need for court and witnesses, see *ibid.*, 50-55.

¹⁷ B.T., 'Avoda Zara, 26a-b: “R. Abbahu recited to R. Johanan: 'Goyim and shepherds of small cattle need not be brought up nor be cast in [*lo ma'alin ve-lo moridin*].”

¹⁸ See *Hidushei HaRamban*, Makot 9a.

¹⁹ See *Hidushei HaRitva*, Makot 9a.

²⁰ See *Hidushei Rabbenu Yonah*, Sanhedrin, 57a; *Turei Zahav*, Y.D., 158.

²¹ *Beit Yosef*, Y.D., 158.

this way.” In other words, “if it is possible to repair (*le-takken*) and to ensure the observance of the Noahide Laws henceforth by repentance ... [the killing of the non-Jew] is not a fulfilment of a commandment, rather this is a slaughter and the destruction of the world, and it is prohibited.”²² Nevertheless, they make sure to state that “whenever we approach a non-Jew who transgresses the Noahide Laws and kill him out of concern for the observance of those laws – there is no prohibition.”²³ To sum up, it seems that for the authors, the intention that prompts the killing is what determines whether it is permissible or not to kill a non-Jew who transgresses the Noahide Laws.

- *Chapter Three: Self-Sacrifice in a Case of Murder among Non-Jews* (mesirut nefesh al retzicha – bein b’nei Noakh)

According to the Babylonian Talmud²⁴ and Maimonides,²⁵ a Jew must sacrifice his or her life rather than transgress the three negative commandments that prohibit murder, sexual misconduct (*giluy arayot*) and idolatry (*avoda zara*). However, according to Maimonides, a non-Jew is allowed to transgress the Noahide Laws, including the prohibition on murder, in order to save his or her life.²⁶ Regarding this issue, the authors discuss the debate between the *Parashat Derakhim* (Rabbi Jodah Rosanes) and the *Maharash Yaffe* (Rabbi Shmuel Yaffe Ashkenazi). In short, the *Parshat Derakhim* argues that a non-Jew should not kill another non-Jew in order to save his or her own life. He grounds this view in the *svara* (logical assumption/reasoning) that “who is to say that your blood is redder”²⁷ applies to both non-Jews and Jews. In contrast, the *Maharash*

²² Shapira and Elitzur, *Torat Ha-Melekh*, 1, 71.

²³ *Ibid.*, 73.

²⁴ B.T., Sanhedrin, 74a; Yoma, 72b; P’sahim 25b.

²⁵ *Mishne Torah*, Sefer Ha-Mada, Yesodei Ha-Torah, 5:1-2, 5-6.

²⁶ *Ibid.*, Sefer Shoftim, Melakhim u’Milkhamot, 10:2.

²⁷ B.T., Sanhedrin 74a.

Yaffe argues that it is permitted for a non-Jew to kill another non-Jew in order to save his or her own life, as he understands the aforementioned *svara* to apply exclusively to Jews. In any event, the authors argue that both the *Parashat Derakhim* and the *Maharash Yaffe* agree that it is permitted for a non-Jew to kill another non-Jew who assists in committing a murder, even if one does so unwillingly. This is because the *svara* of “who is to say that your blood is redder” does not apply to those who assist the murderer.²⁸

- *Chapter Four: The Soul of the Jew Facing the Soul of the Non-Jew*

If the purpose of the previous chapter is to show that it is permitted for a non-Jew to kill another non-Jew in order to save himself or herself, this chapter deals with the case in which the life of a Jew is in danger and the only way to save it is by the killing of a non-Jew.²⁹ First, following the reasoning of the authors we can conclude that if, (1) for Jews, the prohibition against the killing of non-Jews derives from applying the principle of *likha midey* on the Noahide Laws (as the prohibition on murder in Exodus 20:13 is relevant only to the killing of Jews by Jews); and if (2) for a non-Jew, it is permitted to kill another non-Jew who assists in committing a murder in order to save himself or herself – it is clear that (3) it is permitted for a Jew to kill a non-Jew who assists in committing a murder in order to save himself or herself, since Jews have no further obligations regarding the killing of non-Jews. Indeed, the authors conclude unequivocally that

²⁸ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 88-139.

²⁹ Note that if one accepts the ruling of the *Maharash Yaffe* (i.e. it is permitted for a non-Jew to kill another non-Jew in order to save himself or herself from death), then it is obvious that it is permitted for a Jew to kill a non-Jew in order to save himself or herself, for the prohibition – for Jews – against killing non-Jews derives from the Noahide Laws, i.e. from the very same prohibition on murder for non-Jews. Thus, if it is permitted for a non-Jew to kill another non-Jew in this case, so it is permitted for a Jew to do so as well.

“the life of the *ger toshav* is inferior to the life of the Jew, thus it is permitted to kill a *ger toshav* in order to save a Jew.”³⁰

The authors provide supporting texts for this position from the Jerusalem Talmud, Rashi and Maimonides;³¹ all of which argue that the commandment of self-sacrifice is relevant only in cases in which the life of a Jew confronts the life of another Jew. In addition, they present Maimonides’ ruling that it is prohibited to desecrate the Sabbath for the life of a *ger toshav* (and therefore, for the life of any other non-Jew, as the *ger toshav* is the “highest” degree of a non-Jew).³² From this ruling they conclude that if it is permitted to desecrate the Sabbath for the life of a Jew while it is prohibited to desecrate the Sabbath for the life of the non-Jew—then the life of the Jew is superior to the life of the non-Jew, and thus, once again, they reason that it is permitted to kill a *ger toshav* in order to save the life of a Jew.³³

Towards the end of the fourth chapter, the authors present a comparison between the life of a non-Jew and the life of a (Jewish) fetus. According to the Mishna, in a case in which a fetus endangers the mother’s life, it is possible to abort it in order to save the mother’s life, since “her life comes before its life.” However, if most of the fetus has emerged, it is prohibited to abort it, since it is prohibited to “murder one soul [*nefesh*] for the sake of another.”³⁴ According to Rashi, this is because the fetus, before being born, is not considered to be “a soul” (*nefesh*), i.e., a person.³⁵ According to Maimonides, abortion is permitted because the fetus is a pursuer (*rodef*)

³⁰ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 161.

³¹ Y.T., Shabat 14:4, 77a; Rashi on Yoma 82b; Maimonides, *Mishne Torah*, Sefer Ha-Mada, Yesodei Ha-Torah 5:5,7.

³² Ibid, Sefer Zemanim, Shabbat, 2:12

³³ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 160-162.

³⁴ Mishna, Ohalot, 7:6.

³⁵ B.T., Sanhedrin, 72b.; This reasoning of Rashi leads the authors to argue further that according to him, “it is permitted to kill a fetus and to use it in order to produce a particular drug for patients.” Shapira and Elitzur, *Torat Ha-Melekh*, 1, 166.

that endangers the mother.³⁶ The authors argue that the life of a fetus, for which it is permitted to desecrate the Sabbath, is superior to the life of a non-Jew, for whom it is prohibited to desecrate the Sabbath. Thus, they conclude that if, according to both Rashi and Maimonides, it is permitted to save a Jewish life by the killing of a fetus, then it is permitted to do so by the killing of a non-Jew as well.³⁷ In their words:

We conclude that the life of a fetus is superior to the life of a non-Jew. ... For [saving] the life of a non-Jew, it is prohibited to desecrate the Sabbath. From this ruling it follows that his [the non-Jew's] life is not like the life of a Jew. Therefore, it is permitted exploit it for saving the life of a Jew. But a fetus – its life is so precious, so much that it is permitted to desecrate the Sabbath [in order to save it] – there is no permission to kill it to save others, only in a case in which its presence causes danger [to other lives].³⁸

- *Chapter Five: The Killing of Non-Jews During Times of War*

The authors argue that the first and most obvious justification for the killing of the enemy during war is the halakhic category of the “pursuer” (*rodef*), according to which one is commanded to prevent a person who wishes to murder another person by extreme means, even killing.³⁹ However, the authors argue, based on responsa by the Rivash (Rabbi Isaac ben Sheshet) and the *Akhi'ezer* (Rabbi Chaim Ozer Grodzinsky),⁴⁰ that the category of the pursuer applies also to a person who *indirectly* (*be-garma*) threatens to kill another person. Thus, they conclude that

a civilian who assists the combatants is considered to be a pursuer and it is permitted to kill him. A civilian who works in a factory for manufacturing arms and supplies arms for the military is no different than a soldier who serves in the Intelligence Corps and supplies information. Whoever helps the army of evil in any manner strengthens the murderers and is considered to be a pursuer.⁴¹

³⁶ *Mishneh Torah*, Sefer Nezikim, Rotzeach u'Shmirat Nefesh, 1:9.

³⁷ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 164-168.

³⁸ *Ibid.*, 167.

³⁹ Note that according to Maimonides, if it is possible to stop the murderer without killing him, it is prohibited to kill him. See *Mishneh Torah*, Sefer Nezikim, Rotzeach u'Shmirat Nefesh, 1:6-7. The authors do not elaborate on this view of Maimonides; indeed, this is one example of a possible inner-halakhic critique of the book (see below).

⁴⁰ Responsa of the Rivash, no. 138; *Akhi'ezer*, 1, no. 19:3.

⁴¹ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 184.

Moreover, the authors argue that even a civilian who supports and encourages the combatants “expresses satisfaction” (*korat ru'akh*) regarding their acts or “weakens us [the Jews] by speech.” This civilian is considered to be a pursuer and it is therefore permitted to kill him.⁴² In order to support this ruling, the authors quote the Maharal of Prague (Rabbi Judah Loew ben Bezalel) in his commentary on Numbers, where he writes: “Whoever causes our people to be faint-hearted while at war and causes them to run away from the war ... he was sentenced to death.”⁴³

The authors then argue that although it is prohibited to kill a pursuer once he ceased pursuing, “in cases in which there is a presumption that the pursuer will continue to be dangerous in the future, it is permitted to kill him – even if he is not actually pursuing.” Therefore, it is obvious to them that “whoever is in a position in which it is clear that he will pursue and endanger us in the future—there is no need to meticulously examine whether or not, in this very moment, he is actually supporting the persecution against us,” and thus it is permitted to kill him.⁴⁴

Moreover, relying on their discussion in the third and fourth chapters (recall the *Parashat Derakhim* and the Maharash Yaffe on the permission to kill those who assist the murderers), the authors rule that it is permitted to kill those who, while not actively helping the enemy army, are

⁴² Ibid., 185.

⁴³ *Gur Aryeh* on Parashat Mattot. In a footnote the authors add that from this reasoning follows also the permission to kill a soldier of our side who runs away from the battle.

⁴⁴ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 186-187. It is interesting to compare this ruling with the recent incident in Hebron in which an IDF soldier shot and killed a Palestinian terrorist while the latter was lying wounded on the ground. This incident received widespread media coverage in and outside of Israel. See, for example, Isabel Kershner, “Israeli Soldier Who Shot Wounded Palestinian Assailant Is Convicted” (*New York Times*, January 4, 2017).

passively “blocking the way” (*hosmei derekh*) – i.e., civilians who find themselves caught, *willingly or not*, in the battle zone:

And although the civilians were tied or imprisoned, and they have no choice rather than to stay in place and be hostages—it is permitted to run over them and to kill them if this is the way to be saved from the evil ... Young children are often in this situation: they block the rescue in their presence, and they do so unwillingly and unintentionally. Still, it is permitted to kill them as their presence assists the murdering.⁴⁵

In addition to these rulings, which are based on the category of the pursuer, the authors justify the permission of the killing of non-Jews by repeating their argument from the second chapter, which dealt with the killing of a non-Jew who transgresses the Noahide Laws. In a state of war, they argue, the ordinary peace-time restraints on such a killing are removed. They argue so on several grounds: First, in a state of war, there is certainty that the non-Jews who wage war against Jews transgress the Noahide prohibition on murder (from the very fact they wage war against Jews).⁴⁶ Second, the restraint which derives from the desire to avoid enmity is irrelevant in a state of war, where enmity already exists. Therefore, the authors conclude that although “usually we do not harm every non-Jew who transgresses the Noahide Laws around us ... when we are in war against them [the non-Jews] this is [their war against the Jews] a part of their overall evil and now we are sentencing them for it.”⁴⁷

The authors rely on their findings in the fourth chapter and conclude that in any event, since the life of the Jew is superior to the life of the non-Jew, “[t]here is a consensus among the halakhic sources (*le-kulei ‘alma*) that it is permitted to kill non-Jews in order to save the life of

⁴⁵ Ibid., 198.

⁴⁶ The authors argue that “in a state of war, the opposite is true, that there is a power that wants to kill us, and in any event the non-Jews in this place have an interest in killing us. Here it is not merely ‘concern’—rather at least most of them are to be perceived as potential pursuers who can endanger us.” Likewise, “it is hard to conceive [that there could be] a state of war with non-Jews who do not transgress the Noahide Law.” In other words, they assume that if a nation of non-Jews actually follows the Noahide Law, it would not wage war against Jews. Ibid., 191-192.

⁴⁷ Ibid., 193.

Jews ... It is permitted as well in cases in which we exploit the presence of innocent young children [and harm them] in order to harm their parents and so forth.”⁴⁸

- *Chapter six: The Deliberate Harming of Innocents*

As we already noticed in the fifth chapter, the authors approve the *deliberate* killing of innocents during a state of war:

There are situations in which we would want, deliberately, to harm specifically the innocents. Their presence and their killing are actually beneficial and helpful for us. For example: harming young children of the evil king’s family, though they are now innocent. Killing them helps us to hurt him so that he will stop fighting against us.⁴⁹

The authors’ focus on young children (*taf*) does not end there. Relying on Isaiah 14:21,⁵⁰ and on *Rabbeinu Bahya*’s (Rabbi Bahya ben Asher) commentary on Deuteronomy 20:10 (Bahya argues that the killing of young children in such an instance is considered to be “a minor harm so as to prevent a greater harm”), they conclude that “there is a *svara* for hurting young children if it is clear that they will grow up to harm us, and in such cases, we should aim our destruction specifically towards them.” Furthermore, they explain that those young children would actually benefit from this killing, since in any event they would have grown up in an “unrepaired way” (*be-tzurah lo metukenet*) that would ultimately require their killing. Therefore, they conclude, “it is better to kill them now.”⁵¹

The authors begin their discussion in the last chapter with the question of how a king or a government can obligate their own citizens to risk their lives and go to war on their behalf. From a variety of sources, they deduce that a centralized government with enough power to enforce its

⁴⁸ Ibid., 199.

⁴⁹ Ibid., 198.

⁵⁰ “Prepare a slaughtering block for his sons / Because of the guilt of their father. / Let them not arise to possess the earth! / Then the world’s face shall be covered with towns.”

⁵¹ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 205-207.

will is a “universal good” as it assures order, and that without such a government, the situation would be “distorted and unbearable.” In short, as long as we did not reach the end of days (in which there will be an eternal peace), a king or a government should, in some sense, be able to harm their own citizens in order to ensure the triumph of righteousness over evil.⁵²

From this, the authors deduce the following:

If it is permissible for the king to kill his own citizens for the sake of war [by forcing them to risk their life by fighting on his behalf] – the same reasoning applies as well to the citizens of the evil kingdom. In a war of righteousness against evil, we presume that eventually evil will harm us all if we let it raise its head, and the citizens of the evil kingdom will suffer from it as well.⁵³

In other words, this reasoning allows the authors to permit the killing of *any* citizen of “the evil kingdom,” regardless whether this citizen assists the murderers or supports the “evil” policies or even passively “blocks the way.” Again, the authors emphasize that this reasoning permits the deliberate killing of little children and those whom *they* call “complete innocents” (while of course, in this kind of reasoning, there are no genuine “innocents” at all). Therefore, “if harming the children of an evil king would put pressure on him that would prevent him from acting in evil ways, it is permitted to do so (even without considering the reasoning regarding the children’s own evil when they will grow up).”⁵⁴

The last part of the book deals with the act of vengeance. The authors claim that “in order to achieve victory over evil, we must behave with them [the evil-doers] according to the way of vengeance and of an eye for an eye.” This is because “vengeance is necessary to make evil unprofitable and to empower righteousness.”⁵⁵ They support their claim by citing a variety of biblical and rabbinic sources which emphasize the necessity of using ruthless vengeance when

⁵² Ibid., 208-215.

⁵³ Ibid., 215.

⁵⁴ Ibid.

⁵⁵ Ibid., 215-216.

dealing with a ruthless enemy, according to the principle of an eye for an eye. The authors do not forget to note that “the Arab enemy of these days is known for its cruel and savage acts.”⁵⁶

The authors close the book with a footnote which received much attention and played a central role in the Israeli police’s decision to arrest and question them. When they reflect on the biblical story of Dinah and the violent revenge which Simeon and Levi took against the people of Shechem, they conclude that “there is no need for a nation’s decision to allow the killing of the evil kingdom, and individuals from the victim kingdom are allowed to harm them.”⁵⁷ One need not be an expert on Jewish law in order to note that the practical effect of such statement is a call for vigilante actions on the part of Jews against Palestinian Arabs. Indeed, in the very last footnote of their book, Shapira and Elitzur do not leave room for any doubt regarding the practical outcome they hope their book will trigger.

II. The Halakhic Critique of *Torat Ha-Melekh*

In this part, I present a few examples of halakhic critiques of *Torat Ha-Melekh*. By a halakhic critique I mean an attempt to refute the arguments of the authors from within the halakhic system. That is, an attempt to argue that *Torat Ha-Melekh*’s conclusions are invalid due to some failure in the ruling process itself, in light of its inner logic. I am far from summarizing all possible arguments. The arguments I offer here are based on a book by Ariel Finkelstein of Yeshivat Ahavat Yisrael in Netivot, titled *Derekh Ha-Melekh: Giz'anut Ve-'Aflayat Goyim Ba-Halakha: Alternativa Hilkhait La-Sefer 'Torat Ha-Melekh'* (The King's Way: Racism and Discrimination of Gentiles in Halakha: A Halakhic and a Meta-Halakhic Alternative to the book

⁵⁶ See their discussion *ibid.*, 217-224. I elaborate on and challenge the authors' understanding of Maimonides below.

⁵⁷ *Ibid.*, 227.

“Torat Ha-Melekh”), that was published in 2010.⁵⁸ The book, as its title suggests, seeks to offer a halakhic and meta-halakhic alternative to *Torat Ha-Melekh*. Although Finkelstain presents a comprehensive halakhic and meta-halakhic critique which leads to some—in my mind, very persuasive—conclusions, I think his fundamental approach ultimately fails him, as I argue below.

- *Example I: The Value of the Life of the Non-Jew*

Recall the authors’ claim that it is permitted to kill a *ger toshav* in order to save a Jew, which derives from the ruling that it is prohibited to desecrate the Sabbath for saving the life of the *ger toshav*, while it is permitted to do so in order to save the life of a Jew. Finkelstain points out that the authors ignore rulings by Nahmanides, HaMeiri (Rabbi Menachem Meiri), and others, who do not agree that a Torah prohibition is superior to the life of a *ger toshav*. Regardless, Finkelstain also points out a logical failure in the authors’ ruling from the halakhic ruling that prohibits desecrating the Sabbath for saving the life of a non-Jew, a *passive* commandment. It does not follow that it is permitted to *actively* kill a non-Jew. Hence the authors’ argument is invalidated.⁵⁹ Furthermore, Finkelstain rejects the authors’ claims that the life of a fetus is superior to the life of a non-Jew. He rightfully reminds us that Rashi’s ruling regarding the fetus is based on his assertion that a fetus is not “a soul” (*nefesh*). While the fetus is not yet born, and thus is not considered to be “a soul,” it is clear that a non-Jew is considered by the halakhic sources to be “a soul,” i.e., a person, a human being. Similarly, Finkelstain argues that the ruling by Maimonides regarding the fetus as a *rodef* is specific to the case of a fetus that endangers its

⁵⁸ Ariel Finkelstain, *Derekh Ha-Melekh: Giz'anut Ve-'Aflayat Goyim Ba-Halakha: Alternativa Hilkhait La-Sefer 'Torat Ha-Melekh'* (Netivot: Yeshivat A'havat Yisrael, 2010).

⁵⁹ *Ibid.*, 129-130.

mother. Thus, he concludes that the authors' comparison between the two—the life of a fetus and the life of a non-Jew—is misplaced.⁶⁰

- *Example II: Relying on Biblical Commentary while Ruling Halakha*

While the previous example deals with different interpretations of classic halakhic rulings, Finkelstain pays attention to another problem in the authors' ruling process, especially in the last two chapters of *Torat Ha-Melekh* (which happen to be also the two most radical ones). Finkelstain points out that the authors base their halakhic rulings in those chapters on biblical and Midrashic stories, biblical apocalyptic prophecies and commentaries on the bible. That is to say, Shapira and Elitzur base their rulings there on sources which are not valid from a halakhic perspective.⁶¹

- *The Failure of the Halakhic Critique*

In an article titled "This is not Torat Ha-Melekh" (*lo zu torat ha-melekh*), Rabbi Shmuel Ariel of Yeshivat Otniel supports the claims made by Finkelstain and argues that the "severe contradiction which allegedly rises between the halakha and morality ... is a fictitious one, which results only from a very specific interpretation which is not necessary at all."⁶² However, even if one agrees with Ariel, I argue that a re-interpretation of Jewish sources in ways which do not contradict "morality" (at least in Ariel's understanding of the term) is not enough, for this kind of critique fails to support a decisive position against *Torat Ha-Melekh* and its conclusions.

⁶⁰ Ibid., 131-133.

⁶¹ Ibid., 139-140.

⁶² Shmuel Ariel, "Lo Zu Torat Ha-Melekh," Yeshivat Otniel Website, <http://www.otniel.org/show.asp?id=45739>.

First, one cannot deny the existence of ethnocentric, supremacist, and chauvinistic elements in Jewish tradition. While *Torat Ha-Melekh*'s interpretation is perhaps not a *necessary* one, it is a *possible* one: the very existence of the book proves this claim. In other words, a halakhic critique of *Torat Ha-Melekh* is able to offer merely *another possible reading* of Jewish sources. It cannot, however, formulate a decisive and definitive assertion against the more general assumptions which underlie the book. Thus, a halakhic critique of *Torat Ha-Melekh* would lead only to an endless halakhic debate over the “proper” (really, the “truer”) interpretation of Jewish sources. Second, the halakhic critique accepts the assumption that the appropriate way for conducting a halakhic discourse is solely through an examination of Jewish sources. Hence it views any “external” consideration—such as time, place, civic law, moral norms, etc.—as irrelevant to the halakhic system, which is considered to be closed in itself. In this way, it narrows the debate to the realm of Jewish tradition and rejects any possibility of “external” criticism.

To provide one example among many, Rabbi Yoel Katan, in his review of *Torat Ha-Melekh*, claims that the book “is a classical scholarly-halakhic book, which should be measured by scholarly-halakhic measures, for every *posek* [legal decider] knows that sometimes there is a difference between the essential-theoretical halakha and the halakha in practice, in which it is necessary to take into consideration other, external elements.”⁶³ At first glance, it seems that Katan supports my point. But what exactly does he mean by the “difference” between “theoretical halakha” and halakha in practice? Does he have criteria for when and how to consider “other, external elements”? And even if he has such criteria, the problem still stands:

⁶³ Yoel Katan, "Nit'kablu Ba-Ma'arekhet," *Ha-Ma'ayan* 51, no. 1.

For even if there is a difference between “theoretical” and “practical” halakha, *ideally*, according to Katan himself, there would be no such difference. Consider his words here:

The criteria for determining what is permitted and what is prohibited *within the limits of the current law*, and what is considered to be morally good and bad in our relations with our neighbors-enemies – better be influenced by the *shas* [Talmud] and Maimonides, the *Tur* and the *Shulkhan Arukh* ... than from the lying media⁶⁴ and the sages of the associations which get their support from the infamous New Israel Fund ... Should we censor our [Jewish] legal books and “appropriate” them to the contemporary Israeli law?⁶⁵

Indeed, Finkelstein himself admits that a merely halakhic critique of *Torat Ha-Melekh* not only “misses the main point,” but also affirms, even unconsciously, its authors’ presumptions. Thus, Finkelstein presents a meta-halakhic critique as well.

III. The Meta-Halakhic Critique of *Torat Ha-Melekh*

While the halakhic critique of *Torat Ha-Melekh* is clearly incapable of formulating a definite and decisive argument against the book’s conclusions, it seems that a meta-halakhic critique might achieve more success in doing so. By a meta-halakhic critique I mean an attempt to refute the authors’ arguments by arguing that they do not follow general attitudes and principles that derive from an examination of the halakha as a whole.⁶⁶ Put differently, it is to argue for the existence of halakhic principles that underlie particular rules, and that those principles are superior to any particular rule.⁶⁷

- *An Example of a Meta-Halakhic Critique*

⁶⁴ Katan uses the Israeli wordplay “*tishkoret*”.

⁶⁵ Katan, “Nit’kablu Ba-Ma’arekhet.” (Emphasis in original. I suspect Katan emphasizes these words in order to protect himself legally.)

⁶⁶ Thus, only attitudes and principles which are *inherent* to the halakha. “External” attitudes and principles should not be considered as meta-halakha.

⁶⁷ For a further discussion regarding the difference between rules and principles, see Ronald M. Dworkin, “The Model of Rules,” *The University of Chicago Law Review* 35, no. 1 (1967): especially 22-31.

In the appendix of the fourth chapter, the authors state that “regarding the killing of a non-Jew, we adopt the prohibition which is imposed on non-Jews, but this *svara* [*likha midey*] is external [to the halakha] ... In practice (*le’halakha*) the life of a non-Jew will be rejected [sacrificed] each time his killing would save a Jew.”⁶⁸ Recall that the prohibition (for Jews) on the killing of non-Jews is derived from the Noahide Laws, and from the *svara* of *likha midey*. As Finkelstain points out, according to Maimonides, Nahmanides and the *Chazon Ish* (Avraham Yeshaya Karelitz), the halakha understands the Noahide Laws as basic, universal, and “natural” principles for human morality. But for the authors of *Torat Ha-Melekh*, the halakha—or, more precisely, the Torah in general—should be viewed as a substitute (for Jews) of those universal principles. Consider the words of the authors here:

And behold, this simple *svara* [*likha midey*] is not simple whatsoever: who is to say that what is prohibited for a non-Jew is prohibited for a Jew as well? After all, Israel changed, received the Torah, and [therefore] how is it that simple that prohibitions for non-Jews would apply to Israel as well? Perhaps those prohibitions belong to those who are still in a lower degree [i.e., non-Jews]?⁶⁹

In contrast, Finkelstain argues that the Torah does not nullify or invalidate the Noahide Laws—or universal and natural moral principles—and replace them with its own laws. Rather, the laws of the Torah add an additional layer to these principles, which cannot be deduced by human intellect alone, as they are sacred and divine in origin.⁷⁰ A similar argument can be found in the writings of Rabbi Kook:

It is forbidden to let the fear of God thrust aside natural human morality, because this fear is then no longer pure. It is a sign of its purity that it helps the natural morality rooted in honest human nature reach higher rungs than those it would have attained without it. Were the fear of God taken

⁶⁸ Shapira and Elitzur, *Torat Ha-Melekh*, 1, 179.

⁶⁹ *Ibid.*, 40.

⁷⁰ See Finkelstain comprehensive and detailed discussion of the matter in *Derekh Ha-Melekh*, 19-47.

to imply that, without it, life would tend to be better ... and were it true that, as a result of it, this active power is diminished, then the fear of God would be baseless.⁷¹

To sum up, a meta-halakhic argument against *Torat Ha-Melekh* would argue that Jewish law should not be viewed as an alternative to “natural moral law,” but as an additional layer to it—an upper “floor” which is built over the “natural moral law” as a foundation, which helps the Jew to “reach higher rungs.”

- *The Failure of the Meta-Halakhic Critique*

Even beyond the obvious philosophical problem of defining the meaning of “universal” or “natural” moral law, I argue that the problem with such an argument is that, once again, it is not decisive enough. Against every “humanistic” source Finkelstain may quote, a contradictory source can be found. Indeed, the meta-halakhic critique of *Torat Ha-Melekh* suffers from the very same problem of the inner-halakhic critique. A meta-halakhic critique could be rejected rather easily by a knowledgeable and skillful student of Jewish tradition who simply chooses to emphasize different sources. For example, for Ishay Berg, a student at Yeshivat Od Yosef Chai, it is clear that “the Torah, from the Bible until later adjudicators, always regarded itself to be superior to any other world-view. The Torah never considered itself as a moral whim, but as an absolute standard of justice which knows what is right for all human beings.”⁷²

But even more importantly, both the halakhic and the meta-halakhic critiques fail for they miss the entire point: they both play into the hands of *Torat Ha-Melekh*'s authors by affirming their presumptions that not only ascribe a higher status to the laws of the Torah over “universal”

⁷¹ Abraham Isaac Kook, *Orot Ha-Kodesh : Asarah Ma'amarot Ve-Shiv'ah She'arim*, 2 ed. (Jerusalem: Mosad ha-Rav Kook, 1963-1964), III, 27; Translated and reprinted in Avi Sagi, "Natural Law and Halakha - a Critical Analysis," in *The Jewish Law Annual 13* (Harwood Academic Publishers, 2000), 194n134.

⁷² Ishay Berg, "Ma'aneh Le-Derekh Ha-Melekh," *Makor Rishon*, 12/31/2010.

or “natural” morality, but also view the halakhic system as an autonomous system of rules which is impervious in front of any “external” consideration.

IV. “Missing the Entire Point”: An Alternative Way of Dealing with *Torat Ha-Melekh*

- *A Rejection of Halakhic Formalism*

In her feminist critique of Orthodox responsa literature, Ronit Irshai defines legal formalism as “a school of thought that perceives the law as an autonomous system of rules and norms under which all that is expected of the judge is to engage in deductive reasoning independent of values, goals, or interpretive methods.”⁷³ It is clear that the authors of *Torat Ha-Melekh* perceive the halakhic legal system as a formalistic one, for their declared goal in writing the book is to reveal the “true” position of Jewish law. Indeed, in a collection of articles published in November 2010 by Yeshivat Od Yosef Chai, following the publication of *Torat Ha-Melekh*, it was argued that “the Torah is upright [*t’mina*] and clear [*p’shutah*] ... The Torah delivers the word and will of God to us as it is, sincerely, with no distortions and complications ... The Torah does not stand for my own judgment.”⁷⁴ This is a typical statement of a formalist view that understands the halakhic system as “a complete, closed system with internal rules of inference activated by an interpretive process having no connection to the outside reality; accordingly, the halakhic process is unaffected by any consideration of independent values.”⁷⁵

Here lies the very root of the problem with *Torat Ha-Melekh*. The authors’ repugnant discussion and horrifying conclusions are merely the outcome of a much larger issue: the understanding of the halakhic process as closed before every other consideration and subject to

⁷³ Ronit Irshai, *Fertility and Jewish Law: Feminist Perspectives on Orthodox Responsa Literature*, trans. Joel A. Linsider (Waltham, Massachusetts: Brandeis University Press, 2012), 12.

⁷⁴ Yosef Pal'i, ed. *Mishneh Torat Ha-Melekh* (Yitzhar, Lev Ha-Shomron: Od Yosef Chai, 2010), 9.

⁷⁵ Irshai, *Fertility and Jewish Law*, 13.

precedential rules (rather selectively chosen). Of course, if Shapira and Elitzur understand halakha to be “clear” or “simple,” then it also means that they conceive their interpretation and understanding of it as the only one possible. In other words, their halakhic formalism allows them to ascribe “certainty, stability, and especially authenticity to the halakhic system.”⁷⁶ Consider, for example, Rabbi Dov Lior and Ya’akov Yosef, who argue in a public statement that “the book *Torat Ha-Melekh* presents a well-organized doctrine [*mishnah s’durah*] regarding the appropriate actions required by the Torah in times of war, and regarding the true war-time code of ethics according to our holy Torah.”⁷⁷ Similarly, Ishay Berg, in a response to *Derekh Ha-Melekh*, accuses Finkelstein of predetermining the goal of his book. In Berg’s words:

The goal of *Derekh Ha-Melekh* is predetermined – the normalization of the attitude of the halakha toward non-Jews. There is some degree of coarseness [*gassut ha-ruakh*] in predetermining the results of the halakhic inquiry, while demonstrating complete distrust in the moral world of our first rabbis as angels. This goal probably blinded the author from seeing how the way toward it goes through ridiculous errors, falsifications, tendentious quotations, and plain lies.⁷⁸

Another example of the rejection of any “external” consideration for determining halakha can be found in a Hanukkah pamphlet which was published by Yeshivat Od Yosef Chai in November 2010, and defended *Torat Ha-Melekh* and its authors. The following appears under the headline “The Impure Concept of Purity of Arms”:

What is more appropriate than that the “Israel Defense Forces” [quotation marks in original] would act according to the Torah of Israel? Alas, reality is very far from this. ... Shamefully, the IDF operates under “Code of Ethics” and distorted rules of “purity of arms” which are all foreign to us. Frequently those strict rules of distorted “morality” are activated specifically against our soldiers. As a result, a large amount of Jewish blood is being spilled in vain! ... the attitude of Israeli security and judicial authorities—particularly regarding these matters—is disastrous, and it is the rabbis’ duty to express the opinion of the Torah (*da’at ha-torah*) and not to leave this defective reality as it is.⁷⁹

⁷⁶ Ibid.

⁷⁷ Pal'i, *Mishneh Torat Ha-Melekh*, 48.

⁷⁸ Berg, "Ma'aneh Le-Derekh Ha-Melekh," 4-5.

⁷⁹ Pal'i, *Mishneh Torat Ha-Melekh*, 16-17.

Indeed, the defenders of *Torat Ha-Melekh* emphasize over and over again the “neutrality” and the “authenticity” of their position. They insist that they simply read the Torah and deliver God’s word and will as they are—no presuppositions, no external considerations; they provide their readers with Jewish ethics in its most “authentic” version. By placing their contemporary experience—as Jewish settlers who are struggling with Israeli “secular” authorities and institutions as well as with “evil” Arab enemies—into the framework of Jewish tradition, Katan and the authors of *Torat Ha-Melekh* present themselves as perpetuating that tradition in the most authentic way.⁸⁰

However, once again following Irshai, I argue that a “closer examination [of halakhic discussions] demonstrates that halakhic rulings are guided by values and ideology that even dictate, sometimes from the outset, the rulings’ direction and content.”⁸¹

- *The Values and Ideology Behind Torat Ha-Melekh*

In the case of *Torat Ha-Melekh*, its halakhic rulings are guided by values and ideology that derive from a very specific form of neo-Hasidism, particularly as expressed by Rabbi Itzhak Ginsburgh and his radical interpretation of Chabad Hasidism. Tomer Persico notes that one of the main pillars of Ginsburgh’s teaching “is the renewed and rehabilitated connection with nature.” For Ginsburgh, in other words, the material world is the very essence of the divine. Nature, as the “uncultivated wild,” is considered to be spiritually fruitful, and it is the object of the believer’s ultimate desire.⁸²

⁸⁰ See Michael Marmor, “Why Jews Quote,” *Oral Tradition* 29, no. 1 (2014): 13-14.

⁸¹ Irshai, *Fertility and Jewish Law*, 13.

⁸² Persico, “Neo-Hasidic Revival,” 296.

By meeting “nature,” especially one’s “inner” or “wild” nature, one could meet God. Recall Ginsburgh’s justification of the Goldstein’s massacre: revenge is seen as a natural act. Revenge is seen by Ginsburgh as an act that connects one with one’s most inner self, that is, with one’s divine essence. For Ginsburgh, the highest form of religious experience is mystical ecstasy, which could be achieved through the connection with one’s divine essence that is with God. Ultimately, and perhaps also paradoxically, this religious experience of meeting one’s “inner” nature demands the nullification of one’s self, that is, the discarding of all the “daily intellectual, moral, and cultural stratum” of the self. Note that such an ideal is essentially nihilistic, for it conceives itself as the supreme goal of human life, which sanctifies all means and stands above any moral law.⁸³

To this theological worldview, Ginsburgh adds what Persico calls “a romantic flavor,” which is, to use Persico’s words,

heavily influenced by the logic of the German Romantic movement on the one hand, and the American Hippie sub-culture on the other ... Outer and inner nature is considered divine, whereas the human other is perceived as evil. The religious ideal thus becomes an inner connection with the (Jewish) divine nature, manifested outwardly as violence against the non-Jew. It is a romantic, Völkisch Neo-Hasidism.⁸⁴

Precisely because Ginsburgh does not consider all of “nature” to be equal—as the land of Israel and the Jewish people are for him “God’s material”—the road is short to ethnocentric and racist statements and halakhic rulings.⁸⁵ An expression of this view can be found in Berg’s response to Finkelstein, in which he suggests “a [Ginsburghian] Hasidic alternative to the meta-halakhic arguments” that Finkelstein prescribes in *Derekh Ha-Melekh*:

⁸³ Ibid., 297.

⁸⁴ Ibid., 299.

⁸⁵ Ibid., 298-299.

Hasidism [*ha-hassidut*] suggests a different narrative. The people of Israel experienced revelation and election. We believe in God who is above and beyond everything this world has to offer, with all its morality and spirituality. Hasidism teaches us that every Jew is blessed with a soul which is “truly a part of God above” [*The Tanya*, Likutei Amarim, Ch. 2] ... The Jewish soul is, in fact, the thrusting of the world into the absolute, into an entity with a validity of existence which cannot be compared with the fragile reality which we see before our eyes. This perception lies behind the ruling that the life of a Jew and the fulfillment of the commandments are superior to the life of a non-Jew in any situation.⁸⁶

Indeed, Berg lays out here, in his own words, the neo-Hasidic ideology of Rabbi Ginsburgh and of Yeshivat Od Yosef Chai in general. This is the meta-halakhic basis and the meta-halakhic assumptions—which are derived mostly from *The Tanya*—upon which the authors of *Torat Ha-Melekh* base their halakhic rulings. This is the prism through which they understand and interpret Jewish law.

Also important for my purpose here is the claim that Ginsburgh’s emphasis on “the return to nature” itself, both in its internal and external forms, is inspired by non-Jewish sources and cultural changes.⁸⁷ The contrast between Ginsburgh’s worldview and the classic halakhic worldview is even more striking once we recall that the classic halakhic ethos is one of overcoming nature—and not of “returning” to nature.⁸⁸

It is thus clear that the halakhic rulings of Shapira and Elitzur in *Torat Ha-Melekh* are guided by Ginsburgh’s ideology and values, which are no less “external” and “foreign” to the halakha than the IDF Code of Ethics or what Finkelstein understands to be “universal” or “natural” morality. Furthermore, I think that Persico is right in his assertion that Ginsburgh’s followers are “directed towards realizing the authenticity of their intimate selves by externalizing their most passionate feelings as religio-nationalist violence.” Here lies the importance of

⁸⁶ Berg, "Ma'aneh Le-Derekh Ha-Melekh."

⁸⁷ See Persico, "Neo-Hasidic Revival," 297. Regarding non-Jewish influence on Ginsburgh, see also Shlomo Fischer, "Self-Expression and Democracy in Radical Religious Zionist Ideology," (Ph.D. thesis, Hebrew University, Jerusalem, 2007).

⁸⁸ Persico, "Neo-Hasidic Revival," 296-297.

halakha for Ginsburgh and his students, as the halakhic boundaries “are the very standards and criteria that divide between Jew and Gentile, and thus lay the necessary ground for these passions and acts.”⁸⁹

I sought to challenge the very distinction between what is “external” and “internal” to halakha, for this distinction presumes halakhic formalism, i.e. the view that the halakhic legal system is closed within itself and impervious to any external influences.

- *The Alternative Way of Dealing with Torat Ha-Melekh*

An alternative way of dealing with *Torat Ha-Melekh* is expressed by Rabbi Iddo Fechter of Young Israel of Netanya, who argues that the struggle against the book should not be conducted solely from within the realm of Jewish sources. “As long as the debate stays within this arena,” Fechter argues, “we are missing the entire point. Once we passed the stumbling block of ‘the status of the non-Jew’ we will have to deal with the status of women, and afterwards with the stumbling block of organ transplantation.” Rather, he suggests that “Judaism’s true engagement with the challenges of modernity should principally deal with the deeper conception on which *Torat Ha-Melekh* is based, and with the general halakhic ruling system of our day.”⁹⁰

Torat Ha-Melekh and *Derekh Ha-Melekh* share the assumption that the approval of modern Western moral values—what Finkelstein understands as “natural moral law” and Rabbi Yaakov Yosef calls “the forged moral law”—⁹¹ should be derived from and conditioned by Jewish sources alone. In other words, both texts share the same narrow worldview according to which the halakha functions as the final and only arbitrator in determining ethical values. Recall

⁸⁹ Ibid., 302.

⁹⁰ Iddo Fechter, "Arkhei Ha-Musar Lo Z'kukim Le-Ishur," *Makor Rishon*, 12/31 2010.

⁹¹ Yaakov Yossef, "Lakhzor La-Musar Ha-Yehudi," Yeshivat Od Yosef Chai Website, <http://www.odyosefchai.org.il/TextHome/TextInfo/372>.

that while Finkelstein approves “natural moral law” and argues that the Torah constitutes a “higher level” of morality, he learns this view from the Jewish sources themselves. Thus, what Finkelstein calls “natural moral law” is perhaps not so “natural.” Instead, it appears that he justifies and legitimizes his position by an appeal to Jewish sources. Again, Rabbi Iddo Fechter has a different view:

We have no need for any sources to justify natural moral law for us. We do not need to prove to the authors of *Torat Ha-Melekh* that they deviate from the intention of the Torah. Natural moral law or common sense, or whatever we call it, obligates us by its own virtue, and any deviation from it is not an expression of a deviation from the legitimate halakhic discussion, but an expression of a deviation from life.⁹²

The failure of *Derekh Ha-Melekh* lies, therefore, not in its halakhic or meta-halakhic critique of *Torat Ha-Melekh*. Rather, its failure lies in its apologetic attempt to undermine *Torat Ha-Melekh*'s conclusions from within Jewish tradition. Such an attempt presumes halakhic formalism and the possibility of distinguishing between what is “internal” and “external” to halakha, while giving superiority to the former over the latter. Finkelstein's attempt is a paradoxical one where he tries to prove that Jewish law does not contradict “natural moral law” from within Jewish law—for example, by relying exclusively on Jewish sources. In other words, while he shares the view of Shapira and Elitzur regarding the superiority of Jewish law over “natural moral law,” he tries apologetically to legitimate “natural moral law” as the “lower level” of Jewish law. Furthermore, it is an attempt that shares *Torat He-Melekh*'s view regarding the monolithic nature of halakha, for it seeks to reveal the one “true” attitude of halakhic sources towards non-Jews.

Every student of Jewish tradition who possesses the most basic intellectual integrity would admit that large parts of it are problematic from a modern or Western moral perspective:

⁹² Fechter, "Arkhei Ha-Musar Lo Z'kukim Le-Ishur."

chauvinism, racism, calls for murder, vengeance, and even genocide can all be found in the ancient texts. It should not surprise us, however, for this tradition's canonical and other main texts were written hundreds and even thousands of years ago in an entirely different world and era, in which laws, ethical norms, and the geopolitical status of the Jewish people all differed sharply from our days. Obviously, there are different elements—which some may consider as more “positive”—within this tradition as well. My point is simply that, as Louis Newman argues, “some voices within the tradition openly contradict others.”⁹³

Given the mixed elements in every tradition, the issue is why different scholars select and emphasize different elements while ignoring or rejecting others. Sometimes, perhaps more often than not, different interpretations of the very same source contradict one another. There are all sorts of precedents of almost every type. There is no escape from facing the fact that historical, sociological, cultural, philosophical, psychological and other explanations are required to account for which factors lead one to select one or the other, or to interpret in a certain way. As Michael Marmor argues, Jews have always quoted, and those “seeking to articulate various Jewish responses to modernity quote different sources.”⁹⁴ In other words, halakhic interpretation is always creative, for the text is open to several meanings. The gates of interpretation are indeed not locked before us.

Thus, any sincere and genuine attempt to argue against *Torat Ha-Melekh* and the like, however scholarly and learned, must, in the final analysis, confront the problematic elements that lurk within Jewish tradition, rather than merely quote the “positive” elements that suit and support its goal. For, as Newman sharply observes, the very existence of such controversies within the tradition invalidates the entire endeavor to arrive at some conclusive and definite

⁹³ Louis E. Newman, "Ethics as Law, Law as Religion: Reflections on the Problem of Law and Ethics in Judaism," *Shofar: An Interdisciplinary Journal of Jewish Studies* 9, no. 1 (1990): 20.

⁹⁴ Marmor, "Why Jews Quote," 12.

answers. He writes, “The fact is that ... the sources are simply ambiguous. The problem is not just that different texts say contradictory things. Many sources do not say any one thing clearly.”⁹⁵

Moreover, as Marmor reminds us, “[t]o quote is to quote out of context, and thereby to corrupt an aspect of the original source.”⁹⁶ We should not rely solely on sources—whether they are, from our perspective, “positive” or “negative”—if only because those sources were written in and for a different context. In Jewish tradition, there are simply no precedents and thus no answers for many contemporary questions, including ethical ones. Hence any attempt to answer contemporary questions solely by quoting from tradition would bring about “boundless possibilities of misprision.”⁹⁷

Thus, in order to be able to have its own steady moral stand, a critique of *Torat Ha-Melekh* should transcend Jewish tradition and seek support elsewhere. To cite Fechter once again:

In order to engage with phenomena like *Torat Ha-Melekh* we have to introduce to our consciousness the ability to innovate [Jewish tradition]. *There is an inherent holiness in modern values ... thus, very carefully and with great God-fearing awareness (yirat sha'mayim) there is an obligation to integrate them into the halakhic ruling.* Even though such a ruling would not rely on explicit [Jewish] sources, certainly it would be possible to mark it as the continuation of the enterprise of the sages, as extra-halakhic considerations influenced and shaped their Torah. This is the King's way.⁹⁸

Fechter suggests that the appropriate way of dealing with such sources is to continue the legal legacy of rabbis such as HaMeiri and Haim Hirschensohn, who introduced extra-halakhic

⁹⁵ Newman, “Ethics as Law: Law as Religion,” 20-21.

⁹⁶ *Ibid.*, 20.

⁹⁷ *Ibid.*

⁹⁸ Fechter, “Arkhei Ha-Musar Lo Z'kukim Le-Ishur.” (my emphasis)

considerations into their halakhic rulings.⁹⁹ HaMeiri, for example, is known for asserting that the non-Jews to whom traditional Jewish sources refer are “ancient nations” of idolaters who were “not restricted by the ways of religions,” and therefore should not to be identified with contemporary non-Jews.¹⁰⁰ It is not the purpose of this paper to offer an analysis or interpretation for HaMeiri’s line of thought, but it is sufficient to state that if one would seek the specific Jewish sources HaMeiri relies upon in this ruling, one would find no such sources. For HaMeiri’s true “source” here is a “common sense and a sober-minded”¹⁰¹ view of the teachings of the sages, as well as of the environment, culture and society in which he had lived and for which he had issued halakha.

In other words, and this is my final point, we should recognize the potential conflict between halakha and ethics, and that both need to be taken seriously by contemporary halakhic discourse. This means, first of all, recognizing that a conflict between “ethics” (however broadly defined and understood) and halakha indeed sometime occurs. Second, it means conceiving halakha as by no means superior to ethics. In other words, this is a rejection of the assumption Finkelstein shares with Shapira and Elitzur, namely that halakha is the “upper level” of “universal” ethics. Third, as a result of the previous two points, one must acknowledge that there is room for “extra-halakhic,” i.e., ethical considerations in halakhic decision-making.

⁹⁹ For a discussion and analysis of Hirschensohn’s position see David Ellenson, “Rabbi Haim Hirschensohn: An Orthodox Rabbi Responds to the Balfour Declaration,” *American Jewish History* 101, no. 3 (2017): 247-69. Originally delivered as the Robert and Florence Derben Lecture on Jewish Law, co-sponsored by the Harvard Center for Jewish Studies and the Julius Rabinowitz Program on Jewish and Israeli Law at Harvard Law School on September 19, 2016.

¹⁰⁰ The Meiri, *Beit Ha-Bekhirah*, Avodah Zarah 26a. It is noteworthy that Torat Ha-Melekh presents the Meiri’s ruling, but immediately reject its relevancy for times of war. See Shapira and Elitzur, *Torat Ha-Melekh*, 1, 189-191; Rabbi Yisrael Ariel presents another way to bypass HaMeiri's ruling: he argues that this ruling should be understood as self-censorship by HaMeiri himself, who feared from Christian persecution. See Yisrael Ariel, “Mikhtav Be-Inyan Ha-Sefer Torat Ha-Melekh,” Yeshivat Od Yosef Chai Website, <http://www.odyosefchai.org.il/TextHome/TextInfo/427>.

¹⁰¹ Fechter, “Arkhei Ha-Musar Lo Z’kukim Le-Ishur.”

A modern Orthodox attempt in moving in this direction was made, for instance, by Rabbi Aharon Lichtenstein. Lichtenstein argues that what we may understand as “natural morality” lies at the root of several principles of Jewish tradition. Unlike Elitzur, Shapira, Ginsburgh, and their students, Lichtenstein argues that the halakhic system itself recognizes the existence of an independent set of moral values (not laws) outside of it and by no means inferior to it, to which he calls “natural morality.”¹⁰² Indeed, through this very set of independent moral values, the halakha itself has been traditionally understood, explained, and interpreted by rabbis from Talmudic times onward. For example, Lichtenstein argues that “it makes no sense to say, with Abaye, that “the whole of the Torah ... is for the purpose of promoting peace,” unless the ethical value of peace can be taken for granted.”¹⁰³ Lichtenstein goes even further than this in his rejection of halakhic formalism as he argues that it is “both palpably naive and patently wrong” to conceive the halakha as an all-embracing system which resolves every moral dilemma; rather, “there are moments when one must seek independent counsels.”¹⁰⁴ Lichtenstein justifies this assertion by using the halakhic concept of *lefanim mi-shurat ha-din* (beyond the line of the law), which complements the objective rigid halakhic *laws* with its contextual or situational approach. In other words, for Lichtenstein, the halakha itself demands that the legislator transcend its own legislative system. By using the concept of *lefanim mi-shurat ha-din* as a contextualizing concept, Lichtenstein in fact argues for a contextualizing aspect or quality in the halakha itself, which rejects its understanding as a formalistic, closed system of law.¹⁰⁵ Rather, to use Newman’s term, it testifies for the existence of “extra-legal” morality inherent to Jewish law.¹⁰⁶

¹⁰² Aharon Lichtenstein, “Does Jewish Tradition Recognize an Ethic Independent of Halakha?,” *Modern Jewish Ethics*, 1975, 62–88.

¹⁰³ *Ibid.*, 64.

¹⁰⁴ *Ibid.*, 68.

¹⁰⁵ *Ibid.*, 70, 77–80.

¹⁰⁶ Newman, “Ethics as Law, Law as Religion,” 16.

Yet a different, perhaps more radical, approach can be found in the writings of David Hartman, who emphasizes the role of human moral autonomy in any halakhic interpretation and discussion.¹⁰⁷ As David Ellenson points out, Hartman “does not apologize for maintaining that rabbinic Judaism countenances the notion that an autonomous human moral sense can play a legitimate and seminal role in covenantal Judaism.”¹⁰⁸ Hartman’s understanding of a morally autonomous religious self allows, first and foremost, interpretation of the text in multiple ways, and therefore allows for pluralism. That is, there is no one “true” way to understand halakha and halakhic sources; halakhic discussion is not deductive syllogism, and “decision-making in a legal system is not a mechanical process.”¹⁰⁹ This leads to a second conclusion, namely, the obligation of the decision-maker to consider and appreciate “the particularity of different situations and historical contexts.”¹¹⁰ In other words, it is the decision-maker’s duty “to bring broader social and moral considerations to bear on the issue at hand.”¹¹¹

Yet another similar approach toward halakhic interpretation can be found in the Conservative movement’s responsum titled “The Status of Non-Jews in Jewish Law and Lore Today.” This responsum was written by Rabbi Reuven Hammer and was unanimously approved by the Committee on Jewish Law and Standards of the Rabbinical Assembly in April 2016. The document admits that “there are passages in rabbinic literature, kabbalah and medieval philosophical works that depict Gentiles in negative terms, as inferior to Jews and sometimes even as less than human.”¹¹² To be sure, in this detailed responsum, which stretches over more

¹⁰⁷ See especially Hartman’s “Judaism as an Interpretive Tradition” in his *A Heart of Many Rooms: Celebrating the Many Voices within Judaism* (Woodstock, VT: Jewish Lights Publishing, 1999), 3-37.

¹⁰⁸ David Ellenson, *After Emancipation: Jewish Religious Responses to Modernity* (Cincinnati: Hebrew Union College Press, 2004), 505.

¹⁰⁹ Hartman, *A Heart of Many Rooms*, 99.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, 16.

¹¹² Reuven Hammer, “The Status of Non-Jews in Jewish Law and Lore Today (Hm 359.1.2016),” in *Hoshen Mishpat: Robbery and Extortion*, ed. Committee on Jewish Law and Standards (2016), 1. The responsum can

than two dozen pages, the Committee does rely on Jewish sources in formulating its critique against *Torat Ha-Melekh* and the like. For example, it shows and argues that “[t]he Torah’s attitude toward non-Israelites is overwhelmingly positive and is based on the concept that all human beings are created in the image of the Divine.”¹¹³ This notion of human equality taught by the Torah provides the foundation for rabbinic Judaism’s attitude toward humanity, hence “[t]here are numerous rabbinic sayings (as well as halakhic decisions) advocating fair and just treatment of non-Jews and making no differentiation between Jews and Gentiles based on race or nationality.”¹¹⁴ Moreover, against the rulings of *Torat Ha-Melekh*, the Conservative rabbis conclude that there is no distinction between Jews and non-Jews regarding the prohibition against murder.¹¹⁵ The Conservative responsum refers directly to *Torat Ha-Melekh* and argues that the book “cites many of the discriminatory sources ... but largely ignores the fact that these were confined to idolaters or negated for [other] reasons.”¹¹⁶ “These beliefs,” it argues further, “are clearly based on teachings from the Zohar and the Tanya, which in turn were influenced by earlier sayings ... while ignoring the myriad other teachings that emphasize the equality of all human beings and require fair treatment of the non-Jew.”¹¹⁷

Notwithstanding these halakhic and meta-halakhic critiques, I think that the real value of the Conservative responsum lies elsewhere. It lies precisely in the uncompromising ethical stance of the Conservative rabbis. In the very few first pages of this document we read:

If we are not to descend to the level of simple apologetics, it will be necessary to deal honestly with the sources, to admit that different attitudes existed over the course of the development of Judaism and to candidly criticize and reject certain parts of the tradition while embracing others

be found in <http://www.rabbinicalassembly.org/sites/default/files/public/halakhah/teshuvot/2011-2020/Hammer%20Teshuvah%20Final.pdf>

¹¹³ Ibid., 3.

¹¹⁴ Ibid., 7-8.

¹¹⁵ Ibid., 14.

¹¹⁶ Ibid., 22.

¹¹⁷ Ibid., 23.

as representing the Judaism we wish to promulgate and which we believe represent the true core of Jewish belief beginning with the Torah itself. Our movement is uniquely qualified to understand that both laws and concepts change in accord with differing times and conditions and that not everything said and taught in the name of Judaism need be defended. Indeed it is our responsibility to define what is appropriate for us in our time basing it upon those teachings within the tradition that represent the highest ideals of Judaism.”¹¹⁸

In other words, Hammer and the rest of the Committee examine the vast and contradictory halakhic materials and then seek to issue a legal decision that consciously emphasizes the beliefs *they* wish to encourage over those *they* oppose. Although they are right to assert that Conservative Judaism is “uniquely qualified” to understand the change in Jewish tradition, the examples shown above—Fechter, Lichtenstein, and Hartman—prove that similar approaches exist in modern Orthodoxy as well.

These approaches—Fechter’s, Lichtenstein’s, Hartman’s, and Hammer’s—provide us, on different levels, with ways to overcome the tension between “natural moral law” or “ethics” and Jewish law. Newman suggests that the religious character of Judaism necessarily blurs the lines separating between the two.¹¹⁹ This is because insofar as the halakha is conceived not merely as having a social function, but a religious one as well, it seeks the cultivation of certain godlike moral qualities in human beings. Therefore, Newman argues, the halakha is an “open-ended” moral system: “Israel’s moral obligations are potentially limitless, for ultimately they are required to seek moral perfection through a process of *imitatio Dei*.”¹²⁰ In other words, what Newman—together with the aforementioned positions of Fechter, Lichtenstein, Hartman, and Hammer—seems to argue is that in some sense, halakha—or more precisely, Judaism as “a religious system,” as Newman terms it—really acknowledges, indeed *includes*, different spheres of ethics. By this, Newman means “all ethics are in a certain sense, ‘of a piece,’ all encompassed

¹¹⁸ Ibid., 2.

¹¹⁹ Newman, “Ethics as Law, Law as Religion,” 27.

¹²⁰ Ibid, 26.

within God's revelation to Israel."¹²¹ To put it in Fechter's words once again, "there is an inherent holiness in modern values." Precisely because "Israel's moral obligations are potentially limitless," halakha must be complemented by "extra-halakhic" ethics that should be understood as no less divine. Unlike the meta-halakhic critique of *Torat Ha-Melekh*, this view does not argue for the superiority of halakhic law, or even Jewish tradition, over other "spheres of ethics." Rather, it insists that the boundaries between spheres of ethics are fluid. This fluidity of the boundaries, I argue, is precisely what previous critics of *Torat Ha-Melekh* have failed to acknowledge, and what the aforementioned approaches in this section provide us with.

In this paper, I sought to argue that any halakhic discussion that seals itself off from what it views as an "external" influence and conceives Jewish law to be monolithic presents itself as the sole representor of God's word in its truest form and acts in an irresponsible and reckless way that can lead to radical and morally problematic conclusions. *Torat Ha-Melekh* functions merely as one possible example for this assertion. "There is not a nefarious deed," wrote Mordecai Kaplan in a spirit akin to Halbertal's comment with which I opened this essay, "which has not used religion as a cloak or a banner. Yet even the most militant opponent of religion must admit that, if religion has been thus used, it is not due to anything inherently evil in religion, but rather to human perversity which is capable of corrupting the finest products of human soul."¹²² Indeed, it is not "Jewish tradition"—or any other tradition, religion, or culture, for that matter—that is "nefarious," "monstrous," or racist. These attributes can be ascribed only to people, to human beings, who use tradition as a seal of approval for their own viciousness and perversity.

¹²¹ Ibid, 27.

¹²² Mordecai Menahem Kaplan, *Judaism as a Civilization: Toward a Reconstruction of American-Jewish Life* (New York: The Macmillan Company, 1934; repr., New York: Schocken Books, 1967), 236.