Critical Philosophy of *Halakha* (Jewish Law): The Justification of *Halakhic* Norms and

Authority

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ABSTRACT

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Authority

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Contemporary conflicts over such issues as abortion, same-sex marriage, circumcision, and

veiling highlight the need for renewed reflection on the justification of religious norms and

authority. While abstract investigation of these questions is necessary, inquiry into them is not

foreign to religious traditions. Philosophical engagement with these traditions of inquiry is both

intellectually and practically advantageous. This does not demand, however, that these

discussions be conducted within a discourse wholly internal to a particular religious tradition;

dialogue between a religious tradition and philosophical reflection can be created that is mutually

beneficial. To that end, this dissertation explores a central issue in philosophy of halakha (Jewish

law): the relation between the justification of halakhic norms and halakhic-legal practice.

A central component of philosophy of halakha is the project of *ta'amei ha-mitzvot* (the

reasons for the commandments). Through such inquiry, Jewish thinkers attempt to demonstrate

the rationality of Jewish religious practice by offering reasons for halakhic norms. At its best, it

not only seeks to justify halakhic norms but also elicits sustained reflection on issues in moral

philosophy, including justification and normativity. Still, there is a tendency among its

practitioners to attempt to separate this project from halakhic-legal practice. Legal practice is

thus isolated from philosophical reflection, and the reasons for the norms do not guide their

application. *Ta'amei ha-mitzvot* therefore also provokes queries in legal philosophy concerning

the relation between normative and legal justification.

This study explores the relation between the justification of halakhic norms and halakhic-legal practice in modern Jewish thought by placing it into dialogue with both moral and legal philosophy. This occurs in two stages: First, the philosophies of halakha of three influential twentieth-century Jewish thinkers, Yeshayahu Leibowitz (1903-1994), Joseph Soloveitchik (1903-1993), and Eliezer Berkovits (1908-1992) are examined and critically assessed. It is shown that despite the denials of Leibowitz and Soloveitchik, all their accounts of the reasons for the commandments influence their approaches to halakhic-legal practice; they each combine a foundationalist approach to justification with skepticism about the practical normativity of reason; and none of them adequately grounds halakhic-legal authority. However, their skepticism is based on unduly constricted conceptions of reason and untenable alternative sources of normativity, such as will, metaphysics, or revelation.

Second, through engagements with the work of Jürgen Habermas and Joseph Raz an alternative to their accounts of the justification of halakhic norms and authority is developed. This alternative is described as critical philosophy of halakha, for it does not attempt to justify halakhic norms or authority but articulates the rational *constraints* on, and practical *consequences* of, their justification. In terms of justification, this account is contextualist, that is, pragmatic and intersubjective, rather than foundationalist, and it is responsive to failures of justification. Correspondingly, it entails pluralism yet avoids moral and epistemic relativism. In terms of authority, this account is instrumentalist and thus mediates between normative and legal justification without reducing the latter to the former. Consequently, authority is circumscribed as opposed to total. Critical philosophy of halakha therefore represents a method whereby the modern religious believer may hold herself accountable to both her faith and other individuals.

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By this point it has become a platitude that no intellectual work is the product of a single author. We are all so dependent on so many others that—for better or worse—they are all implicated in our work. Still, I thought that the process of writing a dissertation would leave me full of a sense of my own accomplishment. However, upon completion of this study I am left with a sense of dependence—intellectually, emotionally, and even physically—on so many others and hence the gratitude that I owe them. It thus remains for me to let them off the hook by formally taking responsibility for it, while simultaneously acknowledging my debts to them.

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provided a vital early model for me of the possibility of pursuing an academic career and was also there for the very last grammar question. My parents-in-law, Ruthy and Steven Rosenberg, never for a moment questioned why their daughter's husband might devote himself to such an unusual goal, which certainly helped me to cope with my own doubts.

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INTRODUCTION

I. Social Conflict and Philosophy: The Justification of Norms and Judaism

Debates in the United States and beyond over circumcision, veiling, abortion, and same-sex marriage highlight the need for renewed reflection on the justification of religious norms and authority. On the one hand, religious communities engage in political activism to enshrine the prohibitions of their respective religions, whether concerning abortion or homosexuality, into law. The religious community asserts a claim to universality for its norms; they are applicable to everyone and should be enforced by the state. In such cases, the justification of religious norms and authority is clearly relevant. In demanding that their religious norms be imposed on others, religious believers expose themselves to the challenges of other citizens for the justifications for those norms and the authorities that command them. The role of religious reasons in the political debate of ostensibly secular nation-states has been the subject of intense discussion in political theory and philosophy of religion, drawing in some of the luminaries of twentieth-century philosophy, including *inter alia* John Rawls, Richard Rorty, and Jürgen Habermas.[1]

On the other hand, in cases involving circumcision or veiling, religious communities demand the right to abide by their traditions' norms in the face of opposition motivated, at least purportedly, by moral concerns. The religious community asserts a claim to legitimate particularity. It does not demand that everyone be circumcised or don the veil; it only asserts the right to abide by its religious norms without interference. Still, if there is a moral challenge to

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[1] See for example John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005); Richard Rorty, "Religion as a Conversation-Stopper," in *Philosophy and Social Hope* (London: Penguin, 2000), 168–74; Richard Rorty, "Religion in the Public Square: A Reconsideration," *Journal of Religious Ethics* 31, no. 1 (Spring 2003): 141–49; Jürgen Habermas, *Between Naturalism and Religion: Philosophical Essays*, trans. Ciaran Cronin (Cambridge UK & Malden MA: Polity, 2008), 114–148, henceforth *BNR*; and Eduardo Mendieta and Jonathan VanAntwerpen, eds., *The Power of Religion in the Public Sphere* (New York: Columbia University Press, 2011).

subjecting a child to irreversible and medically unnecessary surgery or maintaining a culture in which women cannot show their faces in public, then it seems that these religious norms and the authorities that command them must be justified even for religious believers themselves.

A. Philosophical Investigation and Religious Traditions

While abstract philosophical investigation of these questions is necessary, it has its weaknesses. First, due to the disciplinary history of philosophy of religion, it is likely that a particular conception of religion, focused on individual belief and neglectful of the centrality of law and practice in other religions, will determine the contours of the investigation. Under such conditions, philosophy's claim to universality is merely disguised parochialism. Second, such abstract analysis, removed from the concrete concerns and thick language of religious traditions, is likely to have limited effect on the practices of religious communities. But if philosophical investigation is to help resolve the social conflicts from which it emerges, then it must find a way to speak to the parties to the social conflicts. Fortunately, inquiry into the justification of religious norms and authority is not alien to religious traditions themselves. Such inquiry represents a foothold for advancement on these philosophical issues and towards resolution of these social conflicts.[2]

This does not demand, however, that these discussions be conducted within a discourse wholly internal to a particular tradition as communitarians may claim.[3] Dialogue between a

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[2] Focused squarely on the role of religious reasons in public debate, Jeffrey Stout touts the role of immanent criticism and expressive rationality in working towards a resolution of these social conflicts. See *Democracy and Tradition* (Princeton: Princeton University Press, 2004), 73–91. While inspired by his work, this study takes a different approach both by examining Judaism's resources for resolving these questions and in endorsing an approach to justification derived from Jürgen Habermas rather than Robert Brandom. This latter difference has significant implications for the constraints on justifications that can be offered for religious norms. See Chapter 5 for a brief discussion of these differences.

[3] See Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1989). For similar arguments in the Jewish context, see Daniel Rynhold, *Two Models of Jewish Philosophy: Justifying*

religious tradition and philosophical reflection may be created in which both are mutually enriched. The religious tradition gains in two ways: by having its claims granted a fair hearing by those outside of it and by being held accountable to the internal logic of those claims. Though difficult and requiring the subjection of closely held beliefs to criticism, the latter should be considered a benefit. Accountability to the consequences of a claim is a hallmark of authentic commitment to it. Philosophy, for its part, gains by the input of new perspectives, which renders it less parochial and redeems its claim to universality. Further, answers that arise from such dialogues are more likely to resolve the social conflicts from which these questions emerge because they attempt to speak the language of the participants instead of simply presenting them with philosophical or religious dicta.

B. Judaism as Party to Social Conflict and as Partner for Dialogue

Judaism is an attractive candidate for such dialogue with philosophy: it is a party to these social conflicts; it offers a unique perspective on some of the underlying issues; and it has a robust tradition of inquiry into the justification of its religious norms and authority.[4] The most high-profile cases of Jewish involvement in such social conflicts are a ballot initiative in San Francisco and a judicial ruling in Germany to prohibit circumcision.[5] In opposing them, the Jewish community asserts a claim to legitimate particularity. Conversely, organs of the Jewish community have engaged in political activism against the recognition of same-sex marriage.

One's Practices (Oxford UK & New York: Oxford University Press, 2005) though he does not draw these conclusions.

[4] I use the phrase "tradition of inquiry" to describe an intellectual tradition focused on specific issues and confronting particular problematics. I draw this notion from MacIntyre's _Whose Justice? Which Rationality?_. However, as will be indicated in Chapter 5, I reject his contextualist conclusions about these types of inquiries.

[5] For the text of the proposed ban, see "San Francisco Male Genital Mutilation Bill," accessed October 18, 2013, www.sfmgmbill.org. For information about the German ruling, see Nicholas Kulish, "German Ruling Against Circumcising Boys Draws Criticism," _The New York Times_, June 26, 2012, sec. A.

They thereby claim universal scope for at least some Jewish religious norms. For example, in a statement in response to the Supreme Court ruling declaring the Defense of Marriage Act unconstitutional the Union of Orthodox Jewish Congregations of America (OU) issued a statement in which it declared that "we believe that our Divine system of law…represents a system of universal morality, and therefore can stake a claim in the national discourse."[6] The OU does not merely claim the right of the Jewish community to abide by its sexual norms but asserts that they possess universal validity; they are valid for and binding upon everyone. These instances capture attention beyond the Jewish community because of their relation to political power. But debates about the justification of Jewish religious norms and authority rage within the community as well. Gender and bioethical issues are significant sites of contention, for they express the tension between the norms of the Jewish tradition, on the one hand, and moral claims and scientific facts, on the other. The question of the justification of religious norms and authority is thus of importance for Judaism because of its relation with those outside of it and because of its internal debates.

Judaism has a robust tradition of inquiry into questions concerning the justification of its norms and authority. This tradition is a feature of Jewish thought's tendency to focus on issues of practical concern. While Judaism never lacked for reflection on theological or metaphysical questions, Steven Schwarzschild has aptly noted that it tends to give them a practical twist.[7] Questions about God or being become queries about human action. Jewish thought thus contains a corrective to philosophy of religion's tendency to focus on issues of belief. Additionally,

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[6] OU Public Relations, "Orthodox Union Statement on Supreme Court's DOMA Ruling," June 26, 2013, http://advocacy.ou.org/2013/orthodox-union-statement-on-todays-supreme-court-rulings/.

[7] See Steven S. Schwarzschild, "An Agenda for Jewish Philosophy in the 1980s," in *Studies in Jewish Philosophy: Collected Essays of the Academy for Jewish Philosophy, 1980-1985*, ed. Norbert M. Samuelson (Lanham: University Press of America, 1987), 101–25.

though often a subject of criticism, Judaism's uneasy combination of chosenness with monotheism offers a promising schema for reflecting on the relation between particularism and universalism in the justification of religious norms.

Judaism probes questions concerning the justification of its norms and authority in what has recently been termed the philosophy of halakha (Jewish law).[8] While this area of inquiry comprises a number of related questions, two areas are significant for the purposes of this study: *ta'amei ha-mitzvot* (the reasons for the commandments) and theory of halakha. Through the former effort, Jewish thinkers attempt to demonstrate the rationality of Jewish religious practice by offering reasons for its norms. At its best, it not only seeks to justify halakhic norms but also elicits sustained reflection on issues in moral philosophy. Moreover, it inevitably draws its participants into reflection on the relation between universalism and particularism in Jewish practice. In justifying the commandments Jewish thinkers attempt to explain, on the one hand, why it is rational to practice them, but, on the other hand, why only Jews are bound by them. Theory of halakha is centrally concerned with conceptualization of halakhic-legal practice,[9] including the nature of halakhic-legal authority and halakhic-legal decision-making.[10]

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[8] For reasons of style in this study I do not italicize "halakha," despite the general practice of italicizing foreign words. Additionally, while I use the transliteration "halakha," I retain alternative transliterations in quotations. Alternative transliterations of other Hebrew terms are also preserved in quotations.

[9] See Noam Zohar, "Pituah Te'oreyah Hilkhatit ki-Bases Heyune le-Filosofiyah shel ha-Halakha [Development of Halakhic Theory as an Essential Basis for Philosophy of Halakha]," in `*Iyunim Hadashim Ba-Filosofiyah Shel Ha-Halakhah [New Investigation in Philosophy of Halakha]*, ed. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press, 2008), 43–63 for a different conception of halakhic-legal theory and for an argument for its necessity.

[10] In this study I use the somewhat unwieldy term "halakhic-legal practice" to describe the practice of interpreting, determining, and applying Jewish law. The emphasis on practice leaves open the question of whether halakha constitutes a legal *system*. Halakhic-*legal* practice is distinguished from halakhic practice *simpliciter*, which is the practice of abiding by the prescriptions and prohibitions of Jewish law. Obviously, to the extent to which halakhic-legal practice is governed by halakhic norms, it too is a type of halakhic practice.

Philosophy of halakha thus represents a promising site for inquiry into the justification of religious norms and authority. For that purpose, however, it must not be apologetic or exclusively descriptive. To be useful in resolving philosophical questions and social conflicts concerning religious norms and authority, the "of" in "philosophy of halakha" must connote philosophical reflection *on* halakha as opposed to the quixotic attempt to discover a ready-made philosophy *in* halakha. Regrettably, philosophy of halakha often does degenerate into apologetics or restricts itself to description. Practitioners of *ta'amei ha-mitzvot* attempt to separate it from halakhic-legal practice, even when a thinker is both a philosopher and a halakhic-legal decisor. Legal practice is isolated from philosophical reflection and the reason for the norm, which ostensibly justifies it, does not guide its application. Theory of halakha, for its part, is often restricted to description: Portraying how halakhic-legal practice is conducted without evaluating whether that conduct is justified.

C. Critical Philosophy of Halakha

A *critical* philosophy of halakha, in contrast, would join a non-apologetic approach to *ta'amei ha-mitzvot* with a normative theory of halakhic-legal practice. That is, it would be intellectually and practically responsive to demands for justification and would reflect on how halakhic-legal practice could justifiably be conducted. It would thus create a full-fledged dialogue between Jewish thought and contemporary philosophy, in which they are each open to the other's claims while reserving the right to subject them to scrutiny. In this study such a critical philosophy of halakha is developed by working at the intersection of Jewish thought and contemporary philosophy. Specifically, the relation between the justification of halakhic norms and halakhic-legal practice in modern Jewish thought is examined by placing it into dialogue with moral and legal philosophy.

This occurs in two stages: First, the philosophies of halakha of three twentieth-century Jewish thinkers, Yeshayahu Leibowitz (1903-1994), Joseph Soloveitchik (1903-1993), and Eliezer Berkovits (1908-1992), are examined and critically assessed. These figures have been selected because of their influence on Jewish communities in the United States and Israel as well as on Jewish thought, specifically the rise of philosophical reflection on Jewish law. In addition, they each engaged, to varying degrees, in both philosophy of halakha and halakhic-legal practice. It is shown that despite the denials of Leibowitz and Soloveitchik, all of their accounts of the reasons for the commandments do influence their approaches to halakhic-legal practice. Further, they all combine a foundationalist approach to justification with skepticism about the practical normativity of reason, which leads them to identify alternative sources of normativity, such as human will, metaphysical values, or divine revelation. However, their skepticism is based on constricted conceptions of reason and their alternative sources of normativity are untenable. Lastly, they do not adequately ground halakhic-legal authority.

Second, through engagements with the work of the philosopher Jürgen Habermas and the legal theorist Joseph Raz an alternative to the approaches to the justification of halakhic norms and authority of these philosophers of halakha is developed. This alternative is described as critical philosophy of halakha because it does not attempt to justify halakhic norms or authority, but articulates the rational *constraints* on, and practical *consequences* of, their justification. Its account of justification is contextualist, that is, intersubjective and pragmatic, rather than foundationalist, and it is intellectually and practically responsive to failures of justification. Correspondingly, it entails pluralism yet avoids moral and epistemic relativism, which expresses a dual commitment to universalism and particularism. Its account of authority is instrumentalist and thus mediates between normative and legal justification without reducing the latter to the

former. Authority is also circumscribed as opposed to total: Authority must be grounded for areas of competence and in connection with individuals' preexisting reasons for action. Yet, a grounded authority's directives possess uniquely legal normativity, which may preempt its subjects' own judgments.

Beyond aiding in the intellectual task of solving philosophical problems or in the practical charge of resolving social conflicts, it is suggested that critical philosophy of halakha represents a method whereby the modern religious believer may hold herself accountable both to her faith and to other individuals. Holding oneself accountable to one's faith demands taking its claims to truth, morality, goodness, or beauty seriously enough to require justification. Holding oneself accountable to others requires offering them justifications for one's actions that affect them that they too could accept. And, from a theological perspective, if an object of faith is always encountered indistinctly through one's faith and in one's interactions with others, justifying one's actions to others opens the possibility of justifying oneself before the object of faith.

In the remainder of the introduction, this work is situated within the context of the study of Jewish thought and law (II), and then its critical methodology is articulated (III). Next, its contributions are briefly described (IV), and chapter summaries are offered (V).

II. The Study of Halakha

Just as religious practice and law has been a neglected area of study in philosophy of religion, halakha has not been a traditional topic of investigation in Jewish thought. Only recently has philosophy of halakha developed as a subject of inquiry.[11] Before turning to philosophy of halakha, other paradigms for the study of Jewish law are described and considered

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[11] Avi Sagi, "Reflections on the Challenges Confronting the Philosophy of Halakhah," in *The Cambridge History of Jewish Philosophy: The Modern Era*, ed. Martin Kavka, Zachary Braiterman, and David Novak, vol. 2 (Cambridge UK & New York: Cambridge University Press, 2012), 501–502.

in terms of their potential to contribute to the resolution of social conflicts over religious norms and authority (A). Recent attempts to describe the object and method of philosophy of halakha are then examined (B), before turning to a sketch of *ta'amei ha-mitzvot* in Jewish thought (C) and its academic study (D).

A. Historical and Legal Theoretic Paradigms

The academic study of Jewish law has been largely dominated by two paradigms that have reigned sequentially: history and legal theory. In a review article, "Methodological Reflections on the Study of Halakha," Jeffrey Robert Woolf notes that the academic study of Jewish legal literature *qua* halakha only developed in the middle part of the twentieth century. Prior to that, historians approached Jewish legal literature merely as a source of historical details, without interest in the halakhic process itself. Only with the work of Jacob Katz did interest in halakha itself develop. Still, the primary focus was historical; halakhic literature must be read from the perspective of the halakhic decisor to enable better historical understanding.[12] This approach, while seemingly inert in the context of social conflicts, possesses resources to aid in their resolution. In displaying the contingent historical or cultural factors in the development of halakhic norms, historical research reveals that contrary to the perspective of many of their practitioners, halakhic norms could have been different. Such research also shows how interaction and accommodation with surrounding societies is an enduring feature of halakhic development, possibly making contemporary adjustment less troubling.

The historical paradigm, however, suffers from weaknesses inherent to its approach. History and legal practice have a vexed relation in any legal system. Legal practitioners question the

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[12] Jeffrey Robert Woolf, "Methodological Reflections on the Study of Halakhah," *EAJS Newsletter*, no. 11 (October 2001): 7–8.

relevance of an explanation of a norm's historical origin for its legal validity. From the perspective of the legal practitioner, the legal historian succumbs to the genetic fallacy, attempting to reduce the validity of the norm to its history.[13] Further, showing the fluidity of halakhic norms and their susceptibility to "external" forces is helpful in creating an awareness of contingency, but it offers no guidance as to how exactly religious norms should be changed. Indeed, this should not be surprising, for the historical paradigm does not generally declare any aims besides scholarship.

The legal theoretic paradigm, while seemingly more "philosophical" insofar as it is a sub-field of philosophy of law, even more scrupulously attempts to avoid the impression that it possesses aims beyond scholarship. Its development during the apogee of legal positivism, or analytic jurisprudence, explains much of its character. The most representative work is Menachem Elon's monumental *Jewish Law: History, Sources, Principles*, which self-consciously describes Jewish law in the image of positivism.[14] However, this description of Jewish law is distortive and tendentious. It obscures much of the contingency in Jewish law by forcing it into the frame of a system. Further, despite its claim to value-neutrality, it is in the service of the nationalistic project of creating a *Mishpat Ivri*, Hebrew Law, which its advocates hope will serve as a source of law in the State of Israel. It implicitly claims that because of Jewish law's purported systematicity it *could* serve as the law of the State of Israel and because it is "Hebrew" it *should* serve as the law of the Jewish state. It is thus inherently conservative, offering no standards of evaluation besides coherence and "Jewishness."

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[13] For this type of criticism of the use of legal history in legal practice, see Jack Balkin, "Constitutional Interpretation and the Problem of History," *NYU Law Review* 63 (1988): 911–54.

[14] Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: Jewish Publication Society, 1994), 228–239.

More recent trends in the legal theoretic paradigm have discarded the procrustean bed of positivism. Aware of the influence of the legal theory held by the investigator on her analysis of halakhic texts, researchers have dedicated themselves to understanding the native, though often partial and implicit, legal theories held by halakhic decisors themselves.[15] There has also been an appreciation of the relation between material easily identifiable as law (halakha) and narrative (*aggadah*) in Jewish legal texts.[16] Yet, the legal theoretic paradigm still lacks the resources to aid in the resolution of social conflicts over religious norms and authority. It oscillates between the aims of Elon's positivist project and that of the historical paradigm, even while denying their methods. In the first case, it continues to pursue the goal of presenting a coherent Jewish legal *system* but recognizes that a positivist framework is untenable. In the second case, it merely deploys legal theory to gain a better understanding of Jewish legal literature in its historical contexts. Legal theory allows the halakhic historian to separate those developments that are "internal" to law from those that are the result of "external" factors. In either case, independent assessment of the justification of halakhic norms and authority is far from its concerns.[17]

B. Philosophy of Halakha

Despite being a new entrant on the scene of Jewish thought, philosophy of halakha, properly interpreted, represents a more fruitful approach to this type of inquiry. As Avi Sagi points out,

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[15] See for example Yair Lorberbaum and Haim Shapira, "Maimonides' Epistle on Martyrdom in Light of Legal Philosophy," *Dine Israel* 25 (2008): 123–69.

[16] See for example Yair Lorberbaum, "Reflections on the Halakhic Status of Aggadah," *Dine Israel* 24 (2007): 11–27; and Suzanne Last Stone, "On the Interplay of Rules, 'Cases,' and Concepts in Rabbinic Legal Literature: Another Look at the Aggadot on Honi the Circle-Drawer," *Dine Israel*, no. 24 (2007): 125–55.

[17] A significant exception to this trend is feminist philosophy of halakha, see for example Rachel Adler, *Engendering Judaism: An Inclusive Theology and Ethics* (Boston: Beacon Press, 1999); and Ronit Irshai, "Toward a Gender Critical Approach to the Philosophy of Jewish Law (Halakhah)," *Journal of Feminist Studies in Religion* 26, no. 2 (Fall 2010): 55–77.

sustained philosophical reflection on Jewish law was not a feature of modern Jewish thought

until the last few decades. However, spurred on by the thought of Leibowitz and Soloveitchik,

which take halakha as their central object of investigation, it has become a burgeoning area of

research, especially in the State of Israel.[18] Notwithstanding this growth of interest, Sagi points

out that "a critical-reflective endeavor about this new discipline is still missing. The range of

problems covered by the philosophy of Halakhah and its specific perspective have yet to be

formulated."[19] To that end, both Sagi and Avinoam Rosenak articulate views on the nature of

philosophy of halakha. While Rosenak works inductively, Sagi presents a methodology. They

both elucidate important features of philosophy of halakha; however, their accounts must be

supplemented by a critical orientation, which would fulfill the claim of philosophy of halakha to

be *philosophy*.

In his article "Thoughts on the Connection between Philosophy of Halakha and Philosophy

of Education," Rosenak lists a number of topics covered by philosophy of halakha, including:

> to understand the authority of the halakhic system in general and the decisor in particular; to
> clarify the role and power of interpretation; to expose the sources that establish the norms
> and are capable of changing them; to distinguish the status of the concepts of 'tradition,'
> 'revelation,' and 'reason,' and their power in the design of the halakha; the definition of the
> concept of 'truth' of the halakhic system; what is 'error' in the halakhic context and how
> should one relate to controversy; is halakha canonization or codification—and what is the
> implication of this distinction; determining the relation between law and narrative.[20]

Clearly, there is much overlap between the concerns of the legal theoretic paradigm and the

topics of philosophy of halakha as Rosenak describes them. Indeed, insofar as they both take

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[18] Sagi, "Reflections on the Challenges Confronting the Philosophy of Halakhah," 501–502.

[19] Ibid., 504.

[20] Avinoam Rosenak, "Hirhurim al ha-Zeka she-Beyn ha-Filosofiyah shel ha-Halakha le-Filosofiyah shel ha-Hinuch [Thoughts on the Connection between Philosophy of Halakha and Philosophy of Education]," in *Iyyunim Hadashim bi-Filosofiyah shel ha-Halakha [New Streams in Philosophy of Halakha]*, ed. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes Press, 2008), 67. Unless otherwise indicated, all translations and brackets in this study are mine.

Jewish law as their object this is to be expected. There are certain issues, like the authority of halakha and its decisors, the sources for its norms and their process of change, and its method of interpretation, that are so central to Jewish law that any type of research that takes Jewish law as its object will engage with them. Let us call analyzing these issues, within any rubric, "theory of halakha." Theory of halakha conceptualizes halakhic-legal practice, delineating its institutions and their powers. Two important issues within it are the nature of halakhic-legal authority and halakhic-legal decision-making.[21]

Although Rosenak challenges the dominance of the methods of legal theory and suggests philosophy of education, along with its focus on pedagogical effect, as an alternative paradigm, his identification of the topics of philosophy of halakha exclusively with those of theory of halakha already concedes too much. By focusing on the institutions and workings of halakhic-legal practice, he excludes other concerns arising out of Jewish law such as *ta'amei ha-mitzvot* and the grounding of halakhic-legal authority.

In contrast, in his presentation of a methodology for philosophy of halakha, Sagi expands its boundaries beyond those of theory of halakha. Reflecting on its expected method, he writes,

> The philosophy of Halakhah takes as its starting assumption that Halakhah is not merely a legal system but a full and complex way of life, and, in this sense, the philosophy of Halakhah is a consistent attempt to disclose its meaning. In phenomenological terms, we could say that the philosophy of Halakhah is an explication of the halakhic "given".... The philosophy of Halakhah is... an...attempt to explicate or reflect upon the empirical phenomenon of Halakhah so as to expose its meaning, if any.... [T]he philosophy of Halakhah is an effort to make the implicit given explicit.[22]

Sagi thus presents a phenomenological approach to philosophy of halakha. Philosophy of halakha is concerned with explicating the meaning of the halakha, or, more properly, halakhic

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[21] See Zohar, "Development of Halakhic Theory as an Essential Basis for Philosophy of Halakha" for a different conception of theory of halakha.

[22] Sagi, "Reflections on the Challenges Confronting the Philosophy of Halakhah," 504.

norms, for he questions whether there is in fact a unified halakhic system.[23] He does not see

halakha as simply law but rather as a "full and complex way of life."

This position broadens the object of philosophy of halakha while simultaneously narrowing

its method and consequences. On the one hand, halakhic life, including particular halakhic norms

and individual halakhic practices, is taken as the object of investigation as opposed to the

narrowly legal topics of theory of halakha. Thus, issues like *ta'amei ha-mitzvot* and the

grounding of halakhic-legal authority become legitimate and even central topics. On the other

hand, according to Sagi, philosophy of halakha only uses the phenomenological method. It takes

halakhic norms as its basic data and exposes their meaning. Philosophy of halakha aims to

explicate the philosophy *in* halakha; it is not full-fledged philosophical reflection *on* halakha,

which would evaluate the justification of halakhic norms and authority. Indeed, this choice is

signaled by Sagi's concern with meaning as opposed to reasons. While there are good arguments

that even the understanding of meaning implicates reasons, an exclusive concern with meaning

idles the normative significance of those reasons. Contrariwise, concern with the reasons for

halakhic norms and authority ineluctably draws the investigator into the normative domain, for to

fully understand a reason is to assess whether it is, in fact, a valid reason.[24]

Rosenak's and Sagi's respective articulations of philosophy of halakha each have

contributions and deficiencies. Rosenak draws attention to theory of halakha as an important

element of this area of inquiry. Further, he attempts to break out of the narrow constraints of the

legal theoretic paradigm by suggesting the methods of philosophy of education. But he is

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[23] Ibid., 509.

[24] For some of these arguments, see Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society*, trans. Thomas McCarthy (Boston: Beacon, 1984), 102–141 henceforth *TCA1*; and Robert B. Brandom, *Making It Explicit: Reasoning, Representing, and Discursive Commitment* (Cambridge MA: Harvard University Press, 1994), 67–198; 229–271; 495–650.

ultimately trapped in the legal theoretic paradigm by his selection of topics. Sagi broadens the topics of philosophy of halakha, allowing the inclusion of *ta'amei ha-mitzvot* and the grounding of halakhic-legal authority, but restricts its method to phenomenology, which forecloses the possibility of normative assessment. A critical philosophy of halakha is necessary for productive reflection on the justification of religious norms and authority. This study aims to develop such a critical approach with the further goal of contributing to the broader discussion concerning religious norms and authority. It takes as its starting point reflection on the reasons for the commandments in Jewish thought and its relation to halakhic-legal practice. It thus critically analyzes the nexus of *ta'amei ha-mitzvot* and theory of halakha.

C. *Ta'amei ha-Mitzvot* in Jewish Thought

A comprehensive review of attempts at *ta'amei ha-mitzvot* in Jewish thought is beyond the scope of this study. In the following, a few episodes in that history are reviewed to assemble its central features and problematics. First, the presence of reasons for the commandments in the Hebrew Bible itself is discussed to dissolve objections stemming from the supposed opposition of reason and revelation (1). Second, some discussions of the reasons for the commandments in rabbinic literature are briefly surveyed to mark three important issues: its relation to halakhic-legal practice, misgiving about offering reasons for the commandments, and the division of the commandments into two categories with different degrees of accessibility to reason (2). Third, features of Moses Maimonides' account of the justification for commandments in the *Guide of the Perplexed* are discussed: the emergence of *ta'amei ha-mitzvot* as a distinctively philosophical project, its potentially antinomian consequences, and its separation from halakhic-legal practice (3). Lastly, Moses Mendelssohn's account of the reasons for halakhic norms in *Jerusalem, or on Religious Power in Judaism*, is examined to show the persistence of a basic problematic—its

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relation to halakhic-legal practice—into modernity and to draw out the project's significance for *modern* Jewish thought (4).

1. *The Bible: Reasons in Revelation*

Reflection on the reasons for the commandments is an intellectual tradition the roots of which extend as far back as the commandments themselves. Despite facile as well as sophisticated attempts in modern Jewish thought to harden the opposition between reason and revelation,[25] the Bible itself, the purported datum of revelation, does not seem to recognize this distinction. In his work *Midrash, Mishnah, and Gemara: The Jewish Predilection for Justified Law*, David Weiss Halivni documents the presence of "motive clauses" in the Bible and argues that they evidence a "preference for law that is expressly reasonable, that seeks to win the hearts of those to whom the laws are addressed."[26]

Motive clauses are phrases which give the reason or motivation for a law.[27] Berend Gemser divides those found in the Bible into four types: explanatory, ethical, religious and historical.[28] Halivni adds that sometimes these are reasons that apply to particular commandments, while other times they are more general, "serving as an overall justification for God to issue commandments,"[29] such as God's role as creator or redeemer from Egyptian bondage. For

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[25] For a sophisticated and famous attempt, see Leo Strauss, "Progress or Return," in *Jewish Philosophy and the Crisis of Modernity*, ed. Kenneth Hart Green (Albany: State University of New York Press, 1997), 87–136.

[26] David Weiss Halivni, *Midrash, Mishnah, and Gemara: The Jewish Predilection for Justified Law* (Cambridge MA: Harvard University Press, 1986), 4.

[27] Ibid., 10.

[28] Berend Gemser, "The Importance of the Motive Clause in Old Testament Law," *Supplement to Vetus Testamentum* 1 (1953): 51–52. See Isaac Heinemann, *Taʿamei ha-mitzvot be-sifrut Yisraʾel [The Reasons for the Commandments in the Literature of Israel]*, vol. 1 (Jerusalem: ha-Histadvut ha-Tsiyyonit, 1956), 14–23 for further discussion of reasons for the commandments in the Bible.

[29] Halivni, *Midrash, Mishnah, and Gemara*, 11.

example, in the Decalogue (Ex. 20: 1-17), the exemplar of revelation, Halivni counts three

instances of motive clauses, which are each marked by the word "*ki*" (for): "You should not bow

down to [idols] nor serve them *for* I am the Lord your God"; "You should not take the name of

the Lord your God in vain, *for* the Lord will not hold them guiltless"; "The seventh day is the

Sabbath…*for* in six days the Lord made Heaven and earth."[30]

The first instance prohibits the worship of other gods because of the exclusive relationship

between God and the children of Israel. The second instance offers a prudential motivation for

not vainly swearing in God's name. The third seems to establish a cosmological or symbolic

relation between God's creation of the world in six days and the prescription to observe the

Sabbath on the seventh. To appreciate the prevalence and significance of motive clauses, it is

important to have a broad understanding of justification. The issue at this point is not whether

modern readers should accept the Bible's justifications for the commandments but the fact that

they were offered at all, that justifying its commandments was seen as legitimate and perhaps

even necessary. According to Halivni, this was not the case in other ancient Near Eastern law

codes. Thus, he argues, "biblical law is not categorically imperative…it seeks to justify itself,

though the justification is sporadic and sometimes logically not very tight."[31]

2. Rabbinic Literature: Legal and Normative Justifications

The predilection for justified law continues into rabbinic literature, where an important

distinction between exegetical motives and normative justifications emerges. Exegetical motives

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[30] Unless otherwise noted, Biblical citations and translations in this study are from *JPS Hebrew-English Tanakh* (Philadelphia: Jewish Publication Society, 1999) Emphasis added here.

[31] Halivni, *Midrash, Mishnah, and Gemara*, 13. Nothing of substance for this study hinges on this comparative claim. It is enough that Jewish texts express a predilection for justified law; it need not be unique to them.

support a norm by showing how it follows from an authoritative text.[32] Though, as Halivni notes, they are present even within the Bible, they become the centerpiece of rabbinic literature. Indeed, they are paradigms of legal justifications, which substantiate norms by showing how they follow from the pronouncements of legal authorities or elements of a legal system, whether canonical texts, precedents, or assumptions. They are the basic components of general legal practice and halakhic-legal practice. Such justifications are the focus of Halivni's further discussion of the "Jewish predilection for justified law." But legal justification can be opposed to "extra-legal" or normative justifications.[33] A legal justification attempts to substantiate the validity of a norm given the validity of the legal system or the legal authority. A normative justification attempts to substantiate the validity of the norm all-things-considered.[34]

The relation between these types of justification becomes significant within rabbinic literature and is an important concern of this study. Indeed, a way of posing the issue under investigation is to what extent normative justifications ought to be "extra-legal." For such a justification need not necessarily prescind the norm from the legal system of which it is a part or the legal authority that pronounces it, but if it does examine the norm within those contexts, the legal system or the legal authority themselves must be independently grounded. Similarly, the legal application of a norm is relevant to its normative justification, for the former could result in consequences that undermine the latter. Thus, the relation between normative justification and legal practice is pertinent for assessing a norm's all-things-considered justification.

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[32] Ibid., 14.

[33] In this study, when "justification" is used without modifier, normative justification is meant. It is also referred to as "independent justification."

[34] An important concern of this study is how exactly one justifies norms. For some preliminary information, see James Lenman, "Reasons for Action: Justification vs. Explanation," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2011, http://plato.stanford.edu/archives/win2011/entries/reasons-just-vs-expl/.

Alongside the legal justifications that are characteristic of rabbinic literature, there are attempts to offer normative justifications for the commandments. Isaac Heinemann, in his classic study, *The Reasons for the Commandments in the Literature of Israel*, divides them into three categories: proportionality, symbolic, and behavior-influencing. The latter is further separated into mystical, utilitarian, and educational.[35] While a comprehensive review of such justifications is beyond the scope of this study, three issues that develop in rabbinic literature are significant: debate about the relation between justifications for the commandments and halakhic-legal practice (a), misgivings about offering reasons for the commandments (b), and the division of the commandments into two categories with different degrees of accessibility to reason (c).

The first two features are apparent in a discussion of the laws of the king in BT Sanhedrin 21. It is written in the Bible (Deut. 17:16-17): "[The king] shall not keep many horses or send people back to Egypt to add to his horses, since the Lord has warned you, 'You shall not go back that way again.' And he shall not have many wives, lest his heart go astray; nor shall he amass silver and gold to excess." This is an example of motive clauses in the Bible. The first sentence exegetically substantiates the prohibition of the king amassing horses or sending traders to Egypt for horses. The second sentence justifies the prohibition of marrying many women in view of their likelihood of leading the king's heart astray; it also similarly justifies the prohibition of amassing excess gold and silver, though elliptically.

(a) In discussing the prohibition of marrying many wives, the Mishnah presents three views on the relation between the reasons for the commandments and halakhic-legal practice.[36] The first position, that of an anonymous sage, does not take the reason given by the Biblical text into

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[35] Heinemann, *The Reasons for the Commandments in the Literature of Israel*, 1956, 1:30–35.

[36] M Sanhedrin 2: 4.

account and merely stipulates that the number of wives permitted to the king is eighteen. Though he generally does not deduce reasons for the commandments and lend them legal application as evidenced by debates elsewhere, Rabbi Judah, the proponent of the second position, focuses on the explicit manner the reason is given in the Bible in this case. He argues that the king may marry more than eighteen women so long as they do no lead his heart astray. In contrast, Rabbi Simeon, the proponent of the third view, maintains that the king may not marry even one woman if she will lead him astray. Rabbi Simeon holds that one must always deduce the reasons for the commandments and lend them legal application, even when no reason is given in the Bible. Thus, when the Bible does supply a reason for its commandment it must be adding a further legal detail. In this case it is adding that though the prohibition is to marry many women, even one woman is prohibited if she will lead the king's heart astray.[37] In sum, three positions on the relation between justification and halakhic-legal practice are given in this pericope: there is *no* relation even when a justification is provided by the Bible (i); there is *only* a relation when the justification is provided by the Bible (ii); and there is *always* a relation even when the justification must be independently deduced (iii).

David Novak claims that, with a few exceptions, the justifications for the Biblical commandments given in the Talmud are normatively inert: They do not influence their halakhic-legal application. Though he claims that reflection on the reasons for the commandments is the starting point for practical Jewish philosophy, it takes the Biblical commandments as its basic data for interpretation and so cannot undermine them. He does note that teleological reasoning plays a role in the halakhic-legal practice of certain rabbinic sages but only in the establishment

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[37] I draw on the Talmud's (BT Sanhedrin 21) discussion of this Mishnah for my understanding of the debate.

of rabbinic enactments as opposed to the interpretation of Biblical law.[38] However, Ephraim

Urbach in his *The Sages: Their Concepts and Beliefs* notes that the justification of the

commandments often fulfills a practical need in the Talmud.[39] An example that he offers is that

of the *prosbul*, a document which transforms private debts into public debts to avoid their

cancellation during the sabbatical year.[40] The reason given for this enactment is to avoid the

withholding of loans in the years prior to the sabbatical year. If creditors knew their loans would

not likely be returned they would be reticent to extend them and would thus violate the

prohibition of withholding charity.[41] While such teleological reasoning certainly eventuates in a

rabbinic enactment, in the process it circumvents what is arguably a Biblical commandment.

Novak's neat distinction between teleological reasoning in interpreting Biblical law and rabbinic

enactment is thus untenable.

(b) Nevertheless, the impulse to ignore the reasons for the commandments found in the

anonymous opinion in the Talmud finds expression in more generalized misgivings about efforts

to offer reasons for the commandments. Indeed, in the Talmud's discussion of the Mishnah

described above, Rabbi Isaac is quoted as claiming,

> Why were the reasons of [some] Biblical laws not revealed? — Because in two verses
> reasons were revealed, and they caused the greatest in the world [Solomon] to stumble. Thus
> it is written: He shall not multiply wives to himself, whereon Solomon said, 'I will multiply
> wives yet not let my heart be perverted.' Yet we read, When Solomon was old, his wives
> turned away his heart. Again it is written: He shall not multiply to himself horses; concerning
> which Solomon said, 'I will multiply them, but will not cause [Israel] to return [to Egypt].'

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[38] David Novak, "The Talmud as a Source for Philosophical Reflection," in *History of Jewish Philosophy*, ed. Daniel H. Frank and Oliver Leaman (New York: Routledge, 1997), 49–63.

[39] Ephraim E. Urbach, *The Sages: Their Concepts and Beliefs* (Jerusalem: Magnes Press, 1979), 373–376.

[40] For further discussion of the *prosbul*, see Chapters One and Three of this study.

[41] See Deuteronomy 15: 9 and M Shevi'it 10: 3.

Yet we read: And a chariot came up and went out of Egypt for six [hundred *shekels* of silver].[42]

Rabbi Isaac is concerned about the consequences of offering reasons for the commandments. If one knows the reason for a commandment, one might come to devalue the commandment itself. However, even he does not reject the claim that there are reasons for the commandments. He could hardly do that given that the reasons he is discussing are provided by the Bible, and the results he fears are just those that the Bible explicitly sought to prevent. Rather, he expresses misgiving about the result of knowledge of the reasons for the commandments.

(c) Other sages expressed greater misgivings about offering reasons for the commandments, retrojecting concealment of the reasons for at least some of the commandments into the Bible. The Sifra records the following exegesis:

> 'My commandments [*mishpatai*] shall you do….'—this refers to matters in the Torah that had they not been written, reason would have dictated that we should write them, such as [the prohibitions of] stealing, the forbidden sexual relationships, idol worship, blasphemy, and murder…. 'and My statutes [*huqqotai*] you shall observe'—these are commandments concerning which the evil inclination, as well as idol worshippers, argue against—such as [the prohibition of] eating pork, wearing linen and wool together, and the release of the levirate wife, purification of the leper, the red heifer, and the scapegoat ritual. The verse teaches: 'I am the Lord'—I have laid down the law and you are not permitted to question it.[43]

A distinction is drawn between two classes of commandments: *misphatim* and *huqqim*. *Mishpatim* are the commandments the reasons for which are transparent. Even had God not commanded them, human beings could have derived them on their own and established them as norms. The reasons for *huqqim*, in contrast, are less clear. They provide an opening for both internal and external enemies to question the rationality of the commandments. This distinction,

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[42] BT Sanhedrin 21b. All translations from the Talmud in this study, unless otherwise noted, are from Isidore Epstein, ed., *The Babylonian Talmud* (London: Soncino Press, 1935).

[43] Sifra on Leviticus 18:4 para. 140, cited and translated in Isaac Heinemann, *The Reasons for the Commandments in Jewish Thought: From the Bible to the Renaissance*, trans. Leonard Levin (Brighton MA: Academic Studies Press, 2008), 19.

though not drawn in the Biblical text, becomes central for both proponents and adversaries of *ta'amei ha-mitzvot*. Even proponents of offering reasons for all the commandments recognize that some commandments are easier to justify than others; often they suggest a special explanation for the opacity of the reasons for the *huqqim*. In contrast, the Sifra takes a strongly negative line; the opacity of the reasons for the *huqqim* means that they are justified for humans solely by God's authority, and thus one is forbidden to question them. Still, it only claims that some of the commandments are opaque to reason. Further, it does not claim that the *huqqim* do not have any justification at all, only that their reasons are not known to humanity.

3. Maimonides: The Project and its Problematics Emerge

Indeed, it is difficult to find examples of those who completely reject the justification of the commandments, except as figures in the writings of its proponents. Maimonides (1138-1204) writes, "[t]here is a group of human beings who consider it a grievous thing that causes should be given for any law; what would please them most is that the intellect would not find a meaning for the commandments.... What compels them to feel thus is a sickness that they find in their souls...."[44] Maimonides' nameless adversaries believe that the greatness of God is better expressed by laws that transcend reason. Apparently, if reasons could be found for the commandments, it would imply that they were the creation of mere human minds. Maimonides rejects this view and presents a comprehensive approach to justifying the commandments:

> But He is far exalted above this; the contrary is the case – the whole purpose consisting in what is useful for us, as we have explained on the basis of its dictum: *For our good always, that he might preserve us alive, as it is at this day* [Deut. 6: 24]. And it says, *Which shall hear all these statutes* [*huqqim*] *and say: Surely this great community is a wise and understanding people* [Deut. 4: 6]. Thus it states explicitly that even all the statutes [*huqqim*] will show to all the nations that they have been given with *wisdom and understanding*. Now

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[44] Moses Maimonides, *The Guide of the Perplexed*, trans. Shlomo Pines, vol. 2 (Chicago: University of Chicago Press, 1963), pt. III: 31.

if there is thing for which no reason is known and that does not either procure something useful or ward off something harmful, why should one say of one who believes in it or practices it that he is *wise and understanding* and of great worth? Rather things are indubitably as we have mentioned: every *commandment* from among these *six hundred and thirteen commandments* exists either with view to communicating a correct opinion, or to putting an end to an unhealthy opinion, or to communicating a rule of justice, or to warding off injustice, or to endowing men with a noble moral quality, or to warning them against an evil moral quality. Thus all [the commandments] are bound up with three things: opinions, moral qualities, and political civic actions.[45]

Maimonides claims that all the commandments, even the *huqqim*, have reasons. Indeed, the verse he cites to support the reasonability of the commandments specifically uses the term "*huqqim*" to describe them. He also attempts to substantiate this claim, devoting approximately twenty-five chapters of the *Guide of the Perplexed* to describing the reasons for the commandments, especially those traditionally identified as *huqqim*.[46]

Further, he maintains that the reasons given for the commandments can be appreciated even by those outside of Judaism. The "other nations" who hear of the laws of the Jewish people will proclaim their wisdom. The commandments thus have universal validity even if other nations are not bound by them. This is because, according to him, the commandments cohere into a unified framework with one overarching goal: the benefit of the human being. The human being is able to achieve perfection through halakhic practice. This results from the commandments' three functions: teaching proper opinions, establishing good morals, and regulating social conduct. Elsewhere, Maimonides explains how the commandments have a first intention, the instruction of proper opinions, and a second intention, social and political organization. While the first intention is of greater importance since it directly allows for human perfection—intellectual achievement, it depends on the second intention—social and political stability—for its

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[45] Ibid.

[46] Ibid., vol. 2, pt. III: 25–50.

possibility.[47] Maimonides' justification of the commandments is thus embedded in an overarching account of human flourishing. For him, reflection on the reasons for the commandments is not an ad-hoc attempt to substantiate Jewish practice but an element of moral, social, and political philosophy. *Ta'amei ha-mitzvot* thereby becomes a distinctively philosophical project.

While Maimonides can thus be described as the initiator of the philosophical project of *ta'amei ha-mitzvot*,[48] he is also the originator of two of its major problems. These two problems cut in opposing directions: one threatens to undermine established halakhic practice, while the other illicitly protects it. First, Maimonides introduces the problem of antinomianism, for, as Josef Stern points out, the reasons he offers for the *huqqim* function more as explanations than justifications. Since Maimonides describes many of the *huqqim* as serving to undermine the idolatrous practices of Ancient Israel's neighbors, the reasons he offers for them demonstrate why it made sense for those norms to have been instituted in that context. However, it is not clear how such reasons justify the practice of these norms to individuals without such idolatrous neighbors, such as Maimonides' contemporaries and those who succeeded him.[49]

Second, while Maimonides' dedicated focus to providing reasons for the commandments in *The Guide of the Perplexed* signals the emergence *of ta'amei ha-mitzvot* as a distinctively

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[47] Ibid., vol. 2, pt. III: 27.

[48] This is not to deny the earlier and significant contributions of Philo and Saadia Gaon. See Philo, *Philo*, trans. F.H. Colson and G.H. Whitaker (Cambridge MA: Harvard University Press, 1929), vol. VII and VIII; and Saadia Gaon, *The Book of Beliefs and Opinions*, trans. Samuel Rosenblatt (New Haven: Yale University Press, 1989), bk. III. However, Philo's justifications for the commandments had no effective history in the Jewish tradition of inquiry on *ta'amei ha-mitzvot*. Saadia's efforts did influence later Jewish thinkers, including Maimonides. Yet, he does not place the reasons for the commandments within an overarching philosophical framework. His effort is more similar to that found in the Talmud than in the *Guide of the Perplexed*.

[49] Josef Stern, *Problems and Parables of Law: Maimonides and Nahmanides on Reasons for the Commandments (Ta'amei Ha-Mitzvot)* (Albany: State University of New York Press, 1998), 15–48.

philosophical project in Jewish thought, it also separates it, at least rhetorically, from halakhic-legal practice, which leads to concerns about apologetics. Maimonides creates two distinct genres for the discussion of the commandments: the philosophical genre of the *Guide of the Perplexed* and the halakhic-legal genre of the *Mishneh Torah*. The relation between the former and the latter is a vexed issue in terms of interpretation, philosophy, and law. Discussion of these crucial topics is beyond the scope of this study.[50] What is significant for it, however, is the legacy of this separation, for it proves to be an enduring feature of the relation between the project of *ta'amei ha-mitzvot* and halakhic-legal practice. Even those Jewish thinkers who both offer accounts of the reasons for the commandments and engage in halakhic-legal practice often deny any connection between the two endeavors. This seems to undermine both the philosophical seriousness of the project of *ta'amei ha-mitzvot* and the justifiability of abiding by halakhic norms. If the reasons offered for the commandments do not influence how they are applied in halakhic-legal practice, then nothing is really at stake in *ta'amei ha-mitzvot*. Any reason at all can be offered for the commandments so long as it silences the questioner. And even if the reason is not persuasive, halakhic practice remains unchanged. *Ta'amei ha-mitzvot* thus devolves into apologetics. Similarly, if halakhic-legal practice is not guided by the reasons that justify the commandments, the application of the commandment may lead to consequences that the justification did not encompass. Halakhic practice will then be unjustified.

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[50] The classic source on these issues is Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven: Yale University Press, 1980), 356–514. However, for a variety of other views, see David Hartman, *Maimonides: Torah and Philosophic Quest* (Philadelphia: Jewish Publication Society, 1986); Leo Strauss, "The Literary Character of the Guide for the Perplexed," in *Persecution and the Art of Writing* (Chicago & London: University of Chicago Press, 1988), 38–94; Marvin Fox, *Interpreting Maimonides: Studies in Methodology, Metaphysics, and Moral Philosophy* (Chicago: University of Chicago Press, 1990); and Warren Zev Harvey, "The Mishneh Torah as a Key to the Secrets of the Guide," in *Me'ah She'arim: Studies in Medieval Jewish Spiritual Life in Memory of Isadore Twersky*, ed. Ezra Fleischer et al. (Jerusalem: Magnes Press, 2001), 11–28.

4. Mendelssohn: Voluntarism, Universalism, and the Limits of Surmises

Maimonides may have been unconcerned or unaware of the apologetic implications and antinomian potential of his approach to *ta'amei ha-mitzvot*. While the former question can only be clarified by a detailed study of the *Mishneh Torah*, Maimonides' disregard for the antinomian potential of his account is understandable in view of his context. In the medieval period the Jewish community possessed autonomy and coercive power. Halakhic practice was obligatory for all members of the Jewish community whether or not they thought it justified. The threat of antinomianism was therefore not a pressing issue for him. Modernity and the end of Jewish autonomy present unique challenges to halakhic practice that raise the stakes for the project of *ta'amei ha-mitzvot*. Like many of the themes of modern Jewish thought, its newfound importance is evident in the writings of Moses Mendelssohn (1729-1786).

Mendelssohn's *Jerusalem* has two parts: The first uses natural law arguments to contend that religious institutions, like churches, synagogues, and mosques, do not possess coercive authority, and the second presents a philosophy of Judaism. While the proximal impetus for this work was an anonymous letter challenging Mendelssohn's commitment to Judaism given his rejection of religious coercion, Arnold Eisen persuasively argues that the broader context is Jewish civil emancipation. If the Jews achieved emancipation, an event that was beginning to seem likely to Mendelssohn, then they would no longer be part of the autonomous Jewish community and subject to its coercive powers. New possibilities for identity and practice would open to them, allowing individuals to decide how to worship religiously, if at all. Halakhic practice would become voluntary. Under these conditions of halakhic voluntarism, Eisen argues, "[t]*a'amei ha-mitzvot*… become[s] of unprecedented importance. Unless there were sound reasons for

observing commandments, Jews were unlikely to maintain such observance voluntarily."[51] Thus, in the second part Mendelssohn offers a justification for the commandments. In addition to explaining why obedience to halakhic norms should be voluntarily assumed, this account aims to navigate the tensions between universalism and particularism: It explains both why Jewish practice is justified and why it is only for Jews.

Mendelssohn maintains that Judaism does not claim exclusive access to saving truths. Exclusive revelation of saving truths is not in keeping with God's goodness. In fact, he claims, "According to true Judaism all the inhabitants of the earth are destined to felicity…."[52] All the truths necessary for human salvation are eternal truths of reason, which can be gained from ordinary human experience or, if necessary, philosophical reflection.[53] Indeed, Mendelssohn attempts to demonstrate the existence of God, the immortality of the soul, and the basis for moral obligations in his own writings of philosophical theology.[54] Instead of revealed truths, the Jews have been granted revealed legislation. The norms that comprise this legislation do not mandate any beliefs; rather, they command actions that aid in the education, communication, and preservation of eternal and saving truths: "All laws refer to, or are based upon, eternal truths of reason, or remind us of them, and rouse us to ponder them."[55] Thus, just as Maimonides embeds his reasons for the commandments within a moral, social, and political philosophy, Mendelssohn

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[51] Arnold Eisen, "Divine Legislation as 'Ceremonial Script': Mendelssohn on the Commandments," *AJS Review* 15, no. 2 (1990): 259.

[52] Moses Mendelssohn, *Jerusalem, or on Religious Power and Judaism*, trans. Allan Arkush (Hanover: Published for Brandeis University Press by University Press of New England, 1983), 94.

[53] Michah Gottlieb, *Faith and Freedom: Moses Mendelssohn's Theological-Political Thought* (New York: Oxford University Press, 2011), 75–112.

[54] Moses Mendelssohn, *Moses Mendelssohn: Writings on Judaism, Christianity, and the Bible*, ed. Michah Gottlieb, trans. Curtis Bowman, Elias Sacks, and Allan Arkush (Waltham: Brandeis University Press, 2011), 241–251.

[55] Mendelssohn, *Jerusalem*, 99.

fixes his justification for halakhic norms within a broader philosophy of religion. He thus

continues the distinctively philosophical project of *ta'amei ha-mitzvot*.

Still, the Jewish people have not been privileged with this revelation only for their own

benefit. They are meant "to be a priestly nation; that is, a nation which, through its establishment

and constitution, through its laws, actions, vicissitudes, and changes was continually to call

attention to sound and unadulterated ideas of God and his attributes."[56] For Mendelssohn idolatry

is a constant threat even within the context of religion and especially when it possesses a written

Scripture. As a "living script" halakhic practice is an aid in educating, communicating, and

preserving the truths of religion while countering the threat of idolatry.[57] But more widespread

observance of halakha is not necessary. Just as not everyone need be a teacher, only one nation

need observe the divine legislation. Mendelssohn thus aims to explain how halakhic practice

promotes a universal aim while only obligating the Jewish people. This can be contrasted with

Maimonides' approach. While he too justifies the commandments in view of a universal goal—

human perfection, he did not feel it necessary to explain why the means for this perfection was

only revealed to the Jewish people.

Mendelssohn offers another reason why only the Jewish people should practice halakha:

Only they were commanded by God. While he offers a justification for the commandments in the

context of practical halakhic voluntarism, that is, on a practical level relinquishing halakhic

observance is now an option for Jews, he maintains that, as Jews, they are still bound to observe

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[56] Ibid., 118.

[57] For an interpretation that makes this the centerpiece of Mendelssohn's thought, see Gideon Freudenthal, *No Religion without Idolatry: Mendelssohn's Jewish Enlightenment* (Notre Dame: University of Notre Dame Press, 2012).

it. Moreover, this obligation establishes a boundary between reflection on halakha and halakhic-legal practice. Mendelssohn writes,

> I cannot see how those born into the House of Jacob can in any conscientious manner disencumber themselves of the law. We are permitted to reflect on the law, to inquire into its spirit, and, here and there, where the lawgiver gave no reason, to surmise a reason which, perhaps, depended upon time, place, and circumstances, and which, perhaps, may be liable to change in accordance with time, place, and circumstances—if it pleases the Supreme lawgiver to make known to us His will on this manner, to make it known in as clear a voice, in as public a manner, and as far beyond all doubt and ambiguity as He did when He gave the law itself…. [R]everence for God draws a line between speculation and practice which no conscientious man may cross.[58]

While Jews can now disobey halakhic norms in practice without risk of human penalties, they are still bound by them. Halakha still possess normative force. Further, Mendelssohn establishes a sharp separation between the project of *ta'amei ha-mitzvot*, which he describes as offering "surmises," and halakhic-legal practice. Modification of halakhic norms on the basis of independently adduced reasons for the commandments would only be permissible after a new revelation of God's will. Thus, although operating in a different context of halakhic voluntarism and universalism, Mendelssohn turns what is rhetorically implied in Maimonides' thought into a basic principle: the justification of the commandments and halakhic-legal practice are separate endeavors.[59]

This brief sketch of the project of *ta'amei ha-mitzvot* in Jewish thought has noted a number of its features and problematics that are important for this study: Despite stereotyped views of the opposition of reason and revelation and with the recognition that there are strains within Judaism that have misgivings about it, there is a continuous tradition of inquiry within Jewish

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[58] Mendelssohn, *Jerusalem*, 133.

[59] While Mendelssohn was not a halakhic-legal decisor, he did occasionally weigh-in on halakhic issues. Sometimes he even expressed positions that deviated from those of traditional authorities, for example see Alexander Altmann, *Moses Mendelssohn; A Biographical Study* (University AL: University of Alabama Press, 1973), 286–295 for a discussion of his position on burial.

thought concerning the reasons for the commandments. Thinkers like Maimonides and Mendelssohn turned this tradition into a distinctively philosophical project of justifying the commandments by embedding their accounts of the reasons for the commandments within larger philosophical frameworks. Nevertheless, there is a persistent attempt, even by thinkers like Maimonides and Mendelssohn, to isolate this project from halakhic-legal practice. Lastly, in modernity it becomes of even greater significance as halakhic practice becomes voluntary in Jewish life and the tension between universalism and particularism becomes acute within Jewish thought.

This study fixes on one of these features of the project of *ta'amei ha-mitzvot*, while keeping the others in view: It explores the relation between the reasons for the commandments and halakhic-legal practice. It takes for granted that justification of the commandments is important, while recognizing that there are strains within the Jewish tradition that have reservations about it. Further, it examines the reasons for the commandments with an interest in their philosophical dimension; it is less interested in the specific reasons offered for commandments than in the accounts of justification that anchor those reasons. Lastly, it is self-consciously modern, both in taking twentieth-century figures as its focus and in its commitment to the value of human autonomy and to negotiating the tension between universalism and particularism without denying either of their legitimate claims.

D. The Study of *Ta'amei ha-Mitzvot*

Research on *ta'amei ha-mitzvot* has largely taken a historical approach, though some philosophical investigations have been conducted. In order to further situate the methods of this study, the historical studies are reviewed (1), before turning to the philosophical investigations, which provide its more immediate context (2).

1. Historical Approaches

The classic study of *ta'amei ha-mitzvot* remains Isaac Heinemann's *The Reasons for the Commandments in Israeli Literature.* Heinemann works historically. In the first volume he begins with the Hebrew Bible as well as rabbinic and Hellenistic literature and then moves on to examine medieval figures, including Saadia Gaon, Bahya ben Joseph ibn Pakudah, Judah ha-Levi, Abraham ibn Ezra, Abraham ibn Daud, Moses Maimonides, Levi Gersonides, Hasdai Crescas, Joseph Albo, and Don Isaac Abravanel. The second volume surveys the views of Moses Mendelssohn, Samuel David Luzzatto, Samson Raphael Hirsch, Zacharias Frankel, and Franz Rosenzweig. Heinemann's work is monumental in the range of figures it covers, spanning the ancient, medieval, and modern periods. Additionally, in charting attempts at *ta'amei ha-mitzvot* through history, it implicitly constructs these efforts as a tradition of inquiry. He also identifies emancipation as a crucial juncture in the history of the tradition. But it is deficient in three respects: its character as a history with pedagogical intent, lack of philosophical analysis, and want of attention to the relation of *ta'amei ha-mitzvot* to halakhic-legal practice.

Heinemann aims to explore the history of the reasons for the commandments in order to unearth lessons for present day Jews struggling with the value of halakhic practice. His goal is to discover what answers given in the past can still speak to moderns.[60] His concern is less with philosophical assessment than with pedagogical applicability. He often merely collects and categorizes the type of reasons for the commandments offered by individual thinkers as opposed to reconstructing the structure of their justifications. Neither does he fit the reasons into the thinkers' larger philosophical frameworks. Indeed, this is of little concern for him because he ultimately concludes that most Jewish thinkers offered reasons for the commandments for

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[60] Heinemann, *The Reasons for the Commandments in the Literature of Israel*, 1956, 1:9–11.

apologetic purposes or to deepen religious experience.[61] He claims that the types of reasons

given by different thinkers derive from their diverse characters: Some were intellectuals, while

others were men of action or emotionally oriented.[62] He also does not reflect in depth on the

relation between this project and halakhic-legal practice. Indeed, one suspects that he constructs

the history of *ta'amei ha-mitzvot* in view of his own pedagogical interests: A major lesson that he

draws from this history is that different reasons must be offered to individuals of different

character types.[63] His work is indispensable for its summaries of views on the reasons for the

commandments; but philosophical analysis of this tradition of inquiry and its connection to

halakhic-legal practice is necessary.

Eisen expands on his examination of Mendelssohn's approach to *ta'amei ha-mitzvot* in

Rethinking Modern Judaism: Ritual, Commandment, Community.[64] Though drawing on

Heinemann's work, Eisen focuses on the modern period and broadens the perspective to include

theories of religion, modernity, and ritual as well as those of intellectual and social history. He

also expands the definition of *mitzvah* (commandment) to include Jewish practices that are not

found in any halakhic code. Eisen's goal is to "reopen the simplest questions about what modern

Jews have done, 'religiously' and 'ethnically,' and why."[65] His work provides important

historical and sociological context to understand halakhic observance or any attempt at justifying

the commandments in the modern period. However, his focus is more on comprehending Jewish

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[61] Ibid., 1:141–142.

[62] Ibid., 1:138–139; Isaac Heinemann, *Ta'amei ha-mitzvot be-sifrut Yisraʾel [The Reasons for the Commandments in the Literature of Israel]*, vol. 2 (Jerusalem: ha-Histadvut ha-Tsiyyonit, 1956), 237–244.

[63] Heinemann, *The Reasons for the Commandments in the Literature of Israel*, 1956, 1:139–140.

[64] Arnold Eisen, *Rethinking Modern Judaism: Ritual, Commandment, Community* (Chicago: University of Chicago Press, 1998).

[65] Ibid., 17.

practice and its interpretations than analyzing the cogency of its justifications. Moreover, his

expanded focus comes at the cost of attention to the varieties of justifications found in

philosophical accounts of *ta'amei ha-mitzvot*. After Mendelssohn the only such figure he

analyzes is Samson Raphael Hirsch, whose symbolic approach Eisen takes to be paradigmatic for

the modern period.[66] But philosophers of halakha like Leibowitz, Soloveitchik, and Berkovits

eschew symbolic approaches to Jewish practice. And while Eisen explores the relation between

actual Jewish practice and its interpretations, he does not examine their more direct connection

through halakhic-legal practice.

A number of studies discuss the reasons for the commandments in the thought of specific

thinkers or groups of thinkers. Urbach describes the reasons for the commandments in rabbinic

literature. His work also collects and categorizes the different reasons offered.[67] Importantly, he

notes that there was sometimes a practical, or halakhic-legal, motive for exploring the reasons for

the commandments.[68] However, aside from presenting instances where the reason for the

commandment influenced its application, he does not analyze this relation. As noted above,

Novak too discusses the reasons for the commandments in rabbinic literature, though he focuses

exclusively on the Talmud. In contrast to Urbach's approach, Novak has a philosophical interest

in the material. He insightfully points out that reflection on the reasons for the commandments is

the starting point for practical Jewish philosophy. However, he hastily concludes that it is

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[66] Ibid., 135–155.

[67] Urbach, *The Sages: Their Concepts and Beliefs*, 366–399.

[68] Ibid., 373–377.

normatively inert.[69] Detailed research on the relation between the justification of the commandments and halakhic-legal practice is necessary, especially in modernity.

Isadore Twersky and Stern both focus on Maimonides. In his important *Introduction to the Code of Maimonides*, Twersky devotes over a hundred pages to the relation between law and philosophy in Maimonides' thought. Significantly, he notes and analyzes instances of reflection on the reasons for the commandments in the *Mishneh Torah*, thus deconstructing the separation between *ta'amei ha-mitzvot* and halakhic-legal writing that Maimonides implicitly established.[70] Still, Twersky does not examine the philosophical structure of Maimonides' justifications of the commandments. That task is undertaken by Stern in his *Problems and Parables of Law: Maimonides and Nahmanides on the Reasons for the Commandments,* in which he compares and contrasts Maimonides' approach with that of Moses Nahmanides (1194-1270). Stern's analysis is philosophically sophisticated and provides a number of useful distinctions, including between reasons that explain the origin of the commandments and reasons that justify their performance.[71] He fixes on the problem of antinomianism, which arises from a disjunction between these two types of reasons.[72] Stern does not, however, discuss the relation between justifying the commandments and halakhic-legal practice. His study also does not concern the modern period.

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[69] Novak, "The Talmud as a Source for Philosophical Reflection."

[70] Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)*, 407–484.

[71] Stern, *Problems and Parables of Law: Maimonides and Nahmanides on Reasons for the Commandments (Ta'amei Ha-Mitzvot)*, 15–20.

[72] Ibid., 15–48.

2. Philosophical Investigations

While Stern's work is philosophically sophisticated, it main goal is a better understanding of the thought of Maimonides and Nahmanides. As a work with primarily philosophical interests, Daniel Rynhold's *Two Models of Jewish Philosophy: Justifying One's Practices* provides the most immediate context for the present study.[73] It combines advanced discussions of the accounts of the reasons for the commandments of Maimonides and Soloveitchik with an attempt to construct a new approach to justifying the commandments. Rynhold does not merely detail the types of reasons offered by Maimonides and Soloveitchik; he examines their assumptions about the nature of justification. Further, in the constructive stage of his project Rynhold does not offer specific reasons for the commandments but presents what he takes to be a philosophically sound approach to justification in general. This work is significant for injecting a distinctively philosophical orientation into the study of Jewish thought, both as it studies figures from the past and engages in original argument.

While Rynhold is mindful of the connection of *ta'amei ha-mitzvot* to moral philosophy, he does not thematically explore its link to philosophy of law nor does he examine the halakhic-legal writings of his subjects. Additionally, while he legitimately reads Soloveitchik's writings in view of his own philosophical concerns, a more contextual interpretation of Soloveitchik's views, which draws from a wider reading of his philosophical influences and halakhic-legal writings, has the potential both to advance understanding of his thought and to provide important material for discussions of the justification of religious norms and authority. Turning to Rynhold's own constructive approach to the justification of religious norms, he fails to appreciate the role that authority might play in the justification of norms. Moreover, his

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[73] Rynhold, *Two Models of Jewish Philosophy*.

contextualism neglects the commitment to context-transcendent validity implied by justification in general and Jewish normative claims in particular. This results in the blunting of the critical potential implicit in its claims to justification. In an overly post-modern move Rynhold overdraws Jewish particularism.

In addition to his discussion of *ta'amei ha-mitzvot* in the Talmud, Novak has offered a constructive approach to justifying the commandments in his *Natural Law in Judaism*.[74] In contrast to Rynhold's contextualism, he offers a modern natural law theory, which more adequately negotiates the tension between universalism and particularism in justifying the commandments. Though he is an astute reader of halakhic texts, Novak does not explicitly link his discussion of the justification for the commandments to an analysis of its implications for halakhic-legal practice. He also neglects the role that authority might play in justification. Further, there are elements in Novak's account that make it susceptible to apologetics.[75]

III. Method: History, Philosophy, and Three Senses of 'Critical'

This study combines the historical approach with philosophical investigation: it examines the thought of twentieth-century philosophers of halakha with a view to developing a critical philosophy of halakha. While these examinations are motivated by and aimed at resolving philosophical questions concerning the justification of religious norms and authority, they are also meant to be contributions to the study of the thought of Leibowitz, Soloveitchik, and Berkovits. Insight into their thought is gained by delving into their less well-known writings and appreciating their philosophical influences. Contemporary philosophical literature is also

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[74] David Novak, *Natural Law in Judaism* (Cambridge UK & New York: Cambridge University Press, 1998).

[75] The halakhic-legal applications of his approach and its apologetic consequences are evident in his discussion of abortion in *The Sanctity of Human Life* (Washington, D.C: Georgetown University Press, 2007).

adduced to clarify their views; yet, their writings are not simply "raided" for a philosophical investigation external to their own concerns. Additionally, their writings are read with charity. An attempt is made to see how their views could fit together, even if they did not make all the connections. This does not mean that contradiction or incoherence is denied. Indeed, this study focuses more on the deficiencies of their views than their strengths.

Drawing on these evaluations, the second part develops a critical philosophy of halakha focused on the issue of the justification of halakhic norms and authority. Its *critical* orientation is manifest on three levels, which correspond to three senses of "critical": The first sense simply means evaluative. It is already evident in the first part and informs the examinations of Leibowitz, Soloveitchik, and Berkovits. Studies of Jewish thought often have the character of uncritical doxographies. This is even more the case when thinkers like Soloveitchik and Berkovits, who are still influential within religious communities, are the object of study. A critical orientation is expressed by undertaking both understanding and assessment of their thought, filling them out in view of their context in order to evaluate their cogency.

The second sense of "critical" derives from the Kantian tradition. In describing the method of the *Critique of Pure Reason*, Immanuel Kant writes that it undertakes "the mere estimation of pure reason, of its sources and boundaries, as the propaedeutic to the system of pure reason. Such a thing would not be a doctrine…and its utility in regard to speculation would really only be negative, serving not for the amplification but only for the purification of our reason, and for keeping it free of errors, by which a great deal is already won."[76] Kant's goal is not to make substantive claims about reality but to determine the constraints on human reason, which then does have consequences for the types of claims that can legitimately be made about reality.

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[76] Immanuel Kant, *Critique of Pure Reason*, trans. Werner S. Pluhar (Indianapolis: Hackett, 1996), A11/B25.

Similarly, critical philosophy of halakha is a "method, not a system of science itself."[77] It neither attempts to justify the commandments nor halakhic-legal authority; rather, it is concerned with constraints on, and consequences of, their justification. Critical philosophy of halakha is thus a second-order form of inquiry; it ascertains what types of justifications could legitimately be offered for halakhic norms and authority and details the consequences of failures of justification for halakhic-legal practice.

The third sense of "critical" derives from Critical Theory, which has been described as a "kind of reflection that is aware of its social roots as well as its practical context of application."[78] This modifier applies to critical philosophy of halakha in a two-fold manner:

First, critical philosophy of halakha recognizes that the first-order efforts of practitioners of *ta'amei ha-mitzvot* arise out of social contexts and practical concerns. The attempt to provide reasons for the commandments does not derive from a timeless desire or obligation to justify halakhic norms. Jewish thinkers attempted to justify the commandments because of challenges to them from within and without the Jewish community. Further, the justifications they offered were influenced by both the Jewish tradition and the intellectual framework they shared with their interlocutors. More broadly, inspired by the work of Habermas, critical philosophy of halakha recognizes that justification is always an attempt by *someone* to justify *something* to *somebody*. Correspondingly, it adopts a contextualist account of justification, which consists of intersubjective and pragmatic features. The justification of a norm is not antecedently required

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[77] Ibid., Bxxiii. For further discussion, see Helmut Holzhey and Vilem Mudroch, *Historical Dictionary of Kant and Kantianism* (Lanham: Scarecrow Press, 2005), s.v. CRITIQUE.

[78] Pieter Duvenage, *Habermas and Aesthetics: The Limits of Communicative Reason* (Cambridge UK & Malden MA: Polity, 2003), 32. For a classic programmatic statement of critical theory, see Max Horkheimer, "Traditional and Critical Theory," in *Critical Theory: Selected Essays* (New York: Continuum, 1982), 188–243. For a more recent, second-wave interpretation see Jürgen Habermas, *Knowledge and Human Interests*, trans. Jeremy J. Shapiro (Boston: Beacon, 1972), 301–317.

but only becomes necessary when it has been challenged. Justification is not a two-place relation between a norm and principle that justifies it; rather, it is a three-pace relation between the norm, its proponent, and an audience to whom it must be justified. But appreciation of the social roots and practical context of application of attempts to justify norms in general and halakhic norms in particular need neither dissolve their philosophical import nor deny rational constraints.

Second, the social roots and practical context of application of this study itself is significant. Its philosophical interest in the justification of religious norms and authority stems from social conflicts over religious norms and authority. It aims to make progress on a means of resolving them. This does not entail, however, that philosophical analysis is sacrificed to instrumental concerns. Methodologically, this study aims to unite theory and praxis in a manner that does justice to both philosophical integrity and practical commitment.

IV. Contributions: Jewish Thought, Philosophy of Religion, Practice

A number of this study's contributions have been signaled in the foregoing. They can be classified into three categories: Jewish thought in its constructive, critical, and historical modes (1), philosophy of religion (2), and practice (3).

(1) The main contributions of this study are to Jewish thought through the development of a critical philosophy of halakha. All three senses of "critical" are significant: Jewish thought often restricts itself to historical understanding of earlier thinkers; this study focuses on evaluation. With important exceptions Jewish thought on this topic seldom engages in second-order reflection; this study directly engages in such analysis. Philosophy of halakha, for its part, often oscillates between the historical paradigm that entirely contextualizes its object and the legal theoretic paradigm that tends towards conservatism; this study recognizes the importance of

social context and practical applicability for its questions without denying their philosophical import or the possibility of critique.

This study also aims to add to the scholarship on twentieth-century Jewish thought through its analyses of the philosophies of halakha of Soloveitchik, Leibowitz, and Berkovits. Soloveitchik has been the object of a number of studies; but because of his influence within the modern orthodox Jewish community they seldom engage in evaluation. Additionally, his thought has yet to be fully assessed in view of the philosophical influences on him and his posthumously published writings. This study rectifies both of these lacunae by drawing on these influences and writings to understand and evaluate his thought. Leibowitz has received attention in Israel and some notice in the United States. However, his ardent political views and polemical manner of pronouncing his religious positions have detracted from sober analysis of their philosophical presuppositions. This study focuses on these philosophical bases and also explores an underappreciated element of his thought—his forays into halakhic decision-making. Berkovits is mainly known in the American context as a post-holocaust thinker. Study of his halakhic thought has recently commenced in Israel, though these works do not engage in assessment. They also occasionally succumb to significant errors of interpretation. Thus, while conducted with a contemporary philosophical and practical aim, the examinations of these thinkers expand and deepen the study of twentieth-century Jewish thought, especially philosophy of halakha.

(2) Though recently philosophy of religion has begun its own "practical turn" informed by an appreciation of the philosophical tradition of American Pragmatism,[79] to a large extent the central issues of the field are still determined by its origin in Christian Theology and the latter's

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[79] See as examples of this "practical turn": Wayne Proudfoot, *Religious Experience* (Berkeley: University of California Press, 1985); Stout, *Democracy and Tradition*; and the section on "Pragmatics" in Nancy K. Frankenberry and Hans H. Penner, eds., *Language, Truth, and Religious Belief: Studies in Twentieth-Century Theory and Method in Religion* (Atlanta: Scholars' Press, 1999).

focus on individual belief.[80] It can thus benefit from the input of perspectives from other traditions. This would redeem philosophy of religion's implicit claim to study religion and not simply Christianity. This would also strengthen philosophy of religion's links to other areas of philosophy, including moral and legal philosophy. This study contributes to both these efforts. It brings important issues in Jewish thought to the attention of philosophy of religion and, simultaneously, expands the boundaries of philosophy of religion to include moral and legal philosophy.

(3) Lastly, though it cannot be assured, it is hoped that the dialogue created in this study between philosophical reflection and the Jewish tradition aids in the resolution of social conflicts over religious authority and norms. In addition to considering what types of justifications may be offered for different claims and the consequences of failures of justification, it aims to call attention to religious believers' commitments to hold themselves accountable to their faith and to other individuals. In concluding, then, it suggests a possible theological interpretation of these commitments, which aims to integrate them.

V. Chapter Summaries

In Part I the accounts of the justification of halakhic norms and authority and their relations to halakhic-legal practice in the thought of Leibowitz, Soloveitchik, and Berkovits are analyzed. Chapter One examines Leibowitz's theocentric philosophy of halakha. Leibowitz claims that halakhic practice is exclusively devoted to service of God. Despite his explicit rejection of *ta'amei ha-mitzvot*, he does offer a justification for the commandments. There is only one valid reason for them: service of God. Further, on the basis of metaethical and axiological arguments,

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[80] Recent readers or handbooks on philosophy of religion often contain no chapters on religious practice or religious law. See for example William J. Wainwright, ed., *The Oxford Handbook of Philosophy of Religion* (New York: Oxford University Press, 2008).

he contends that this reason cannot be further justified; it is a value decision, and like all such decisions it derives from an arational act of the human will. Yet, this "decisionist" account of justification is inadequate as an account of normativity. Moreover, it renders Leibowitz's theory of halakha inadequate. Indeed, in Leibowitz's forays into halakhic-legal practice he struggles to abstain from ascribing other reasons to halakhic norms.

Chapter Two analyzes Soloveitchik's attempt to make philosophy of halakha the foundation for Jewish thought. When he addresses the project of *ta'amei ha-mitzvot* he privileges the validity of halakhic norms by using them as the basis for their own justification. But it is unclear how this approach could actually justify norms. An alternative justification of the commandments that underwrites Soloveitchik's more apparent approach is evident when the philosophical influences on him and his posthumously published writings are considered. This account conceives of the commandments as the objectified expression of collective Jewish consciousness's affective cognition of objective values. Correspondingly, by engaging in halakhic practice, the individual Jew disciplines her emotions to respond appropriately to reality and achieve value perception. This approach influences Soloveitchik's halakhic-legal practice, which incorporates consideration of the values underlying halakhic norms. While the structure of this justificatory approach is more understandable, it rests on dubious metaphysical presuppositions.

Chapter Three focuses on Berkovits' teleological philosophy of halakha. For him the commandments and halakhic-legal practice are media for the transformation of the world into the Kingdom of God, an ideal moral state characterized by *sedeq*, the union of justice and equity. *Sedeq* both justifies the commandments and guides halakhic-legal practice. This direct connection of *ta'amei ha-mitzvot* and halakhic-legal practice presents a robust justification of

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halakhic practice. But on the basis of a problematic account of normativity, Berkovits insists that only revelation makes *sedeq* or any other moral value normative. Berkovits' theory of halakha, for its part, is susceptible to conflicting interpretations, each with its own difficulties. The most important difficulty derives from the very robustness of his justification of halakhic practice: norms require normative justification, but normative justification threatens to make authority superfluous.

In Part II questions raised in the preceding chapters about the justification of norms and authority are analyzed to develop a critical philosophy of halakha. Chapter Four focuses on normative justification. The shared foundationalist features of the philosophies of halakha of Leibowitz, Soloveitchik, and Berkovits are detailed and criticized on the basis of the Pragmatic philosophical tradition. Then an alternative contextualist, that is, pragmatic and intersubjective, account of justification is offered by drawing on the thought of Habermas. This approach does not undertake the hopeless effort to identify a basic source of normativity. Yet, on the basis of a *communicative* conception of rationality, it articulates the rational constraints on, and practical consequences of, justification. This account is then applied to the justification of halakhic norms, and in the process it is modified to more accurately conceptualize "religious" discourse.

Chapter Five focuses on authority. It aims to resolve the competitive relation between normative justification and legal authority that becomes apparent through the examination of the thought of Leibowitz and Berkovits. Beginning with the structure of Soloveitchik's grounding of halakhic-legal authority while recognizing its limitations, it then deploys Raz's service conception of authority to model halakhic-legal authority. For Raz legal authority is justified by showing that one is more likely to comply with one's preexisting reasons for action by relying on its directives than by depending on one's own deliberations. But once a legal authority is

grounded, it provides its addressees with new reasons for action. Thus, while connected to normative justification, the directives of a grounded authority possess uniquely legal normativity. Authority is thus instrumentally grounded, and it mediates between normative justification and legal justification. This conception of authority is then integrated into the account of justification developed in the previous chapter and applied to halakhic-legal authority.

The conclusion is comprised of closing reflections, which reconnect the detailed philosophical work of the previous chapters with the conflicts over religious norms and authority in our society that gave rise to this study. While critical philosophy of halakha provides a framework for delineating the legitimate boundaries of Jewish religious norms, it may be claimed that it is foreign to the Jewish tradition. Resonances between critical philosophy of halakha and the broader tradition of Jewish thought and law are thus suggested through reflections provoked by Emmanuel Levinas' engagements with Biblical and rabbinic texts. In addition to indicating connections that are actually present, this amplifies the approach's practical effectiveness in resolving these conflicts.

CHAPTER ONE

'Service of God' as the Value of Halakha: Leibowitz's Theocentric Philosophy of Halakha

The theocentric philosophy of halakha of Yeshayahu Leibowitz[1] seems an inauspicious place to start a study of the justification of halakhic norms and authority and its relation to halakhic-legal practice. Leibowitz explicitly rejects the project of *ta'amei ha-mitzvot* in favor of exploring the "meaning of the halakha," which he simply identifies with service of God. Moreover, he contrasts a true understanding of Judaism as a "demanding religion" with false "endowing religions." The latter provide a service to human beings, for God fulfills a function in the economy of human needs. Echoing Ludwig Feuerbach,[2] Leibowitz claims that such religions, like Christianity, are veiled forms of atheistic humanism; humanity is the actual object of

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[1] Yeshayahu Leibowitz was born in Riga (in present day Latvia) in 1903. His early secular education was conducted in a *Gymnasium*, and he was home schooled in Judaic studies. His family fled Riga in 1919 in connection with the Russian invasion, finding refuge in Berlin. He studied chemistry and philosophy at the Friedrich-Wilhelm University in Berlin, receiving a doctorate in 1924 on the chemical structure of sugar. In Germany he also received a medical education, though due to the Nazi ascent to power, he only received his medical degree in 1934 from the University of Basel. In 1935 he immigrated to Mandatory Palestine and joined the faculty of the fledgling Hebrew University as a professor of organic chemistry, biochemistry, and neurophysiology. He later became the chair of the Department of Biological Chemistry and professor of neurophysiology at Hebrew University Medical School. In these roles, alongside his strictly scientific instruction, he offered courses in history and philosophy of science. He authored works on genetics and the mind-body problem. He also served as the editor in chief for a number of volumes of *Encyclopedia Hebraica*, writing many of the articles on history and philosophy of science himself. Beyond these academic endeavors, Leibowitz was well-known in Israeli society as a public intellectual, lecturing on Jewish themes and current events on television and radio. He published many articles on these themes in Hebrew journals; these articles were later reprinted in collected volumes. He was a vigorous critic of Israeli military policies, calling for the Israeli military's withdrawal from its occupation of the West Bank as early as 1968 and supporting conscientious objectors to the Lebanon War in 1982. In 1993 he was nominated for the prestigious Israel Prize; however, soon afterwards a controversy erupted in response to his comparison of special units of the Israeli Defense Force to the Nazi SS, leading him to withdraw his candidacy. He died in Israel in 1994. For more biographical information, see "Leibowitz, Yeshayahu," *Encyclopedia Judaica* (Jerusalem & New York: The Macmillan Company, 1972); and Daniel Rynhold, "Yeshayahu Leibowitz," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2011, http://plato.stanford.edu/archives/sum2011/entries/leibowitz-yeshayahu/.

[2] Ludwig Feuerbach, *The Essence of Christianity* (Mineola: Dover, 2008).

worship.[3] The former, in contrast, does not benefit humans in any manner; it simply presents their obligations to God.[4] Thus, to the extent to which *ta'amei ha-mitzvot* provides reasons beyond service of God for halakhic norms, it threatens to vitiate Judaism of religious significance and transform it into a form of anthropolatry. In terms of theory of halakha, Leibowitz was neither recognized by others nor identified himself as a halakhic-legal authority. In fact, when discussing halakhic issues, he often stresses that he lacks the authority to deliver rulings.[5] Thus, investigating his theory of halakha does not seem promising either.

However, such appearances are deceiving. While Leibowitz rejects traditional approaches to *ta'amei ha-mitzvot*, he does assign a reason to halakhic norms: service of God. His denunciation of providing reasons for the commandments and focus on the meaning of the halakha are attempts to distinguish his approach from those that he finds problematic; it does not announce an absolute difference in project. Indeed, far from rejecting justifications for the commandments, Leibowitz offers two such justifications with varying strengths based on specific metaethical and axiological premises. According to the first, commitment to service of God through obedience to halakhic norms cannot be further justified because it is a value decision. However, as such, it is on all fours with commitment to any other axiological orientation and its entailed norms, which can only be grounded in an individual's arational decision. Halakhic norms are thus at least as justified as any other norms. According to the second, service of God is the only true value because only it can be willed in the radical freedom required of authentic value decisions.

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[3] Yeshayahu Leibowitz, *Yahadut, 'Am Israel u-Medinat Israel [Judaism, the People of Israel, and the State of Israel]* (Jerusalem: Schocken, 1975), 296. Henceforth *JPS*.

[4] Yeshayahu Leibowitz, *Torah u-Mitzvot ba-Zeman ha-Zeh: Hartsaot u-Maamarim [Torah and Commandments in this Era: Lectures and Essays]* (Tel-Aviv: Masada, 1954), 21. Henceforth *TCE*.

[5] See for example, Yeshayahu Leibowitz, *Beyn Mada' le-Filosofiyah: Ma'amarim, Hartsa'ot ve-Sihot [Between Science and Philosophy: Essays, Lectures, and Discourses]* (Jerusalem: Academon, 2002), 311. Henceforth *BSP*.

Compliance with halakhic norms is thus more justified than any other practical decision. Yet, Leibowitz's underlying metaethical and axiological positions require scrutiny.

Moreover, despite not being a halakhic-legal authority, Leibowitz does present a theory of halakha, including a general description of the halakhic-legal system, an account of halakhic-legal authority, and criteria of halakhic-legal validity. He even occasionally offers opinions on halakhic-legal questions. Moreover, he attempts to create a direct link between his account of *ta'amei ha-mitzvot* and theory of halakha by identifying the criterion of halakhic-legal validity with service of God. However, when service of God is understood in the manner Leibowitz requires of it, it cannot serve as a criterion of halakhic-legal validity. It is also not descriptively adequate of halakhic-legal practice, and even Leibowitz is unable to sustain it in his halakhic-legal efforts.

Leibowitz's philosophy of halakha thus actually presents an ideal starting point for this study, as questions raised by his thought elicit reflection on central issues regarding the justification of norms and authority and the relation between it and legal practice. In the following, his philosophy of halakha is examined and assessed from three perspectives: First, its basic methodology is investigated. An attempt is made to determine the argumentative status that he attributes to his reflections on the "meaning of halakha." This examination is crucial because it directly relates to his views on the type of justification that should be offered for the commandments. However, it is inconclusive and concerns about methodological consistency pervade the analysis of his thought. In the course of this initial discussion, his position on the meaning of the halakha is also briefly introduced (I). Leibowitz's characterization and rejection of the traditional project of *ta'amei ha-mitzvot* is then explored against the background of his metaethics and axiology. His account of the meaning of halakha is thoroughly described, and it is

argued that it is amounts to a justification of halakhic norms. Some of the difficulties of his underlying philosophical positions are then discussed (II). Next, Leibowitz's theory of halakha is examined, and it is argued that he presents a positivist conception of halakhic-legal practice, in which service of God functions as the criterion of halakhic-legal validity. However, it is contended that this theory of halakha is not sustainable, and its failure raises broader questions about the relation between normative justification and legal authority (III).

I. Methodology of Philosophy of Halakha: Objective or Interpretive?

Both this section and the next consist of a discussion of the essay "Practical Commandments (The Meaning of Halakha),"[6] which presents the best summary and introduction to Leibowitz's thought since he never composed a systematic work, contenting himself with collections of essays. Other essays are also drawn upon to clarify and assess his claims. The first task is to examine his method of philosophy of halakha to ascertain the argumentative status that he claims for his views. However, this task is hampered by his inconsistency on this issue.

Leibowitz initiates his discussion of halakha in "Practical Commandments" by describing his approach and defending his focus on Jewish law. At the outset, he makes two important methodological points: he will deal exclusively with the *meaning* of the halakha (A) and the halakha is the only uniquely identifying and individuating feature of Judaism (B).

A. Philosophy of Halakha and Meaning

Leibowitz writes that in his investigation of the practical commandments his focus will be on meaning as opposed to other approaches to them:

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[6] This essay has its roots in an early lecture, and was published in Hebrew twice with modifications in each version as well as once in English under the non-literal and interpretively over-determined title "Religious Praxis: The Meaning of Halakha." My analysis is mainly based on the second Hebrew version of this essay as it is the last recension of it that he decided to print.

> This essay deals with the practical commandments as an element of the living religious existence, that is, not as a historical or theological issue. It will not deal with the philosophy of the reasons of the commandments [*ta'amei ha-mitzvot*], rather with the meaning of the practical commandments for Jewish religiosity, which we are living and are capable of living here and now…. This essay deals not with the content of the halakha—which is the consolidated form of the practical commandments—rather with its meaning for the religion and for the religious person.[7]

Leibowitz distinguishes his method of investigation from other sorts of inquiry. He is not concerned with history, theology, or *ta'amei ha-mitzvot*. His concern for "the meaning of the practical commandments for Jewish religiosity, which we are living and capable of living here and now" and their "meaning…for the religious person" seems to indicate that his goal is interpretive; he reflects on the significance of halakha within Jewish religious life. Yet, he also speaks of "the meaning of the practical commandments for the religion," which implies that the practices have an objective meaning that he will identify. This lack of clarity, between offering *an* interpretation of the meaning of the commandments and identifying *the* meaning of the commandments, evidences a basic inconsistency in Leibowitz's thought: The latter claim asserts a type of objectivity for his view, while the former does not.

B. Halakha and Judaism

Leibowitz's lack of clarity about the status of his claims becomes striking later in the essay. In substantiating his decision to focus on halakha, he makes a very strong claim: Judaism is identical with the halakha. He offers two arguments to support this statement: The first is presented as empirical (1), while the second is overtly philosophical (2).

(1) Leibowitz's empirical claim is that halakha is the only uniquely identifying and individuating feature of Judaism. He writes,

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[7] Leibowitz, *JPS*, 13.

We define Judaism as an institutional religion—not only in the sense that it possess institutions, for institutions exist in all religions, rather in the sense that these institutions—the practical commandments—they themselves for Judaism are the religion itself, and [Judaism] does not exist at all outside of these institutions…. We will deal with the place and meaning of the practical commandments in Jewish religious existence using a line [of argumentation] that leads from the simpler to the more difficult. As the most simple starting point, we will use an empirically-historically confirmed fact, which does not depend on any ideology, any faith, or any prior belief about the essence of Judaism: the fact that Judaism as a specific historical phenomenon and a subject of identity and three thousand year continuity is embodied in only one thing—the practical commandments, which are joined in a systematic structure in the form of the halakha; and only this is the objective historical-empirical individualization of Judaism, without any subjective evaluation of this fact. Judaism was never defined as one unit, separated from other units, and that maintains its essence and independence except by virtue of the halakha.[8]

This argument is directed against the claim that Judaism is defined by the acceptance of certain doctrines. Leibowitz counters this assertion by contending that, in fact, throughout Jewish history there has been nothing upon which there has been less agreement than the principles of faith. Elsewhere, he extends the argument and claims that halakha is also the only way of uniquely identifying and individuating the Jewish people, who share no common race, territory, or language.[9] As is evident, Leibowitz strongly insists on the objectivity of this judgment. Yet, this insistence is hard to reconcile with statements in other texts, such as his *Discourses on Science and Values* (*DSV*) where he claims that all areas of inquiry besides for logic, mathematics, and the natural sciences lack objectivity. In fact, following Karl Popper, he denies the human sciences, including history, objectivity.[10]

(2) Leibowitz's second and philosophical argument for the identity of Judaism with the halakha consists in the denial of the possibility of separating the meaning of a practice from the

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[8] Ibid., 14–16.

[9] Yeshayahu Leibowitz, *Emunah, Historiyah, va-ʿArakhim: Maʾamarim ve-Hartsaʾot [Faith, History, and Values: Essays and Lectures]* (Jerusalem: Academon, 1982), 113–115; 205–206. Henceforth *FHV*.

[10] Yeshayahu Leibowitz, *Sihot ʿal Madaʿ va-ʿArakhim [Discourses on Science and Values]* (Tel Aviv: Matkal/Ketsin Hinukh Rashi/Gale Tsahel/Misrad ha-Bitahon, 1985), 69. Henceforth *DSV*.

practice itself. This argument is directed against the position that recognizes the centrality of halakha for Judaism but insists that halakhic practices refer, whether instrumentally or symbolically, to further purposes or values, which are truly essential to Judaism. He denies this separation: The practice and the meaning of the practice are inherently connected. He writes,

> There is a very widespread conception due to shallow rationalism that there is a distinction in religion between the content and the husk: between the eternal intellectual content that constitutes absolute value and the different external forms in which it is embodied, which are subject to change, and should be changed in agreement with the periods, conditions, and occurrences. This distinction has nothing upon which to rely: there is nothing in the content except what is manifested in the form. The essence of a specific content is expressed in that it wraps itself specifically in a particular form, while if it had a different wrapping it would not be the same content…. [T]he faith values of Judaism, or the faith content of it—the stance of man before God—are not expressed except in a specific form: in the framework of halakha. A person who thinks that it is possible to uphold the content and to change the halakha in agreement with the needs of man—his material, spiritual, or vital needs—is nothing but mistaken. The essence of the faith content is that it cannot be expressed in anything but the systematic framework of the practical commandments—the halakha.[11]

Leibowitz makes a general claim about the relation between content and form: they are inseparable. To change the form is to change the content. Indeed, another example he mentions is the relation between Shakespeare's use of the form of the sonnet and the eros that he expresses. Correspondingly, halakha does not refer to some values or purposes outside of itself; its meaning—the human's stance before God—can only be expressed in the halakha. Thus, since halakha and its meaning are codetermining, there is no other candidate for the essence of Judaism. The essence of Judaism is the halakha and its meaning: the human's stance before God.

In the course of arguing for the identity of Judaism with halakha, then, Leibowitz advances a further claim about its meaning. Just as halakha is the uniquely identifying and individuating feature of Judaism, the human's stance before God is the specific meaning that the halakha

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[11] Leibowitz, *JPS*, 17.

expresses. Thus, to the extent to which the former claim is meant to be objective, so too is the

latter. Yet, he gives the opposite impression when discussing the very same point, writing,

> There have been disputes between researchers of religions and cultures over the issue of the relation between myth and ritual in primitive religions. In the time of the reign of rationalism in the eighteenth and nineteenth centuries, it was an axiom that primitive peoples created ritual from out of their worldview and sense of the world that was embodied in myth so as to make tangible their intellectual contents. In our time, there are partisans for the idea that is opposed to this who view ritual as the first manifestation and the myth as an attempt to interpret the ritual and to extract from it understanding and meaning…. Also in Judaism, in which the religious faith and action are attached to one another, one can ask: Are the practical commandments a superstructure that is erected on the bases of "religious values," which are intellectual and emotional contents; or perhaps the vital and spiritual world of the religion of Israel is itself the superstructure raised on the basis of the religious action? The answer to this question is not dogmatic or normative, rather empirical: the values of the faith, the categories of cognition and feeling of the religion are, in the world of Judaism, commentary on the framework of the Torah and the commandments.[12]

Leibowitz claims that it is religious practice that is prior to doctrine or values and that the latter is

merely an interpretation of the former, at least in Judaism. This point, while similar to the earlier

one in rejecting the rationalist assumption that practices are subordinate to doctrines or values,

differs from it because it significantly loosens the relation between practice and meaning. While

the former view insists on the unique relation between the content and form, such that if the form

is objective then so too is the content, here Leibowitz claims that the content is an interpretation

of the form. This allows for the possibility that the content may shift and change over time. And,

indeed, Leibowitz details various interpretations of halakha to show that Judaism cannot be

defined by ideas but only by the halakha itself. While this may further support his contention that

the halakha is the only uniquely identifying and individuating feature of Judaism, it undermines

the status of his claim about the meaning of halakha. If it is halakhic practice that is essential to

Judaism and everything else is interpretation, then his own claim that the meaning of halakha is

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[12] Ibid., 14–15.

the human's stance before God is not objective either. It is not *the* meaning of halakha but just another interpretation.

In sum, Leibowitz's methodological remarks in his programmatic essay are ambiguous about the status he claims for his reflections on halakha. It is uncertain whether the argument that halakha is the uniquely identifying and individuating feature of Judaism is meant as an objective empirical claim or whether it is an interpretive move within a discourse constituted by the religious life of halakhic Judaism. Taking it in the former sense makes it difficult to reconcile with his theoretical remarks on the objectivity of the human sciences. In contrast, taking it in the latter sense requires ignoring his insistence on the claim's objectivity and, moreover, negates the claim's persuasiveness for anyone not already committed to a "living religious existence" within halakha. Additionally, it is not apparent whether he claims to have identified the objective meaning of halakha or whether he is simply offering another interpretation of it. Much hinges on this distinction, for he uses this account of the meaning of the halakha to support his rejection of most attempts at *ta'amei ha-mitzvot*, his own justification of halakhic norms, and as a criterion of halakhic-legal validity in his theory of halakha. However, as is shown, methodological inconsistency plagues Leibowitz's philosophy of halakha, rendering the status of his justification of the commandments and theory of halakha unclear.

II. Service of God and the Justification of Halakhic Norms

Regardless of whether it is understood in an objective or interpretive sense, the meaning of halakha is the central component of Leibowitz's philosophy of halakha. He claims to focus on the meaning of the halakha instead of *ta'amei ha-mitzvot*. Thus, his account of the meaning of halakha must be clarified in the context of his metaethical and axiological premises to understand his account of the justification of halakhic norms. However, when this is done it becomes

apparent that Leibowitz only rejects a particular kind of justification for the commandments and offers his own in its place (A). However, it is further claimed that concerns about Leibowitz's methodological consistency resurface, issuing in three different interpretations of his justification of halakhic norms (B). Lastly, in addition to his methodological inconsistency, it is argued that his justification of halakhic norms suffers from number of difficulties, which stem from his metaethical and axiological premises (C).

A. Metaethics and Judaism

Metaethics is generally understood to comprise "attempts to understand the metaphysical, epistemological, semantic, and psychological presuppositions and commitments of moral thought, talk, and practice."[13] In this context, however, it is useful to expand its domain to include all practically normative "thought, talk, and practices." This allows one to entertain the possibility of a position like that of Leibowitz, which does not identify what one ought to do with what is moral. By axiology the more specific metaethical issue of the metaphysical, epistemological, and psychological status of values is meant. In this section Leibowitz's general metaethics and axiology are reviewed (1), before their application to halakha and Judaism is detailed (2). The consequences of his metaethical and axiological positions for the justification of halakhic norms is then assessed (3).

1. Metaethics and Axiology

Leibowitz's metaethical position is first described in connection with his reflections on meaning, values, and the contrast between evaluative judgments and factual conclusions (a). It is then explicated by a comparison of his view of practical reason with that of Kant (b).

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[13] Geoff Sayre-McCord, "Metaethics," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2012, http://plato.stanford.edu/archives/spr2012/entries/metaethics/.

a. Meaning, Value, and Decision

As has been shown, Leibowitz conceives of the relation between halakhic practice and its meaning in two ways, as both objective and interpretive. But he also uses the term "meaning" (*mashmaut*) in another sense that is closely connected with the notion of value. The central textual site for his discussion of this sense of meaning is *DSV*, in which he presents his metaethics and axiology. In the introduction to that work, his general conclusion is anticipated:

> There is no relation of relevance or interdependence between scientific cognition and axiological decision, and there is no contact or confrontation between them. Scientific cognition is not based on values, and the world of values is autonomous, it is not influenced by or in need of science, and it too does not contributed to scientific cognition and does not direct it. Hence, the intention of man—which is embodied in his actions—does not derive from his knowledge, but from his will.[14]

As an epigraph to the lectures, Leibowitz places, among others, a quote from Ludwig Wittgenstein that he takes to encapsulate his central contention:

> The sense[15] of the world must lie outside the world. In the world everything is as it is and happens as it does happen. In it there is no value—and if there were, it would be of no value.
>   If there is a value which is of value, it must lie outside all happenings and being-so…. It must lie outside the world.[16]

Setting aside whether this is an accurate interpretation of Wittgenstein,[17] Leibowitz uses this quote to emphasize two points: the connection of sense, or meaning, with values (i), and the sharp separation of facts from value, and consequently of ascertaining facts, or scientific cognition, from evaluative judgments, or value decisions (ii).

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[14] Leibowitz, *DSV*, 7.

[15] Leibowitz's translation uses the Hebrew word "*muvan*" to translate Wittgenstein's German "*Sinn*."

[16] Translation from Ludwig Wittgenstein, *Tractatus Logico-Philosophicus*, ed. Bertrand Russell, trans. C. K. Ogden (New York: Cosimo Classics, 2010), sec. 6. 41.

[17] See David Wiggins, "Wittgenstein on Ethics and the Riddle of Life," *Philosophy* 79, no. 3 (2004): 363–91 for an interpretive discussion.

(i) Leibowitz connects meaning, values, and purposes, writing that "even without

philosophical study it is understandable that the concept of an end is connected to the concept of

value, which is the meaning that we relate to things."[18] More specifically, he means ultimate

ends and intrinsic values, which he contrasts with instrumental ends and values. Indeed, he

writes, "one should distinguish between two possibilities—that an individual does something

because he sees that thing as the good, or that he does it because he sees it as good for the

attainment of something else."[19] He casts this distinction in the language of the halakha by

identifying it with the contrast between "for its own sake" and 'not for its own sake" and

describes it as "the important dual in the world of values."[20]

Leibowitz also contrasts values with needs, which he describes in two different ways: needs

given certain ends and "objective" needs. In reference to the first sense, he writes,

> It is possible to say 'man needs to eat.' Seemingly, we establish through this statement a fact
> grounded in natural existence; man is a creature whose biological properties necessitate him
> to eat. Despite that, even here the great distinction between the concept 'need' in this
> instance and the concept [in other contexts] is recognizable. For we know… there are
> circumstances in which men have sat hunger strikes until their death, thus, we must delimit
> somewhat the sentence…and express it such: 'man, to the extent to which he wants to live,
> needs to eat.' But it is possible that the man does not want to live, he prefers death, in which
> he sees a demonstration for a goal more important to him than life, and thus he does not eat.[21]

Given a particular end, certain actions can be described as needs because they are necessary for

the attainment of that end. The needs can thus be described as instrumental values, while the end

can be considered an intrinsic value. Turning to the other sense of needs, Leibowitz contrasts

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[18] Leibowitz, *DSV*, 27.

[19] Ibid., 58.

[20] Ibid.

[21] Ibid., 31–32.

"objective" needs and values in two conflicting ways: as itself an objective distinction and as a phenomenological distinction. Both of these contrasts are apparent in this passage:

> Values, not only are they things for which man has no need in the objective sense, rather they are things for which man is ready to pay a price. And this is what differentiates between values and everything else, for which man is ready to pay a price…only if that…thing satisfies something for him. And here, man is ready to pay a price for something for which he has no need from an objective perspective.[22]

Sometimes he implies, as indicated by his mention of "objective" needs, that there are certain natural needs that human beings possess that they are forced to pursue. However, as indicated by his comments about hunger strikes, these 'objective needs' are only objective given the value of one's life and the goal of preserving it. A better distinction between needs and values is expressed when he writes, "values, as opposed to the satisfaction of needs, are measured in what man is ready to give up for them and not by what they give to man."[23] Whatever an individual sees as demanding from her the renunciation of something else is for her a value. On this interpretation, the boundary between values and needs can shift for a particular individual.[24] More properly however, for Leibowitz that for the sake of which an individual is willing to sacrifice *all* else is for her a value, because true values demand the sacrifice of all other goods

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[22] Ibid., 35.

[23] Ibid., 34. Leibowitz as well Soloveitchik and Berkovits often use the male gender to indicate generic personhood and the pronoun "he" in their examples. In this study, I have retained their usage in citations and translations. However, in the body of the text I often use the feminine gender and the pronoun "she" in my examples.

[24] For example, life can be an "objective" need for an individual so long as she never has to consider the possibility of giving it up for sake of something else; only then will it become apparent whether life is a value or not for her. She can either preserve her life by giving up something else, commitment to her faith for example, and then it is apparent that life is a value for her. Alternatively, she can renounce her life for the sake of her faith, and thus faith is her value. Presumably, she could also act instinctively, without making a decision at all, and then her life would remain an "objective" need for her In this case, it is unclear what she values; but for Leibowitz life would not be a value for her because she did not decide to preserve it while giving up on other things through a free decision. For further support for this phenomenological reading, see Leibowitz, *FHV*, 211.

without offering anything in return. Indeed, Leibowitz is what can be termed a psychological axiological monist: individuals can only have one true value at any given time.

(ii) Leibowitz also contrasts value decisions with rational conclusions about facts. Throughout *DSV*, he marshals a number of arguments to establish the fact/value distinction. These arguments clarify his metaethical commitments and conception of rationality.

Leibowitz identifies the adoption of values with the positing of ends. Using this terminology, he offers an argument similar to G. E. Moore's "Open Question Argument" but leading to a significantly different conclusion. He writes,

> Every goal or end that is asserted as a conclusion necessitated by rational deliberations derived from the stock of knowledge immediately provokes the question: and what is the goal of the goal or the end of the end?—And this—*ad infinitum*—unless we stop at a point, a willful value decision—that is to say, irrational—that the individual establishes as ultimate.[25]

While Moore argues that any definition offered for the good that identifies it with a natural property is always open to the question of "whether it itself is good?,"[26] Leibowitz argues that any end or goal that is asserted as supported by reason is always open to the question of "yes, but what is the goal or end of that?". And whereas Moore offers his argument in support of the position that the good is a non-natural property that can be rationally intuited, Leibowitz holds that this shows that ends, goals, or values cannot be rationally anchored at all. They are the result of arational decisions. In response to the request to justify such a decision an individual can only remark that "this is his axiological decision."[27] Leibowitz thus articulates a non-cognitive approach to evaluative judgments.

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[25] Leibowitz, *DSV*, 55.

[26] G.E. Moore, "From Principia Ethica," in *Moral Discourse and Practice: Some Philosophical Approaches*, ed. Stephen Darwall, Allan Gibbard, and Peter Railton (Oxford UK & New York: Oxford University Press, 1997), 56–58.

[27] Leibowitz, *DSV*, 35.

In assessing the influence and cogency of Moore's argument Darwall, Gibbard, and Railton argue that a move like that of Leibowitz from the "Open Question Argument" to non-cognitivism was a historically characteristic and philosophical understandable response. The strength of Moore's argument comes from the assumption that attributions of "goodness" are linked to the guidance of action, or reasons/motivates internalism, and the demonstration that a "logical or conceptual" link is missing between the attribution of good to any state of affairs and the motivation to action.[28] But once Moore's solution of identifying the good with a non-natural, rationally intuitable property is questioned due to the range of disagreement in ethics or the "ontological queerness" of values, non-cognitivism becomes an attractive option for connecting judgments with motivation.[29]

The link between Leibowitz's internalism and his non-cognitivism is made explicit in another argument. At the outset of *DSV*, he asks us to consider a group of people sitting in a room who have just been informed that the ceiling is about to collapse. He argues that this knowledge does not necessitate that they flee the room. It is quite possible that some of the individuals decide to leave while others stay, despite acknowledging the same facts. Only the desire to live, which is the acceptance of the value of her life by an individual, will cause anyone to flee the room.[30] A similar point is expressed by Wittgenstein in his early "Lecture on Ethics," where he writes, "The *absolute good*, if it is a describable state of affairs, would be one which everybody, independent of his tastes and inclinations, would *necessarily* bring about or feel guilty for not

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[28] Stephen Darwall, Allan Gibbard, and Peter Railton, "Toward Fin de Siecle Ethics: Some Trends," in *Moral Discourse and Practice: Some Philosophical Approaches*, ed. Stephen Darwall, Allan Gibbard, and Peter Railton (Oxford UK & New York: Oxford University Press, 1997), 4–5.

[29] For arguments about the "ontological queerness" of objective moral values, see J. L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth UK: Penguin, 1977), 38.

[30] Leibowitz, *DSV*, 12–13.

bringing about. And I want to say that such a state of affairs is a chimera."[31] Both Leibowitz and

Wittgenstein are committed to a form of judgment reasons/motives internalism, according to

which the judgment that one has reason to perform an action issues in the motivation to do it.[32]

The problem with descriptive or factual claims is that they do not have the required action-

guidingness for value decisions; they cannot, by themselves, provide reasons for action.[33]

Leibowitz concludes that judgments about value must not be cognitive at all but completely

conative and thus arational.

Lastly, Leibowitz supports the fact/value distinction by appealing to the objectivity of

conclusions about facts in science in contrast to the subjectivity of judgments about values. This

comparison clarifies his approach to rationality. His description of science is scattered

throughout his writings. He portrays modern science as prescinding from metaphysical claims

and restricting itself to the establishment of functional relations between phenomena. It attempts

to see how far inquiry can proceed based only on the notion of efficient causality,[34] bracketing

the Aristotelian notion of the final end.[35] This is because the final end is merely "the relation of

our consciousness to the given matter," or the meaning of facts for us. In contrast, science only

provides 'information.'[36] Further, it suffices with only an instrumental conception of truth;[37] the

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[31] Ludwig Wittgenstein, "A Lecture on Ethics," *The Philosophical Review* 74, no. 1 (January 1965): 7; italics in original.

[32] On the various forms of reasons/motives internalism, see Stephen Darwall, "Reasons, Motives, and the Demands of Morality: An Introduction," in *Moral Discourse and Practice: Some Philosophical Approaches*, ed. Stephen Darwall, Allan Gibbard, and Peter Railton (Oxford UK & New York: Oxford University Press, 1997), 307–310. Reasons/motives internalism and externalism are further discussed in Chapter Three of this study.

[33] Darwall, Gibbard, and Railton, "Toward Fin de Siecle Ethics: Some Trends," 4–5.

[34] Leibowitz, *DSV*, 27.

[35] Ibid., 28.

[36] Leibowitz, *JPS*, 379.

laws of nature are "generalizations and principles according to which we succeed, in our dealing with nature and portions of nature, to make conclusions and achieve successes. The meaning of the laws of nature is applied, and their truth is in their effectiveness."[38]

Leibowitz discusses the objectivity of scientific cognition in two different ways that are not distinguished: as resulting from a type of psychological coercion and as merely describing the fact that a consensus has been achieved in a certain area of inquiry. In terms of the former, he writes, "scientific cognition…forces itself from a psychological perspective on anyone that understands it."[39] Yet, he also writes, "the concept of objectivity does not correspond to the concept of the truth. Objectivity is expressed in that on the basis of shared knowledge every person comes to the same conclusions; though it is possible for the knowledge [sic] to be mistaken."[40] There may be a connection between the first and second positions: If in a certain domain of inquiry conclusions are forced on the researchers, then *ipso facto* there would be consensus among them. But there need not be this connection as Richard Rorty has shown.[41]

Leibowitz contrasts the subjectivity of evaluative judgments with the objectivity of scientific conclusions in both these ways. On the one hand, he simply notes the recalcitrance of axiological disagreement; the inability to come to a consensus over values as compared to the more uniform nature of scientific investigations.[42] On the other hand, he writes,

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[37] Leibowitz, *DSV*, 53.

[38] Ibid., 63.

[39] Leibowitz, *JPS*, 345.

[40] Leibowitz, *DSV*, 24. I take it that actual knowledge, as compared to justified belief, cannot be mistaken.

[41] Richard Rorty, *Objectivity, Relativism, and Truth* (Cambridge UK: Cambridge University Press, 1991), 90.

[42] Leibowitz, *DSV*, 11.

One of the greats of our time, Heidegger says "*die Wissenschaft nicht denkt*" (science does not think), for scientific thought is forced on man. Philosophy thinks; science does not think, but merely operates its method. The thought of scientific man is acted upon; the method and the facts force upon him certain cognitions and conclusions. In this the world of science is distinguished from the world of values and from all fields of thought that man establishes and in which he thinks, that is to say, that in them he acts, and is not acted upon…. Science does not force on man any way of acting….[43]

The objectivity of science and the subjectivity of values are connected to the passivity of the

inquirer in the former and the activity of the agent in latter. The activity of evaluative judgments

is described in two ways: it results in human action and the decision itself is a form of human

activity. Leibowitz moves from the first point to the second:

Values have a motivational meaning: values are not a certain understanding of reality, but a certain motivation regarding reality…. [V]alues are among the things that have no basis in reality. If something is based in reality, then it has the force of coercion, and there is no choice regarding it; and if there is no choice regarding it, then the thing is neutral and it is not a value.[44]

Science is objective while value decisions are subjective because the same conclusions are

forced on all inquirers but human beings are free to choose their own values. The fact/value

distinction is thus grounded in the coercion of facts and the freedom of values.

b. Leibowitz contra Kant: Freedom, Reason, and the Will

Indeed, freedom is central to Leibowitz's philosophical anthropology and axiology.

According to him "only the autonomous creature is worthy of the name man."[45] Further,

decisions are of axiological significance if, and only if, they are made freely. This is because he

holds that only decisions that are freely made are attributable to an individual. In *Faith of*

Maimonides (*FM*), he writes,

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[43] Leibowitz, *FHV*, 237.

[44] Leibowitz, *BSP*, 276.

[45] Leibowitz, *JPS*, 60.

All of man's actions…are not worthy of being counted as his own deeds unless they originate from him alone, as distinct from any sentiment or behavior which comes about on account of factors which act on him and from any act performed by him on account of such factors.[46]

This is not a novel idea; indeed, the connections among axiological significance, autonomy, and attributability are central to Kantian ethics. In fact, one way to understand Leibowitz's metaethics is through a general comparison with the thought of Kant. A number of commentators, including Silman,[47] Kasher,[48] and Statman[49] have noted the similarities between the thought of Kant and Leibowitz. Leibowitz like Kant accepts the disjunction between 'is' and 'ought', which has been discussed under the heading of the fact/value distinction. Leibowitz's psychological axiological monism corresponds to the moral rigorism which is attributed to Kant. Additionally, like Kant, he identifies the intention with which an action is done as the site for the action's evaluation. Correspondingly, he articulates a deontological practical philosophy and draws the distinction between acting out of duty and merely conforming to duty.

What is often missed in these comparisons is that though Leibowitz does accept certain elements of Kant's practical philosophy, his basic move is the translation of them up a register from morality to metaethics.[50] This results in a conversion of Kant's moral "monotheism" to

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[46] Yeshayahu Leibowitz, *The Faith of Maimonides*, trans. John Gluck (New York: Adama Books, 1987), 81. Henceforth *FM*.

[47] Yohanan Silman, "Motiyviym Kanty'anyym Be-Haguto Shel Libovits [Kantian Motives in the Thought of Leibowitz]," in *Sefer Yeshayahu Libovits [Yeshayahu Leibowitz Book]*, ed. Asa Kasher and Jacob Levinger (Tel-Aviv: Agudat ha-Studentim, 1977), 47–55.

[48] Naomi Kasher, "Tifysat ha-Yahadut shel Libovits Le'umat Tifysat ha-Musar shel Kant [Kant's Ethics and Leibowitz's View of Religion]," *Iyyun* 26 (1976): 242–55; "Dat, Musar, ve-Rigashut [Religion, Morality, and Feeling]," *Iyyun* 42, no. 3–4 (1993): 509–16; and "'Ki Elohim Ba-Shamayim ve-Atah Al Ha-Arets': Libovits Ba-Mahshavah Sheniyah ['For God Is in Heaven and You Are on Earth': Second Thoughts on Leibowitz]," *Iyyun* 54 (2005): 424–54.

[49] Daniel Statman, "Torato Ha-Musarit Shel Libovits [The Moral Theory of Leibowitz]," in *Yeshayahu Libovits: Olamo ve-Haguto [Yeshayahu Leibowitz: His World and Philosophy]*, ed. Avi Sagi (Jerusalem: Keter, 1995), 326–41.

[50] Statman, however, does notice this without making it explicit, see ibid.

axiological "polytheism." The major step in executing it is a rejection of Kant's conception of reason, and more specifically, practical reason, which has implications for Leibowitz's conception of human freedom. Kant viewed reason in both its theoretical and practical employments as manifestations of human spontaneity and autonomy, that is, freedom.[51] Indeed, he writes, "The power to judge autonomously—that is, freely (according to principles of thought in general)—is called reason."[52] But Leibowitz views reason as coercive and external to the individual and, instead, identifies the individual with the will.[53] Thus, while for Kant autonomy is identical with rationality, for Leibowitz freedom must be arational.[54] A practical judgment must be based on an arational decision in order for it to be attributable to the individual and of axiological significance. Indeed, he rejects rationalistic approaches to morality, like that of Kant, as attempts to evade human responsibility.[55]

However, once practical reason is dismissed and freedom is reconceived as arational decision, there are no longer any connections among rationality, freedom, and morality. Every evaluative judgment is just as arational as any other and can be as autonomous or as heteronomous as any other. Thus, while Kant holds that "it is impossible to think of anything at all in the world, or indeed even beyond it, that could be considered good without limitation

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[51] Garrath Williams, "Kant's Account of Reason," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2009, http://plato.stanford.edu/archives/sum2009/entries/kant-reason/.

[52] Immanuel Kant, *Religion and Rational Theology*, ed. Allen W. Wood and George Di Giovanni (Cambridge UK & New York: Cambridge University Press, 1996), 7: 27.

[53] Yeshayahu Leibowitz, "Mada' va-'Arakhim [Science and Values]," *Iyyun* 42, no. 3–4 (1993): 552.

[54] Since Kant identifies freedom with reason and law-giving, his view of freedom is properly described as auto*nomy*. Leibowitz rejects this equation, and so autonomy is not a precise description of his view of freedom. Nevertheless, he uses autonomy synonymously with freedom, and so will I.

[55] Leibowitz, *DSV*, 78.

except a **good will**,"[56] which he then identifies with the morally good will, Leibowitz is an ontological axiological pluralist. Morality is just one value among many. Human beings are confronted with a plurality of values, to each of which they can freely commit themselves. Leibowitz therefore presents a relativistic axiology.

It is at the axiological level that Leibowitz retains other Kantian ideas such as rigorism and a focus on intention. Since he believes that individuals can only have one absolute value, they must be consistent. There can be no competing values existing in tension with one another in an individual's life. Further, he takes Kant's focus on the intention with which an action is performed as the site of moral evaluation and translates it into the site of axiological evaluation:

> Ethics is not a program of specific behavior. Any action, in itself, is indifferent from the perspective of morality. In two cases a rifle is loaded, cocked, and the safety catch is off, and someone is in the sight and I pull the trigger, and the result is one of two occurrences—it is possible that in one case it will be said: this is base murder, and in a different case it will be said: this is an act of valor and self-sacrifice of a soldier who protects his homeland. Thus, it is not the action that is judged here but the intention of the action. Moral judgment relates to the intention of the actor. Morality is not a doctrine of proper behaviors but a doctrine of the pure intention of man. Intention is not a guarantor for the 'good' action: man is liable to err; the result of a 'good intention' can possibly be very bad. But the moral judgment does not relate to the result of the action, but the intention. However, regarding the question, 'what is the pure intention and what the 'good' is' there is a difference of opinion. [57]

For Leibowitz the question of the "good" includes different moral theories as well as non-moral values. The intention with which an action is done determines the value that it instantiates and according to which it is judged. He thus articulates a form of agent-centered deontological axiology, which recognizes the distinction between acting from commitment to a value and

[56] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. Mary J. Gregor (Cambridge UK & New York: Cambridge University Press, 1997), 4: 393–394 emphasis in original. Henceforth *GMM*.

[57] Leibowitz, *FHV*, 126–127.

merely acting in accordance with it.[58] In fact, this is made clear when he contrasts the axiological

significance of the very same act done with a religious intention or a moral intention.[59]

In addition to the connection between autonomy and the human will, Leibowitz holds that the

different value orientations cannot be rationally adjudicated because they are incommensurable.

After describing how the question of the color of an object can be translated into a quantitative

question about the wavelength of light, he invokes an example that recurs throughout his works:

> In the midst of World War II Eleanor Roosevelt said in one of her speeches that this war is a holy war, for it is conducted for the sake of the highest human interests and values, and we are allowed to enlist men and send them to kill and be killed for the sake of the highest human interest, which is to secure the existence of a world in which a glass of milk will be ensured every day for every child, without regard for race, nationality, or religion; in contrast to the dark forces that intend to turn the world into oppressors and the oppressed, exploiters and the exploited. On the same day, or one of the days preceding or following it, General Tojo…spoke from the other end of the Pacific Ocean. He too established that this war was a holy war, conducted for holy values, and thus it is permissible to enlist men and send them into war for the highest value, which is—to die for the sake of the Emperor and for the sake of honor. And now what shall we do in order to decide between Mrs. Roosevelt and General Tojo by means of the scientific method?... From the scientific perspective one cannot make any contribution regarding value problems, and needless to say regarding the problem of morality. What Tojo said was as moral no less than that which Eleanor Roosevelt said; in any event, I see no objective criterion to decide between the moral levels of the two. I can say, I want this, and that I do not want. The fact that I want this or that I do not want that is not an objective cognition, for my friend, who is no less intelligent than me, wants precisely that and not this.[60]

Leibowitz describes both Roosevelt and Tojo as making "moral" claims; however, it is clear that

he means value claims: axiology. While Leibowitz does not believe that the obligation to act

morally can be rationally grounded, he does identify a definite content to morality, which closely

tracks that of Kantian morality. Indeed, paralleling the second formulation of the categorical

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[58] Larry Alexander and Michael Moore, "Deontological Ethics," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2012, http://plato.stanford.edu/archives/fall2008/entries/ethics-deontological/.

[59] Leibowitz, *JPS*, 294 cited below.

[60] Leibowitz, *BSP*, 273.

imperative ("So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means."),[61] for him morality involves embracing humanity as the ultimate value.[62] Thus his argument is that, as opposed to science where arguments can be decided by reducing data to a common quantitative unit, any attempt to reduce values to a common denominator begs the question about what is of ultimate value.[63]

2. The Value of Religion, Judaism, and Halakha

In the example of Roosevelt and Tojo two value orientations are presented, which Leibowitz describes elsewhere as the values of morality and fascism or ethnocentrism.[64] While he makes no effort to present an exhaustive account of values, these two orientations are frequently joined by a third—religion. Religion, according to him, does not offer information about the world but is concerned with the meaning of the world and thus the value orientation that an individual takes towards it: "Behold the essence of the concept of religion – even if we abstract from it the concept of the Torah—includes within it the concepts of motive, end, and orientation."[65]

Leibowitz is not consistent in distinguishing the value of religion and that of Judaism. Often he describes the religious value as that of the human's stance before God, or the recognition of God, and Judaism's further specification of this stance as that of service of God.[66] At other times, however, he identifies the value of Judaism with the true religious value and then characterizes

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[61] Kant, *GMM*, 4: 429.

[62] Leibowitz, *JPS*, 26.

[63] Leibowitz, *BSP*, 275.

[64] Leibowitz, *JPS*, 182; 295–296.

[65] Leibowitz, *BSP*, 296.

[66] Leibowitz, *JPS*, 109.

other religions, in particular Christianity, as anthropocentric and veiled forms of humanistic atheism.[67] Again, such inconsistency renders it difficult to establish his methodological approach—does he see himself as first abstractly defining religion in general and then specifying Judaism or, alternatively, as explicating Jewish practice? Still, it is necessary to examine his view on the value of Judaism and its relation to his metaethical and axiological views to comprehend his justification of halakhic norms.

Leibowitz views Judaism as a value orientation. He writes, "the root and constitutive principle, of both the religious feeling and religious consciousness, is not attached to any knowledge that is capable or incapable of being derived from faith, but from the essence of faith as a demand presented to man—to serve God."[68] Indeed, he explicitly sets this view in the context of his metaethics and axiology:

> The religious stance is the decision of man to serve God in the fulfillment of the Torah and the commandments, because he sees this as the end of man. This is the axiological decision—and like axiological decisions it is not forced on man by the power of existence. The facts are the same in relation to all men, despite this, one decides to accept upon himself the yoke of the kingdom of heaven and the yoke of the Torah and commandments, while this one claims 'I know not God,' while a third 'knows his master and intends to rebel against him.' And this is the case for all axiological decisions…. Axiological decisions do not derive from objective facts, and therefore they are not capable of being justified…. On the basis of objective facts it is only possible to justify choices in the matter of appropriate means to achieve an end upon which one has already decided, but it is not possible to give a justification for the axiological decision for a particular end.[69]

An individual must choose through a free decision to serve God as an end in and of itself for her choice to be attributable to her and possess axiological significance. The obligation to serve God cannot be derived from facts, or else it is would be forced on the individual and be of no

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[67] Ibid., 293–294.

[68] Ibid., 380; and Leibowitz, *DSV*, 74.

[69] Leibowitz, *FHV*, 63.

axiological significance, nor can it be justified in relation to any other end, or else it is not of intrinsic value. In sum, Leibowitz writes, "the root of religious faith is nothing but the decision that faithful man makes and the choice he takes: his obligating himself to the service of God."[70]

Moreover, Leibowitz claims that service of God is uniquely expressed in halakhic practice. In "Practical Commandments," he writes, "what distinguishes Judaism as the religion of the commandment is not the fact that it has *ab initio* commandments of certain content, rather the very fact that it recognizes a structure of commandment, while the particular commandments can be established after the fact. Not just that Judaism has a structure of commandment; Judaism is manifested in its structure of commandments."[71] This point is emphasized when Judaism is compared to other religions:

> We distinguish between two types of religiosity: religion at whose base are values and beliefs from which actions are obliged, and religion at whose base are practical commandments upon whose existence are based also values and contents of consciousness. 'A religion of values and beliefs' is an endowing religion—it is an instrumental medium for man to satisfy spiritual needs and to relieve his vital expressions; its end is man, and God offers his service to man in it; one who accepts upon himself this religion is a redeemed man. 'A religion of commandments' is a demanding religion—it places upon man obligations and tasks and makes him an object of service for the realization of an end that is not embodied in man; the satisfaction that it gives is nothing but the satisfaction that man has from doing his duty; one who accepts upon himself this religion is the man who serves his God [with] service for its own sake, for He is worthy to be served…. Therefore, what is the content and what is the meaning of the performance of the commandments?—the effort man makes to attain the religious goal. The practical commandments as a form of life, as an established and permanent form of human existence, prevents the conversion of religion to a means to attain an end: for most of these commandments there is no sense [*ta'am*] if they are not conceived as an expression of service of God…. Man will not accept upon himself this form of life unless he views service of God as an end and not as a means to attain another end.[72]

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[70] Leibowitz, *DSV*, 75.

[71] Leibowitz, *JPS*, 13–14.

[72] Ibid., 22–24.

The meaning of the commandments is the religious value—service of God. Thus, in some sense, the meaning of the commandments is the commandments themselves. They do not serve as a means for some other goal but themselves instantiate the value of service of God. Indeed, unless they are understood from this perspective, most of them lack any purpose whatsoever.

A crucial implication of Leibowitz's deontological axiology, combined with his identification of the value of halakha with service of God, is that having the intention to serve God is a necessary condition for a halakhic act to have religious significance. He writes, "religious meaning is the intention to serve God, and this sentence is a tautology."[73] This agreement between Kant and Leibowitz about the locus for the evaluation of action is best manifested when the latter rejects any connection between religion and morality, something upon which the former insists. Leibowitz writes,

> Religion and morality cannot be reconciled with one another—for everything depends on the intention: man's decision is religious, if his intention in this decision is for the sake of heaven; it is moral, if his intention is for the sake of man. It is necessary that one of these two intentions will be displaced by the other; in this sense only an atheist is capable of being a 'moral' man, while he who accepts upon himself the yoke of heaven recognizes the commandment and does not recognize the moral command.[74]

If a halakhic act is performed because one thinks that it is the morally right action and not simply because it is service of God, then it is devoid of religious significance. In this case, one merely conforms to the halakha; one does not comply with its demands. True, Leibowitz, like Kant, recognizes that there is some value in merely conforming to the law; in performing the commandments "not for their own sake." Still, actions of this sort possess only pedagogical significance; they are allowed with the hope that one will come to perform the commandments

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[73] Leibowitz, *FHV*, 153. Also, see Ibid. 138.

[74] Leibowitz, *JPS*, 294.

"for their own sake."[75] Leibowitz's psychological axiological monism is also evident here. An individual can only have one highest value: God or humanity; if it is God, he must serve him and not humanity; if it is humanity, he must serve it and reject God.

3. Service of God as the Reason for the Commandments

Leibowitz's metaethics, axiology, and conception of Judaism provide the background for understanding his rejection of traditional approaches to *ta'amei ha-mitzvot* (a) and proposal of his own account of the reason for the commandments (b).

a. The Problem with *Ta'amei ha-Mitzvot*

In characterizing and rejecting what he takes to be the project of *ta'amei ha-mitzvot*, Leibowitz writes,

> If the practical commandments are service of God and not service of man, there is no need for them to be directed at or intended for the needs of man. Any justification of the commandments by the needs of man and any grounding of them on the needs of humanity—from any perspective of need: cognitive, moral, social, national—empty the commandments of any meaning: religiously. For if the commandments are an expression of philosophical cognition, or if they have moral content, or if they rectify society, or if they safeguard the Israelite nation—then those that uphold them are not worshipping God, but themselves, or society, or their nation, and do a good service for themselves. In any event, they do not serve God; rather, they use the Torah of God for their own benefit and as an instrument to satisfy their own needs. Thus, the reasons for the commandments [*ta'amei ha-mitzvot*] is a theological concept and not a religious-faith concept. The reason [*ta'am*] for the commandments is service of God: service of God—and not the satisfaction of a human need or interest.[76]

Leibowitz characterizes the project of *ta'amei ha-mitzvot* as the justification of the commandments by showing how they are efficient means for the attainment of particular ends. These ends are described as "needs," which themselves are only necessary from a particular

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[75] Leibowitz, *FHV*, 11–19.

[76] Leibowitz, *JPS*, 26.

perspective; thus "needs" are intermediate ends and "perspectives" are ultimate ends or intrinsic values. All the ultimate ends that are identified as involved in *ta'amei ha-mitzvot*, truth, morality, society, and the nation, are understood by Leibowitz as "human" values. Thus, if the commandments are performed for the reasons offered for them by those who engage in *ta'amei ha-mitzvot*, they are service of humanity and not God. *Ta'amei ha-mitzvot* threatens to vitiate the religious significance of the commandments by providing "non-religious" reasons for performing them. If one performs them with these reasons in mind, one's act has no religious significance.

In rejecting such approaches to *ta'amei ha-mitzvot* Leibowitz draws an interesting connection among justifications, reasons for actions, intentions, and axiological significance. Justifications provide reasons for actions, which can then be taken up by individuals as their intentions in action, thereby determining the axiological significance of the action. For example, if a commandment is justified as a means for the attainment of a moral "need," an act one has reason to do given a commitment to the value of morality, then the commandment so justified is a moral act. In performing the commandment for that reason, or with that intention, one is serving humanity and not God. So too, if a commandment is justified as a means for the attainment of some national "need," an act one has reason to do given a commitment to the value of the nation, then the commandment so justified is a nationalistic act. In performing the commandment for that reason, or with that intention, one serves the nation and not God.

However, a proponent of such approaches to *ta'amei ha-mitzvot* might object that when moral or national justifications for the commandments are given God is still being served and not humanity or the nation. Of course the commandments are being performed because God commanded them and in this sense God is being served; but God is a perfect moral being or has selected the Jewish people as his chosen nation. Consequently, his commands are moral or

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ensure the preservation of the Jewish people. However, Leibowitz would reject this argument and contend that humanity or the nation has surreptitiously replaced God as the ultimate value; God is conceived merely as a functionary who allows the attainment of what is of true value: morality or the nation. Service of God through the commandments is only justified because it is a means to attain the other ends. In contrast, according to Leibowitz, God must be served for his own sake, "because he is fit to be served."[77] This fitness, however, cannot be reduced to any attribute God possesses or function he fulfills. God must be served for his own sake.

But understanding the philosophical roots of Leibowitz's rejection of such approaches to *ta'amei ha-mitzvot* makes it evident that he is only rejecting a particular type of justification for the commandments. For him the danger of justifying halakhic norms in terms of human values is two-fold: (i) They certainly reduce religious significance to some other value orientation, and (ii) they may even preclude the possibility of religious or even axiological significance altogether. This is because human values can be presented either as resulting from axiological decisions or as rooted in human nature or reason. The denial of intrinsic religious significance in *ta'amei ha-mitzvot* can thus take place on different levels:

On the first, actional level, the reason offered for the commandments is that they are a means for the attainment of a human value and this value is conceived as autonomously willed. Thus, if, and only if, one has that value orientation, then one has reason to perform the commandments. But then the axiological significance of the commandments is that value and not service of God. On the second, theological level, the reason offered for the commandments is that they are service of God but God is seen as epitomizing the value, such as moral goodness. Still, the value is conceived as autonomously willed. Thus, in this case too, if, and only if, one has that value

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[77] Ibid., 23.

orientation, then one has reason to serve the God who epitomizes it by performing the commandments. Yet, because God is merely an intermediary for the attainment of a human value, the true axiological significance of service of God by performing the commandments is this human value. On the third, philosophical level, the reason offered for the commandments is that they are a means for the attainment of some value but now this value is seen as rooted in human nature or determined by reason. Since few would recognize service of God as a value rooted in human nature or determined by reason, this type of argument tends to reduce service of God to a value that is more broadly recognized.[78] Moreover, offering such reasons for the commandments entirely deprives them of their axiological significance. Since the adoption of the value would be coerced by nature or reason, it would not truly be a value, which must be willed autonomously. Indeed, Leibowitz would even reject claims that service of God is a naturally or rationally determined end. His rejection of *ta'amei ha-mitzvot* is thus limited to particular types of reasons: those that reduce the axiological significance of halakhic norms to human values and those that attempt to ground their value in nature or reason.

b. Service of God as Intention, Reason for Action, and Justification for Halakhic Norms

Once this is seen, however, it becomes apparent that Leibowitz himself offers a reason and thus a justification for the commandments. In fact, he juxtaposes the "theological" concept of *ta'amei ha-mitzvot* in terms of "human values" with the "religious-faith" concept of the commandments, service of God, which he does not refrain from describing as the "reason" for the commandments. In interpreting the commandment to love God, he writes,

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[78]In fact, Leibowitz responds to a proponent of *ta'amei ha-mitzvot* of this form when he writes, "I am forced to posit that… anthropocentrism… forces him to see in all life programs of man or of a group of men the realization of the tendencies of that man or that group, and thus does he see the form of life determined in the Torah and that the faithful Jew accepts. In other words: he is not capable of understanding the religious meaning of life according to the halakha." Leibowitz, *FHV*, 38.

Observance of the commandments—because their reason is neither "national," "moral," nor "social," rather it is from the motive of service of God alone….—it itself is love of God. Were their reason national—their observance would be love of Israel; were it moral—their observance would be love of man; were it social—their observance would be the satisfaction of human needs.[79]

Leibowitz identifies the reason for the commandments with the "motive of service of God" and compares it with national, moral, or social reasons. He also links this with the view that the intention with which an action is performed determines its axiological significance. Indeed, the key to seeing that he offers his own reason and justification for the commandments is two-fold: recognizing that he aims to protect service of God both as "religious" and as a "value," which was just reviewed, and fully understanding the connection among intentions, reasons, and justifications, to which Leibowitz himself hinted.

While the issues concerning action and intentions have proliferated in contemporary philosophical literature, this case represents a small subset of these concerns.[80] Leibowitz takes for granted that performance of the commandments in the optimal case will be intentional actions, actions undertaken with intention. He specifies that not only must the halakhic action be done intentionally but that it must be done with a particular intention: The individual must perform the action mandated by the halakhic norm with the intention of serving God. This is what has been identified as "intentions with which." Donald Davidson, in his essay "Actions, Reasons and Causes," describes such intentions as follows:

The expression 'the intention with which James went to church' has the outward form of a description, but in fact is syncategorematic and cannot be taken to refer to an entity, state, disposition, or event. Its function in context is to generate new descriptions of actions in

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[79] Ibid.

[80] For good introductions to the underlying issues, see Carlos J. Moya, *The Philosophy of Action: An Introduction* (Oxford UK: Polity in association with Basil Blackwell, 1990), 129–144; and Alfred R. Mele, *The Philosophy of Action* (Oxford UK & New York: Oxford University Press, 1997), 1–26.

terms of their reasons; thus 'James went to church with the intention of pleasing his mother' yields a new, and fuller, description of the action described in 'James went to church.'[81]

Descriptions of actions in terms of the intentions, then, describe the actions in terms of their reasons. According to Carlos Moya, Davidson's conception of intentions has two components: (1) it identifies the cause of the action; and (2) it rationalizes or justifies the action.[82] There can be many reasons for performing a particular action; however, the reason for action upon which one actually does act is one's intention. Reasons, however, are not normatively inert, and thus when the cause of the action is described as a reason it also justifies the action. Consequently, intentions, reasons for action, and justifications are closely related to one another, such that to restrict the type of intention and reason for action that an individual may have in performing an action is to restrict the type of justification that she can offer for her action. Correspondingly, to restrict the type of justification that an individual can offer for her action is to restrict the type of intention and reason for action that she can have.

With this background in place it is apparent that Leibowitz's view about intention is also a view about justification. He claims that the only valid intention that an individual can have when performing the commandments in order for the performance to have religious significance is service of God. But this is to say that the only legitimate reason for action that an individual can have in performing the commandments is service of God. Thus, when he claims that the only intention that an individual can have in performing a commandment is service of God, he establishes that service of God must be the individual's reason for action. And, if reasons for

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[81] Donald Davidson, "Actions, Reasons, and Causes," in *Essays on Actions and Events* (Oxford UK: Clarendon Press, 2002), 8. Davidson later revised his approach to intentions; however, this was in order to accommodate other forms of intentions, such as 'pure intendings' and 'prospective intentions.' For our purposes this earlier account, many elements of which were retained, suffices.

[82] Moya, *The Philosophy of Action*, 106–107.

action justify actions, then in restricting the reasons for action that an individual can validly have in performing the commandments, he limits the legitimate justifications that can be offered for them. In this way, it is evident that far from completely rejecting the project of *ta'amei ha-mitzvot*, Leibowitz actually claims something more specific: There can only be one reason and justification for each and every commandment—service of God.

B. The Justification of Service of God

For Leibowitz the reason for the commandments is service of God. Service of God is therefore the justification for halakhic norms. But what is the justification of service of God, such that one is obligated to the norms that it ostensibly entails? Without a justification of this value, the halakhic norms may be explained in terms of service of God but they still lack normative force. Leibowitz's discussions of the justification of service of God fall into two main categories: The first follows the position on values presented earlier, in which service of God is a value orientation that must willed in freedom, while the second exploits connections among his axiology, theology, and philosophy of halakha to argue that service of God is the only true value.

Despite these differences, these two accounts can be described as foundationalist justifications because they justify service of God and halakhic norms by tracing them back to a basic source of normativity: the human will. However, a non-foundationalist interpretation of Leibowitz's account of justification that has been advanced must also be evaluated (1), before these accounts can be examined (2-3). The former evaluation increases concerns about his methodological consistency, while the latter examinations allow the assessment of his main approach to justification.

1. The Circular Relation between Halakha and Service of God: System and Practice

Sometimes, Leibowitz appears to eschew claims of objectivity for his views about the value of halakha and instead seems to reflect on the value of the halakhic form of life from within it. As has been shown, some of his methodological remarks in his programmatic essay manifest this approach. Encapsulating this view, he writes, "the halakha is based on faith, however, it itself is the base for this faith…. [T]he Jewish religion creates the faith upon which it is based. This is a logical paradox, but not a religious paradox."[83] If "faith" is identified with service of God, this statement suggests that Leibowitz believes that there is a circular relation between halakha and its justification. There are two ways to take this claim: as a structural claim about the relation between the halakhic system and the particular value it embodies (a), or as a philosophical claim about the relation between halakhic life, or any social-practice, and its justification (b). Both of these interpretations, however, are problematic.

(a) The structural interpretation of this claim is offered by Asa Kasher. Kasher aims to clarify and resolve the logical paradox identified by Leibowitz. He argues that it involves four claims, from which both a conclusion and its contrary can be deduced:

  i.   (Initial Premise) The Jewish religion creates its faith.
  ii.   (Initial Premise) The Jewish religion is based on its faith.
  iii. (General Premise) If x creates y, x is prior to y.
  iv.   (General Premise) If x is based on y, then y is prior to x.
  v.   (From i and iii): The Jewish religion is prior to the faith of Judaism.
  vi.   (From ii and iv) The faith of Judaism is prior to the Jewish religion.[84]

The paradox is created by the assumption that two things cannot both be prior to each other, while here it is asserted both that the Jewish religion is prior to the faith of Judaism and that the faith of Judaism is prior to the Jewish religion. However, Kasher concludes that there is actually

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[83] Leibowitz, *JPS*, 20.

[84] Asa Kasher, "Paradox - Siman Sh'elah [Paradox - Question Mark]," *Iyyun* 26 (1976): 237.

no paradox in this case because halakha is not a system of regulative rules but of constitutive rules, and "priority" means giving of validity [*matan tokef*], more specifically "internal validity," not temporal succession. [85]

Constitutive rules, in contrast to regulative rules, do not order a preexisting area of behavior but establish an area of practice. Traffic laws and the rules of chess are example of regulative and constitutive rules respectively. Traffic laws regulate the movements of vehicles, which is a preexisting behavior with its own purpose that must be properly ordered for this purpose to be accomplished. Abstracting from issues of legality, which are discussed below, these laws are valid if they properly fulfill this antecedent purpose. The rules of chess, in contrast, do not regulate preexisting behavior by fulfilling an antecedent purpose. Rather, they establish the goal of check-mating one's opponent and institute the moves that are permissible to achieve it. This goal has a form of internal validity. Thus, while on the one hand, the rules validate the purpose by establishing it, on the other hand, the purpose validates the rules by endowing them with a point. In this case, while halakhic norms identify the value of service of God as their purpose, this value is the meaning of halakha and governs the validity of halakhic norms. Premise (i) therefore means that the halakha determines the content of the Jewish faith as the "the demand… presented to man to serve God."[86] It does this is by identifying the texts that comprise the Hebrew Bible, which, according to Leibowitz, express this demand. Premise (ii) means that "the halakha is the partial realization of the value presented by its Holy Scriptures."[87] Halakhic norms must express service of God to be valid.

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[85] Ibid., 238.

[86] Leibowitz, *JPS*, 352.

[87] Kasher, "Paradox - Question Mark," 239.

Kasher's point that a system of constitutive rules, including perhaps halakhic norms, can establish a novel purpose and be governed by internal validity is apt. However, this analysis leaves out the central issue of all-things-considered normativity. Granted that the rules of chess establish the goal of check-mating one's opponent and the moves that are valid to achieve it, this does not establish that one ought to play chess. Similarly, granted that service of God is the value of the halakhic system, this leaves unanswered whether one ought to engage in halakhic practice. That the halakha identifies a value that serves as its internal standard of validity establishes nothing about whether anyone should accept that value. Indeed, this point is made by Leibowitz himself in response Kasher. He writes, this "closed circle… does not exhaust the vital reality of the religious faith in Judaism, because this whole cognitive framework depends on a conative factor that is outside of the circle: the willful decision of man to serve God…. Only this decision brings man into the circle…and this decision, that is 'faith.'"[88]

(b) Rynhold offers a different interpretation of the same "paradox" and directly engages with the question of normativity. He glosses Leibowitz's claims as follows:

    i.   Faith is defined as, or constituted by, halakhic practice.
   ii.   Faith, defined as halakhic practice, is the basis of faith in the practice.[89]

(i) is an interpretation that gives centrality to Leibowitz's statement that "for Judaism, faith is nothing but its system of mitzvoth, which was the embodiment of Judaism,"[90] which Rynhold interprets as meaning that "the concept [of faith] is *exhausted* by the performance of mitzvoth."[91]

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[88] Yeshayahu Leibowitz, "Tiguvot [Responses]," *Iyyun* 26 (1976): 277–278.

[89] Rynhold, "Yeshayahu Leibowitz."

[90] Yeshayahu Leibowitz, *Judaism, Human Values, and the Jewish State*, trans. Eliezer Goldman (Cambridge MA: Harvard University Press, 1992), 38.

[91] Rynhold, "Yeshayahu Leibowitz."

Indeed, he maintains that for Leibowitz faith is contracted to a behavioral definition. (ii), in turn, means that engagement in halakhic practice precedes any discursive justification of it "such that one's commitment is not based on that [justification] in any meaningful sense. At the point at which we are able to reflect thoughtfully about our commitment to our practices, we are already implicated and formed by them."[92]

However, for Leibowitz, according to Rynhold, such precommitment does not undermine the validity of practices and their justifications, for no commitment can be completely discursively justified. Drawing on Leibowitz's skepticism about practical reason, Rynhold claims that he holds that practices "are not rational all the way down." Instead, justification is always a matter of reflecting on practices to which one is already committed. Such reflection cannot and does not aim to convince a non-participant to engage in the practice because only the experience of engaging in the practice itself can justify it: "The practice *is* persuasive in a way that the circle of justification is not."[93] Thus, according to Rynhold, Leibowitz offers a phenomenology of Jewish faith, which arises from an antecedent commitment to halakhic life.

While Rynhold's interpretation presents a useful critique of foundationalist approaches to justification and offers an interesting practice-based approach in its place, it too cannot be correctly attributed to Leibowitz. Leibowitz is skeptical about ultimate justification for human actions; but this is because actions are ultimately based on value decisions, which must be radically autonomous to be attributable to the person and possess axiological significance. This excludes Rynhold's interpretation, for, according to Leibowitz, if one's commitment to halakhic norms stems from habituation to their practice, then one has not adopted service of God as a

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[92] Ibid.

[93] Ibid.

value. More generally, Rynhold's claim that Jewish faith is exhausted by halakhic practice does not reckon with Leibowitz's position on the necessity of the intention to serve God.

However, neither Kasher's nor Rynhold's interpretation is entirely unfounded. Both notice the interpretive strain in Leibowitz's thought, in which he does seem to be reflecting on the halakhic form of life from the inside. However, this approach is in tension with the dominant objectivist strand. These two approaches are set alongside one another when Leibowitz writes,

> I do not see in religious faith a conclusion that one derives but a value decision that one decides, and like all axiological content in man's consciousness it does not derive from knowledge that is provided or given to him, rather it is an obligation through which man obligates himself…. Therefore, it is not possible to teach faith: what is possible is to present it to man in all…its strength and awesomeness.[94]

Religious faith is a value decision that must be the result of free decision. Yet, Leibowitz also describes himself as depicting faith to those who do not have it in order to introduce them to it. He seems to allude to some form of determination intermediary between coercive rationality and radical freedom which results from a type of description that is persuasive but allows individual choice.[95] However, once again, this interpretive strain conflicts with the dominant objectivist approach which is manifest in two different ways in his discussions of the justification of service God.

2. Value Decisions and Religion: A Polytheistic Axiology

Most frequently, Leibowitz discusses the justification of service of God by connecting it to his metaethics and axiology. It is most clearly evidenced when he writes,

> Nobody needs to accept upon himself the yoke of the kingdom of heaven and the yoke of the Torah and the commandments… It is impossible to indicate any need in the objective sense

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[94] Leibowitz, *FHV*, 11.

[95] A similar combination of "religious decisionism" and the value of description for religious instruction is made by Wittgenstein. See *Culture and Value* (Oxford UK: Blackwell, 1998), 73e.

that the acceptance of the yoke of the kingdom of heaven and the yoke of the Torah and the commandments come to satisfy.[96]

The normativity of service of God cannot be justified by being shown to fulfill a natural or rational need, for, as has been shown, either its religious significance or general axiological significance would thereby be destroyed. Only the individual's arational decision grants normative force to service of God.

A corollary of this account is a complex relation between authority and autonomy. On the one hand, Leibowitz presents a strongly heteronomous approach to the commandments and starkly asserts divine authority. No appeal is made to human reason; one must simply perform the commandments out of service to God. Neither is God's worthiness to be served justified:

> If God is not a pagan god or the Christian God, rather the 'God who is God'…without description or image—there is no other content to the faith in God and the love of God but the acceptance of the yoke of his kingship, which is the yoke of the Torah and the commandments. God is the giver of the Torah, and the faith in him is man's recognition of the obligation to fulfill his Torah, thus their fulfillment by the hand of man is an act of love.[97]

On the other hand, Leibowitz embraces human autonomy by identifying service of God as a value decision. In this vein he writes,

> [J]ust like the moral man, for whom morality is the highest value, grounds the validity of this value on his own decision, which establishes that it is the ultimate value, and just like the political man who takes a certain position on questions involved in the relationships between individuals grounds his position…on his decision that a certain relationship in social reality is what he see as the good, just so religious faith…is grounded on man seeing his stance before God as a value, which he is unable to ground except on his own decision….[98]

The human being is confronted by a variety of competing values: morality, political expedience, religion. She is free to accept or reject any one of them, including service of God. Only an

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[96] Leibowitz, *DSV*, 34.

[97] Leibowitz, *FHV*, 17.

[98] Leibowitz, *DSV*, 78.

autonomous decision to accept upon herself the heteronomous yoke of the kingdom of heaven

obligates her to service of God through halakhic norms. The authority of God is thus absolute but

only for the individual that recognizes it. Indeed, Leibowitz describes religious faith as "an

obligation through which man obligates himself."[99]

Crucially, while this approach does not establish that service of God possesses normative

force in the sense that an individual is obligated by it as opposed to other values, it does establish

that service of God is on all fours with any other value. It and its entailed norms are at least as

justified as any other value and its consequent norms. The human will is the source of

normativity and it is unconstrained in the value that it adopts. Leibowitz therefore presents a

relativistic account of values and normativity. There is no good that everyone is required to

pursue, only competing value orientations. However, in contrast to the preceding interpretations,

Leibowitz assumes an objectivist philosophical position in presenting this relativist axiological

account. He stands outside each of the values and makes the second-order point that value

decisions cannot be grounded. He has embraced service of God; but his own will is the source of

that value's normativity. Others may adopt other values, thus rendering them normative for them.

3. Negative Axiology: Service of God as the Most Valuable Value

However, sometimes Leibowitz does argue that service of God is the most fitting value to

adopt, despite his commitment to the arationality of evaluative judgments. In contrast to the

preceding approach, in these instances he seems to express an objective view about what is truly

valuable and thus normative. On this approach, service of God is the most valuable value. Still,

this is not because there is some hierarchy of values in which service of God holds the highest

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[99] Leibowitz, *FHV*, 11.

place; rather, it results from the way in which Leibowitz conceives of freedom, God, and service of God, so that only service of God fully expresses freedom.

The view that only service of God fully expresses human freedom is evident when Leibowitz writes, "[the] man that lives in the world of *halakha*…[h]e is free…the establisher of the laws of his life, and only the autonomous creator is deserving of the name 'man.'"[100] The strongest statement of this position is when he writes,

> Faith is the ultimate, and perhaps the only, expression of man's free choice. Man can accept upon himself the yoke of the kingdom of heaven and yoke of the Torah and the commandments, and he can refuse to accept them, and there is no method in the world that is capable of directing this decision and choice. There is also nothing in the world that can bring him to faith, unless it derives from his decision and choice.[101]

Leibowitz claims that service of God is the fullest expression of human freedom because its adoption depends entirely on an individual's decision in contrast to other values; but elsewhere he identified other value orientations as resulting from free decision as well. Indeed, that is constitutive of their status as value orientations.

Without denying the contradiction between these two positions, once again Leibowitz's view can be understood when put into a dialogue with elements of Kant's philosophy, in particular the relation between freedom and morality. In the *Critique of Practical Reason*, Kant claims that "freedom and unconditional practical law reciprocally imply each other."[102] According to Henry Allison, this means that Kant subscribes to the "Reciprocity Thesis": "Freedom of the will is not

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[100] Leibowitz, *JPS*, 60–61.

[101] Leibowitz, *FHV*, 11.

[102] Immanuel Kant, "Critique of Practical Reason," in *Practical Philosophy*, ed. Mary J. Gregor (Cambridge UK & New York: Cambridge University Press, 1999), 5: 29.

only a necessary but also a sufficient condition of the moral law."[103] The claim that freedom of

the will is a necessary condition for moral activity is a clear tenet of Kant's thought. An

individual must act autonomously for an action to be attributable to her. But that suggests that

one can act autonomously immorally as well as morally. The claim that freedom of the will is a

sufficient condition for acting morally goes further in that it means that when one acts freely one

ipso facto acts morally. Thus, in its sufficiency condition the reciprocity thesis claims that a free

will can only act according to the moral law as expressed in the categorical imperative.

The rationale for this claim is that Kant's conception of free will is not only practical—the

ability for an individual to act on the basis of imperatives which ultimately derive from her own

nature—but also transcendental, which requires "complete independence from anything

empirical and hence from nature more generally."[104] The categorical imperative uniquely

satisfies this condition because it, especially in its first formulation ("Act only in accordance

with that maxim through which you can at the same time will that it become a universal law"), is

comprised merely of the form of legality itself.[105] Consequently, it abstracts from any desire and

incentive that an individual might possess. Any imperative that incorporates material elements

appeals to such desires and incentives and therefore cannot be willed in transcendental freedom.

The only law that can be willed in this manner is the contentless moral law.

Similarly, Leibowitz argues that there is a reciprocal relation between freedom and the

religious value: freedom is not only a necessary but also a sufficient condition for the religious

value. That freedom is a necessary condition for a value decision in favor of serving God is

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[103] Henry E. Allison, *Kant's Theory of Freedom* (Cambridge UK & New York: Cambridge University Press, 1990), 201.

[104] Ibid., 207.

[105] Kant, *GMM*, 4: 420–21.

consistent with a plurality of values. Freedom is necessary for any decision to be attributable to an individual and thus of axiological significance. However, that freedom is a sufficient condition for the religious value is a new claim, which denies the axiological significance of other purported value decisions as such. The only thing that can be chosen freely, and is thus a value, is service of God.

Leibowitz's strategy for arguing for a reciprocal relation between freedom and service of God is two-fold: he pursues it at the level of theology and the level of philosophy of halakha. In both approaches he shows how the religious value is a purely formal value. It simply signifies the notion of valuing something "in and of itself" or "for its own sake." It appeals to no human desires or interests, indeed it negates them, and thus its adoption is the only way to fully manifest one's freedom.

Leibowitz espouses a radically negative theology. Naomi Kasher identifies two basic statements about God in Leibowitz's *oeuvre*.[106] The first is purely negative: "Nothing in the World is God." It is evidenced in statements like the following: "There is no more typical pagan approach than seeing holiness in natural existence…. This is typical paganism, for it makes the world as it is into God."[107] The second, while seemingly positive, actually functions negatively: "God exists beyond objective existence and his Godliness is in and of itself and not in His relation to the world." It is manifest in statements like the following: "the living God, who is beyond nature and beyond the world"[108] and "the Godliness of God is in and of itself and not in

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[106] Naomi Kasher, "Elohim Be-Tifysat Ha-Yahadut Shel Libovits [God in Leibowitz's Conception of Judaism]," in *Yeshayahu Libovits: Olamo ve-Haguto [Yeshayahu Leibowitz: His World and Philosophy]*, ed. Avi Sagi (Jerusalem: Keter, 1995), 92–107.

[107] Leibowitz, *FHV*, 142.

[108] Ibid., 88.

His relation to the world."[109] This statement, while logically positive, functions negatively

because by placing true value outside of the world it denies absolute value to anything in it.

This theology has both epistemological and axiological sources. Kasher claims that the

background for understanding Leibowitz's view is Kantian epistemology. While this is

somewhat true, his description of rationality as coercive is more in keeping with positivism than

Kantianism. In fact, it is the axiological motives that are more significant, for there is a

remarkable congruence between Leibowitz's axiological and theological views. In *FM*, while

describing Maimonides' (in Leibowitz's interpretation) and his own view of God, he writes,

> [I]n a religious hymn which has achieved great popularity, and is to be found in all Jewish
> prayer books, we say: 'He is the Lord of the world, who reigned ere any creature was yet
> formed.' But ere any creature yet was formed, over what did He reign? That is to say, God's
> royalty is not like that of the king of a country, who is not a king if he has no country over
> which to reign…. But God's royalty is his essence and is not functional. God is king in
> Himself, and His Kingship is in no way dependent on the existence of anything over which
> He reigns. Thus does Maimonides explain the Divine name "*El Shaddai*" (usually translated
> as God Almighty): "That it is sufficient (*she-dai*) Himself, for He is content with His own
> being and requires not the being of another.[110]

The divinity of God is not an attribute that is dependent on a relation to the world or a functional

role he plays in human life. God's divinity is not relative but absolute.

Similarly, in an essay devoted to explicating the trials of Abraham and Job, Leibowitz writes

that they were both tested to determine whether "they fear God because He is God, cleaving to

whom and serving whom are the end of man…or perhaps they only fear Him because of certain

properties or functions attributed to him as the overseer and supervisor of man and the satisfier of

his needs?"[111] God tested Abraham and Job to discover whether they fear him as an end in and of

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[109] Ibid., 39.

[110] Leibowitz, *FM*, 51.

[111] Leibowitz, *FHV*, 21.

itself or, as a result of ascribing certain properties to him, as a means to attain rewards or avoid

punishments. That is, whether they view God and service of God as intrinsic or instrumental

values. The ascription of any attributes or functions to God threatens to render these attributes or

functions of intrinsic value and God and service of God as mere instruments for their attainment.

The same condition that is necessary to ensure the theological absoluteness of God is thus

also necessary for service of God to be an intrinsic value: God's divinity must be viewed as

irreducible to a relation or functional role, and God must be served for its own sake. In fact,

Leibowitz writes that the God of Israel is not even the creator of the world but "the God who is

to be served."[112] After rejecting any factual statement about God, all that remains is his

axiological significance.

In addition to emptying the object of religion of any content in his theology, Leibowitz also

drains the practice of religion of any content in his philosophy of halakha. He writes,

> The problem of the practical commandments, which have no psychological, philosophical, or
> sociological reasons, and which are not necessitated by man's intellect, feelings, or will,
> because of that, combines with the problem of the freedom of man. One who accepts upon
> himself the Torah and the commandments, what is his standing as an autonomous being? It is
> known that there are many that claim…that one who accepts upon himself the yoke of the
> Torah and the commandments is enslaved. But the concept of enslavement and also the
> concept of freedom require semantic analysis…. If the world has a custom and lawfulness—
> man is part of it, and he is subordinated to the entire framework of natural existence that
> includes not just his body but also his soul: he is subordinated to it from both a physiological
> and psychological perspective. According to this, what is the freedom of man? The
> acceptance of a form of life that does not derive from his nature means freeing man from his
> enslavement to the crude natural bonds…. [T]here is no freedom from the bonds of nature
> except as a result of the acceptance of the yoke of Torah and the commandments…and that is
> what is meant by 'there no freeman except one who is involved in Torah': he is a freeman
> from servitude to nature since he lives in action a life contrary to this nature, both in its
> general manifestation and in its manifestation in man himself. Therefore, there is no need—
> from either a religious or a philosophical perspective—to bring the practical commandments
> to man's conceptual world or the world of his interests; precisely in their foreignness lies
> their strength. Attempts to rationalize the commandments and investigations after 'the

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[112] Leibowitz, *JPS*, 362.

reasons for the commandments [*ta'amei ha-mitzvot*]' are lacking religious and philosophical sense [*ta'am*]....[113]

Leibowitz confronts a common view, famously held by Kant, according to which observance of the commandments is a base form of heteronomy,[114] and he instead claims that only one who observes halakha is autonomous. In doing so, he articulates a position on autonomy that not only requires practical and transcendental freedom but also freedom from reason. To be autonomous one must be free from desires, interests, and reasons. Correspondingly, one must choose something purely for its own sake, without any desire, interest, or reason to choose it. And, according to him, halakhic practice uniquely fulfills this requirement because halakhic norms satisfy no natural or rational human concern. Halakhic practice can be performed for its own sake because in terms of those concerns it is contentless. By deciding to serve God through the performance of halakhic norms the individual sets herself against any desire, interest, or reason that she may have, will have, or could have. Indeed, Asa Kasher argues that service of God, when understood according to Leibowitz's negative theology, should be interpreted as the negation of the worship of anything in the world.[115] Halakhic practice is thus a form of negative praxis. The decision to serve God just is the decision to be free of human desires, interests, and rationality: it is simply the decision to will freely.

Kant claimed that transcendental freedom reciprocally implies the moral law.[116] Leibowitz radicalizes transcendental freedom: To be free one must not be determined by external or internal

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[113] Ibid., 29–30.

[114] Immanuel Kant, *Religion Within the Boundaries of Mere Reason and Other Writings*, ed. Allen W. Wood and George Di Giovanni (Cambridge UK & New York: Cambridge University Press, 1998), 6: 125–126.

[115] Asa Kasher, "Tsalilym The'ologhyym [Theological Shadows]," in *Sefer Yeshayahu Libovits [Yeshayahu Leibowitz Book]*, ed. Asa Kasher and Jacob Levinger (Tel-Aviv: Agudat ha-Studentim, 1977), 69–75.

[116] In fact, Kant himself undergoes a movement similar to Leibowitz—but in reverse—from the *Groundwork of the Metaphysics of Morals* and *The Critique of Practical Reason* to *Religion within the Boundaries of Mere Reason*.

nature or even by reason. Consequently, he proposes a negative axiology: the only thing that can be chosen freely is something for which one has no desire, interest, and reason to choose. Conceived in this manner, freedom can only be fully achieved by willing something that negates all desires, interests, and reasons. Indeed, it must be entirely contentless. For him, God and service of God uniquely satisfy this requirement. God is simply the God is who is to be served, and the reason for the commandments is simply service of God. Service of God is thus the most valuable value because it most paradigmatically instantiates the formal features of being a value. It can be adopted simply for its own sake, for there could be no motivation or reason for committing to it.[117] This connection is made clear when in an interview with Michael Shashar, in response to the question of whether man's obligation to serve God is really the only true value, Leibowitz responds, "Yes, if in truth one bases oneself on the theoretical analysis of the concept of a value, then that is the value."[118] Because of their lack of content, God and service of God uniquely fulfill the formal properties of a being a value: only they can be truly chosen for their own sake; only they can be valued in and of themselves.

This justification of the value of service of God shares certain features with each of the preceding approaches. Like the first approach, Leibowitz decidedly champions commitment to the service of God. He does not just set out the values that one might adopt and rule out the possibility of rationally deciding among them; he argues that service of God is the only true value. However, like the second approach, he takes up an objectivist philosophical position. He

While in the former works he maintains the reciprocity thesis, in the latter he articulates a view that allows for immoral and autonomous choices. See Michelle Kosch, *Freedom and Reason in Kant, Schelling, and Kierkegaard* (Oxford UK & New York: Oxford University Press, 2006) for a discussion of this development.

[117] Leibowitz is careful to point out that this does not imply that the reason that one should serve God is in order to more fully manifest one's autonomy. See Leibowitz, *FHV*, 49.

[118] Yeshayahu Leibowitz, *Yeshayahu Libovits 'Al 'olam U-Melo'o: Sihot 'im Mikha'el Shashar [Yeshayahu Leibowitz On Just About Everything: Talks with Michael Shashar]* (Jerusalem: Keter, 1987), 142.

does not offer an interpretation of the meaning of halakhic practice from within it; rather, he offers an argument that stems from philosophical premises about the unique axiological and justificatory status of service of God. In sum, despite comments that imply a more interpretive approach, Leibowitz offers two objectivist approaches to the justification of the value of service of God. Further, both of these accounts are foundationalist justifications, which identify the human will as the source of normativity. Yet, while on the first approach he endorses axiological relativism, on the second approach he claims that service of God is the most valuable value.

C. Normative Difficulties

Before proceeding to discuss the connection between Leibowitz's theocentric account of *ta'amei ha-mitzvot* and his theory of halakha, difficulties in his justification of halakhic norms must be noted. These include his methodological consistency (1) and philosophical positions (2).

(1) Leibowitz's thought manifests an inconsistency about the methodology of philosophy of halakha. This inconsistency is evident in his identification of the meaning of the halakha with service of God and, as just noted, in his discussion of the normativity of that value. Questions remain about whether he offers an interpretation of halakhic practice to appeal to those already committed to it or makes objective arguments about its value. Further, if the latter, it is unclear whether these arguments establish the parity of service of God with other values or its axiological superiority. Moreover, he also gives service of God a central role in his theory of halakha. The status of this claim thus determines the overall status of his philosophy of halakha.

(2) While perhaps attractive for the austerity of its devotion to service of God and correlative rejection of all worldly absolute values, Leibowitz's justification of halakhic norms and service of God depends on specific metaethical and axiological positions that encounter a number of

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philosophical problems. These can be grouped into two categories: general metaethical problems (a) and problems resulting from his negative axiology, theology, and halakhic praxis (b).

(a) While Leibowitz subscribes to metaphysical axiological pluralism, he is a psychological axiological monist. But it is not clear that the latter is actually a plausible moral psychological position, for individuals do not seems to have such organized axiological schemes. Aviezer Ravitzky points out that one can maintain the notion of intrinsic value without subscribing to such monism. Individuals can recognize a number of intrinsic values. Often there might not be a conflict among them. And when they do conflict one value need not prevail over the others; rather, an accommodation among them can be achieved. Further, even if one value does win out, this does not nullify the intrinsic nature of the other values. They do not become merely instrumental to the attainment of the highest value.[119] This monism underlies many features of Leibowitz's thought. If one can have only one value, then the choice is clear: one can serve God or humanity for example. But pluralism allows for the possibility that one might be committed to other values alongside service of God without it becoming an instrument for them.

Leibowitz draws a strict distinction between scientific cognition and facts, on the one hand, and axiological decisions and values, on the other. However, he inadequately conceptualizes both of these phenomena. Indeed, he presents caricatures of both, in which there is too much coercion and objectivity in science and too much freedom and subjectivity in values. Yemima Ben-Menahem points out a number of difficulties with Leibowitz's approach to evaluative judgments. She argues that a sense of coercion is present in the adoption of evaluative judgments as well as scientific conclusions. Individuals' do not experience themselves as free in relation to

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[119] Aviezer Ravitzky, " 'Arakhim ve-Reshamim: 'Al Yeshayahu Libovits [Values and Impressions: On Yeshayahu Leibowitz]," in *Yeshayahu Libovits: Olamo ve-Haguto [Yeshayahu Leibowitz: His World and Philosophy]*, ed. Avi Sagi (Jerusalem: Keter, 16-25).

the obligations that follow from their values, such that they could simply revise their values and change their obligations. For example, most people feel that they simply must not harm the innocent not that they have chosen not to harm them. Indeed, ordinary language, both Hebrew and English, usually does not allow the use of the word "chose" in moral matters. For example, while it is common to say "I chose to live in New York," it usually indicates cynicism to say "I chose to believe in democracy." She also notes that the process of revision is not all that different in the area of values than in the domain of beliefs. For example, one can be persuaded to relinquish an evaluative judgment upon realizing that it conflicts with another value decision one has made or noticing an implication of it that one had not previously detected.[120]

Moreover, Leibowitz describes individuals as responding to requests for their justification for a value decision by bluntly responding "this is my will,"[121] but this seems more the exception than the rule. In most cases, individuals do offer reasons for their evaluative judgments. Consistent with his axiological view, Leibowitz equates value decisions with aesthetic evaluations. But the way in which individuals respond to normative disagreement differs from disagreements of taste. While even in the latter individuals still do give reasons for their evaluations of an artistic work, in the former the discussion seems to be guided by a presupposition that there ought to be consensus.[122] His account does not capture the motivation for, or character of, normative argumentation.

Leibowitz occasionally articulates an error theory of practical reasoning. He writes that in non-scientific areas "man never derives conclusions, even though sometimes he deceives himself

[120] Yemima Ben-Menahem, "Mada' va-'Arakhim [Science and Values]," *Iyyun* 35, no. 3–4 (1987): 240–51.

[121] Leibowitz, *DSV*, 33.

[122] Jürgen Habermas, "Richard Rorty's Pragmatic Turn," in *Rorty and His Critics*, ed. Robert B. Brandom (Oxford UK: Blackwell, 2001), 31–55.

that he does so."[123] For him it might not matter that his account of evaluative judgments does not accurately capture our intuitions or adequately describe our practices of normative argument; however, for one who does believe that an accurate account should capture these phenomena this tells against his view. Moreover, Leibowitz himself takes the presence of moral disagreement as evidence in support of his error theory. He should not ignore the fact that such disagreement often leads to attempts at resolution.

Leibowitz also clearly overestimates the degree of consensus found in the scientific community at any given time. Indeed, his positivist account of science is not descriptively adequate. He underestimates the role that higher-order theories play in even the interpretation of the results of the simplest experiments, and the role that methodological values, like conservatism or parsimony, play in the selection of such theories. While these values are not moral or religious, they certainly are not the type of things that he considers rational.[124]

Leibowitz might respond that in the scientific domain the overriding value that guides investigators is that of objectivity, or bringing their observations and theories into correspondence with reality. This shared commitment differs from the diverse and incommensurable values that individuals embrace in their evaluative judgments. Having the same goal of "getting the facts right" unifies the scientific community and regiments their deliberations. And indeed, some of his comments do support this view.[125] But this is equally true of evaluative judgments as evidenced by normative deliberation and debate. Individuals' argue about what is right and wrong, what is good and bad, because they presuppose that there is a

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[123] Leibowitz, *DSV*, 49.

[124] Ben-Menahem, "Science and Values."

[125] Leibowitz, *DSV*, 50–53.

"right" answer. If this approach is taken, our intuitions and practices regarding values cannot be dismissed. If they are robust enough to regiment practice, then a certain form of objectivity could emerge in the normative domain as well.[126]

Leibowitz is right that there is a distinction between facts and values and between scientific conclusions and evaluative judgments. Any theory of values should incorporate this insight. Though there is not complete disagreement over values and totally uniformity in facts, there does seem to be greater consensus about facts than values. Further, evaluative judgments do seem to have a closer relation to motivation than factual conclusions, even though factual conclusions are not always conatively neutral.[127] Neither of these points entail that evaluative judgments are entirely arational, however. The presence of disagreement over values is qualified by the motivation for, and practice of, normative argumentation. And while the connection between reasons and motivation is complex, it should not be denied without argument that reasons can motivate without being coercive.

(b) A second set of problems relate to Leibowitz's conception of autonomy, intention, and reasons for action, especially when he identifies service of God with the "most valuable value." Beginning with his conception of autonomy, it is unclear whether the type of radicalized freedom that he requires is really plausible. Kant's conception of transcendental freedom is problematic; it is doubtful that an embodied being can distance herself to that extent from external or internal nature. Leibowitz goes further in requiring that the subject abstract from reason as well. But it

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[126] Habermas, "Richard Rorty's Pragmatic Turn."

[127] See for example Philippia Foot, "Moral Beliefs," in *Virtues and Vices* (Berkeley: University of California Press, 1978); and John McDowell, "Value and Secondary Qualities," in *Moral Discourse and Practice: Some Philosophical Approaches*, ed. Stephen Darwall, Allan Gibbard, and Peter Railton (Oxford UK & New York: Oxford University Press, 1997), 201–14.

does not seem possible for a human subject to be entirely undetermined by both desires and reasons.

Additionally, even if it was possible, it is unclear that such freedom should be characterized as autonomy and its result a decision in favor of a particular value. As was shown, Leibowitz connects autonomy with attributability, but it is dubious that such arational decision could be distinguished from mere caprice. As Naomi Kasher points out, viewing an individual as having no desire or reason for performing an action is more often an argument for exculpating her from responsibility for her behavior than attributing it to her. Similarly, an individual who claims that she does not know why she did something seems to indicate the disavowal of an action rather than an endorsement of it.[128] The same should hold for the adoption of values. Lastly, it is unclear in what sense such a choice should be described as the selection of a particular intentional object, in this case one value as opposed to another; it was not made on the basis of any desire for or reason in favor of it. Leibowitz insists that values must be chosen for their own sake; but how can a particular intentional object be identified and distinguished from others if not in terms of its properties? But once these properties enter the picture, the individual is choosing the value on the basis of some desire or reason.

Leibowitz insists that one value is radically contentless enough to measure up to the standards of freedom that he sets: service of God. But this just makes his conception of the religious value more problematic. Despite its connection to the tradition of negative theology, it is questionable whether this contentless value can bear the semantic weight of "service of God," which does seem to have some positive connotations. More importantly, service of God, like all

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[128] Naomi Kasher, "'Otonomyah Shel Ha-Dat ve-'Otonomyah Shel Ha-'Adam Ha-Dati [Autonomy of the Religion and Autonomy of the Religious Man]," in *Yeshayahu Libovits: Beyn Shamranut Le-Radikaliyut: Diyunim Be-Mishnato [Yeshayahu Leibowitz: Between Conservatism and Radicalism: Investigations of His Teachings]*, ed. Aviezer Ravitzky (Jerusalem: Van Leer Institute/Hakibbutz Hameuchad Publishing House, 2007), 103–104.

values, does double duty for Leibowitz: It is a value that is adopted, but it also serves as the necessary intention for an action to be of religious significance; it must be the reason for the individual's action. But when a value is conceived as entirely contentless, it is unclear how it can be an intention with which a particular action is done. It is necessary that there should be at least some perceived connection between the intention with which an action is done and the type of action that is performed for that intention to serve as the reason for that particular action. But in order for there to be such a connection there must be some content to the intention.

In contrast to Leibowitz, Kasher argues that "important ingredients for one's feeling that a particular action can be attributed to him are the understanding why he chose to do that particular action, what the reason for that choice is, what is the deliberation that is at its base, and also the awareness that the action was indeed chosen on the basis of those [considerations]."[129] On this account, reasons link the individual to the action she performs. Rationality does not compete with freedom. Indeed, it is crucial for a decision to be traceable to the reasons for which one made it for it to be one's own. Reasons for action connect the individual to her decisions and actions. Thus, far from ensuring autonomy Leibowitz's axiology severs the connection of the individual to her choice and the link between intention and action.

Consequently, in addition to the questions about its methodological consistency, there are intractable problems with the metaethics and axiology that underlie Leibowitz's justification of halakhic norms. The root of his mistake seems to be his conception of reason. He holds a constricted conception of rationality that makes it the realm of coercion, leaving arbitrariness the only type of human freedom possible. A fuller conception of rationality, and in particular practical reason, could avoid some of the problems that have been exposed in his thought.

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[129] Ibid., 105.

Practical rationality could respond to what Jürgen Habermas calls "the unforced force of the better argument."[130] This conception might still be able to answer some of Leibowitz's central concerns, including the distinction between facts and values, the relation between reason and motivation, and recognize service of God as an irreducibly religious value.

III. Theocentric Theory of Halakha

Leibowitz aims to provide a unified philosophy of halakha centered on service of God. Just as his justification of the commandments identifies service of God with the reason for halakhic norms, his theory of halakha recognizes service of God as the criterion of validity for halakhic-legal decision-making: A halakhic-legal decision must be for the sake of service of God to be valid. This attempt to connect the reason for halakhic norms and halakhic-legal practice through service of God has two major advantages: First, consonant with an important thread in the Jewish tradition it conceives of halakhic-legal practice itself as a commandment. Thus, it too must be performed with the intention of serving God. Second, it attempts to clearly ground halakhic-legal authority, for valid halakhic-legal decisions are based on the same reason that the individual has to perform halakhic norms—service of God.

However, this attempt fails. Service of God, as Leibowitz understands it, cannot govern halakhic-legal deliberation and seems to rule out any other considerations. Thus, it cannot be the criterion for halakhic-validity. Indeed, when Leibowitz offers more detailed reflections on theory of halakha and engages in halakhic-legal practice himself, he offers more substantive considerations as the basis for halakhic-legal decisions. There is consequently a gap between the reason an individual has for performing a commandment, or the commandment's normative

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[130] Jürgen Habermas, *Justification and Application: Remarks on Discourse Ethics*, trans. Ciaran Cronin (Cambridge MA and London: MIT Press, 1993), 163. Henceforth *JA*.

justification, which must be service of God, and the actual reason that determines the content of that norm, or its legal justification. Leibowitz thus does not ground halakhic-legal authority.

In the following Leibowitz's theory of halakha is first characterized as a form of positivism (A), and his account of halakhic-legal authority is sketched (B). The central argument of the part is then presented: It is contended that he attempts to make service of God the criterion of halakhic-legal validity, even while he recognizes alternative considerations in his other halakhic-legal writings (C). Lastly, the problems encountered by his theory of halakha are detailed (D).

A. Halakhic-Legal Positivism

This section explores Leibowitz's theory of halakha through the lens of legal positivism. First, it is argued that he problematizes the connection between service of God and halakhic practice by denying the revelatory status of the Torah and the commandments but that his halakhic-legal positivism aims to reestablish that connection on a new basis (1). A rough sketch of legal positivism is next offered (2) as a basis for an analysis of Leibowitz's general legal theory and his basic theory of halakha (3). The details of his theory are then examined using H.LA. Hart's conception of law as a comparison (4).

1. Revelation and Service of God

Sagi aptly notes that in his mature reflections on halakha Leibowitz reorients the divinity of the Torah and halakhic norms from their origin to their purpose.[131] In his early works he does indicate that halakha has a divine source. In the first version of "Practical Commandments," he writes that his object is "Torah and the commandments as things that are holy, whose origin,

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[131] Avi Sagi, *Tradition vs. Traditionalism: Contemporary Perspectives in Jewish Thought.* (Amsterdam & New York: Rodopi, 2008), 59.

meaning, and purpose are transcendent."[132] However, this statement disappears from the later version. Moreover, while he writes that "God was revealed neither in nature nor in history—he was revealed in the Torah,"[133] the content of the Written Torah is completely determined by the Oral Torah, or human halakhic-legal practice.[134] The Oral Torah, in turn, "expresses the understanding and cognition of men *who intend to realize the regime of the Torah*."[135] More explicitly, he writes, "the entire Oral Law is the creation of men, who established the halakha in agreement with their understanding of what the Torah obligated."[136] Instead of a divine origin, the Torah and the commandments are divine because they are oriented to the service of God.

The significance of this claim for Leibowitz's theory of halakha is that a direct connection between service of God and halakhic practice is denied: One does not serve God through halakhic norms because God has literally expressed that it is through them that he wants to be served. Still, halakhic norms must be performed in order to serve God. It is argued that Leibowitz attempts to maintain a connection between halakhic practice and service of God by construing halakha-legal practice as a form of positivism and recognizing service of God as the criterion for halakhic-legal validity: A halakhic-legal action must be for the sake of service of God in order to be valid.

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[132] Leibowitz, *TCE*, 10.

[133] Leibowitz, *JPS*, 240.

[134] Leibowitz, *TCE*, 21.

[135] Leibowitz, *JPS*, 14 emphasis in original.

[136] Ibid., 145.

2. Legal Positivism: A Rough Sketch

Recent decades have seen interminable debates among legal positivists, natural lawyers, and legal post-positivists. Each party to the debate has clarified and slightly modified their position to the point that it is often unclear what their essential features are and what distinguishes the positions from each other. This is particularly the case with legal positivism. This debate will not be engaged nor is it necessary for the purpose of using legal positivism as a framework for examining Leibowitz's theory of halakha. A rough sketch of legal positivism is sufficient. More features and varieties of positivism are explored in subsequent chapters.

Jules L. Coleman and Brian Leiter identify two central beliefs held by all legal positivists:

1) Social Thesis: what counts as a law in any particular society is fundamentally a matter of social fact or convention.
2) Separability Thesis: there is no necessary connection between law and morality.[137]

The first thesis is central. It establishes that criteria of legal validity, what identifies a law as a law in a given society, consist of social facts or conventions. Andrei Marmor glosses this thesis as that in any society that has a legal system "there are conventional rules of recognition, namely, social conventions which determine certain facts or events that provide the ways for the creation, modification, and annulment of legal standards."[138] He also shows that the separability thesis is a negative implication of the social thesis: Since there is no necessary connection between social facts or conventions and morality, and if the conditions for legal validity consist entirely of social facts or conventions, then there is no necessary connection between law and morality.[139]

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[137] Jules Coleman and Brian Leiter, "Legal Positivism," in *A Companion to Philosophy of Law and Legal Theory*, ed. Dennis Paterson (Oxford UK & Malden MA: Blackwell, 2003), 241.

[138] Andrei Marmor, "The Nature of Law," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2011, http://plato.stanford.edu/archives/win2011/entries/lawphil-nature/.

[139] Ibid.

Ronald Dworkin attributes another thesis, the essentiality of which to positivism is disputed, though it too seems to be entailed by the social thesis:

3) Discretion Thesis: in principle the law can run out and in those cases the judge must make new law.[140]

Neither the polemical history of this thesis nor its essentiality to positivism need be examined here, though the role of discretion in legal practice is explored in subsequent chapters. While not all positivists hold that laws are determinate rules, Leibowitz certainly does. Suffice it to note here that if one maintains that all law must be positively enacted and that laws are determinate rules, then it is possible in principle for there to be gaps in the law and for judicial legislation, or "strong" discretion, to be necessary.

3. Leibowitz's Positivist Conception of Law

Leibowitz presents a positivist conception of law in general and Jewish law in particular. His conception of law is presented in the course of reflection on the notion of national "rights":

'Right' is a legal category, and this concept has no authority except in regard to an institutional reality defined by law and adjudication, which was established by men….What is my right to this watch strapped to my wrist?... There are a number of causes for this, and all of them are necessary conditions for the existence of this right. (1) I and other men…live together in the framework of a society that established the legal institution of private ownership…and which organizes the relationship among individuals from the perspective of property or assets. (2) 'I' as an entity defined from an objective perspective and existing as a 'personality,' that is, as a legal unit defined in the framework of this legal system. (3) My right to this watch as my property is based on criteria of ownership, which are established by this system…. (4) If doubts arise regarding this right, and if there arise claimants for it, there is an authorized institutional authority, accepted and recognized, to decide on this matter: the judge, who rules in accordance with his understanding of the valid law.[141]

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[140] Ronald Dworkin, *Taking Rights Seriously* (Cambridge MA: Harvard University Press, 1977), 17.

[141] Leibowitz, *FHV*, 196. See also ibid., 245; and *BSP*, 287: "The concepts 'right,' 'obligation,' and 'prohibition' are legal concepts, and they have no meaning except in a particular legal framework, whose laws acquire for man rights and establish obligations and prohibitions…. To the extent that one relates oneself to an institutional framework of a particular society, he has particular rights and certain obligations and prohibitions are valid for him in the framework of this society and its recognized institutions."

Leibowitz's commitment to both the social thesis and separability thesis are evident in this passage. Legal statuses only exist as components of a legal system. The legal system itself is an institution established by society, presumably by some social practice or convention. The legal system authorizes certain institutions to adjudicate conflicts, and, one assumes, establish new laws and revise old ones. From his description it is apparent that there is no necessary connection between these legal statuses and morality. Indeed, the context of this discussion reinforces this view, as Leibowitz himself was an outspoken moral critic of the Israeli occupation of the Palestinian territories, yet he denies that a legal case could be made for their national "right." Since there is no international legal system based in social facts or convention, the concept of national rights is meaningless.

Leibowitz does not abstractly reflect on his conception of halakha. However, his positivist view is evident from his general conception of law, along with his claim that halakha is a human creation. If halakha is a form of human law, then he should conceive of it according to his general schema for law. Further, in response to the question of what the halakha is, Leibowitz answers that it is simply "What is accepted as halakha among the nation who intend to accept upon themselves its yoke (the yoke of Torah and the commandments)."[142] Now, he certainly does not subscribe to the view that halakha just is whatever practices are regularly performed among the halakhically observant community, for the notion that the halakha must be performed as service of God is central to his thought. Hart, in his classic of legal theory, *The Concept of Law* (*CL*), which exposits the basis for contemporary positivism, uses the distinction between a mere regularity of behavior and an instance of following a rule to preliminarily identify the

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[142] Leibowitz, *Leibowitz On Just About Everything*, 113.

genus of action to which law belongs.[143] Regularities of behavior have no normative significance; in contrast, rules provide reasons for action for those that follow them.[144] Laws can be provisionally identified as a subset of those behaviors in a society that are conducted by following a rule. Similarly, Leibowitz must identify the halakha as that which is practiced as a rule for the purpose of serving God by the community that considers itself bound by the halakha.

Leibowitz also holds the separability thesis as regards halakha. That halakha need not conform to morality is a point upon which he consistently insists. Indeed, even when halakha and morality agree on the normative status of a particular behavior, he is adamant that the obligation possesses uniquely halakhic normativity and must be performed for that reason to have religious significance. Exemplifying this approach, and also reinforcing his generally positivist view, when asked whether halakha has an internal logic, he replied that it has "the logic possessed by any legal framework, which begins with certain postulates from which it derives conclusions. The whole world of halakha is very rational, but its premises are postulates."[145] Even when the halakha outlaws the same practices as those forbidden by morality, within the halakha these prohibitions are normative because of their statuses within the halakhic-legal system and not because of their moral content.

Lastly, Leibowitz also maintains the discretion thesis. In a number of debates, which are explored below, he insists that contemporary reality presents novel circumstances, which cannot be adequately handled by the codified halakha even if the usual casuistic reasoning is used. He insists that in these cases halakhic-legal adjudication is not sufficient, and that instead the need

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[143] H. L. A. Hart, *The Concept of Law* (Oxford UK & New York: Oxford University Press, 1994), 8–13; 55–61. Henceforth *CL*.

[144] Andrei Marmor, *Philosophy of Law* (Princeton: Princeton University Press, 2011), 47.

[145] Leibowitz, *Leibowitz On Just About Everything*, 115.

for halakhic-legal legislation must be recognized.[146] In effect, he argues that there are gaps in the

halakha and halakhic-legal decisors must legislate anew. Since he does not view halakhic norms

as having a reason beyond service of God, he is drawn to regard them as determinate rules,

which either apply or fail to apply to circumstances. When new circumstances confront halakhic-

legal decisors, the preexisting norms cannot be interpreted based on their reasons and applied to

the circumstances; rather, new norms must be legislated.

4. Halakhic Positivism: Primary and Secondary Rules

Having established that Leibowitz holds a positivist conception of law and halakha, more

specific aspects of his theory of halakha are analyzed using this framework. In particular, Hart's

conception of law as a union of primary and secondary rules is used to explicate and assess

Leibowitz's conception of halakhic-legal authority and validity. It is not claimed that Leibowitz

was influenced by Hart (indeed many of Leibowitz's writings on halakha predate *CL*) or

subscribes to an identical view. Rather, this comparison is offered as a means for understanding

his theory of halakha in the service of assessing its relation to his justification of halakhic norms.

Hart defines law as a union of primary and secondary rules. In describing these primary and

secondary rules, he writes,

> Under rules of the one type which may well be considered the…primary type, human beings
> are required to do or abstain from certain action, whether they wish to or not. Rules of the
> other type are in a sense parasitic upon or secondary to rules of the first; for they provide that
> human beings may by doing or saying certain things introduce new rules of the primary type,
> extinguish or modify old ones, or in various ways determine their incidence or control their
> operations. Rules of the first type impose duties; rules of the second confer powers, public or
> private. Rules of the first type concern action involving physical movement or changes; rules
> of the second type provide for operations which lead not merely to physical movement or
> change, but to the creation or variation of duties or obligations.[147]

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[146] Leibowitz, *JPS*, 143–144.

[147] Hart, *CL*, 81.

To simplify, primary rules are laws about actions, whereas secondary rules are laws about laws. Hart identifies three types of secondary rules: rules of recognition, change, and adjudication. The rule of recognition "specif[ies] some feature or features possession of which by a suggested rule is taken as conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts"; it is "a rule for conclusive identification of the primary rules of obligation."[148] The notion of legal validity arises from the rule of recognition; the rule of recognition identifies what are valid laws. Rules of change allow for the addition or deletion of primary rules; they are closely connected to the rule of recognition, since for rules of change to exist the rule of recognition must make reference to institutions and procedures by which rules can be validly modified. Rules of adjudication "empower individuals to make authoritative determinations of the question whether…a primary rule has been broken."[149]

Whether the rule of recognition should actually be considered a *law* about laws is unclear. Legal validity is described by Hart in the following manner: "To say that a given rule is valid is to recognize it as passing all the tests provided by the rule of recognition and so as a rule of the system. We can indeed simply say that the statement that a particular rule is valid means that it satisfies all the criteria provided by the rule of recognition."[150] But since the rule of recognition provides the criteria for legal validity, it itself cannot be legal grounded. For example, accept for the purposes of illustration that the Constitution is the rule of recognition in the legal system of the United States; it establishes that passage by majorities of the House of Representatives and the Senate, along with the approval of the President, is necessary for a bill to become a valid

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[148] Ibid., 94–95.

[149] Ibid., 96.

[150] Ibid., 103.

law.[151] But what grounds the legal validity of the Constitution? The Constitution establishes the procedure for its ratification, but it is unclear what makes that procedure legally valid.[152]

Hart provides reasons for thinking of the rule of recognition as both a law and a non-legal social fact. Hans Kelsen, with whom Hart engages in a sustained debate in *CL*, maintains that the rule of recognition or, as he referred to it, the *Grundnorm* must be presupposed as legally valid by those who accept the legal system in order to anchor the system's validity.[153] However, Marmor argues that it is more consistent with Hart's philosophical program to hold that the rule of recognition is a social fact. It is simply that which is appealed to by members of a given society as the ultimate standard for justifying and criticizing laws.[154]

This background is helpful to understand Leibowitz's view on the relation between the Written Torah and halakhic-legal practice and to lay the foundation for discussion of his conceptions of authority and validity. He views the Written Torah as the rule of recognition of the halakhic-legal system. He writes, "the halakha of the Oral Law, which is a human creation, derives its authority from the word of the living God that is in Scripture,"[155] indicating that the Written Torah serves as the source of the validity of the institutions and procedures of halakhic-legal practice. But the Written Torah possesses this authority because halakhic-legal practice treats it as having this authority. This is what Leibowitz implies when he claims that the Written Torah is one of the institutions of the Oral Law.[156] He casts this view in language that is more

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[151] *U.S. Constitution*, Article I, Sections 1 and 7.

[152] Ibid., Article VII.

[153] Marmor, *Philosophy of Law*, 15–28.

[154] Ibid., 48–59.

[155] Leibowitz, *JPS*, 21.

[156] Ibid., 20.

reminiscent of Kelsen than Hart, writing, "the meaning of the occasion of Mount Sinai is the recognition of the command that we have been commanded."[157] Revelation at Sinai, or the Written Torah, stands as the *Grundnorm* that must be presupposed to anchor the validity of the halakhic-legal system. However, this presupposition can also be understood in Hart's language of social practice as that which is ultimately appealed to by participants in halakhic-legal practice to justify or criticize halakhic-legal claims. Indeed, understanding Leibowitz's view in terms of social practice is more consistent with his identification of halakhic practice with Judaism. However, more important than the details of Leibowitz's position on rules of recognition are his conceptions of halakhic-legal authority and validity.

B. Two Types of Halakhic-Legal Authority

Beyond the most rudimentary forms, legal systems must establish institutions with the authority to modify, interpret, and apply laws. A rule of recognition must identify those institutions that are authorized to perform these functions for their actions to be legally valid. In terms of halakha it is natural to think of rabbis as having the authority to modify, interpret, and apply halakhic norms. And indeed, as Sagi notes, while Leibowitz does not present a full-fledged theory of halakhic-legal authority, he does believe that rabbis have this authority. He identifies the rabbis as the historical framework for the life of Torah.[158] Further, for Leibowitz rabbis "have authority that derives from Sinai,"[159] thus again indicating the relation of halakhic-legal institutions to their rule of recognition. The necessity of rabbinic authority for halakhic-legal

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[157] Leibowitz, *FHV*, 154.

[158] Leibowitz, *JPS*, 176.

[159] Avi Sagi, "Ha-Rav Solovait'sik U-Prof. Libovits Ke-Teoretikanim Shel Ha-Halakha [Rabbi Soloveitchik and Professor Leibowitz as Theoreticians of the Halakha]," *Da'at* 29 (1992): 131–48.

rulings is also evident from Leibowitz's discussions of halakhic-legal questions, where often he

demurs from offering a formal opinion because he is not a halakhic-legal authority.[160]

However, Leibowitz also offers another conception of halakhic-legal authority, which vests

the power of modifying, interpreting, applying, and even legislating halakhic norms with the

Jewish people. He sets out this view in the context of a debate in the religious Zionist community

about the need for and possibility of a Torah-State, or a state governed according to the halakha.

He claims that it is crucially important as a matter of intellectual and religious honesty for the

religious Zionist community to present a plan for such a state instead of merely attempting to

secure the possibility of its members individually abiding by halakha. His general view on the

problems and opportunities confronting the Jewish people and the halakha as a result of the

establishment of the State of Israel is evident when he writes,

> The working-up and realization of this program are not possible according to an approach
> whose essence is merely conservatism…. This program depends on the religious self-
> initiative of the religious community: it is not possible except on the background of new
> halakhic decisions in those areas of public life, which were not dealt with in the existing
> halakha because they were not included in the framework of life that this halakha envisioned,
> but now they are included in the framework of religious…problems by the historical act of
> the national-statist revival in this time—before the coming of the messianic redemption.
> These halakhic decisions require considerable deviations from that behavior and religious
> form of life that consolidated when there was a lack of political independence and civil
> responsibility…. The subject of the religious-halakhic decisions of our generation can only
> be the organized religious community, which carries in action the yoke of the duties of the
> state and society and which accepts upon itself their responsibilities and feels in its heart and
> soul the religious-halakhic problems that derive from them. Do not expect any action in this
> area from the official religious institutions of instruction, since they are bound by the
> psychological bonds of their tradition of generations, during which the political and social
> regime of the Jewish people was not given in their hand to form—to uphold or to change;
> therefore they were absolved of the necessity of new religious legislation according to their
> decision and self-responsibility, and they became accustomed…to establish religious

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[160] Leibowitz, *BSP*, 311. In a review of a collection of articles discussing halakhic issues concerning advancements
in medicine, he writes, "One should note that, even if there is no halakhic adjudication in these volumes, a few of the
rabbinic authors do not restrain themselves from giving expression to how their views incline…. And I, though I am
not a participant in halakhic decisions, must note that in most instances the views expressed there are like mine in
the matters discussed, based on my modest attainments in the matters of Torah and medicine."

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decisions on precedent alone…. However, our generation undertook an act without precedent in our history and unexpected from the perspective of that religious consciousness, which accepted the rule of foreigners upon us as a given reality which one does not question at least in the framework of history. Upon the decisive religious questions of our generation it is impossible to rule according to the halakha, rather one must legislate halakha…. Currently, the responsibility and obligation for decisions at this time, returns and descends on the first religious authority, which is the Torah-observant community as a whole, for all the institutions of instruction were nothing but its agents and only derived from its power.[161]

The halakha as it has been received by the contemporary Jewish community was developed in the Diaspora, where Jews were not sovereign and did not have the responsibilities entailed by self-government. Consequently, it does not concern itself in a realistic, that is, non-messianic, manner with political issues and those that relate to society at large. Many of its norms are premised on the supposition that certain tasks and responsibilities, such as waging war and providing services that need continuous labor, are carried out by non-Jews. Leibowitz thus insists that any feasible halakhic plan for a sovereign Jewish state requires wholesale revisions of currently accepted halakha. However, he does not believe that the rabbinic establishment is up to this task; they are wedded to a conservative form of halakhic-legal practice, which only utilizes casuistic reasoning, relating 'new' cases to 'old' cases. But the new cases presented by Jewish sovereignty are novel and therefore require original legislation.

More broadly, Leibowitz argues that due to their failure to cope with the new situation the rabbinic establishment has lost its authority, which has returned to its original possessor—the Jewish community. He thus presents an alternative theory of halakhic-legal authority, according to which the power of validly changing and adjudicating halakhic norms originally rests with the halakhically observant community, which it can then delegate to rabbis.[162] In practice, Leibowitz

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[161] Leibowitz, *JPS*, 143–144.

[162] For the details of this idea, its connections to the religious Zionist movement and participatory democracy, and its fate, see Moshe Hellinger, "A Clearly Democratic Religious-Zionist Philosophy: The Early Thought of Yeshayahu Leibowitz," *Journal of Jewish Thought and Philosophy* 16, no. 2 (2008): 253–82. I disagree with Hellinger that

is not certain whether the rabbinic institution should be completely dissolved. He clearly rejects a governmental post, such as the chief rabbinate, while entertaining the possibility that the community will decide to re-devolve its authority on rabbis that are rooted in the community.[163]

Leibowitz thus presents two models of halakhic-legal authority. The first invests authority in rabbis, while the second places it originally in the Jewish community. In either account, it is a necessary condition for halakhic-legal validity that a potential halakhic norm be recognized by the rabbinic establishment or the Jewish community or both. Still, it is not sufficient.

C. Criteria of Halakhic-Legal Validity

Enactment by authorized institutions is a necessary but not sufficient condition for legal validity in many legal systems. Recall the example of the United States' legal system. Passage by the houses of Congress, along with the approval of the President, is a necessary condition for legal validity, but it not sufficient: A law can still be found unconstitutional and, thus, invalid. The Bill of Rights establishes conditions that restrict the substance of laws. For example, a law cannot establish religion, restrict free speech, or violate due process or equal protection.[164] Leibowitz similarly claims that there are substantive criteria of halakhic-legal validity in addition to enactment by authorized halakhic-legal institutions. In the following, the criteria of halakhic-legal validity that he suggests are described and evaluated. He offers three such criteria: service of God (1), immanent halakhic principles (2), and various other factors (3). It is argued that these criteria conflict and have different relations to his justification of the commandments.

Leibowitz gave up on this conception of halakhic-legal authority. Leibowitz's shift from encouraging the development of a halakha adequate to a modern state to advocating the separation of church and state in Israel stems more from political developments and practical consideration than from a rethinking of his views on religion and halakha.

[163] Leibowitz, *JPS*, 176.

[164] *U.S. Constitution*, Amendments I, V, and XIV.

1. Service of God: Prayer

As was discussed, Asa Kasher interprets Leibowitz's claim that "the halakha is based on faith, however, it itself is the base for this faith" to mean that the Written Torah and the halakhic-legal system stand in a reciprocal relation of "granting validity" to one another: The halakha recognizes the Written Torah as one of its institutions and the Written Torah determines the value of the halakhic system. When conceived as a claim about halakhic-legal validity, as opposed to all-things-considered normativity, this claim is unproblematic and consonant with Leibowitz's legal positivism. The Written Torah is recognized by halakhic-legal practice as being the rule of recognition that grants legal validity to the rest of the halakhic system; it determines the criteria of validity for halakhic-legal practice. In fact, Kasher correctly identifies the value of the Written Torah, according to Leibowitz, as service of God. He also points out that this means that "when halakhic legislation is needed for the sake of an institutional solution to new problems, it must create a further realization of this same value."[165] Leibowitz thus identifies being an expression of service of God as the criterion of halakhic-legal validity: For a halakhic-legal decision to be valid it must be an expression of service of God.

In "Practical Commandments" Leibowitz makes this clear and educes some of its implications:

> The intention is what distinguishes between the forming of the halakha by the teachers of guidance in the Oral Law and those changes by the men of the reform: the former adjudicate according to considerations that seems to them as obligatory by the halakha or from necessary needs for the existence of halakha itself, while the latter—from considerations and pressures whose source is not from the understanding of halakha itself.[166]

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[165] Kasher, "Paradox - Question Mark," 239.

[166] Leibowitz, *JPS*, 14.

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Just as it is exclusively the intention to serve God that makes the performance of the commandments service of God, so too it is exclusively the intention to serve God that makes halakhic-legal actions valid. There is no difference in content between the invalid changes of "reformers" and the valid changes of the "teachers of guidance"; it is merely the intention with which their halakhic-legal practice is conducted. According to Nathan Rotenstreich, for Leibowitz "[t]he absolutism of intention ...is the writ of authority for halakhic innovation."[167] Indeed, here Leibowitz, following the rabbinic tradition, seems to construe halakhic-legal practice as itself a type of halakhic practice: Just as intention determines the religious significance of halakhic practice, so too intention determines the validity of halakhic-legal practice. But since the intentions of the participants in halakhic-legal practice are not accessible, the intention must be translated into the purpose of the halakhic norm. It is this that functions as the criterion of halakhic-legal validity, which can be expressed as follows: "All halakhic norms must be for the purpose of serving God." A proposed halakhic innovation that is not for the purpose of serving God lacks validity.[168]

Leibowitz demonstrates his commitment to this criterion in his essay "On Prayer." Prayer is a halakhic practice that he often cites to emphasize that an action only has religious significance if it is done with the intention of serving God. He aims to reinforce that the intention to fulfill any other interest, even spiritual edification, invalidates the religious significance of the act. He extends this line of thought from the act of prayer to the formulation of the content of prayer:

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[167] Nathan Rotenstreich, *Iyyunim Ba-Mahashavah Ha-Yehudit Ba-Zeman Ha-Zeh [Studies in Jewish Thought in Our Time]* (Tel Aviv: ʿAm ʿOved Tarbut ve-Hinukh, 1978), 86.

[168] While the relation between the subjective intention of a legislator and the objective purpose of a statute is complex, a distinction can be made between the two aims of interpretation. See Aharon Barak, *Purposive Interpretation in Law*, trans. Sari Bashi (Princeton: Princeton University Press, 2007), chap. 6 & 7 for a helpful discussion.

Indeed, we certainly know that the text of the prayer…is not from heaven and it in and of itself has nothing of holiness: it was arranged, organized, and established by men like us according to their deliberations and decisions about what seemed to them the appropriate and pleasing expression for the fulfillment of the commandment of prayer, and any holiness of the text of the prayer only comes from this halakhic decision. In this prayer is not distinguished from any other religious institution or practice, which was established by the halakha according to the principles of the Oral Torah and the authority of this Torah, and there is no doubt that with this authority it is possible to change the text as well—if this change is seen as necessary by the congregation of observers of the Torah and the fulfillers of its commandments, who sincerely believe that this innovation…is required by the Torah, just as the creators and developers of the Oral Torah believed in every generation. This belief is the legitimization of the Oral Torah, and it changes the human halakhic decision into the word of the living God. The opposite is the case for any change of the prayer or the order of the prayer out of any interest in this change—to make the prayer more appetizing for the supplicant, to make it agree with the spirit of the time, to the moral or aesthetic values reigning at that time, etc. A change such as this is not fixing prayer but destroying it as a religious act, and the request for such changes is not an expression of a religious compulsion, but removal of the yoke of the kingdom of heaven.[169]

The purpose of the modification distinguishes valid halakhic-legal changes from those that are invalid. If it is for the purpose of service of God then any particular change is valid, whereas if it is for the purpose of any other interest or value then it is invalid.

This criterion of halakhic-legal validity has an important benefit: It directly connects the legal justification for the halakhic norm with the reason for action of the individual performing it. The reason why the halakha norm is what it is is the same reason that the individual possesses for performing it. It is thus clear why the individual should obey a halakhic-legal authority if she wants to serve God: Service of God is the purpose that guided the authority's establishment of the norm. The norm's normative and legal justifications are identical with one another. This criterion thus unifies Leibowitz's philosophy of halakha: The reason for the commandments is also the governing principle of halakhic-legal practice.

However, it is unclear how halakhic deliberation is possible if service of God, when it is understood as Leibowitz insists that it must, is recognized as the criterion of halakhic-legal

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[169] Leibowitz, *JPS*, 388.

validity. It cannot be interpreted positively, for that would require some positive knowledge about God and how he wishes to be served. This is ruled out by Leibowitz's negative theology. It seems more likely, then, that it should be interpreted negatively. Guided by a suggestion by Asa Kasher about theological statements, the criterion would then read "No halakhic norm can be for the purpose of serving man," or slightly more perspicuously "No halakhic norm can be for the purpose of human needs or values."[170] This reading is supported by Leibowitz's statement that "the halakha cannot—and even need not—be in agreement with the natural interests and needs of man."[171] But this seems to leave nothing at all to guide halakhic deliberation. As Noam Zohar writes, "[i]t is not clear what is appropriate to enter into halakhic deliberation, for all human purposes, spiritual and material, interested and moral alike—are foreign to the essence of halakha as 'the service of God'; once the halakhic action is linked to any of these purposes, it immediately… becomes profane."[172] Thus, if service of God is the criterion of halakhic-legal validity, it is not clear how halakhic-legal deliberation is possible. For this purpose seems to rule out any other consideration and cannot itself guide halakhic deliberation. Further, as is shown below, it is not descriptively adequate and would render many existing halakhic norms invalid.

2. Immanent Principles: Autopsies

In response to this problem Sagi suggests that though service of God functions as a criterion of halakhic-legal validity for Leibowitz, halakhic-legal deliberations are guided by other

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[170] Kasher, "Theological Shadows."

[171] Leibowitz, *JPS*, 28.

[172] Noam Zohar, "Al Ha-Heta'alamut Mei-Ta'amei Ha-Halakha Ha-Mamashit: Iyyun Be-Divarav Shel Libovits Al Netahei Matim [On Disregarding the Actual Reasons for the Halakha: An Investigation of Leibowitz's Views on Autopsies]," in *Yeshayahu Libovits: Olamo ve-Haguto [Yeshayahu Leibowitz: His World and Philosophy]*, ed. Avi Sagi (Jerusalem: Keter, 1995), 62.

immanent halakhic principles.[173] This allows him to maintain service of God as a negative

criterion of halakhic-legal validity, which excludes all "external" interests and values from

halakhic-legal deliberation, while still possessing some positive content to guide it. He first

presented these principles in the debate over the Torah-State and restated them years later:[174]

> Is such innovation of the halakha within the framework of the Torah and in agreement with
> the legitimate halakha possible? This innovation is possible, even obligatory, as a legitimate
> religious action. There are immanent principles of halakhic legislation, without which it is
> not possible at all to offer the halakha as a realistic law for the state, and if the struggle[175]for
> the establishment of "a state according to the Torah" is recognized as a religious task and
> obligation—then these principles allow for the criticism of the existing consolidated halakha.
> What is spoken of is internal criticism and not external criticism. Regarding religion only
> religious judgment and religious deliberation have force. Religion and its manifestations do
> not stand under psychological, moral, sociological, political, or national criticism…. Religion
> does not stand under the judgment of political or social interests, but religion stands under the
> judgment of religion: that is to say, halakha stands under halakhic judgment: One can check
> whether it is proper from the perspective of halakha, or whether it contradicts itself.
> Moreover, the halakha needs to stand under the halakhic test, that is, the test of the principles
> that stand as the fundaments of halakha.[176]

Some of these principles serve as criteria of halakhic-legal validity. But since they are contentful,

they can also guide halakhic-legal deliberation. The principles are as follows:

> (1) The social-political-cultural existence desired by the halakha cannot be dependent and
> conditioned on existential premises that are not established by the halakha….[177]
> (2) Halakhic instruction or…adjudication is not legitimate except to the extent that the
> possibility of fulfilling them and the means of their operation belong…to functions organized
> by halakha.[178]
> (3) Religious-Torah law for the state is law *de jure* [*le-hathila*] and not law *de facto* [*be-de'eved*].[179]

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[173] Sagi, "Rabbi Soloveitchik and Professor Leibowitz as Theoreticians of the Halakha."

[174] Cf. Leibowitz, *TCE*, 145–153, and Leibowitz, *JPS*, 199–208.

[175] The insertion of the word "struggle" is actually the only significant difference between the earlier and later
versions of this article. Cf. Leibowitz, *TCE*, 146; and Leibowitz, *JPS*, 200.

[176] Leibowitz, *JPS*, 200.

[177] Ibid., 200–201.

[178] Ibid., 201.

(4) A decision about the general annuls all the problems about the particulars.[180]

(5) Any religious request or guidance, whether prescriptive or prohibitive, is intended to be fulfilled by every Jewish person.[181]

(6) Folklore is not religion and religion is not folklore.[182]

Leibowitz applies these criteria in a number of places, including in the context of the observance of the Sabbath in Israel. However, the most explicit employment of them is in his discussion of autopsies, which are halakhically problematic due to concerns about delaying burial and the desecration of the dead [*nivul ha-met*].[183] He presents his view on autopsies in a series of journal articles collected under the heading "On the Problem of Surgery after Death."[184] He enters this discussion as a scientist, doctor, philosopher, and Zionist, for the question of the halakhic status of autopsies arose in Israel with the development of medical training programs in the fledgling state. He argues that modern medicine is premised on the regular conduct of autopsies to verify diagnoses, thus improving their reliability and adding to the stock of medical knowledge. He does not offer his own final opinion on what the halakha should be but merely presents a stark opposition: Upholding the ban on autopsies means negating modern medicine, while permitting modern medicine means nullifying the ban on autopsies.

A number of Leibowitz's immanent halakhic principles are at work in this judgment. The way that he creates a stark opposition between alternatives reflects premise (4): If modern

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[179] Ibid., 203.

[180] Ibid., 204.

[181] Ibid.

[182] Ibid.

[183] See M Sanhedrin 6: 4-5; BT Sanhedrin 45-47; BT Bava Batra 154; and BT Hullin 11. The major modern source on this issue is the negative ruling of Rabbi Yechezkel Landau (1713-1793) in his *Noda' Bi-Yehudah*, 2nd ed. (Jerusalem: Halakha Berurah, 1960), vol. 1: 126–127, Yoreh De'ah, Responsa 210. See Chapter 3 for further discussion of his view.

[184] Leibowitz, *JPS*, 223–228.

medicine is permitted (the general), then questions about autopsies (the particular) cease to be relevant. There is no question for him of modern medicine being permitted and autopsies being allowed under restricted conditions. He also dismisses religious objections to the performance of autopsies on account of the 'holiness' of the corpse, for from the perspective of the halakha a corpse is the most impure object. This is congruent with premise (6): Folklore is not religion. More centrally, he also invalidates the possibility of observant Jews practicing medicine and benefiting as patients from the practice of medicine, while autopsies are performed by and on non-Jews and non-observant Jews. This is in keeping with principles (1), (2), and (5). Being premised on forbidden practices invalidates other practices that would, in and of themselves, be valid. He also rejects attempts to base the permission to perform autopsies on the legal principle of "saving lives" (*pikuah nefesh*), which he understand only to refer to emergencies. This reflects principle (3); rulings that conceive of everyday affairs as states of emergency are invalid.

In this example, the halakhic principles function both as guides to halakhic-legal deliberation and as criteria for halakhic-legal validity. They both guide the modification of the halakha and rule out certain decisions as invalid. The introduction of these principles does not mean that Leibowitz has relinquished service of God in its negative sense as a criterion of halakhic-legal validity. He is still committed to the exclusion of other values and interests from halakhic-legal practice. But recognition of these substantive and immanent principles allows him to claim that halakhic norms can be modified when they fail to conform to the principles of halakha itself. They must be modified to be brought into conformity with these principles.

However, Zohar aptly criticizes Leibowitz's position both on the true immanence of these principles and as to whether he adequately describes the type of deliberation that takes place in the halakhic-legal process. First, he questions the source of these principles in the halakha and

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their consistency within the framework of Leibowitz's philosophy of halakha. He wonders where in the halakha Leibowitz has derived them, in particular conditions (1), (2), and (5). If they stem from actual principles discussed in halakhic literature, such as "benefiting from that which is prohibited" or "lack of integrity," then a halakhic discussion relating these principles to the case of autopsies is necessary. If they stem from a moral principle regarding honesty, then, on Leibowitz's own terms, it is problematic to impose them on halakhic-legal deliberations. They are not really immanent but arise from human interests and values.[185]

Second, and focusing on his discussion of autopsies, Leibowitz reduces this halakhic question to the bare opposition of the unequivocal ban on autopsies and the advancement of modern medicine. However, this is merely a result of his conceiving of halakhic norms as simple rules, without underlying values and purposes beyond that of service of God. Actual halakhic-legal practice is not conducted in this manner. Indeed, Zohar shows that the traditional halakhic-legal deliberations concerning autopsies involve ascertaining the individual purposes and values, such as "saving lives" or the "honor of the dead," standing behind halakhic norms to determine their application and limits. This deliberation is evidenced as early as the Mishnah, for, as Zohar notes, the question of the halakhic status of autopsies has its roots in two rabbinic sources, one related to delaying burial, the other to impinging on the corpse. The Mishnah prohibits delaying the burial of a corpse unless it is for the "honor of the dead," implying that the reason that burial must be performed immediately is for the same reason.[186] Elsewhere, the Talmud notes that one may not impinge on the corpse so as to cause it to be disgusting.[187] Zohar argues that this rule is

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[185] Zohar, "On Disregarding the Actual Reasons for the Halakha."

[186] M Sanhedrin 6: 4-5.

[187] See BT Bava Batra 154 and BT Hullin 11 and cf. BT Sanhedrin 45 and BT Arachin 7.

just the obverse of the earlier ruling, as evidenced by a point made by the Rabbi Shlomo ben Aderet, a medieval commentator (1235-1310), that one may cause a corpse to degrade, if one thereby fulfills a wish of the deceased. This is because an individual's will is his honor.[188] This type of discussion continues in halakhic literature to the present day. Indeed, Zohar concludes that "the continuing formation of the halakha is bound together with the reasons for its laws, which is to say in different values—moral and religious—that constitute their purposes."[189]

Leibowitz's immanent principles and criteria of halakhic-legal validity are thus not consistent with his own exclusion of human interests and values from halakhic-legal practice. Moreover, they are not descriptively adequate of halakhic-legal deliberation, which touches on the specific values and purposes that underlie halakhic norms, some of which, like "honor of the dead" seem to be human interests and values. Thus, Leibowitz's attempt to unify his philosophy of halakha by making service of God both the reason for the commandments and the criterion of halakhic-legal validity fails.

3. Halakhic-Legal Practice: Women, Euthanasia, and Abortion

Indeed, Leibowitz's engagement in halakhic-legal practice shows that even he appeals to considerations about the values and purposes of halakhic norms besides service of God. There is, as Rosenak points out, a disjunction between Leibowitz's theory and praxis of halakha,[190] or his theory of halakha and actual halakhic-legal practice. In these cases, he introduces an additional

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[188] Zohar, "On Disregarding the Actual Reasons for the Halakha," 64.

[189] Ibid., 72.

[190] Avinoam Rosenak, "Yeshayahu Libovits: Thi'oriyah ve-Praqsus [Yeshayahu Leibowitz: Theory and Praxis]," in *Yeshayahu Libovits: Beyn Shamranut Le-Radikaliyut: Diyunim Be-Mishnato [Yeshayahu Leibowitz: Between Conservatism and Radicalism: Investigations of His Teachings]*, ed. Aviezer Ravitzky (Tel Aviv: Van Leer Institute/Hakibbutz ha-Meuchad, 2007), 280–306.

immanent criterion of halakhic-legal validity, which allows for the unrestricted introduction of other values and purposes into halakha-legal practice. Moreover, he suggests that there are other reasons for the commandments besides service of God that should influence halakhic-legal practice. Lastly, his own philosophical commitments undercut his theory of halakha by occasionally leading him to call for the revision of halakhic norms on their basis.

a. Metahalakha: Women and Halakha

In an article entitled, "The Status of Women in Judaism: Halakha and Metahalakha," Leibowitz weighs in on a significant issue confronting contemporary Orthodox Judaism—the halakhic status of women—and, in the process, offers two additions to his theory of halakha. He summarizes his argument as follows:

> The existence of the Jewish people and Jewish society in the past generation is an existence that the thought of the halakha consolidated in the historical tradition of Judaism did not expect and did not think of at all. Similar to the political and economic problems of our day, the problem of the place of women in our social, economic, and cultural life is among the things that the halakhic decisions that are in our hands do not comprehend…, for they do not relate at all to our existence. All our social, economic and political problems require— precisely from the perspective of the community that accepts upon itself the form of life according to the Torah and its commandments—renewed halakhic legislation from the perspective of [its] understanding of the premises that are the fundaments of halakhic rulings, the metahalakha—and they are not capable of being solved by relying on the consolidated halakha that did not deal with them at all.[191]

Traditionally, women are recognized as possessing a different set of halakhic obligations, permissions, and prohibitions than men. It is a halakhic principle that women are not obligated to perform positive commandments that are time bound. Though there may be as many exceptions to this principle as there are instantiations of it, significant examples of its application are women's lack of obligation to don *tzitzit*, bind themselves with phylacteries, or eat in a *sukkah* on

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[191] Leibowitz, *FHV*, 71.

Tabernacles (*sukkot*).[192] For different reasons women are not obligated to learn Torah[193] and are excluded from holding various positions of authority.[194]

Leibowitz approaches this halakhic issue from the standpoint of the contemporary status of women in general society. The Jewish community that observes halakha "belongs to a society whose culture is a culture of men and women together, and this is the form of our Jewish existence."[195] The problem created by the clash between a discriminatory halakha and the egalitarianism that prevails in general society, along with the impossibility of ameliorating it through the usual casuistic methods, "threatens the essence of the continuing existence of the Judaism of Torah and the commandments in our world."[196] He thus suggests a metahalakhic principle to the effect that halakhic changes that are necessary for the preservation of the halakhic system itself are valid.[197] With this principle Leibowitz allows halakhic changes, while still maintaining that the source of these changes is the halakha itself. However, as Sagi notes, in practice this radically exposes the content of halakhic norms to what Leibowitz could only describe as human interests and values.[198] Halakhic-legal practice will ultimately be guided by

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[192] See BT Kiddushin 29a For a general discussion see Elizabeth Shanks Alexander, *Gender and Timebound Commandments in Judaism* (Cambridge MA: Cambridge University Press, 2013).

[193] See BT Kiddushin, 29b.

[194] Moses Maimonides, *Mishneh Torah* (Jerusalem: Horev, 1925), vol. 2, Book of Judges, Laws of Kings and their Wars, 1:5.

[195] Leibowitz, *FHV*, 72.

[196] Ibid., 71.

[197] Indeed, it is evident that something of the sort was envisioned by him as guiding halakhic-legal deliberation even earlier. In "Practical Commandments" (Leibowitz, *JPS*, 14), he describes the legitimate participants in halakhic-legal practice as guided by "considerations that seems to them as obligatory by the halakha or from necessary needs for the existence of halakha itself."

[198] Sagi, "Rabbi Soloveitchik and Professor Leibowitz as Theoreticians of the Halakha."

values and interests like egalitarianism, which Leibowitz could only see as "human." This proposal consequently undermines a central component of his theory of halakha.

This proposal is also problematic for his justification of the commandments because Leibowitz distinguishes among halakhic norms in terms of their status and purpose. Despite his calls for new halakhic legislation on the basis of metahalakhic principles, he does not think that all halakhic norms should be made egalitarian. He makes two distinctions, which do not necessarily overlap with each other. He differentiates between commandments which only have meaning as commandments to serve God and those that have further meanings as well as between commandments *de jure* (*le-hathila*) and commandments *de facto* (*be-de'eved*).

Beginning with the first distinction, Leibowitz claims that for some commandments "all of their meaning only comes from the Torah having established them as obligations…; without this obligation they would be devoid of meaning. In other words, these actions are only service of God to the extent that the Torah obligates man to do them. Thus, if a man who is not obligated by them fulfills them of his own volition, there is nothing in it of service of God, rather something like sport."[199] Examples of these commandments include donning *tzitzit*, binding oneself with phylacteries, and eating in a *sukkah*. He holds that egalitarianism in these areas is misguided at best and religiously compromised and halakhically invalid at worst. In contrast, he thinks that men and women must have equal obligations in terms of the commandment to study Torah, for it "in addition to its meaning as the fulfillment of a commandment—[it] makes the Jewish person a partner in the cultural heritage of Judaism and its spiritual matters; one is almost able to say—makes him a partner to the indwelling of the Divine presence among the Jewish

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[199] Leibowitz, *FHV*, 71.

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people. Distancing the study of Torah from women…is the negation of a principle Jewish right from her: Her 'Jewishness' is made lighter than that of a man."[200]

Turning to the second distinction, Leibowitz takes issue with women's exclusion from positions of religious, political, and communal authority and norms about modest dress. He argues that these norms were only *de facto* halakhic prohibitions, which resulted from historically widespread cultural views about women. In these cases the halakha codified "what was in practice" and not "what ought to be." In contrast, he argues that halakhic norms related to sexual prohibitions and family purity are halakhic norms *de jure*, which are not dependent on their cultural context, and which must be accepted as "absolute demands that reflect 'the yoke of the kingdom of heaven.'"[201]

Tamar Ross criticizes Leibowitz's division of the commandments into those that are *de jure,* timeless, and which must be observed as absolute commands, and those that are merely *de facto*, cultural conditioned, and which are subject to change. She argues that this is not an authentic use of halakhic terminology and claims that Leibowitz is using it to license his historicization of halakhic norms. Further, she argues that this historicization is selective in a manner that cannot be sustained; the sexual prohibitions and laws of family purity can be shown to be cultural conditioned as well. Ross speculates as to what drew Leibowitz to such an inconsistent position, including his religious philosophy in general, recognition of historical change, and tendency to create dichotomous categories.[202] A factor she does not include, however, is moral convictions

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[200] Ibid., 72.

[201] Ibid., 73.

[202] Tamar Ross, "M'amadah Shel Ha-Ishah Be-Yahadut: Hasagot 'Al Tifysat Shel Libovits Le-Gabei Menganon Ha-Teyum Beyn Halakha ve-Mitsi'ut [The Status of Women in Judaism - Some Comments on the Understanding of Leibowitz on the Mechanism of Coordination Between Halakha and Reality]," in *Yeshayhu Libovits: Olamo ve-Haguto [Yeshayahu Leibowitz: His World and Philosophy]*, ed. Avi Sagi (Jerusalem: Keter, 1995), 148–61.

about women's equality. Doubtless, these commitments as well influenced this intervention in halakhic-legal practice.

In this connection, Leibowitz's first distinction is inconsistent with his account of *ta'amei ha-mitzvot*, for, as Rosenak notes, it indicates "that that this commandment is counted not only as a deontic divine commandment, but it carries…some function that deals with personal and cultural identity."[203] Thus, whereas in his justification of the commandments Leibowitz insists that the only reason for every commandment is service of God, here he supplies a specific purpose for the commandment to study Torah: It enfranchises individuals to the Jewish people and culture. Further, deploying this purpose in halakhic-legal deliberations conflicts with the original criterion of halakhic-legal validity proposed by Leibowitz; personal and cultural identity is a type of value and purpose that should be excluded by the requirement that all halakhic norms be for the purpose of serving God. Leibowitz might argue that halakhic norms are not changed because of external values or purposes but because the disenfranchisement of women in an era of egalitarianism threatens the continued existence of the halakhic form of life. However, the introduction of a purpose served by the study of Torah supports Zohar's contention that halakhic-legal practice requires engagement with the substantive purposes of the commandments. Only with such purposes in view can one determine the application and limits of halakhic norms. In this case, only by reflecting on the purpose served by the commandment to study Torah could Leibowitz realize that women were not simply freed from an obligation by not being commanded to study Torah but that they were being disenfranchised from the Jewish people and that this undermines the continuity of halakhic practice.

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[203] Rosenak, "Yeshayahu Leibowitz: Theory and Praxis," 300.

b. Metaethics: Euthanasia and Abortion

Leibowitz's use of a specific purpose for the commandment to study Torah evidences a disjunction between his justification of the commandments and his halakhic-legal practice. Some of his other forays into halakhic-legal practice demonstrate continuity between his general philosophical views and his halakhic-legal practice, while still violating his philosophy of halakha. Though the positions he advocates violate his stricture against assigning additional reasons for the commandments, the rationale for his advocacy of those positions stem from his general philosophical commitments. The two areas where such influence is apparent are in his writings on abortion and euthanasia. Leibowitz discusses both of these issues in his essay "Medicine and the Value of Life," which begins by analyzing the case of Karen Ann Quinlan, an American woman who had fallen into a persistent vegetative state and whose parents sued for the right to remove her artificial life-sustaining mechanisms. Leibowitz moves from this case to a broader discussion of the notion of an individual's right to live:

> Does a man have the right to live? We have already said that rights derive from an institutional framework, and therefore—who or what acquires for man the right to live? It seems, if I do not recognize a rational basis for this right, why is it prohibited for me to behave towards a man like I behave towards an inanimate object or a vegetable or another living being? The answer to this… question is that: Indeed, there is no rational basis for this [right], however this is a postulate that has been accepted upon us. Why? Because we have accepted it upon ourselves, and this is the secret of its validity. It is forbidden to take a man's life because we have recognized that it is forbidden to take a man's life.[204]

Leibowitz's view of status of the right to live derives from his metaethical position. The right to live cannot be rationally grounded; it is either itself an ultimate value decision, perhaps identical to that of morality, or it follows from a different value decision, like service of God. For Leibowitz certain practical consequences follow from his metaethical position: "The right of man to live is a non-rational principle. And since it is not rational—it is not capable of rationalization,

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[204] Leibowitz, *FHV*, 245–246.

that is, it is not possible to establish for it boundaries and limits…. And to say: Until here is its validity and from here and onward it has no validity."[205] Further, since he holds on the basis of his philosophy of biology that life is a continuous phenomenon with no absolute boundary both at its origin and its conclusion, abortion and euthanasia are prohibited to those who accept the postulate that one must not take another human's life.[206]

Leibowitz recognizes that his view contradicts the accepted position of the halakha. He notes that Rabbi Moshe Isserles (1520-1572), the Ashkenazi glossator of Rabbi Joseph Karo's (1488-1575) legal code the *Shulhan 'Aruk*, ruled that there is a distinction between actively bringing about death by directly causing one of the necessary functions of the body to cease and passively causing death by removing an external mechanism that is maintaining life. Leibowitz notes, however, that "he is not satisfied with this conclusion," and tries to assimilate Isserles' position as an instance of "a halakha that should not be taught" (*halakha ve-'ayn morin keyn*). He is also aware that the halakha, in fact, does distinguish between different stages of development *in utero*,[207] and thus tries to draw the distinction between culpability in human court versus culpability in heavenly court.[208] Leibowitz is dissatisfied with his contradiction of the established halakha and tries to reconcile his conclusions with it; but these efforts are not successful.

More important than the success or failure of these efforts is the source of these conflicts in Leibowitz's general philosophical commitments. His view that life is a continuous phenomenon derives from his general views in the philosophy of biology. Thus, the latter led him to revise

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[205] Ibid., 246–247.

[206] Ibid., 252. See Rosenak, "Yeshayahu Leibowitz: Theory and Praxis," 302–305 for further discussion.

[207] See BT Yevamot 69b.

[208] Leibowitz, *FHV*, 251.

halakhic norms. Moreover, his view that the right to live is an arational postulate generates the conflict in the first place, for if the right to live had a rational basis, its limit and applicability could be determined as they are in the established halakha. His metaethics thus also leads him to revise halakhic norms. Leibowitz rejects a halakhic position for a reason that does not stem from the halakha itself but from philosophy, while still maintaining that there cannot be reasons for the commandments. His halakhic-legal practice contradicts his account of the reason for the commandments and conforms to his general metaethical views.

D. Legal Problems

Leibowitz attempts to unify his philosophy of halakha through service of God: Service of God is both the reason for the commandments and the criterion of validity for halakhic-legal practice. The normative and legal justifications of halakhic norms are thus identical. This unification would have two related advantages: It would connect the justification for halakhic norms with halakhic-legal practice, which would ensure that halakhic practice would track its justification. Relatedly, the reason for which an individual must engage in halakhic practice would be the same reason that determined the content of halakhic norms. This would render perspicuous why one should follow halakhic-legal authorities if one decides to serve God.

However, Leibowitz's identification of service of God with the criterion of validity for halakhic-legal practice fails. It rules out any other substantive considerations and cannot itself guide halakhic-legal deliberation. Not surprisingly then, it does not accurately describe actual halakhic-legal practice. Indeed, when he engages in halakhic-legal practice, he recognizes other, more substantive considerations. Still, he insists that halakhic norms must be performed exclusively for the reason that they are service of God. Consequently, halakhic-legal authorities pronounce norms that must be followed as service of God, while there are actually other reasons

for each halakhic norm. There is a gap between normative justification and legal justification. Halakhic-legal authority is therefore "opaque"; it generates norms for which its addressees have reason to act but without it being apparent how these particular norms relate to that reason.

This raises a more general question about the relation between normative justification and legal authority. Law as a unique form of normative discourse and practice requires two features that must be reconciled: On the one hand, it is essential to law that legal authorities command, that is, that they do not merely recommend that their subjects perform an action or remind their subjects of their preexisting commitment to perform an action. A legal subject must perform an action *because it's the law*. This insight stands behind early legal positivist views such as John Austin's command theory of law, where the law is the command of the sovereign backed up by threats.[209] But, on the other hand, as Raz has pointed out that the law always at least claims to be a legitimate authority; it therefore needs to appeal to its subjects' reason and not just issue commands and threats.[210] Recast in the language of reasons for action, on the one hand, authority aims to provide new reasons for action by issuing commands, but, on the other hand, it needs to appeal to the preexisting reasons for action of its subjects to show why it should be obeyed.

Resolving these two features seems to involve showing how the legal authority's directives, or the new reasons for action it provides, connects with the reasons for action that its addressees already possess. In this case, it would involve showing how following the dictates of a halakhic-legal authority allows one to achieve one's goal of serving God. But ultimately for Leibowitz halakhic norms are determined by reasons entirely different from, and seemingly unconnected to,

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[209] John Austin, *The Province of Jurisprudence Determined; And, The Uses of the Study of Jurisprudence* (Indianapolis: Hackett, 1998); see Hart, *CL*, 18–78 for an interpretation and critique of Austin's view.

[210] Joseph Raz, "Authority, Law, and Morality," *The Monist* 68, no. 3 (July 1, 1985): 295–324; and Marmor, *Philosophy of Law*, 58–61.

the reason for action that its subjects possess. Leibowitz's philosophy of halakha is a paradigmatic case for this problem because he exclusively designates one valid reason for action, which cannot guide legal deliberation. Therefore, it is not clear why even individuals committed to service of God should follow the directives of halakhic-legal authorities.

A suggestion, which is unique to Leibowitz's thought, is that he could claim that *for Jews* the only way to serve God is to practice halakha as it has been developed by halakhic-legal authorities. But this is not because of any unique property of the halakhic norms they have commanded. Rather, it is for the simple reason that for a Jew to choose to serve God in any other way would require her to reject these halakhic norms and select another form of service that she thinks is more fitting. But both this rejection and selection would depend on her interests and values. To the objection that these halakhic norms themselves contain features that are based on such interests and values, Leibowitz might respond that it is not necessary that these features of halakhic norms be the reasons of one's accepting them; however, when one rejects a framework and accepts another it will always be for some reason or another. Thus, a framework that one did not choose or fashion oneself is the best way to serve God. It is the *givenness* of halakhic norms for Jews that makes it appropriate service of God. In this vein, Leibowitz writes, "anyone who is not capable of coming to religiosity except through the channels of Judaism, or who is not interested and does not want to come to religiosity except through its Jewish manifestation, encounters against his will the practical commandments in the world of halakha"[211] However, this suggestion once again raises concerns about Leibowitz's methodological consistency, for he would be arguing from within a position of preexistent commitment to halakhic practice.

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[211] Leibowitz, *JPS*, 16.

IV. Conclusion: Issues and Insights

Leibowitz thus presents a theocentric philosophy of halakha, in which service of God is both the reason for the commandments and the criterion of halakhic-legal validity. He explicitly rejects traditional approaches to *ta'amei ha-mitzvot*. However, when situated in the context of his metaethical and axiological positions, it is evident that this is not a rejection of the justification of halakhic norms but a denial of specific types of justifications. Indeed, he claims there is one valid intention and reason for performing the commandments—service of God—and offers a justification for that value. Indeed, he offers two justifications with varying strengths: According to the first, commitment to the value of service of God through obedience to halakhic norms is on all fours with commitment to any other axiological orientation and its entailed norms. Halakhic norms are thus at least as justified as any other norms. In contrast, according to the second, service of God is the only true value because of its unique capacity to be willed in radical freedom. Hence, halakhic norms are more justified than any other normative system. However, Leibowitz's account of justification is problematic, for it presents caricatures of both evaluative judgments and factual conclusions, overdraws the fact/value distinction, and misses the link between rationality and attributability. Moreover, in its more radical form where only the contentless value of service of God can be willed with the requisite freedom, the connection between an individual and her action is severed. Indeed, once the will is disconnected from reason, it becomes no different than pure caprice and both the individual who possesses the will and the value the will selects become contentless.

In his theory of halakha Leibowitz attempts to link the justification for the commandments to halakhic-legal practice though service of God. The reason for the commandments is also the criterion of halakhic-legal validity. However, service of God cannot play this role in halakhic-

legal practice. Indeed, halakhic norms will always be determined by other substantive reasons. In his own engagement in halakhic-legal practice he adverts to considerations besides service of God, including immanent halakhic principles, substantive reasons for the commandments, and his own general philosophical positions.

While Leibowitz's justification for the commandments and theory of halakha are problematic, they also contain insights. Sometimes, he embraces an always-already engaged starting point for reflection on halakhic practices. While it unlikely that justification can remain in this purely internal perspective, it is preferable to the unrealistic view that demands that individuals reflect on their practices entirely from the outside. There is no point outside of any and all practices from which a specific culture's practices can be judged; any claim to do so usually involves surreptitiously privileging one culture's practices as "objective" and "neutral," when in fact they are just as "parochial" as the practices being evaluated.

Additionally, in keeping with this internal point of view, Leibowitz conceives of halakha primarily as a social practice and only secondarily as a discursive system of norms. While this cannot be the entire story—the practices are initially justified by the norms, it indicates the complex relation between practices and both their normative and legal justifications. Further, once halakha is conceived of as a social practice and only secondarily as a discursive system of norms, recognizing lay halakhic-legal authority becomes plausible, for practitioners are ultimately the arbiters of their practice. Institutions of halakhic-legal authority may emerge, but they depend on being recognized as such by practitioners.

Moreover, while it ultimately fails, Leibowitz's attempt to unify his philosophy of halakha though service of God is well-intentioned: It indicates that his attempted justification of the commandments possesses practical consequences; it is not mere apologetics. It also tries to

connect the reason an individual possesses for performing the commandments with the reasons that determine the halakhic norms themselves, thus providing a robust grounding of halakhic-legal authority. Lastly, his focus on service of God, though problematic in many ways, resists the reduction of religious practice to other concerns, whether they are sociological, nationalistic, or moral. While it is unlikely that halakha possesses a single aim or value, it is just as improbable that service of God should be excluded from it.

CHAPTER TWO

'The Objectifying Instrument of Religious Consciousness': Soloveitchik's Construction of Halakha as Affective Expression and Emotional Discipline

Referring to the title of his well-known work, Joseph Soloveitchik[1] has been described as the "halakhic man."[2] Taken strictly this description is dubious. The identification of Soloveitchik with the protagonist of this work is uncertain. More charitably, the implication of this description is that he is the modern philosopher of halakha *par excellence*. In this sense the description is apt: Soloveitchik was a renowned Talmudist, a halakhic decisor, and his philosophical writings are centered on halakha. However, the connection between philosophy and halakha in his thought is complex. In fact, he presents two approaches to this relation: At the close of *The Halakhic Mind* (*HaMi*), he makes the programmatic assertion that "out of the sources of Halakhah a new world view awaits formulation."[3] He declares the aim to develop a Jewish philosophy out of halakha. Let us call this the *halakhic philosophy approach*. However, in that same work he offers a philosophical account of halakha. He describes it as "the objectifying

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[1] Soloveitchik was born in Pruzhana (present day Belarus) in 1903. He received a traditional Jewish education from a *heder*, communal school, and his father, Moses Soloveitchik, the son of the founder of the Brisk method of Talmud learning, Hayym Soloveitchik. He received his early secular education at a *Gymnasium* in Dubno and the Free Polish University in Warsaw, where he studied political science. In 1932 he received a doctorate in philosophy from Friedrich-Wilhelm University in Berlin, writing his dissertation on the Neo-Kantian and Jewish philosopher Hermann Cohen. Soloveitchik served as a communal rabbi and head of a small advanced seminary in Boston from 1932 until he replaced his father as a senior *Rosh Yeshivah* (head of rabbinical seminary) at Yeshiva University's Rabbi Isaac Elchanan Theological Seminary in 1941. He taught Jewish philosophy, Talmudic studies, and practical halakha there for over four decades. He also served as a conferrer of rabbinic ordination for Yeshiva University and the chairman of the halakha commission for the Rabbinical Council of America, the major professional organization for centrist and modern Orthodox rabbis in the United States. He died in 1993. For further biographical information, see Aaron Rakeffet-Rothkoff, *The Rav: The World of Rabbi Joseph B. Soloveitchik*, ed. Joseph Epstein (Hoboken: Ktav, 1999), vol. 1 pp. 21–78.

[2] For example see David Hartman, "The Halakhic Hero: Rabbi Joseph Soloveitchik, Halakhic Man," *Modern Judaism* 9, no. 3 (October 1, 1989): 249–73.

[3] Joseph B. Soloveitchik, *The Halakhic Mind* (Ardmore: Seth Press, 1986), 102. Henceforth *HaMi*.

instrument of our religious consciousness."[4] Let us call this the *philosophical account of halakha*. Soloveitchik thus describes halakha as both the source and object of philosophy, while he depicts philosophy as both emerging from and accounting for halakha.[5]

This complex relation engenders an intricate account of *ta'amei ha-mitzvot* and its connection to halakhic-legal practice. In fact, corresponding to the two approaches, Soloveitchik presents two accounts of the justification of the commandments, each of which has a distinct relation to halakhic-legal practice. When he directly discusses the project of *ta'amei ha-mitzvot* he argues that the reasons for the commandments must be autonomously generated from the halakhic norms themselves. They are the basis for his proposed halakhic philosophy. Consequently, the justification for the commandments is subordinated to the results of halakhic legal-practice and cannot issue in the revision of codified norms. Let us call this *ta'amei ha-mitzvot$_1$*. However, he also provides a more substantive theory of the ends of halakhic norms that emerges from his philosophical account of halakha. Drawing on a realist phenomenology, this second account conceptualizes halakha norms as the expression of collective Jewish religious consciousness's affective cognition of objective values. In engaging in halakhic practice the individual Jew disciplines her emotions to respond appropriately to these values and eventually achieve cognition of them. Let us call this *ta'amei ha-mitzvot$_2$*.

The two accounts of *ta'amei ha-mitzvot* do not merely sit side-by-side. *Ta'amei ha-mitzvot$_2$* is more fundamental: It underwrites *ta'amei ha-mitzvot$_1$*, illuminates Soloveitchik's concentration in his theoretical halakhic analyses on a specific type of commandment, and grounds significant features of his halakhic-legal practice. An epistemological corollary of his

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[4] Ibid., 85.

[5] See Zohar, "Development of Halakhic Theory as an Essential Basis for Philosophy of Halakha" for a discussion of the distinction between halakhic philosophy and philosophy of halakha.

philosophical account of halakha entails the main feature of the methodology of *ta'amei ha-mitzvot₁*: the justification of a specific halakhic norm must emerge out of reflection on the norm itself. Yet, only *ta'amei ha-mitzvot₂* delivers a justification of halakha's normativity. Additionally, only it explains Soloveitchik's invention of and preoccupation with the category of experiential mitzvot, the fulfillment of which requires the presence of specific emotional states. And though both accounts cohere with his halakhic conservatism—on neither account do the justifications of halakhic norms provide leverage for modifying the codified halakha, they relate to his theory of halakha in distinct ways: *Ta'amei ha-mitzvot₁* is subordinate to halakhic-legal practice; *ta'amei ha-mitzvot₂* warrants that subordination. Lastly, only *ta'amei ha-mitzvot₂* grounds elements of his theory of halakha: its account of authority and decision-making. Yet, Soloveitchik does not sufficiently support the premises of his philosophical account of halakha, thus undermining his justification of halakhic norms. There are also independent problems with his theory of halakha.

A number of controversial claims have been telegraphed in the preceding paragraphs. In the following they are supported by first presenting Soloveitchik's discussions of the nature of halakha, two accounts of *ta'amei ha-mitzvot*, and view of normativity (I); then, his theory of halakha and its connection to his philosophical account of the halakha and justification of halakhic norms is discussed (II). As in the previous chapter, outstanding problems concerning normative justification and legal-authority arising from his view as well as the strengths of his approach are detailed in the conclusion (III).[6]

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[6] Some of the analysis I present here is based on the use of manuscripts that were posthumously published. In utilizing them my aim is not to unearth an esoteric doctrine that conflicts with Soloveitchik's previously published teaching. The responsa I use, for example, were all documents that were shared with others during his lifetime. Moreover, the task set here is not primarily historical but philosophically reconstructive. My aim is to show how Soloveitchik's thought in its entirety, previously published and posthumous works, *could* fit together. This does not

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I. A Halakhic Philosophy or a Philosophical Account of Halakha?

The main focus of this analysis of Soloveitchik's philosophy of halakha is the account given in *HaMi*. One might object that this is to neglect a more important source—*Halakhic Man* (*HaMa*).[7] Thus, the priority of the description of halakha given in *HaMi* over that in *HaMa* is first argued, and a brief exposition of the former's argument is offered (A). The main contention of the chapter is then introduced: the two accounts of the reasons for the commandments found in Soloveitchik's work are presented, and their relation to each other is assessed. Executing this argument involves reinterpreting *HaMi* by connecting it to its philosophical sources and Soloveitchik's other writings, including posthumously published manuscripts and halakhic analyses (B). Following that, his view of normativity is discussed by drawing on the posthumously published work *The Emergence of Ethical Man* (*EEM*) and the previously published essay *And From There You Shall Seek* (*YSS*) (C). Lastly, it is argued that Soloveitchik's views are beset with epistemological and metaethical difficulties (D).

A. The Nature of Halakha

1. Halakhic Man or Halakhic Mind

In *HaMa* Soloveitchik presents a phenomenology of the Lithuanian Talmudist-virtuoso. An ideal type foreign to philosophers of religion, he claims, the halakhic man is a tense synthesis of two other ideal types: "cognitive man" and "*homo religiosus*." However, as Rotenstreich notes,

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mean that contradiction or lack of cogency is ruled out. In fact, as will be shown, I have severe doubts about the success of Soloveitchik's project. But it does mean that texts are read charitably, even when it is concluded that their positions are untenable. More generally, my claim is that many of his arguments in previously published works can be understood better in the context of the posthumous manuscripts.

[7] Joseph B. Soloveitchik, *Halakhic Man*, trans. Lawrence Kaplan (Philadelphia: Jewish Publication Society of America, 1983). Henceforth *HaMa.*

because the center of halakhic man's life is the halakha, an analysis of that is also central to the discussion.[8] In his most detailed comments on halakhic man's object, Soloveitchik writes,

> Halakhah has a fixed a priori relationship to the whole of reality in all of its fine and detailed particulars. Halakhic man orients himself to the entire cosmos and tries to understand it by utilizing an ideal world which he bears in his halakhic consciousness. All halakhic concepts are a priori, and it is through them that the halakhic man looks at the world…. [Halakhic Man's] world view is similar to that of the mathematician: a priori and ideal. Both the mathematician and the halakhist gaze at the concrete world from an a priori, ideal standpoint and use a priori categories and concepts which determine from the outset their relationship to the qualitative phenomena they encounter. Both examine empirical reality from the vantage point of an ideal reality. There is one question which they raise: does this real phenomenon correspond to their ideal construction? And when many halakhic concepts do not correspond with the phenomena of the real world, halakhic man is not at all distressed. His deepest desire is not the realization of the Halakhah but rather the ideal construction which was given to him from Sinai, and this ideal construction exists forever.[9]

Lawrence Kaplan notes correctly that Soloveitchik uses neo-Kantian concepts and terminology in his description of halakha: Soloveitchik describes the halakha as an ideal and *a priori* cognitive-normative or theoretical-normative system.[10] He explains that in describing halakha as a system Soloveitchik means that halakhic categories represent a "network of interweaving relationships" that are only meaningful in terms of one another.[11] He also provides a charitable interpretation of Soloveitchik's description of halakha as *a priori* and ideal that avoids some of its more obvious problems.[12] By "*a priori*" Soloveitchik does not mean to identify halakhic categories with the Kantian categories of the understanding. He is aware that Kant's categories, unlike those of halakha, are necessary conditions for the possibility of experience; rather,

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[8] Rotenstreich, *Studies in Jewish Thought in Our Time*, 57–58.

[9] Soloveitchik, *HaMa*, 23.

[10] Lawrence Kaplan, "Rabbi Joseph B. Soloveitchik's Philosophy of Halakha," *Jewish Law Annual* 7 (1988): 139–97.

[11] Ibid., 153.

[12] For these criticisms, see Rachel Shihor, "On the Problem of Halacha's Status in Judaism: A Study of the Attitude of Rabbi Josef Dov Halevi Soloveitchik," *Forum* 30, no. 1 (1978): 149–53.

halakhic categories could be considered *a priori* in a Neo-Kantian sense similar to the view of

Ernst Cassirer. They serve as classificatory schemes for empirical reality that constitute a domain

of culture or area of investigation: They provide the criteria for categorizing empirical objects in

halakhic life and inquiry. Similarly, the halakha could be described as ideal because empirical

objects only approximate satisfaction of the halakhic categories into which they fall.[13]

Soloveitchik not only deploys this conception of halakha in his phenomenology of halakhic

man; he also endorsed it is as his own view. In correspondence he writes,

> The Halakhah (I have developed the fundamentals of this theory in my thesis [*Halakhic Man*]) is an a priori ideal system. In other words, it postulates a world of its own—an ideal one, which suits its particular needs. The subject matter of the Halakhah is not the primitive datum, apprehended by our senses, but an actus, a creative performance which results in the emergence of pure halakhic constructs…. In this regard, the halakhic approach is analogous to that of the mathematician….[14]

In another essay, "How is Your Beloved Better than Another? ("Beloved"), he provides a similar

articulation of this conception of halakha and explicitly connects it to the Brisker method of

Talmud study, of which he was one of the foremost practitioners. The Brisker method, now the

dominant traditionalist approach to Talmud study,[15] was founded by Soloveitchik's paternal

grandfather Hayym Soloveitchik (1853-1918), who was the rabbi of the town of Brest-Litovsk

(Brisk).[16] Articulating the main result of the approach, he writes:

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[13] Kaplan, "Rabbi Joseph B. Soloveitchik's Philosophy of Halakha," 157–160. Kaplan still notes problems with conceiving of halakhic norms as ideal in this manner.

[14] Joseph B. Soloveitchik, *Community, Covenant and Commitment: Selected Letters and Communications*, ed. Nathaniel Helfgot (Jersey City: Ktav, 2005), 273. Henceforth *CCC.*

[15] See the articles contained in Yosef Blau, ed., *Lomdus: The Conceptual Approach to Jewish Learning* (Jersey City: Ktav, 2006).

[16] For studies of the Brisker method, see Norman Solomon, *The Analytic Movement: Hayyim Soloveitchik and His Circle* (Atlanta: Scholars' Press, 1993); Chaim Saiman, "Legal Theology: The Turn to Conceptualism in Nineteenth Century Jewish Law," *Journal of Law and Religion* 21, no. 1 (2006 2005): 39–100; Aharon Lichtenstein, "The Conceptual Approach to Torah Learning: The Method and Its Prospects," in *Lomdus: The Conceptual Approach to Jewish Learning*, ed. Yosef Blau (Jersey City: Ktav, 2006), 1–44; and Elyakim Krumbein, "From Reb Hayyim and

The halakha was changed into a fully deductive method…. The halakha is not a jumbled collection of laws, but a method, an approach, which creates noetic unity, a fully organic unit. There is a hierarchy of ideas, and they are all a work of phenomenal architectonic, whose base is rooted in the ground, in daily life, and whose top reaches heaven, to the zenith of intellectual abstraction, and in transcendental cleaving to the intellect of the infinite giver of the Torah.[17]

Instead of a viewing the halakha as an assortment of norms, the Brisker method takes it as a postulate that halakha embodies a conceptual system. In Talmud study one tries to understand how the details of halakhic norms derive from abstract halakhic concepts.[18]

Soloveitchik describes the results of this approach by comparing the achievements of Hayym Soloveitchik to those of Kant:

Kant in his time declared the independence of pure reason of scientific-mathematical cognition. R[abbi] Hayym fought the war of independence of halakhic reason and demanded complete autonomy for it. The psychologization or historicization of halakha are the assassins of its spirit, just as an attempt like this would destroy mathematical thought. If halakhic thought were to be dependent on spiritual factors, it would then lose all of its objectivity and would fall to the level of subjectivity that has no concreteness. The rooting of halakha in its own domain, the establishment of its striking signs and its classification regarding the types of cognition of other disciplines—these are among the attainments of R[abbi] Hayym. He provided unique methodological instruments for the halakha, produced a framework of halakhic categories, and arranged *a priori* premises according to the manner of pure postulatization. His doctrine emphasizes and then reemphasizes, that one cannot grasp the world of halakha through the tools of other types of thought, even those closest to it. Not only is the halakha not interpreted through historical-political or sociological thought, but also not in moralistic or pietistic types of thought. The impulses of general moral pietists are not decisive in halakhic questions. The expressions and thoughts of the halakha are turned towards the ideal that is particular to it. Its tools and methods are originary to it, and its does not borrow tools and measurements from its neighbors.[19]

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the Rav to Shi'urei Ha-Rav Aharon Lichtenstein - The Evolution of a Tradition of Learning," in *Lomdus: The Conceptual Approach to Jewish Learning*, ed. Yosef Blau (Jersey City: Ktav, 2006), 229–98.

[17] Joseph B. Soloveitchik, "Mah Dodekh mi-Dod [How is Your Beloved Better than Another?]," in *Be-Sod ha-Yahid ve-ha-Yahad: Mivhar Ketavim 'Ivriyim [In Aloneness, In Togetherness: Selected Hebrew Writings]*, ed. Pinchas H. Peli (Jerusalem: Orot, 1976), 228–229. Henceforth "Beloved."

[18] Kaplan notes that Soloveitchik's description here differs from that offered in *HaMa*. Here he identifies the object to which the halakhist brings *a priori* concepts with halakhic texts instead of the world. See "Rabbi Joseph B. Soloveitchik's Philosophy of Halakha," 28.

[19] Soloveitchik, "Beloved," 224–225.

The conceptualization of halakha as an ideal and *a priori* system buffers it from extra-halakhic factors and modes of inquiry. Halakha is not affected by reality but solely by the workings of its own constitutive categories. Additionally, the halakhic system certainly does not originate in empirical reality. Indeed, while Kantian categories originate in human reason, Soloveitchik leaves it to his reader to determine in whose mind halakhic categories originate.

In *HaMi* Soloveitchik draws more explicitly on Neo-Kantian philosophy to describe halakha. In a proposal for the work he states its topic as "[t]he Neo-Kantian conception of subjectivity and objectification of the act and its application to the analysis of the *ta'amei ha-mitzvot* problem."[20] However, his depiction diverges from the ideal and *a priori* system described in *HaMa*, "Beloved," and his correspondence. Instead of taking mathematics as his comparison, he uses empirical science as understood by the Neo-Kantian philosopher Paul Natorp. The details of this comparison are discussed below. Briefly, according to Natorp, knowledge of reality as given in pre-reflective experience is impossible: Qualitative reality is intrinsically subjective. Scientific inquiry involves the construction of a parallel, quantitative model that allows for objectivity. Soloveitchik maintains that, similarly, religious experience is initially completely qualitative and subjective. This experience objectifies itself, however, and is expressed as religious doctrines, norms, and practices. Summarizing this description, he writes, "Halakhah is the act of seizing the subjective flow and converting it into enduring and tangible magnitudes…. In short, Halakhah is the objectifying instrument of our religious consciousness…. Rabbinic legalism…is nothing but an exact method of objectification, the modes of our response to what supremely impresses us."[21] Thus, in *HaMi* halakha is described as the objectified expression of religious consciousness.

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[20] Soloveitchik, *CCC*, 271–272.

[21] Soloveitchik, *HaMi*, 85.

This description differs from that of *HaMa* in a number of important ways. First, instead of *a priori* and ideal categories for cognizing reality, halakhic categories arise from interaction with reality. Second, instead of a logically coherent system, as is shown below, halakhic norms reflect the variegated nature of religious experience. Third, instead of implying that halakha originates in divine reason, there is a strong insinuation that it originates in human activity.[22]

There are a number of reasons to prefer the account of halakha given in *HaMi* over that in *HaMa* as Soloveitchik's primary position. Despite Kaplan's charitable interpretation, problems remain in conceiving of the halakha as an *a priori* and ideal system. Kaplan himself points out that halakhic texts invoke moral considerations that are not strictly defined by the halakha. Similarly, Tzvi Zohar points out that as opposed to mathematical language, halakhic discourse incorporates natural language, or terms not defined by the halakha. This occurs not only in descriptions of the circumstances of application of halakhic norms but even in the constitution of halakhic categories.[23] Thus, it seems more likely that Soloveitchik, in keeping with his phenomenological stance in *HaMa*, is describing the halakhic man's experience of the halakha rather than asserting that the halakha is actually *a priori*. Indeed, it is doubtful that Soloveitchik means to offer the view in *HaMa* as his own comprehensive view of halakha. Both the epigraph of the work[24] and its closing paragraph[25] indicate that the work is a phenomenology of someone

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[22] Jonathan Cohen, "Incompatible Parallels: Soloveitchik and Berkovits on Religious Experience, Commandment, and the Dimension of History," *Modern Judaism* 28, no. 2 (May 2008): 173–203. See below for further discussion.

[23] Tzvi Zohar, "'Al ha-Yahas beyn ha-Halakha le-beyn ha-Safah ha-Tiv'it [On the Relation Between Halakhic Language and Natural Language]," in *Sefer Yovel li-Khevod Morenu ha-Gaon Rabi Yosef Dov ha-Levi Solovaitsik [Jubilee Volume in Honor of Our Teacher, The Gaon Rabbi Joseph Dov Halevi Soloveitchik]*, ed. Shaul Yisraeli, Nahum Lamm, and Yitzchak Rafael, vol. 1, 2 vols. (Jerusalem and New York: Mosad ha-Rav Kook and Yeshiva University, 1984), 59–71.

[24] "At that moment the image of his father came to him and appeared before him in the window. – [BT] Sotah 36b" Suggestively, the individual to whom the visage of his father appeared was also named Joseph.

other than the author. Indeed, it has been pointed out that the halakhic man would not have written a work of philosophy like *HaMa*.[25] Consequently, while the halakhic man may view halakha as an *a priori* and ideal system, this is not Soloveitchik's only perspective on it. He is able to occupy both the view of halakhic man, as evident in his correspondence and engagement in the Brisker method, and the "external" viewpoint described in *HaMi*. In effect, in *HaMa* Soloveitchik presents the view of a participant in halakhic-legal discourse, while in *HaMi* he takes up the position of a philosopher of religion. A number of scholars have claimed that *HaMi* functions as the prolegomenon or epistemological prelude to Soloveitchik's other works.[27] As such it can hardly fail to exert a significant influence on other areas of his thought. Indeed, as is shown below, its "external" philosophical perspective is not inert relative to Soloveitchik's account of *ta'amei ha-mitzvot* and theory of halakha. Indeed, it is central.

2. HaMi: Prolegomenon to any Future Jewish Philosophy

Having established the priority of the account of halakha given in *HaMi*, it is necessary to sketch Soloveitchik's argument in that work. In this sub-section, the four basic stages of the argument are exposited (a-d). This establishes a baseline for different interpretations of Soloveitchik's account of *ta'amei ha-mitzvot* and flags two central difficulties. In the next

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[25] Soloveitchik, *HaMa*, 137: "These are but some of the traits of halakhic man. Much more than I have written here is imprinted in his consciousness…. But it is revealed and known before Him who created the world, that my sole intention was to defend the honor of the Halakhah and halakhic men, for both it and they have oftentimes been attacked by those who have not penetrated into the essence of Halakhah and have failed to understand the halakhic personality. And if I have erred, may God, in His goodness, forgive me."

[26] Jonathan Sacks, "Rabbi J. B. Soloveitchik's Early Epistemology: A Review of The Halakhic Mind," *Tradition* 23, no. 3 (Spring 1988): 86 fn. 10.

[27] Kaplan, "Rabbi Joseph B. Soloveitchik's Philosophy of Halakha"; Jonathan Sacks, "Rabbi Joseph B. Soloveitchik's Early Epistemology," in *Exploring the Thought of Rabbi Joseph B. Soloveitchik*, ed. Marc Angel (Hoboken: Ktav, 1997), 209–28; and William Kolbrener, "Towards a Genuine Jewish Philosophy," in *Exploring the Thought of Rabbi Joseph B. Soloveitchik*, ed. Marc Angel (Hoboken: Ktav, 1997), 179–208.

section, a new interpretation of the argument is offered, which resolves these difficulties and, in the process, reveals Soloveitchik's overarching strategy for justifying halakhic norms.

(a) Soloveitchik contends that epistemological pluralism is warranted. He argues that developments in early twentieth-century science and philosophy of science demonstrate, contra positivism, that natural science is not the only approach to the world that grants knowledge of reality. Far from presenting a unified account of reality, methodological and conceptual heterogeneity has been discovered within science itself. Mechanistic explanation has been found insufficient in biology and psychology. Similarly, basic categories, like substance, are defined and deployed differently in diverse sciences. For example, while physics reduces substance to quantitative mass, chemistry preserves the qualitative features of substances. Soloveitchik also points to developments in theoretical physics, such as relativity theory and the Heisenberg uncertainty principle, as indicating that science itself utilizes various symbolic frameworks to conceptualize reality. But if pluralism is recognized within science itself, he argues, there is no ruling out other non-scientific cognitive approaches to reality.

Crucially, in arguing for epistemological pluralism, Soloveitchik rejects "methodological pluralism." Instead, he insists on realist pluralism, writing, "in the final analysis pluralism is founded on reality itself…. [T]he object reveals itself in manifold ways to the subject."[28] Jonathan Sacks criticizes this element of the argument. He claims that "the very force of the argument suggests that reality can be sliced up and interpreted in infinitely many ways. And if reality corresponds to each of them, is it significant to say that it corresponds to any?"[29] To him Soloveitchik's pluralism *eo ipso* sacrifices its claim to being *episteme* or to being cognitive.

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[28] Soloveitchik, *HaMi*, 16.

[29] Sacks, "Rabbi Joseph B. Soloveitchik's Early Epistemology," 219.

Pluralism must be anti-realist. The next stage of the argument only deepens the puzzle about the realism of Soloveitchik's pluralism.

(b) After establishing, at least to his satisfaction, that epistemological pluralism is warranted, Soloveitchik turns to demonstrate that religion in particular offers knowledge of the world. His aim is to substantiate the claim that "[r]eligion too has a cognitive approach to reality. Religious experience is not only of an emotional or ethical essence, but is also deeply rooted in the noetic sphere. Indeed, the urge for noesis is of the very essence of religion."[30] Commensurate with his rejection of merely methodological pluralism, he is committed to demonstrating the realistic nature of religious experience. However, the execution of the argument is disappointing and reinforces Sacks' criticism. Soloveitchik appears to eschew arguments establishing the external existence of the objects of religious cognition in favor of simply analyzing the purely immanent intentional objects of religious mental acts. This seems evident from the way he sets up what must be accomplished by the argument: "If and when an eidetic analysis discerns the cognitive components of the religious act, then the theory of cognitive pluralism will substantiate the claim of religion to theoretical interpretation."[31] But in the phenomenological method introduced by Edmund Husserl eidetic analysis only concerns itself with the object of consciousness, bracketing out the issue of the actual existence or non-existence of the object.[32] In fact, Soloveitchik acknowledges this directly. He maintains that the theory of intentionality delivers a positive response to the cognitive nature of religion because

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[30] Soloveitchik, *HaMi*, 41.

[31] Ibid.

[32] Edmund Husserl, *Ideas: General Introduction to Pure Phenomenology*, trans. William Ralph Boyce Gibson (New York: The Macmillan Company, 1931), 101–111.

[t]he modern philosophy of religion has found an affirmative answer to the *quid facti* question in the theory of intentionality [, which] states that every psychical act is intentional in its character. By intentionality we understand an act coordinated with an object…. [E]very logical act predicates either the existence or non-existence of the object with which it is correlated…. No psychical act can be performed without coordinating it with an object; the existence, or subsistence or pseudoreality…of an object is warranted by the act itself.[33]

Thus, according to Soloveitchik, "every intentional act is implicitly a cognitive one,"[34] including those that are emotional, volitional, or religious. If this argument is meant to establish merely that religious mental acts *purport* to refer to reality, then it is well taken. However, this would not prove that religion is a valid cognitive approach to reality alongside that of science. As Sacks points out again, according to Soloveitchik's reasoning, since all mental acts are intentional, they are all cognitive.[35] But perhaps the objects of religious "cognition" are mere fancy, referring falsely to reality. Why not an "error theory" of religious cognition? Soloveitchik's argument for religious cognition seems to upset the expectations of realism he established.

(c) In any case, after establishing in his view that religion is cognitive in nature, Soloveitchik contends that the modern scientific method of theory construction, or reconstruction, should be emulated to access the contents of religious cognition. In the process, he presents a theory of religious experience. His argument here involves a debate with the Christian phenomenologist Max Scheler. Scheler, like Soloveitchik, maintains that religion is an autonomous cognitive approach to reality. However, he also claims that the object of religious mental acts is God or the Absolute (i) and that the object of philosophy of religion should be the contents of these religious

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[33] Soloveitchik, *HaMi*, 41–42.

[34] Ibid., 43.

[35] Sacks, "Rabbi Joseph B. Soloveitchik's Early Epistemology," 24.

cognitions of the divine (ii).[36] The philosopher of religion must use phenomenological intuition

to access these contents. Soloveitchik rejects Scheler's views and holds that the objects of

religious cognition are everyday phenomena (i) and that the contents of immediate religious

experience are inaccessible and thus not the objects of philosophy of religion (ii).

(i) Soloveitchik rejects Scheler's view on the objects of religious experience on empirical and

epistemological grounds:

> The central theme of the religious experience, however, is not the Absolute, but the
> immediate and phenomenal reality in all its variegated manifestations. Universal knowledge
> of the Absolute is possible only after the "world of shadows" has been thoroughly explored.
> In order to find the ultimate grounds, religion must begin with the sensible world; otherwise
> its quest for the transcendental is futile. Man is bound fast to temporality, is incapable of
> tearing himself loose from the moorings of his sensuous environment. He beholds infinity
> and eternity as reflected in finitude and evanescence…. The aboriginal religious experience,
> whether related to God in or beyond the world, always conceives of him from the purview of
> his relation to reality. The white light of divinity is always refracted through reality's "dome
> of many-colored glass"…. The cognition of this world is of the innermost essence of the
> religious experience.[37]

Soloveitchik claims as a matter of fact that *homo religiosus* is directly concerned with the world

and not the absolute; he also raises doubts about whether finite man could cognize the absolute.

He does not deny that religious cognition concerns God but insists that he is conceived through

the prism of the world.

(ii) Soloveitchik rejects Scheler's view on the objects of philosophy of religion for two

reasons: one practical and the other theoretical. From a practical perspective, Soloveitchik

identifies a reliance on phenomenological intuition with a rejection of reason in favor of

"emotional approaches to reality."[38] "Emotional approaches to reality" seems to be an oblique

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[36] On the method of philosophy of religion, or eidology, see Max Scheler, *On the Eternal in Man* (New Brunswick NJ: Transaction, 2009), 130. On God as the object of religious acts, see ibid., 246.

[37] Soloveitchik, *HaMi*, 45–46.

[38] Ibid., 53.

reference to Scheler's notion of the emotional *a priori*, according to which the initial objects of cognition are not the ordinary objects of experience but values. Values are intuited through acts of emotional value-perception. The intentional objects of feelings are values. This does not mean that value-perception is subjective. According to Scheler, there are correct and incorrect ways to feel and perceive values.[39] Nevertheless, Soloveitchik claims that such views are responsible for catastrophes, such as the Holocaust: "When reason surrenders its supremacy to dark equivocal emotions, no dam is able to stem the rising tide of the affective stream."[40] From a theoretical perspective, he argues that such approaches illicitly move from epistemological pluralism to the claim that non-scientific approaches can directly grasp "the core of nature."[41]

In contrast, Soloveitchik argues that the object of philosophy of religion should be religion's objective forms, that is, its doctrines, norms, and practices. He presents the debate between Kantians and Neo-Kantians regarding the relation of receptivity and spontaneity, or subjectivity and objectivity, in experience. While Kant maintained that experience requires both, Neo-Kantians reduced receptivity and subjectivity to postulations of spontaneity and objectivity. From a methodological perspective at least, he sides with the Neo-Kantians.[42] He argues that immediate experience is subjective and not an object of knowledge. Experience must become

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[39] For useful introductions to Scheler's thought, see Manfred Frings, *Max Scheler: A Concise Introduction into the World of a Great Thinker* (Pittsburgh: Marquette University Press, 1995); Manfred Frings, *The Mind of Max Scheler: The First Comprehensive Guide Based on the Complete Works* (Milwaukee: Marquette University Press, 1997); and Zachary Davis and Anthony Steinbock, "Max Scheler," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2011, http://plato.stanford.edu/archives/win2011/entries/scheler/.

[40] Soloveitchik, *HaMi*, 53.

[41] Ibid., 55.

[42] Ibid., 66.

objective to be knowable: "It is impossible to gain any insight into the subjective stream unless we have previously acquired objective aspects."[43]

Soloveitchik draws on Natorp's philosophy of science, according to which scientific knowledge of qualitative reality is not possible and the scientist constructs a quantitative model of reality to take as his object. However, this is not the end of scientific inquiry. Recent scientific developments have shown that quantification alone cannot fully account for reality—structural models are necessary. These models are stated in qualitative terms and not quantitative formulae. Further, the qualitative nature of reality is not introduced by returning to the given experience but by reconstructing it out of the quantitative data. Soloveitchik recommends this reconstructive approach, as opposed to Scheler's direct approach, for philosophy of religion: "We may gain access to religious knowledge of reality with its unique structural aspects in a two-fold way: First by coordinating two series in the religious sphere, the subjective and the objective; and, second, by reconstructing the former out of the latter."[44] The contents of religious consciousness cannot be apprehended directly; rather, they must be reconstructed out of their objectifications.

Soloveitchik explains that, similar to objectification in scientific cognition, there is a process of objectification in "the realm of inwardness," including ethics, aesthetics, and religion:

> Religion, which is perhaps more deeply rooted in subjectivity than any other manifestation of the spirit, is also reflected in externalized phenomena which are evolved in the objectification process of the religious consciousness. The aggregate of religious objective constructs is comprised of ethico-religious norms, ritual, dogmas, theoretical postulates, etc. There is a definite trend towards self-transcendence on the part of the spirit. It strives to escape its private inwardness and infiltrate the concrete world encompassed by space and pervaded by corporeal forms…. The objectifying process consists of two incongruous parts. The first remains within the world where subjective and objective aspects are rooted in purely qualitative strata, differing only as to their degree of distinctness and as to their proximity to the psychophysical border. The second is an act of emergence of "spiritual" reality into

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[43] Ibid., 74.

[44] Ibid., 62.

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outward tangible forms…. Religious subjectivity, for example, finds its correlate in a certain norm which, though remaining within spiritual bounds, strives towards the mysterious junction of psyche and physis. The norm is much nearer to the outer fringes of externality than its counterpart, the quasi-non-normative subjectivity.[45]

Religious consciousness expresses itself into the doctrinal, normative, and practical forms that constitute religion. Scheler too claims that religious experience objectifies into doctrine, norms, and worship.[46] The difference is that for Soloveitchik immediate religious experience is not available as an object for philosophy of religion. Instead, philosophy of religion's object must be these objectified expressions of religious consciousness out of which it may reconstruct religious subjectivity.

(d) In the final step of the argument, Soloveitchik's theory of religious consciousness and approach to philosophy of religion is applied to halakha and Jewish philosophy. He claims:

Objectification reaches its highest expression in the Halakhah. Halakhah is the act of seizing the subjective flow and converting it into enduring and tangible magnitudes. It is the crystallization of the fleeting individual experience into fixed principles and universal norms. In short, Halakha is the objectifying instrument of our religious consciousness, the form principle of the transcendental act, the matrix out of which the amorphous religious hylo is cast. Rabbinic legalism, so derided by theologians, is nothing but an exact method of objectification, the modes of our response to what supremely impresses us.[47]

Halakha is the objectified expression of collective Jewish religious consciousness. It expresses the contents of Jewish religious cognition in the form of doctrines, norms, and practices, which provide the only means for accessing the contents of Jewish religious cognition.

Consequently, Soloveitchik argues that the reconstructive method should be applied to halakha. In this way it can contribute to solving "the most perplexing problem…of the

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[45] Ibid., 67–68.

[46] Scheler, *On the Eternal in Man*, 249; 264.

[47] Soloveitchik, *HaMi*, 85.

rationalization of the commandments (טעמי המצוות)."[48] He cautions, however, that reconstruction

must be modified to be serviceable for philosophy of religion. It must eschew the "how" question

and causal-genetic explanations: "the reconstructive method is recommended, but it cannot

generate a causal explanation of religion."[49] Soloveitchik's application of reconstruction to

ta'amei ha-mitzvot is set within a critique of Maimonides' approach in the *Guide of the*

Perplexed. His principal complaint is Maimonides' reliance on the causalistic method, the result

of which is that "religion no longer operates with unique autonomous norms." Rather, "in

rationalizing the commandments genetically Maimonides developed a religious

'instrumentalism.' Causality reverted to teleology…and Jewish religion was converted into

technical wisdom." As a result, "the specific religious content and meaning [was] supplanted by

a principle of foreign extraction."[50]

Instead of this explanatory causal-genetic "how" question, Soloveitchik insists that

philosophy of religion, or philosophy of halakha, should focus on the "what" question of

"descriptive hermeneutics."[51] This approach was employed by Maimonides in the *Mishneh*

Torah, where he

> does not pursue the objective causation of the commandments, but attempts to reconstruct its
> subjective correlative…. It would seem that the Maimonides of the Halakhah was not
> intrigued by the "how" question. He freed himself from the genetic purview and employed a
> descriptive method of expounding the content and symbolic meaning of the religious norm.
> The "what" question was his guide in the [*Mishneh Torah*].[52]

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[48] Ibid., 91–92.

[49] Ibid., 87.

[50] Ibid., 93.

[51] Ibid., 91–98.

[52] Ibid., 94.

Soloveitchik describes the "what" question as interpretive and focused on the symbolic aspects of norms.[53] As a consequence, "descriptive reconstruction" does not operate with necessity; it cannot establish that a norm was the only way to express its subjective counterpart.[54]

Still, Soloveitchik claims that "by continuous observation and analysis of the objectified forms of the religious act, the general tendencies and trends latent in religious consciousness may be grasped." Through descriptive reconstruction "the philosopher of religion may glean some hints regarding the basic structure of the most basic cognitive concepts."[55] This method thus also allows the development of an authentic Jewish philosophy. Instead of subordinating Jewish practice to alien philosophical systems, descriptive reconstruction of Jewish practices could expose the worldview within the halakha. In an implicit rejection of Hermann Cohen's *Religion of Reason out of the Sources of Judaism*, which focused on prophetic literature, Soloveitchik proclaims, "[o]ut of the sources of Halakhah a new world view awaits formulation."[56]

B. Two Accounts of the Justification of Halakhic Norms

The nature of the Soloveitchik's realism and its compatibility with epistemological pluralism was left unresolved in the foregoing discussion. Additionally, the method of reconstruction and how it justifies the commandments was intentionally left vague. Now the nature of reconstruction is explored. It is argued that appreciating Soloveitchik's realism is essential for understanding reconstruction's limited justificatory role as well as for comprehending his more fundamental justification of halakhic practice.

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[53] Ibid., 95.

[54] Ibid., 96.

[55] Ibid., 99.

[56] Ibid., 102.

1. Ta'amei Ha-Mitzvot₁: Descriptive Reconstruction

1. Ta'amei Ha-Mitzvot$_1$: Descriptive Reconstruction

Kaplan and Rynhold offer two different interpretations of descriptive reconstruction. While the former focuses on the scientific analogy with which Soloveitchik introduces the method (a), the latter fixes on the hermeneutic language that emerges when he applies it to halakha (b).

a. Kaplan's Quasi-Scientific Interpretation

Following Soloveitchik's lead, Kaplan contrasts his reconstructive approach to justifying the commandments with that of Maimonides in the *Guide of the Perplexed*. Both of them are interested in rationalizing the commandments and draw on the model of scientific explanation of their day. Maimonides, following Aristotle, views explanation as revealing final causes and presents a teleological account of the commandments. In contrast, Soloveitchik operates with a modern conception of science, which rejects final causes. Modern science utilizes a subsumptive model of explanation, according to which "to explain a physical phenomenon means to understand it in light of a general, abstract formal-mathematical equation that will account for the largest variety of physical phenomena possible and that will be integrated with other such abstract mathematical principles to form a unified coherent system."[57] In reconstruction Soloveitchik offers a classificatory model of rationalizing halakhic norms, according to which "to explain commandments means first and foremost to subsume halakhic rulings under highly general, abstract halakhic concepts and principles, concepts and principles of which the specific rulings will be concrete particularizations."[58] The rationality of the halakha is thus not the instrumentalism of a means for achieving an end but the immanent rationality of systematicity.

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[57] Kaplan, "Rabbi Joseph B. Soloveitchik's Philosophy of Halakha," 171.

[58] Ibid.

Rynhold explains Kaplan's interpretation. First, he notes the similarities between this account of reconstruction and the Brisker method of Talmudic learning.[59] Second, he shows how it does not offer a causal account of the commandments; it neither explains them in terms of God's antecedent intentions nor their purposes.[60] Most importantly, he notes the similarity between Soloveitchik's description of reconstruction and the method of reflective equilibrium in theory construction. Just as the scientist begins with his observational judgments to construct a theory and then returns to reinterpret the observations in view of the theory, in providing reasons for the commandments one begins with the halakhic norms to construct a unifying framework and then returns to reinterpret the norms in view of the framework. He provides a number of examples of Soloveitchik's utilization of this method in his halakhic writings.[61] In each, the halakhic norms and their details are explained by being unified into a system of abstract concepts. This systematization is autonomous; the halakhic norms are explained by categories that emerge out of their analysis.[62] Halakha is not made into a handmaiden to non-halakhic purposes.

Rynhold raises two questions about Kaplan's quasi-scientific interpretation. He notes first that Soloveitchik's employment of the method of reflective equilibrium is truncated. In scientific theory construction there is a readjustment of both the observational judgments and the theory. Similarly, in John Rawl's application of reflective equilibrium to the normative domain, although the theorist begins with her considered judgments about justice, these judgments can be revised

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[59] Rynhold, *Two Models of Jewish Philosophy*, 71.

[60] Ibid., 72.

[61] Ibid., 61–70. For example, the specific differences between the norm requiring a *cohen* (priest) to render himself impure to bury an abandoned corpse and the norm requiring a *cohen* to render himself impure upon the death of a close relative are explained by two different types of impurity—functional impurity and substantive impurity.

[62] Ibid., 73–74.

in view of the emergent theory of justice. However, in Soloveitchik's scheme the adjustment is one-sided: The norms never get modified as a result of the halakhic theory.[63] Rynhold further questions whether even full-fledged reflective equilibrium could provide the sort of validity that is required for justification. He argues that "it seems that all we are doing is systematizing our own existing judgments, even if some of them might be revised subsequent to the formation of principles."[64] But, how can mere systematization be justificatory? It seems that the norms are being privileged without warrant.

b. Rynhold's Hermeneutic Interpretation

Rynhold views these criticisms as an opening to offer what he considers a more philosophically plausible reading of Soloveitchik's account—one that is hermeneutically oriented. He interprets Soloveitchik's comparison of Maimonides' rationalization methods in the *Guide of the Perplexed* and the *Mishneh Torah* as centered on the issue of meaning. Soloveitchik rejects a causal-genetic account of the commandments because it destroys their semantic content or meaningful nature. He also rejects an intentionalist account of meaning in favor of a hermeneutic account. The intentionalist account conceives of meaning as the preexisting contents of the author's intention, thus it too is a form of causal-genetic explanation. In contrast, the hermeneutic account, which stems from the work of Hans-Georg Gadamer, conceives of meaning as created in the confrontation between an interpreter and the object of interpretation. On the hermeneutic account of justification the goal is to

> show [our] imaginary interlocutor how the meaning that we have given to a commandment coheres with the system of meanings of which it is a part. We can therefore take him on an interpretive journey through the system showing him how it all fits together. But if he is not

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[63] Ibid., 74–78.

[64] Ibid., 80.

party to the system in which all the various meanings are implicated, then no appeal to other parts of the system is going to convince him. We cannot get beyond our own hermeneutic circle and convince our interlocutor if he is unwilling to enter its circumference.[65]

Justification thus involves reflecting on practices to create a system of meaning that exposes the significance of the norms. This significance is not expected to resonate with everyone or to convince them to engage in halakhic practice but only those who have already been inducted into the universe of meaning constituted by halakhic norms. However, Rynhold notes that this hermeneutic approach is also vulnerable to questions about the validity of its interpretations. The issue is two-fold: First, there is the possibility of competing interpretations. Second, there is the problem of justification. It is not evident how hermeneutic description is supposed to justify a system of norms. Once again, the norms seem to be illicitly privileged.[66]

While Rynhold insists that he is engaged in a reconstruction of Soloveitchik's thought rather than a historical interpretation of it, it is unclear whether it is a particularly accurate or philosophically plausible reconstruction. He claims that Soloveitchik inherits the shift from the "how" to the "what" question from Wilhelm Dilthey, despite there being no reference to him.[67] Soloveitchik also does not seem concerned with the negation of meaning or semantic content; he is worried about the reduction of validity to causal history and religion to other cultural domains.

Soloveitchik charges the causal-genetic approaches with committing something like the genetic fallacy in the realm of religion. He writes,

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[65] Ibid., 88–89.

[66] Rynhold uses these questions to expand Soloveitchik's account beyond his intentions. He launches an assault on what he calls Priority of Theory (PoT) approaches to normative justification in favor of the Priority of Practice (PoP) approach.

[67] Rynhold, *Two Models of Jewish Philosophy*, 56–58. Soloveitchik does discuss Dilthey elsewhere in *HaMi*, but this is only to dismiss the efforts of "autonomous philosophers" to apply the methods of the humanities to reality.

The reconstructive method is recommended, but it cannot generate a causal explanation of religion…. The truth of the matter is that the genetic background of a certain method does not in the least affect its cogency and validity…. The task of the logician and the philosopher is not to survey the cognitive act from a causal, but from a normative and descriptive perspective…. Unfortunately, while neither the mathematician nor physicist are troubled by the history of their disciplines, the philosopher of religion is still a slave to genetics. In contrast with genetic methodology, a philosophy of religion, following a retrospective procedure—from the objective to the subjective realm—does not eliminate its own object. The method of reconstruction yields more than relational explanatory exposition. It offers a multidimensional religious outlook to the *homo religiosus*.[68]

In the same way that genetic explanations of beliefs often, though not always, reduce epistemological questions about their validity to psychological questions about their origins, Soloveitchik is concerned that the genetic method eliminates the object of philosophy of religion by reducing religious beliefs and practices to their psychological and historical pedigrees.

Soloveitchik is also concerned about the reduction of religion to other cultural domains through causal-genetic accounts:

[W]henever the causal question is raised, the philosopher must transcend the boundary line of religion in order to find his answer which lies beyond the religious domain. Both the mechanistic and teleological concepts of causality explain the effect through the existence of an alien factor…. Thus, religion cannot be interpreted under immanent aspects but must avail itself of foreign elements. The net result of Maimonides' rationalization is that religion no longer operates with unique autonomous norms, but with technical rules, the employment of which would culminate in the attainment of some extraneous maximum bonum. In rationalizing the commandments genetically, Maimonides developed a religious "instrumentalism." Causality reverted to teleology (the Aristotelian concept of *causa finalis*) and Jewish religion was converted into technical wisdom. For example, should we post the question: why did God forbid perjury? The intellectualist philosopher would promptly reply, "because it is contrary to the norm of truth." Thus, he would explain a religious norm by an ethical precept, making religion the handmaiden of ethics.[69]

The problem with causal-genetic accounts of religious norms is not that they deny the latter's meaningfulness or semantic content; rather, they deny the autonomy of religion as an area of

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[68] Soloveitchik, *HaMi*, 86–88.

[69] Ibid., 93.

consciousness and culture.[70] Soloveitchik describes the reduction of religion to ethics as well as

to hygienic techniques and aesthetic expression.

Furthermore, as regards the specific claim that Soloveitchik rejects an intentionalist account

of meaning in favor of a hermeneutic one, his comments comparing the "what" question of

reconstruction to the "how" question of psychology are instructive:

> The only difference between the psychologist and the philosopher is that, while the psychologist, guided by the "how" question coordinates subjective religious aspects with those of the mundane cultural consciousness, the philosopher, searching for the "what," limits his investigation to the religious domain and explores objective forms only in retrospect.[71]

Once again, Soloveitchik is concerned with the autonomy of religion more than anything else.

Rynhold's contention that he articulates an interpretive account of reconstruction due to concerns

with meaning or semantic content is not sustainable.[72]

2. Ta'amei Ha-Mitzvot₂: Halakha as Expression and as Discipline

More important than whether Soloveitchik is concerned with preserving the semantic content

of halakhic practices or articulates a hermeneutic account of meaning is Rynhold's criticism that

Soloveitchik illegitimately privileges the halakhic norms. Both a quasi-scientific (whether

construed as truncated or full reflective equilibrium) and a hermeneutic account seem to take

them as a starting point for justification without warrant. Neither of them seems to ground the

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[70] Thus, despite denying the identity of Judaism with ethics, Soloveitchik fully manifests the tendency to convert Judaism into a "religion" in the Protestant sense described by Leora Batnitzky in *How Judaism Became a Religion: An Introduction to Modern Jewish Thought* (Princeton: Princeton University Press, 2011).

[71] Soloveitchik, *HaMi*, 129 fn. 94.

[72] In addition to *HaMi*, Rynhold bases his argument on the lecture, "May We Interpret Hukim?," in *Man of Faith in the Modern World, Reflections of the Rav*, vol. 2 (Hoboken: Ktav, 1983), 91–99. While the hermeneutic language in that essay is stronger, it too can be comprehended by my interpretation. Furthermore, the strength of my rendering of *HaMi,* a work that Soloveitchik wrote and published, outweighs whatever residual difficulties are presented by a lecture that was recorded and published by someone else.

presumption of normativity granted to halakhic norms. Rotenstreich points out that mere systematization of a system of norms neglects the crucial questions of whether they ought to be observed.[73] The rationality of systematization underdetermines normativity. Similarly, as Rynhold writes, "we lack…any argument for…its being a set of data that has some independent rational justification."[74]

Is it true, though, that Soloveitchik does not give any argument for the independent rational justification of the halakhic norms? In fact, when his view about reconstruction is set in the broader context of the argument of *HaMi* this criticism is exposed as misguided. Understood properly, the philosophical account of the halakha given in the earlier stages of the work aims to warrant the privileging of the halakhic norms.[75] To appreciate this, however, the philosophical account must be reinterpreted in view of Soloveitchik's philosophical sources and other writings. These other texts resolve the first interpretive difficulty in *HaMi*—Soloveitchik's realism—and, in the process, explain the second—his seeming privileging of the halakhic norms. Indeed, they show how his philosophical account provides a two-fold justification of halakhic practice. The duality of this justification hinges on two senses of objectification: expression and discipline. Halakha is justified as an expression of accurate religious cognition of reality (a) and as a discipline for training oneself to respond appropriately to reality (b).

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[73] Rotenstreich, *Studies in Jewish Thought in Our Time*, 63–64.

[74] Rynhold, *Two Models of Jewish Philosophy*, 85.

[75] I say "aims" because I have serious doubts about the success of this attempt, which I describe below. But before evaluating it, it must be properly understood.

a. Objectification as Expression

There are two steps to understanding how the philosophical account of halakha justifies halakhic norms as expressions of religious cognition of reality: recognizing the realism of Soloveitchik's pluralism (i) and identifying the type of content he attributes to religious cognition (ii). Both steps require appreciating Scheler's influence on Soloveitchik's thought.

i. Realism

Contrary to the halakhic constructivism expressed in *HaMa* and the implication of Sacks' criticisms, Soloveitchik's view of religious cognition in *HaMi* is robustly realist:

> Our pluralistic cognitive approach is warranted by…ontological heterogeneity…. Methodology…is determined not only by ontological aspects but also by axiological and teleological considerations *presented by Being itself*. Modern axiology plays a major role in this respect. Every system of cognition strives to attain a distinct objective. Systematic knowledge means the understanding and grasping of the universe in consonance with a definite telos. It is interested primarily that *reality reveal itself* in a fashion which is suited to a final noetic goal; the telos is the determining factor in the methodological construction employed by the scientist and philosopher. *Teleological heterogeneity, however, does not invalidate the cognitive act, for, in the final analysis, pluralism is founded on being itself….* [E]pistemological pluralism does not deny the absolute character of Being. On the contrary, it is ontologically conscious of, and reserves a central position in its perspective for, absolute reality. Pluralism asserts only that *the object reveals itself in manifold ways* to the subject, and that a certain telos corresponds to each of these ontical manifestations.[76]

Contra Sacks, Soloveitchik does not claim that reality can be cognized from any perspective whatsoever; rather, he maintains that "there are many keys to the ontological kingdom."[77] Being corresponds, in some sense, with each cognitive approach to reality. Further, "reason leads the physicist, psychologist, philosopher, and *homo religiosus* to a pluralism of viewpoints. The heterogeneity of knowledge, however, is not based on a manifold of methods employed by

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[76] Soloveitchik, *HaMi*, 16 stress added.

[77] Ibid., 18.

theoreticians, but upon a plurality of the objective orders they encounter."[78] There are many

ways to approach reality; but they are finite and determined.

Soloveitchik recognizes a few allies in his argument for epistemological pluralism, including

Absolute Idealism, Pragmatism, and Neo-Kantian Critical Idealism. However, he rejects them

because they are not realist enough. In fact, while much has been made of his influence by Neo-

Kantianism, a better way of describing Soloveitchik's philosophical *oeuvre* is as a struggle to get

out of the grips of that school.[79] His concern with epistemological realism and disagreement with

Neo-Kantianism is evident as early as his dissertation. Entitled *The Pure Thought and the*

Constitution of Being according to Herman Cohen, it argues that Cohen's epistemology is

inadequate on account of its idealism. While Kant recognized that cognition requires both

intuitions and concepts,[80] Cohen, according to Soloveitchik, denies intuition any epistemological

standing. Pure thought is entirely immanent, generating being out of itself. The thing-in-of-itself

is a posit of thought and constantly recedes from it. Thus, he argues, Cohen's epistemology never

actually makes contact with reality. Symptomatic of this is its enthroning natural science and

quantification as the paradigms of cognition, rejection of the cognitive claims of other areas of

experience, like emotions and religion, and avoidance of the qualitative nature of reality.

Munk points out that in rejecting Cohen's "generative" epistemology, "Soloveitchik is of the

opinion that thinking is a process of ordering reality by abstracting the general out of the

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[78] Ibid., 56.

[79] Indeed, the self-declared proponent of Marburg Neo-Kantianism, Steven Schwarzschild, notes and criticizes Soloveitchik's straying from critical idealism. See "The Halakhic Mind - An Essay on Jewish Tradition and Modern Thought," *Sh'ma* 16, no. 316 (1986): 127–28.

[80] Kant, *Critique of Pure Reason*, A51/B76: "Thoughts without content are empty, intuitions without concepts are blind."

historical, or form out of matter."[81] His epistemology is more Aristotelian than Neo-Kantian. In fact, Soloveitchik argues that matter, or the qualitative element of experience, attests to the insufficiency of Cohen's epistemology, being that transcends thought, and the cognitive nature of other mental acts besides science. Soloveitchik summarizes his objections to Cohen as follows:

> That Being only amounts to judgments-of-objects is a matter of course according to a consistently idealistic view, however that no longer entitles us to equate the concepts with one another. Certainly, the specific character of the judgment-of-object consists in its establishment of actuality; however, in order to form an object, one must already consider the category of "being" given. Otherwise we would lack the peculiarity and characteristic in the judgment of object. For all the psychic functions, not only the cognitive judgments, are intentional acts, which are directed at an object. Feeling [and] willing refer to volitional and affective objects. Emotional thought as an intentional act performs objective formation. The singularity in the judgment of object persists even in its complete claim on Being. Therefore, Being must be considered as an original datum of thought, which first justifies the judgment-of-object and bestows dignity on it. In order to secure Being, the postulate of a transcendent component is indispensable.[82]

This paragraph overlaps with a number of themes from the discussion of intentionality in *HaMi* and provides new details. There is the claim that other mental acts, in addition to the scientific, are intentional and directed towards objects. But there is also a focus on specific—emotional and volitional—mental acts. Most importantly, there is the connection between the givenness of the object and its particular qualitative features. The qualitative nature of experience attests to the receptivity of human reason to a reality that transcends it. Indeed, this is a recurring claim in

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[81] Reinier Munk, *The Rationale of Halakhic Man: Joseph B. Soloveitchik's Conception of Jewish Thought* (Amsterdam: J.C. Gieben, 1996). I am indebted to this work for my understanding of the context and some of the content of Soloveitchik's dissertation.

[82] Josef Solowiejczyk, "Das reine Denken und die Seinskonstituierung bei Herman Cohen [The Pure Thought and the Constitution of Being according to Hermann Cohen]," Dissertation (Friedrich-Wilhelms-Universität zu Berlin, 1932), 86.

Soloveitchik's work: Autonomous reason run up against the brute givenness of qualitative

reality. Color, textures, smells, and sounds signal human receptivity.[83]

Soloveitchik's teacher and dissertation advisor Heinrich Meier stimulated his quasi-

Aristotelian epistemology. However, there is also a great deal of influence from Scheler.

Scholars have noted Scheler's influence on Soloveitchik's thought, in particular his conceptions

of time and repentance.[84] Attention to his use of Scheler's epistemology has been neglected. This

is regrettable, for in addition to the negative comments about Scheler in the body of *HaMi* the

footnotes reveal a more ambivalent relationship in which certain elements of Scheler's thought

are rejected, while others are accepted. Indeed, Soloveitchik writes, "One of the foremost

proponents of autonomous religious knowledge and of unique epistemology of religion was Max

Scheler, to whose [*On the Eternal in Man*] this work is indebted in several important points."[85]

Scheler articulated what has been described as a realist phenomenology,[86] which thus also

serves as an epistemology. As mentioned, Husserl maintained that in phenomenological analysis

the investigator brackets out the existence in the external world of the objects he describes.[87]

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[83] See Joseph B. Soloveitchik, "Majesty and Humility," *Tradition* 17, no. 2 (Spring : Special Issue 1978): 51; *HaMa*, 9–19; and *And from There You Shall Seek*, trans. Naomi Goldblum (Jersey City: Ktav, 2008), 11. Henceforth *YYS*.

[84] Eliezer Goldman, "Teshuvah ve-Zeman be-Hagot ha-Rav Solovaits'ik [Repentance and Time in the Thought of Rabbi Soloveitchik]," in *Emunah Bi-Zemanim Mishtanim: Al Mishnato Shel Ha-Rav Yosef Dov Solovaitsik [Faith in Changing Times: On the Teachings of Rabbi Joseph Dov Soloveitchik]* (Jerusalem: Merkaz Yaʻakov Hertsog/ha-Kibuts ha-Dati, 1996), 175–90; and Yitzchak Blau, "Creative Repentance: On Rabbi Joseph B. Soloveitchik's Concept of Teshuva," in *Exploring the Thought of Rabbi Joseph B. Soloveitchik*, ed. Marc Angel (Hoboken: Ktav, 1997), 263–76.

[85] Soloveitchik, *HaMi*, 120 fn. 62.

[86] Davis and Steinbock, "Max Scheler."

[87] Husserl, *Ideas*, 101–111.

Scheler rejects this characterization of phenomenology and writes that phenomenological reduction is

> totally independent of the epistemological antithesis of idealism-realism…. What remains after the deactualization of the world is indeed the "ideal" world of essence, but not something that can be automatically considered merely immanent to consciousness. Husserl's assertion, that 'immanent essence' precedes 'transcendent essence' and that therefore the laws of the 'consciousness' of something must also be the laws of the objects of consciousness…in no way follows from the procedure of reduction. It is an epistemological standpoint which comes from elsewhere and follows from the well-known principle, first expressed by Descartes, that every given is originally immanent to consciousness. We have already rejected this principle.[88]

Herbert Meyer explains that for Scheler the objects of phenomenological analysis are not immanent to consciousness; rather, they are "essences of autonomous realities" that "do not have their origin in the activity of the subject."[89] Scheler writes that in analysis "the ontological and value contents of the world reveal itself, and the difference between 'thing in itself' and 'appearance' falls away."[90] While phenomenological analysis is an analytical standpoint, it has only the contents of everyday consciousness with which to work. The objects of ordinary mental acts are thus also not merely immanent to consciousness but contain elements given by reality. If Soloveitchik's arguments about the cognitive nature of religious mental acts are interpreted along these lines, the basis for his realism is evident. Since they are intentional acts directed at the qualitative world, religious mental acts apprehend real objects that transcend consciousness.

  This does not rule out the possibility that mental acts, religious ones included, misdescribe their object. Scheler does not grapple with this problem, for according to his philosophy of religion the object of religious mental acts is the absolute, and he holds that everyone—no matter

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[88] Max Scheler, *Selected Philosophical Essays* (Evanston: Northwestern University Press, 1992), 317.

[89] Herbert H. Meyer, "Max Scheler's Understanding of the Phenomenological Method," *International Studies in Philosophy* 19, no. 1 (1987): 22.

[90] Cited in ibid., 23.

their religious proclivities—intends some absolute object.[91] And while one can erroneously perceive the absolute, Scheler's goal is not to establish its accurate perception. However, Soloveitchik explicitly rejects this position and claims that the object of religious cognition is the finite world. Indeed, this is the crux of his critique of Scheler's philosophy of religion.[92] Nonetheless, he is silent on what warrants the adequacy of particular religious cognitions. He all but rejects justifying the accuracy of specific contents of religious cognition and is impatient with attempts to secure the accuracy of religious cognition *a priori*. Instead, he encourages the articulation of a religious description of reality.[93] Yet, he still insists on the realistic claims of religious cognition in general, marshaling as evidence the historical clashes between the church and science as well as the certainty with which religious experience is held.[94]

This seems to be due to his view regarding the inaccessibility of the immediate contents of religious cognition. While from an epistemological perspective he agrees with Scheler, against Neo-Kantianism, that there is givenness in cognition, he agrees from a methodological perspective with Neo-Kantianism, against Scheler, that these contents are inaccessible except through their objectifications. But if the contents of religious cognition are inaccessible directly,

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[91] On Scheler's conception of religious psychic acts, see Scheler, *On the Eternal in Man*, 173; 248.

[92] Soloveitchik, *HaMi*, 120 fn. 62: "The main defect in Scheler's mother discipline of religion, Eidology...is that it moves in a vacuum. There is no objective order underlying his eidology of religion. Furthermore, his unique religious categories refer mainly to the hypersensible world. Concrete reality is left to metaphysics. Like the Christian gnostic of old, Scheler craves for gnosis of the divine. His religious knowledge ignores the 'here and now' reality." Soloveitchik's critique of Scheler's philosophy of religion signals his own views: religious cognition must aim at the here and now world, and philosophy of religion must refer to some objective order.

[93] Ibid., 118 fn. 58: "The reason for the overzealous search for finality, so popular among contemporary theologians, is the passionate desire of every philosopher of religion to legitimate the cognitive validity and truthfulness of religious propositions. Yet the problem of evidence in religion will never be solved. The believer will not miss the philosophic legitimation; the skeptic will never be satisfied with any cognitive demonstration…. Philosophers of religion would have achieved more had they dedicated themselves to the task of interpreting concrete reality in terms and concepts that fit into the framework of a religious world perspective."

[94] Ibid., 119 fn. 61.

there is no direct way to assess their correspondence to reality. Instead, one should focus on

understanding their objectifications. He may also agree with E.W. Lyman, whom he cites,[95] that

the coherence of religious notions into a worldview attests to their correspondence to reality. [96]

ii. The Content of Religious Cognition

There is another feature of Scheler's thought that Soloveitchik adopts—the affective content

of religious cognition. While he is adamant in *HaMi* that the specific contents of religious

cognition cannot be accessed directly, in stray comments there and in his posthumously

published essay "Theory of Emotions" he indicates the type of content contained in religious

cognition.

Soloveitchik's passing, negative comment about Scheler's notion of the emotional *a priori*

has been noted. However, a closer look at his sole example of the process of objectification

exposes certain Schelerian elements:

> To illustrate, we may analyze the God-man relation: first, the subjective, private finitude-
> infinity tension; second, the objective normative outlook; and third, the full concrete
> realization in external and psychophysical acts. A subjective God-man relation implies
> various contradictory states. These are wrath and love, remoteness and immanence, repulsion
> and fascination (on the part of divinity), tremor and serenity, depression and rapture, flight
> and return (on the part of man), etc. This subjective attitude in man is in turn reflected either
> in the form of logico-cognitive judgments or ethico-religious norms, e.g., God exists…. He is
> vengeful…. You shall love God; You shall fear Him…. These judgments and norms lying on
> the immediate proximity of the psychophysical threshold tend to externalize themselves.
> They find their concrete expression in articles of faith, in prayers, in physical acts of worship,
> and in other practices and observances, all of which lie in the external world.[97]

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[95] Ibid., 118 n56.

[96] Eugene William Lyman, "Can Religious Intuition Give Knowledge of Reality?," in *Religious Realism*, ed. D.C. Macintosh (New York: The Macmillan Company, 1932), 271–272.

[97] Soloveitchik, *HaMi*, 67–69.

The earliest (in a non-temporal sense) elements of religious cognition that can be articulated are affective states: tremor, serenity, depression, rapture, flight, and return. Soloveitchik would disagree with Scheler about the means of accessing them, but he seems to agree with him about their priority.

This impression is verified by the essay "Theory of the Emotions," where Soloveitchik articulates a robustly realist phenomenology of the affects. Indeed, his discussion of affects parallels in significant ways the analysis of religious cognition in *HaMi*. Given that the dissertation, which foreshadows the argument of *HaMi*, used affects as an example of non-scientific cognition of reality, this should not be surprising. He claims that "[t]he affective act...is an intentional experience, having reference to an object; in other words, it is correlated with something…. The same challenge to which the intellect responds with a noetic performance, is also encountered by feeling-consciousness. The latter, in meeting this challenge, naturally employs intentional acts of feeling that are directed upon the challenging realia."[98] And while he recognizes that particular affective mental acts may fail to correspond to reality,[99] he insists that they are directed at intentional objects that transcend consciousness.

More surprising is the explicitly Schelerian view about the specific nature of this intentional object. He continues: "The objective reference inherent in the affective experience is of a twofold nature: theoretical cognitive predication and axiological assessment…. Emotions are the media through which the value-universe opens up to us."[100] And further, "Judaism believes that the emotional experience is suffused with ethico-moral meaning. Axiological structures and

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[98] Joseph B. Soloveitchik, *Out of the Whirlwind: Essays on Mourning, Suffering and the Human Condition*, ed. David Shatz, Joel B. Wolowelsky, and Reuven Ziegler (Jersey City: Ktav, 2003), 180. Henceforth *OW*.

[99] Ibid., 181.

[100] Ibid.

moral ideas are intuited through our emotional experiences."[101] Like Scheler, for Soloveitchik

values are the intentional objects of affective mental acts. Values are perceived through feelings.

Crucially, feelings and their axiological perceptions are not just an individual's idiosyncratic

evaluations. Soloveitchik too claims that there are normative standards for feelings: "In view of

the underlying noesis and valuation of our affective life, feelings may be classified as meaningful

or degrading depending upon the correctness and truthfulness of the noetico-axiological

judgments which form the base of these attitudes." There is such a thing as "an axiological

error," a misperception of value, which "results in unwarranted emotional activity."[102]

The criteria of adequacy for affective perceptions of value that Soloveitchik articulates are

robustly realist. He writes, "The value judgment about the worth of a particular affect

depends…on the feeling-event-relatedness, on the commensurability or incommensurability of

the objective content of the message and its inward decoding, on the correspondence between

impressions pouring in from the outside and the interpretations the person gives to these

impressions."[103] For Soloveitchik there are no intrinsically good or bad affects, just as there are

no intrinsically good or bad perceptions. What matters is the correspondence of an affect to its

axiological object. An affective response must be appropriate to the value it perceives.

Soloveitchik also discusses religious affects, which are distinguished from other affects by

their object:

> Since the religious experience…is an all-inclusive affair (its objective reference extends to
> the totality of being, to finitude as such in its relationship to the Infinite), it must respond not
> only to one event, but to an unlimited multiplicity of occurrences. It must encounter a

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[101] Ibid., 197.

[102] Ibid., 182.

[103] Ibid.

multifaceted reality which can be interpreted only by a strange diverse experience, in defiance of the law of consistency and self-identity.[104]

The object of religious affects is "the totality of being." This characterization of the object of religious affect seems to violate Soloveitchik's stricture in *HaMi* that the object of religious cognition must be the "here and now reality" and not the absolute. However, in *HaMi* Soloveitchik never denied that religious cognition aspires to cognize the absolute; he only insisted that it must be seen from the perspective of everyday reality. Similarly, here he identifies the objective referent of religious affects with "the totality of being," but also with "finitude in its relationship to the Infinite." The object of religious affects is the totality of reality as given in human experience. Still, this experience must be understood realistically; human experience represents reality as it is.

But, according to Soloveitchik, "the totality of being" or "finitude in its relationship to the Infinite" is not homogenous and does not call for a uniform affective response. Reality is multifarious and calls for antithetical affective responses. Again, he is not simply stating that human beings experience and respond to reality in different ways; rather, he claims that there are real features of being that require diverse affective responses. Additionally, recall that these affective responses are acts of value-perception. There are thus a plurality of values that must be recognized and responded to appropriately. In sum, accurate religious cognition involves veridical value-perception and apt affective responses. These diverse axiological evaluations and affective responses then objectify themselves into different religious doctrines, norms, and practices.

Consequently, when viewed from the perspective of the whole arc of *HaMi*, and when his realist commitments are appreciated, it becomes apparent that Soloveitchik privileges halakhic

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[104] Ibid., 190.

norms because he believes they express accurate religious cognition of reality in an objectified

form. He discusses *ta'amei ha-mitzvot* under the rubric of reconstruction because that is the only

method to access the specific contents of particular halakhic norms. However, what justifies the

norms, making them fit objects for reconstruction in the first place, is his realist philosophical

account of halakha. Therefore, the philosophical account of halakha underwrites the method of

reconstruction, or *ta'amei ha-mitzvot$_1$*. Indeed, it constitutes a broader justification of halakhic

norms, *ta'amei ha-mitzvot$_2$*, which is more fundamental than *ta'amei ha-mitzvot$_1$.*

However, one might object that this is to neglect Soloveitchik's rejection of causal-genetic

methods in philosophy of religion. Similarly, one might argue that it is to deny his concern with

meaning, and, more specifically, hermeneutic meaning. There are two responses to these

objections: The first questions the completeness of Soloveitchik's rejection of causal-genetic

methods and commitment to a hermeneutic account of meaning. As has been shown, he seems

more concerned with the reduction of religion to other areas of consciousness and culture than

with a complete rejection of causal-genetic accounts. In addition, his warnings against causal-

genetic accounts are more focused on the process of transformation from subjectivity to

objectivity than with the norms' original source.[105]

The second response maintains that even if Soloveitchik intends *ta'amei ha-mitzvot$_1$* as a

stand-alone justification for halakhic norms, and even if this approach is motivated by concerns

about causal-genetic explanations and intentional approaches to meaning, he simply was

mistaken about the force of his argument or the way it fits together. As Rynhold points out,

barring revisionist claims about practical rationality, it is not clear how descriptive reconstruction

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[105] Soloveitchik, *HaMi*, 86: "The philosopher of religion in his regressive movement from objectivity to subjectivity should not undertake the explanation of religious norms by antecedence, for there is no causal continuity in the passage from one order to another. The subjective correlate does not interpret an objective commandment. The reconstructive method is recommended, but it cannot generate a causal explanation of religion."

alone can be justificatory. Moreover, causal or genetic explanations for beliefs are not always irrelevant for the assessment of their justification. Causal accounts of doxastic justification require that a belief be caused "in the right way" by its object in order to be justified.[106] For example, on some accounts, for my belief that my cellphone is on my desk to be justified, the belief must be caused in some way by my cellphone being on my desk. Soloveitchik has similarly provided a causal account of halakha, which describes it as originating in religious cognition and eventuating in halakhic norms. Appealing to this causal history to justify halakhic norms does not commit any fallacy. In fact, it is necessary for the cogency of the approach.

b. Objectification as Discipline

However, even granting this account, two related questions remain: First, why should halakhic practice be normative, for if Soloveitchik's account is correct, should it not simply be an individual's immediate response to reality? Second, why should anyone engage in halakhic practice? Why not simply access religious cognition through reconstruction, thus gaining a new type of knowledge? The answers to these questions expose another element of Soloveitchik's justification of halakhic norms: objectification as discipline. To understand this sense of objectification, and thus the more directly normative component of *ta'amei ha-mitzvot₂,* it is necessary to explore two other issues: the subject of religious cognition (i) and experiential commandments (ii).

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[106] These accounts were motivated by the difficulties raised by Edmund Gettier, "Is Justified True Belief Knowledge," *Analysis* 23 (1963): 121–23. See D.M. Armstrong, "Knowledge Entails True Belief," in *Belief, Truth, and Knowledge* (Cambridge UK: Cambridge University Press, 1973), 137–49 for an early and influential causal account.

i. The Subject of Religious Cognition

In *HaMi* Soloveitchik does not identify the subject of religious cognition and experience with the individual but with the historically evolving collective consciousness of a community. He writes, "It is not only the individual ego…but the entire community that meets God. Revealed religion rests upon the idea of a charismatic social ego that is the living incarnation of the faith…. The objective religious order is identical with the psychophysical religious act in which the living historical religious consciousness comes to expression."[107] It is the objectification of this collective consciousness's religious cognition and experience that constitutes the forms of a religion. The Jewish people as a whole engage in religious cognition that expresses itself as the halakha. The individual Jew might not cognize reality in this way and respond with the appropriate emotions, value-perceptions, and behaviors.

The fact that it is the community that engages in religious cognition and objectification and not the individual somewhat clarifies Soloveitchik's peculiar combination of realism with particularism. One might think that since religious cognition is realistic, it should deliver the same contents to every subject. However, he insists on the diversity of religious experiences, cognitions, and practices. In the essay "Confrontation," he argues that differences in religious practice and thought are witness to the incommensurable religious experiences of historical faith communities: "The *logos*, the word, in which the multifarious religious experience is expressed does not lend itself to standardization or universalization.... It reflects the numinous character and the strangeness of the act of faith of a particular community which is totally

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[107] Soloveitchik, *HaMi*, 79–81.

incomprehensible to the man of a different faith community."[108] The subject of religious

cognition is not the individual that confronts generic human experience and universal reality, but

a particular community that confronts those universal elements and its historical experience.

Lastly, Soloveitchik holds that the participation of the entire community in religious activity

results in the further development of religious forms: "The history and psychology of religion

will attest to the fact that the force and effectiveness of religion grows commensurately with the

increasing participation of the entire society in the religious drama, with continuing

embodiments of its formless subjectivity and with the expansion of its objectified form and

symbol."[109] As will be shown, this position has an influence on Soloveitchik's theory of halakha,

especially in his conceptualization of authority. However, at least initially the individual member

of a religious community confronts the religion's norms as external to her; they are simply

actions to be done.

ii. Experiential Mitzvot

But why should the individual actually do them? An answer is suggested by Soloveitchik's

theoretical halakhic analyses.[110] A number of commentators have noted that he devoted

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[108] Joseph B. Soloveitchik, "Confrontation," *Tradition* 6, no. 2 (1964): 23–24. For the philosophical links between HaMi and this essay, see Daniel Rynhold, "The Philosophical Foundations of Soloveitchik's Critique of Interfaith Dialogue," *The Harvard Theological Review* 96, no. 1 (January 2003): 101–20.

[109] Soloveitchik, *HaMi*, 79.

[110] For another discussion of the relation between philosophy and these theoretical halakhic analyses, see Avinoam Rosenak, "Filosofiya ve-Mahshavah ha-Halakha: Qri'at be-Shi'urei ha-Rav Y. D. Solovaits'ik le-'Or Modolim Neo-Kantiyyanim [Philosophy and Halakhic Thought: A Study of the Talmudic Lectures of Rabbi Joseph B. Soloveitchik from a Neo-Kantian Perspective]," in *Emunah Bi-Zemanim Mishtanim: Al Mishnato Shel Ha-Rav Yosef Dov Solovaitsik [Faith in Changing Times: On the Teachings of Rabbi Joseph Dov Soloveitchik]*, ed. Avi Sagi (Jerusalem: Merkaz Ya'akov Hertsog/ha-Kibuts ha-Dati, 1996), 275–306.

significant effort to studying one type of halakhic norm.[111] In fact, Aaron Lichtenstein credits

him with inventing this type.[112] The medieval Jewish philosopher Bahya ben Joseph ibn Pakuda

(11th century) divides the commandments into two categories: obligations of the body and

obligations of the heart.[113] Soloveitchik recognizes these categories and adds a third—

experiential norms. In describing them, he writes,

> The Halakhah enters a new dimension of human life, that of subjectivity and inwardness. In contrast, to the actional *mitzvot*, the experiential *mitzvot* postulate a way not of doing but of experiencing as well. The Halakhah attempts to regulate not only the body but also the soul…. Halakhic examination reveals the primary characteristic of that group of *mitzvot* which finds expression in parallel action. It is that in each *mitzvah* we must carefully discriminate between *ma'aseh ha-mitzvah* (the piecemeal process of actual execution) and *kiyyum ha-mitzvah*, compliance with the norm. *Ma'aseh ha-mitzvah* denotes a religious technique, a series of concrete media through which the execution of the *mitzvah* is made possible, while *kiyyum ha-mitzvah* is related to the total effect, to the achievement itself, to the structural wholeness of the norm realization.[114]

Experiential norms require certain physical acts (*ma'asim*) but the latter are not sufficient for

their fulfillment (*kiyyum*); rather, they are only fulfilled when the individual experiences a

specific emotional state. The physical act is referred to as the *ma'aseh ha-mitzva*, while the

emotional state is referred to as the *kiyyum ha-mitzva*. The precise nature of each and their

relation require analysis.

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[111] See for example Aharon Lichtenstein, "R. Joseph Soloveitchik," in *Great Jewish Thinkers of the Twentieth Century*, ed. Simon Noveck (Washington, D.C.: B'nai B'rith Books, 1985), 281–98; and Marvin Fox, "The Unity and Structure of Rabbi Joseph B. Soloveitchik's Thought," in *Exploring the Thought of Rabbi Joseph B. Soloveitchik*, ed. Marc Angel (Hoboken: Ktav, 1997), 25–56.

[112] Lichtenstein, "R. Joseph Soloveitchik," 295. Lichtenstein recognizes a focus on experiential commandments as one of two pillars of Soloveitchik's exposition of the implementation of halakha. The other is sanctification, which Soloveitchik understands as centrally concerned with the negative commandments and withdrawal or recoil from instinctual drives so as to redeem them. As I argue below, there is a case to be made that negative commandments are also experiential in a looser sense.

[113] Bahya ben Joseph ibn Pakuda, *The Book of Direction to the Duties of the Heart*, ed. Menahem Mansoor (Oxford UK: Littman Library of Jewish Civilization, 2004), 87–100.

[114] Joseph B. Soloveitchik, *Worship of the Heart: Essays on Jewish Prayer*, ed. Shalom Carmy (Jersey City: Ktav, 2003), 15–18. Henceforth *WH*.

Soloveitchik recognizes a number of norms as experiential, including: prayer,[115] honoring and revering parents,[116] reading the Torah,[117] mourning, and rejoicing on the festivals.[118] Mourning and rejoicing are particularly instructive examples because he discusses them in connection with one another, and this discussion shows what purpose this distinction serves in his halakhic analyses. They are discussed in a lecture entitled "Mourning," which was part of an annual series in memory of his father.[119]

Some background is necessary: There is a commandment to mourn the death of one's close relatives, including one's parents, spouse, children, and siblings.[120] There are several stages of mourning beginning with the period from the time of death until burial (*aninut*), the seven days following the burial (*shiva*), thirty days following the burial (*shloshim*), and for a parent the twelve months following the burial (*shneim asar hodesh*). During *shiva*, a number of activities are forbidden, among them cutting one's hair, laundering clothing, washing oneself, anointing oneself, sexual intercourse, wearing leather footwear, working, and learning Torah (aside from certain portions).[121] There is also a commandment to rejoice on festivals, including Passover

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[115] Ibid., 19–26.

[116] Joseph B. Soloveitchik, *Family Redeemed: Essays on Family Relationships*, ed. David Shatz and Joel B. Wolowelsky (Jersey City: Ktav, 2002), 127–157. Henceforth *FR*.

[117] Joseph B. Soloveitchik, *Shiurim Le-Zecher Abba Mori Zt'l [Lectures in Memory of My Father, My Teacher, May the Memory of the Righteous Be for a Blessing]* (Jerusalem: Akiva Joseph, 1985), vol. 2; pps. 229–230. Henceforth *SZAM*.

[118] See below.

[119] Published in Hebrew in Soloveitchik, *SZAM*, vol. 2: 197–212, and translated into English with slight changes as "The Essential Nature of Mourning" in Soloveitchik, *OW*, 49–85. All citations are from the translation.

[120] Codified by Maimonides as Positive Commandment #37

[121] Maimonides, *Mishneh Torah*, vol. 2, Book of Judges, Laws of Mourning, 8: 1.

(*pesah*), Tabernacles (*sukkot*), and Pentecost (*shavuot*). [122] Rejoicing on the festival primarily involved offering a peace sacrifice (*korban shelamim*) during the time of the Temple. However, Maimonides adds that in the post-Temple period each type of person must rejoice in his or her own manner, children with nuts and other delicacies, women with new clothing and ornaments, and men with meat and wine. [123]

Soloveitchik raises a number of questions concerning Maimonides' position on the laws of mourning and their relation to other areas of halakha. [124] It would be an undue detour to recapitulate this discussion. Suffice it to note that in attempting to resolve difficulties he is led to reflect on the reason why the obligation to rejoice on festivals seems to supersede the obligation to mourn, in that the mourning practices of *avelut* are suspended on festivals. It is not readily apparent that this should be the case. The Sabbath does not supersede the obligation to mourn in the same way, since then only public mourning practices are suspended. Moreover, the practices required by the obligations to mourn and to rejoice seem compatible. For example, one could refrain from sexual relations and still eat meat.

He argues, however, that the obligation to mourn is not comprised simply of the various prohibitions described above:

> [A]*velut* entails, in its very essence, carrying out the positive commandment to mourn; and it encompasses in the first instance, not the observance of prohibitions but the affirmative *kiyyum* of mourning as a phenomenon…. [T]hese prohibitions are merely the mechanism for

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[122] Codified by Maimonides as Positive Commandment #54.

[123] Maimonides, *Mishneh Torah*, vol. 1, Book of Times, Laws of Rest on Festivals, 6: 17-18.

[124] For example, the relation between public and private mourning practices, the similarities and differences between mourning practices and the practices of one who has been excommunicated or is afflicted with leprosy, the obligations of the High Priest (*cohen gadol*) to mourn, and the different implications for mourning practices of the occurrence of Sabbath and festivals

realizing the state of *avelut*, the concrete means by which the commandment to mourn is carried out. Conceptually, mourning remains a *kiyyum*, a positive realization.[125]

In addition to the individual prohibitions, there is a positive commandment to mourn. Achieving the inward state of bereavement is the *kiyyum*, or fulfillment, of the obligation. The prohibitions are "merely the mechanism" for realizing this emotional state. Similarly, in reference to rejoicing he writes,

> Notwithstanding the ways in which we have been commanded to fulfill the *mitzvah* of rejoicing on a festival…it is plainly-clear that this *mitzvah* in fact entails a joyful heart in the simplest sense, requiring the individual to be joyful on the festival. The specific norms pertain only to how the commandment is to be carried out in a technical sense, but the essence of the commandment, it is clear, pertains to the person's inner state on the festival. In formulating specific details, the Torah simply directed how the inner joy is to be actively affirmed.[126]

The obligation to eat from the sacrificial offering during the time of the Temple or for men to eat meat and drink wine in the present is not the "essence" of the commandment. The actions are simply the way in which the joy is to be "carried out in a technical sense" or "actively affirmed." Achieving the emotional state of joy is the fulfillment of the commandment.

Now the reason why the obligations to mourn one's relatives and to rejoice on festivals are incompatible becomes apparent:

> This then is the meaning of the… determination that a mourner does not follow the mourning practices on a festival because the community's positive commandment to rejoice on the festival displaces the individual positive commandment to mourn. Mourning and festival rejoicing are mutually exclusive; the *kiyyum* of one cancels that of the other and the two cannot be achieved simultaneously. The external actions, to be sure, can co-exist, and one could practice outer, concrete expressions of mourning while eating sacrificial meat. But these actions were intended merely as expressions of psychological states, as means for effecting the *kiyyum* of inner mourning or inner rejoicing, and one commandment is displaced by the other.[127]

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[125] Soloveitchik, *OW*, 60.

[126] Ibid., 65.

[127] Ibid., 69–71.

Further reflecting on these obligations and their interaction with other laws, Soloveitchik connects each with a different experience: "[J]oy is…an emotional expression of the human experience of standing before God,"[128] while mourning is the expression of "distancing before God."[129] Each of these emotional states thus reflects diverse human experiences: closeness to God and estrangement from God.

Alex Sztuden offers a broad discussion of Soloveitchik's argument regarding the relation between the *kiyyum* and the *ma'aseh* of the commandments by focusing on this particular discussion.[130] He correctly connects Soloveitchik's view on experiential commandments with the philosophical account of halakha as objectification in *HaMi* and offers a number of criticisms of this view from psychological, philosophical, and halakhic perspectives. The adequacy of Soloveitchik's halakhic analysis is not of concern presently. Sztuden's psychological criticism is that Soloveitchik builds implausible expectations into the basic obligations of halakhic norms. If the basic fulfillment of the norm of rejoicing on festivals requires one to be joyful, which is incompatible with mournfulness, then an individual who has recently sustained the loss of a loved one is required to reject her feelings of bereavement. Sztuden believes that this demanding view is inconsistent with Soloveitchik's position, expressed elsewhere, that halakhic observance is accessible to the average person.[131]

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[128] Ibid., 78.

[129] Ibid., 81.

[130] Alex Sztuden, "Grief and Joy in the Writings of Rabbi Soloveitchik, Part I: Psychological Aspects," *Tradition* 43, no. 4 (2010): 37–55; "Grief and Joy in the Writings of Rabbi Soloveitchik, Part II: Philosophical Aspects of the Ma'aseh/Kiyyum Distinction," *Tradition* 44, no. 1 (2011): 9–32; and "Grief and Joy in the Writings of Rabbi Soloveitchik, Part III: Halakhic Aspects," *Tradition* 45, no. 2 (2012): 67–79.

[131] For citations see Sztuden, "Grief and Joy in the Writings of Rabbi Soloveitchik, Part I: Psychological Aspects."

Sztuden rightly notes that Soloveitchik identifies the *ma'aseh ha-mitzvah* with objectivity and the *kiyyum ha-mitzvah* with subjectivity. The *ma'aseh* is an objective act; the *kiyyum* is a subjective state. However, he argues that Soloveitchik describes their relation inconsistently. Indeed, in the citations above, the *ma'aseh* is described variously as the "piecemeal process of actual execution," "religious technique," "concrete media through which the execution of the *mitzvah* is made possible," "merely the mechanism for realizing the state," "how the commandment is to be carried out in a technical sense," "active affirmation," "simply the means for concretizing the goal," "merely as expressions of psychological states," and a "means for effecting" psychological states. The *kiyyum* is described as the "compliance with the norm," "total effect," " achievement itself," "structural wholeness of the norm realization," "positive realization," "goal," "essence," and identified with the commandment itself. Sztuden finds four basic descriptions of the relation between *ma'aseh*/objectivity and *kiyyum*/subjectivity:

> 1) Objective act *triggers* subjective state; Outer act is a 'means'; not part of the *kiyyum*.
> 2) Objective act *expresses* subjective state; Outer act is 'integral' but secondary-essential component of the *kiyyum*, while inner state is primary-essential component.
> 3) Objective act *shapes* subjective state; Both outer and inner states are equally essential parts of the *kiyyum*….
> 4) Objective act *realizes* the subjective state; Outer/inner distinction is replaced by parts/whole distinction.[132]

Sztuden specifically rejects the first relation because he thinks that it runs afoul of Soloveitchik's critique of Maimonides' approach to rationalizing the commandments in the *Guide of the Perplexed*. He argues that it turns halakhic norms into mere instruments for the attainment of something else. However, as contended above, Soloveitchik's actual problem with Maimonides' approach is the reduction of religion to another realm of consciousness or culture and not

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[132] Sztuden, "Grief and Joy in the Writings of Rabbi Soloveitchik, Part II: Philosophical Aspects of the Ma'aseh/Kiyyum Distinction," 32.

instrumentalism *per se*. But in this relation the action is conceived of as the means for triggering specifically religious emotions. It is thus compatible with *HaMi*.

More broadly, Sztuden argues that the first three relations subscribe to a form of dualism of inner experience and outer deed or, alternatively, that the means can be specified without reference to the end.[133] However, Soloveitchik does not hold that there is such a separation. First, the *ma'aseh ha-mitzvah* is nearly always necessary (except in derivative and parasitic cases) for the fulfillment of the commandment. Second, Soloveitchik does not think that the external actions and internal states are unconnected: festival joy is nearness to God, which corresponds to certain specific behaviors; mourning is distance from God, which also corresponds to certain specific behaviors. The specific actions and the particular emotional states are codetermining.

Moreover, Sztuden takes an overly static view of halakhic practice and does not recognize the two different subjects and senses of objectification. Conceptually and historically, halakha is initially the objectification of collective Jewish consciousness's religious cognition of reality, including such occurrences as nearness and distance from God. This cognition is originally affective, including joy and bereavement, and directed at values, which Soloveitchik does not identify; but it expresses itself as halakhic norms, such as mourning and rejoicing practices. Temporally, for the individual experiential halakhic norms are initially actions that aim to trigger certain emotional states: Mourning and rejoicing practices attempt to stimulate the emotions of bereavement and joy, respectively. However, halakha is practiced over a lifetime and through continuous engagement in halakhic practice the individual's subjectivity is shaped by the norms. She comes to experience the appropriate emotions and perceive the correct values without the practices needing to trigger them. This is the sense of objectification as discipline. Indeed,

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[133] Ibid., 31.

halakhic practice can be described as a form of *bildung*, in which an individual is formed by and eventually appropriates ways of seeing, feeling, and acting. Thus, once this discipline is complete, the halakha becomes expression once again: It expresses the individual's subjectivity that has been shaped under its influence. Sztuden is correct that there is a fourth relation in which the actions fully realize the internal state and there is no longer any dichotomy between internal state and external action; there is now a parts/whole relation between the emotion and the practices. However, this is only achieved after a process in which the individual's actions are guided and emotions are shaped by the practice.

Consequently, Sztuden's criticism of Soloveitchik's approach because of its psychological implausibility also fall way. Soloveitchik is clear in his essay "Catharsis" that "[t]he Torah…has also tried to control the inner life of man. Laws such as 'thou shalt not covet,' 'thou shalt not hate thy brother,' are as integral a part of the Halachic normative system as are those related to human external action. In a word, the Halacha thinks there is an ethic, not only of action, but of feeling, as well. Man is master over his own emotional world, capable of disowning feelings or emotions, however compulsive or powerful, if they seem to be disruptive; and, conversely, of assimilating redemptive emotions into his personality."[134] Elsewhere, he writes, "Freedom of will, according to Judaism, is not limited to external action. Its application extends to the inner life of man. Man freely forms his living experience by selecting ennobling and worthwhile emotions out of a pile of unorganized and amorphous moods, and molds them into a great experience, endowed with constancy and directedness."[135] Doubtless, this seems to demand an impossible task if one takes a static perspective. However, if one views halakha as a discipline in

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[134] Joseph B. Soloveitchik, "Catharsis," *Tradition* 17, no. 2 (Spring : Special Issue 1978): 47.

[135] Soloveitchik, *OW*, 168–169.

which an individual is gradually trained by halakhic practice, the task of responding with the requisite emotions does not seem quite as difficult.[136]

Returning to the wider issue of *ta'amei ha-mitzvot*, recall that for Soloveitchik halakha is not simply a practice but the expression of cognition of reality. There is then a specifically normative justification of halakhic practices for the individual: Through engaging in halakhic practice as a discipline she is trained to have apt affective responses to and veridical value-perceptions of reality, including the ultimate reality, the human experience, and the specific historical experience of the Jewish people. Indeed, Soloveitchik writes, "If Judaism has construed ethical norms with regard to the emotional life, the basic moral criterion by which Judaism has been guided in the formulation of a normative system consists in the need for a relationship of congruity between reality and emotional attitudes."[137] In keeping with his methodological strictures one can still only reconstruct the specific affective responses and value-perceptions underlying a norm out of the norm itself; however, the reason to perform the practice mandated by the norm is to attain these apt emotional states and to achieve accurate value perception.

One might object that the experiential commandments comprise a small number of halakhic norms, and so Soloveitchik's account of them should not be extrapolated to a global approach to the commandments. However, there is evidence that he views the experiential commandments as prototypical norms, the features of which are evident though not fully instantiated in other norms.[138] In fact, he attempts to extend the *ma'aseh/kiyyum* analysis and thus this wider

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[136] Viewed in this manner, Soloveitchik's approach can be profitably compared with Talal Asad's analysis of medieval Christian monasticism as a disciplinary practice in which a self is formed. See Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: The Johns Hopkins University Press, 1993), 125–135.

[137] Soloveitchik, *OW*, 182.

[138] A similar, though by no means identical, point is made by Gerald Blidstein in *Society & Self: On the Writings of Rabbi Joseph B. Soloveitchik* (New York: OU Press, 2012), 132. However, like Sztuden, Blidstein has an overly

normative justification of the halakha to include all interpersonal commandments and all negative commandments.

Regarding interpersonal commandments, in a letter on the topic of the commandment to "Love thy neighbor as thyself," he writes,

> All interpersonal commandments (at least the overwhelming majority) correspond to internal emotional instincts that operate in the consciousness of the human being, and were they not given [as commands] they would have been worthy to have been given and we would have derived them from the natural world which surrounds and envelops us, and from our internal world…. However, when the Jewish people were commanded regarding the rational laws…[t]he normative field of operation was expanded and deepened and reached the depths and farthest bounds of idealism, which are unknown to the psychological instincts and predilections. For example, the natural love of the members of one's group is simply a feeling of solidarity that emerges from a shared sense of history and fate. In truth, this love is really, in its uniqueness, self-love…. However, the command "Love thy neighbor as thyself" (in all its meanings, which as per Hillel the elder in its negative sense, or in its positive meaning as formulated in [Maimonides'] Code…), demands of the individual non-egotistical love toward the other, and obligates the individual to perform concrete actions.[139]

All interpersonal commandments correspond to internal states. These states are instinctual in that they could have been derived from internal or external nature. However, as commandments, they, among other transformations, require an altruistic form of love and concrete actions. Indeed, in the section of the *Mishneh Torah* that Soloveitchik cites, Maimonides codifies a number of interpersonal norms, including comforting mourners and rejoicing with a bride, as derived from the Biblical commandment to "Love they neighbor as thyself."[140] In a halakhic lecture Soloveitchik comments on that passage and claims that, as least from one perspective, "Love thy neighbor as thyself" is the *kiyyum ha-mitzvah,* while the specific actions are the

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static view of halakhic practice and argues that internalization is meant to precede behavior and behavior is not meant to stimulate the appropriate state. He also does not recognize that other commandments approximate the form of the experiential norms.

[139] Soloveitchik, *CCC*, 333–334.

[140] Maimonides, *Mishneh Torah*, vol. 2, Book of Judges, Laws of Mourning, 14: 1.

ma'asei ha-mitzvah.[141] All interpersonal commandments thus correspond to internal states and a vast number of them correspond to altruistic neighbor-love.[142]

Soloveitchik's description of many, if not all, negative commandments manifest a similar structure, in which a specific prohibition is imposed, but the essential element is the formation of a particular type of subject, possessing certain emotional states and desires. While halakha may forbid specific actions, like eating non-kosher food, laboring on the Sabbath, or engaging in various types of sexual intercourse, the crucial point is an individual's recoiling or withdrawing from particular desires. It is not that these desires are negative in and of themselves, but it is necessary that an individual engage in self-formation by renouncing some of them. Soloveitchik describes this process as cathartic and as serving to sanctify or redeem desires.[143] It is an instance of self-creation, in which one imitates God's act of self-limitation (or *tzimtzum*) to make "ontological space" for the creation of the world.[144]

Soloveitchik is not consistent as to the reason this cathartic redemption or sanctification is necessary. Often he adopts Kantian language in which the obligation is ideal and imposed on reality. The human being becomes an ethical personality through the ability to impose constraints on his desires.[145] However, other times, he uses language that intimates that such self-limitation aligns an individual's behavior and self-perception with the reality of the human condition.

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[141] Soloveitchik, *SZAM*, vol. 2: 71–72.

[142] Tantalizingly, recall that Hillel identifies "Love thy neighbor as thyself" with the entire Torah, see BT Shabbat 31a.

[143] Soloveitchik, "Catharsis"; and Soloveitchik, *FR*, 49–50.

[144] Soloveitchik, "MH," 35–36; and Soloveitchik, *HaMa*, 103–108.

[145] The discussions in "Catharsis" and *HaMa* seem to follow this line.

Though he may have delusions of infinitude, the individual is finite.[146] There is thus a realistic

dimension to this act. The difference between these negative commandments and the

prototypical experiential commandments is that here the connection between the internal process

and the external action is more tightly linked. Soloveitchik assumes that these are desires that

everyone possesses, and thus by abiding by the prohibition one *ipso facto* recoils or withdraws

from the drive. The possibility of performing the actions without the corresponding internal state,

present in the case of the experiential norms, is absent here.[147] In any event, Soloveitchik

sometimes even suggests that all halakhic norms function in this manner,[148] at least at an early

stage of an individual's induction into halakhic practice.[149] Before an individual has learned to

allow the halakhic norms to trigger emotional states, they serve as an exercise in self-formation

through self-limitation. In fact, he claims that the telos or ideal of the halakha is the attainment of

holiness,[150] which he identifies with self-creation through self-limitation.[151]

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[146] Soloveitchik, *OW*, 154–156; Joseph B. Soloveitchik, *The Emergence Of Ethical Man*, ed. Michael S. Berger (Jersey City: Ktav, 2005), 52 henceforth *EEM*; and Blidstein, *Society & Self*, 139–151.

[147] However, one should recall that one of the paradigmatic cases of experiential commandments, mourning, was *prima facie* comprised merely of negative prohibitions. Yet, following Maimonides' codification, Soloveitchik argued that over and above these negative prohibitions there was a positive obligation to mourn. Similarly, he might claim, though he does not, that over and above the negative prohibitions regarding sexual intercourse, for example, there is a positive commandment to engage in recoil or self-creation vis-à-vis one's drives. His unpublished discussion of the blessing which accompanies the act of *erusin*, or betrothal, is fascinating in this connection. I thank Rabbi Yitzi Genack for bringing this to my attention.

[148] Soloveitchik, "Catharsis," 45; and Joseph B. Soloveitchik, *Shiurei Harav: A Conspectus of the Public Lectures of Rabbi Joseph B. Soloveitchik*, ed. Joseph Epstein (Hoboken: Ktav, 1994), 133.

[149] Soloveitchik, *YSS*, 35; 53–55.

[150] Soloveitchik, *HaMa*, 99; 109.

[151] Ibid., 46–47: "Holiness consists of a life ordered and fixed in accordance with the Halakhah and finds its fulfillment in the observance of the laws regulating human biological existence, such as the laws concerning forbidden sexual relations, forbidden food, and similar precepts…. Holiness is created by man, by flesh and blood."; and *FR*, 75: "Disciplining the body, interfering with its pleasure seeking drives, organizing them into a meaningful whole, and relating them to a higher frame of reference by refusing to yield to the powerful push of the flesh and by resisting the rush of primitive lust, are attainable only at a high prince in terms of self-denial, self-despair, and self-sacrifice. Desires unfulfilled, pleasure pursuits interrupted when attainment is in sight, and withdrawal from

Whether or not these extensions of the strategy are successful, it is clear that Soloveitchik recognizes experiential commandments as prototypical halakhic norms. This is because they precisely fit his philosophical account of the halakha and make clear its normative implications. By engaging in halakhic practice one participates in a discipline in which one's actions are guided and subjectivity is shaped. It is training for religious cognition, allowing one to perceive values veridically and respond affectively aptly. Consequently, *ta'amei ha-mitzvot$_2$* is Soloveitchik's basic justification of halakhic norms. It undergirds his more apparent approach, explains his preoccupation with experiential commandments, and justifies the normativity of halakhic practice.

C. Normativity and the Ultimate Telos of Halakha

On the basis of the previous discussion, Soloveitchik's general account of normativity can be extracted and, in the process, some of his more tentative remarks about the ultimate telos of halakhic practice can be introduced. He describes at least two experiences of normativity, which correspond to two different levels in an individual's moral and religious development.

As has been shown, Soloveitchik holds a realist epistemology of values in which the latter are perceived through affective responses. He thus holds an objectivist conception of values: values inhere in reality. Normativity is founded in reality itself, as opposed to deriving from human reason or will. In his major work that discusses normativity, *EEM*, Soloveitchik does not use the terminology of values but of laws. Still, he conceives of these laws realistically, as natural laws, inherent in reality and the nature of man. This work contains, in the words of

something fascinating are painful events. Because of the passional character of these experiences they represent the dynamic of holiness."

Michael Berger, Soloveitchik's "religious anthropology,"[152] in which he describes the nature of the human as an ethical being, called to moral responsibility but tempted to be derelict. It is an interpretation of Genesis' depiction of the creation of Adam and his sin as well as the stories of Abraham and Moses. The creation and fall of Adam describes the human being's essential nature as well as the prerequisites for ethical existence and normativity. The stories of Abraham and Moses describe two types of moral character and their respective experiences of normativity.

Soloveitchik describes all living beings, the human being included, as consisting of a polarity of freedom and constraint.[153] The human being has the ability to transform and transcend her current state over and above that of the plant and the animal world, yet she still has certain limitations, both those that are physically unsurpassable and those that she transgresses to her own detriment. She has certain natural possibilities and opportunities; sin is overstepping these boundaries. In describing the human being's essential nature, Soloveitchik writes,

> As it was intended in the primeval scheme of creation, man appeared as a harmonious being, not torn by inner strife; his consciousness was his conscience as well. His theoretical consciousness, which expressed itself in *cogito ergo sum*…was at the same time the ethical conscience, asserting itself in the awareness of ethical need and necessity. The same consciousness which said to man "you exist" also told him "you exist as a moral being." [154]

Ideally, the human being's biological urges are immediately congruent with the moral law. Such a being is not an ethical being, however, for there is no possibility of transgression. To become capable of ethical action, the human being's immediacy to her natural drives must be broken.

Soloveitchik delineates three prerequisites for the emergence of normativity and with it the ethical being. The central necessary criterion for an ethical act is that it be motivated by "the

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[152] Soloveitchik, *EEM*, xi–xxii.

[153] Ibid., 52.

[154] Ibid., 134.

pressure of a normative feeling." The human being must feel the pull of the moral norm and be free to comply with it or to reject it. However, for that to be possible she must undergo two related experiences: She must recognize her separateness from nature and enter into coexistence with another human being. Empirical cognition causes the human being to recognize her distinction from the rest of nature, while encountering another human constitutes the human being's self-consciousness. After these transformations, in addition to being beholden to the inescapable laws of physics, the human being confronts "the ethical imperative [which] is experienced as both a must and as something that may be resisted or ignored." She now has the capacity either to consciously stay within natural and legitimate bounds or to overstep them:[155] "[N]aturalness is moral, unnaturalness is sin."[156] To consciously stay within natural boundaries is to act ethically, to transgress them is to sin.

Soloveitchik uses the story of Adam's fall to elucidate his conception of sin. He casts the serpent as a counter-man, one who recognizes his separateness from nature but rejects his ethical potential. Counter-man is esthetic man: He instrumentalizes his biological urges in pursuit of the maximal amount of pleasure without respect for boundaries.[157] Ethical man in contrast strives to maintain his desires within their natural bounds. "It is true that the biological law and the ethical imperative are identical, yet this is the ideal…not [the] starting point. First man must experience the specific unique ethical norm and attain all the attributes of personality-existence. Only then is he able to re-experience his biological reality as an ethical telos."[158]

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[155] Ibid., 76–82.

[156] Ibid., 141.

[157] Soloveitchik alternates between "aesthetic" and "esthetic" in different works. In order to maintain consistency with the source material I adopt his spelling in my discussion.

[158] Soloveitchik, *EEM*, 82.

Soloveitchik identifies two types of moral characters with different experiences of

normativity: Abraham and Moses. Abraham discovers the moral law:

> The moral law is revealed to him by God, who is at once friend, comrade, and master, and
> who speaks from beyond and within his own personality. The source of the law is the
> *mahazeh*, the prophetic vision, not the royal decree. The charismatic person discovers the
> ethos himself. As a free personality, he goes out to meet the moral law with his full collected
> being; he chances to find it in himself and to consciously adopt it. He is not overpowered by
> an unforeseen element. There is a free act on his part in dedicating himself to a universal
> natural morality. His sovereign freedom has not been restricted. Only later does he find
> out…that with the moral law he has discovered the God of morality beyond himself….[159]

Abraham discovers the moral law by seeing it in the world and within his self. It is revealed to

him by God only in the sense that he created the world and human capacities. Soloveitchik

insists that human conscience does not represent the special intervention of God but human

nature. Abraham finds God only through morality. Morality is therefore something that he

accepts in complete freedom. He recognizes it as something in reality that is commensurate with

his nature and thus desirable.

Abraham sets to work realizing the moral law, that is, reconciling the ethical and the esthetic

by redeeming his biological drives. This has two results: Abraham enters into a covenant with

the God of morality, and he founds an ethical community dedicated to the moral ideal:

> By discerning the moral law and with it the God of morality, the charismatic person realizes
> that the realization of the moral goal is not to be found within the bounds of an individual life
> span. The individual may contribute a great deal to the fulfillment of the ethical ideal, yet he
> can never attain it. A moral telos is gradually realized in a historical process. This is why the
> charismatic persona organizes a community, a medium which is guided by the vision of the
> founder....[160]

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[159] Ibid., 154.

[160] Ibid., 168.

Soloveitchik also alludes to other responsibilities and obligations that accrue as a result of the history of the covenant,[161] but he implies that the ultimate goal of Jewish practice is the reconciliation of the ethical with the natural. The telos is complete redemption, which is "the great miraculous act of rendering human reality commensurable in all of its manifestations…. In other words, we will witness the triumph of the ethical over the esthetic."[162]

Moses shares the goal of Abraham. He "must reconcile both opposing forces and emerge as a harmonious personality…. The dual personality, consisting of genuine ethical existence and adopted orgiastic one, must be raised to the level of harmony. Cosmic law and moral law become identical as originally intended: ethical designs are woven into the cosmic texture, and natural existence is the background against which the ethos should be seen."[163] But Moses does not discover the law in the world or his self; he is already a member of Abraham's ethical community. The law presents itself to him as already in force. Soloveitchik thus describes Moses as confronted by the apocalyptic and numinous command, which demands that he be "re-educated, re-trained, and re-formed." In contrast to the founder, he "subjected himself to a covenantal historical reality and actually forced his natural existence into a pre-arranged scheme of things."[164] While Abraham experiences the normativity of the moral law as freedom, Moses initially experiences it as coercion. Because of this, he has an additional task: he must reappropriate the moral mission as his own. Soloveitchik writes, "Yisrael denotes the triumph of

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[161] Ibid., 174–175: "As a consequence of the perennial [covenant] consciousness, we may speak to a historical ethical memory. Agreements entered into, obligations assumed, promises made, objectives formulated by the father of the nation are valid and binding for the charismatic group. We remember the ethical duty contained in the covenant. Again, this is not just simple remembrance; it is rather a re-acceptance, a re-experience. We assumed our duties through Abraham and Moses. They represented us, and we in turn represent them."

[162] Ibid., 185.

[163] Ibid., 185–186.

[164] Ibid., 187.

man over the numinous moment in his relationship with God, his victory over the antithetic phase in his communion with his Creator…. [A]t dawn he emerges hero, winning the battle by reforming himself…."[165] What is first confronted as coercion must be reaccepted in freedom.

The two different experiences of normativity are also discussed in *YSS*, though there they are not identified with these figures and are described in terms of religious experience as opposed to ethical experience. Soloveitchik is also more explicit that he is discussing ideal types and not actual individuals or approaches. This discussion is helpful because it elaborates on Abraham's vision and Moses' initial experience and later reappropriation of that vision.

The work is a philosophical interpretation of the *Song of Songs*. Soloveitchik characterizes that text as depicting the mutual love between the creator and creation or God and Israel.[166] He describes two basic types of religious experience: natural consciousness and revelational consciousness.[167] Natural consciousness is evident in all areas of culture and involves the human being seeking the Absolute in order and lawfulness.[168] It is characterized by freedom.[169] When it is explicitly religious, God is conceived of as the Hidden Intellect,[170] and his attributes are mercy and love.[171] Revelational consciousness, in contrast, involves God's search for the human being and his disclosure in the "obscure and incomprehensible."[172] God is conceived as the Divine

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[165] Ibid., 200.

[166] Soloveitchik, *YSS*, 5.

[167] Ibid., 40.

[168] Ibid., 7–9.

[169] Ibid., 41.

[170] Ibid., 35.

[171] Ibid., 47–49.

[172] Ibid., 32.

Will,[173] and his attributes are justice and fearsomeness.[174] The individual to whom God reveals himself encounters the force of necessity.[175] Soloveitchik argues that both of these experiences are initially mere sublimations of natural drives: the desire for self-preservation and fear of punishment, respectively. However, they eventually mature into types of ontological consciousness. Natural consciousness becomes ontological eros: a love for the root of being, which he describes using kabbalistic terminology as "running towards." Revelational consciousness becomes ontological anxiety: awe before the negator of being, which he describes as "running away."[176]

Soloveitchik claims that while they are opposed, they are both necessary and "constitute the root of halakhic religious consciousness."[177] However, he also notes that the "religious individual," perhaps as opposed to the founder of a religion, must always begin with revelational consciousness;[178] he confronts revelation as already disclosed. A reconciliation of natural and revelational consciousness is attempted through the concept of *imitatio dei*, where the necessity of revelation is appropriated as a type of freedom: By imitating God the individual partakes in some sense in divine freedom. However, this only internalizes the conflict and creates an unstable oscillation between total subjugation and liberation. The individual constantly runs toward and then runs away, as it were.[179]

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[173] Ibid., 35.

[174] Ibid., 49–50.

[175] Ibid., 42–43.

[176] Ibid., 61–73.

[177] Ibid., 70.

[178] Ibid., 162 fn. 10.

[179] Ibid., 75–85.

Ultimately, the consciousnesses can be reconciled by "cleaving," which is distinct from unification and is characterized by pure love. Soloveitchik also describes it as sanctification and the climax of the Jewish worldview. It involves a double (or possibly quadruple) employment of the Aristotelian and medieval notion of the identity of the knower and the known: God's cognition of the world is perfect and as such the divine intellect is identical with the world. Additionally, since God is completely unitary, there is an identity between his knowledge, will, and action. While human cognition is not constant like that of God, when it is actualized there is an identity between the human intellect and its object. Human intellect can also become identical with the world. Therefore, the individual can cleave to God by cognizing the world, which is identical with the divine intellect. But for the cleaving to be complete, the individual too must unify his will and action with his knowledge. Knowledge of the world and, thus, of God must be practical knowledge.[180]

At this point in the text there is a puzzling development. The object of cognition, through which the individual cleaves to God, switches from the world to the halakha. Now it is by studying expressions of revelation that the individual cleaves to God.[181] Ravitzky attributes this switch to epistemological concerns: Soloveitchik does not think actual knowledge of reality is possible, thus identity with God through empirical cognition is impossible.[182] Appreciating Soloveitchik's epistemological realism, however, allays such concerns. A better explanation is that the polarity of natural consciousness and revelational consciousness is retained somewhat even at the level of cleaving due to individuals' differing starting-points and thus perspectives.

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[180] Ibid., 96–105.

[181] Ibid., 106ff.

[182] Aviezer Ravitzky, "Rabbi J. B. Soloveitchik on Human Knowledge: Between Maimonidean and Neo-Kantian Philosophy," *Modern Judaism* 6, no. 2 (May 1986): 157–88.

Soloveitchik writes, "Judaism declares the only difference between the revelational system of laws and the ontological law is one of perception. The ontological law, which is manifested in the created reality, is revealed to man in the form of the revelational moral command…. [For] the moral law is, in essence, the law of existence, and moral action is action interwoven with the drama of the great creation.[183] A unique individual (Abraham) may be able to discover the ultimate religious and moral reality by cognizing the world, but most individuals encounter that reality already expressed in texts, norms, and practices. Such individuals (like Moses) find themselves already within a normative system. Their task is to reappropriate this coercive revelation and transform it into freedom.[184]

   Soloveitchik describes three ways that Judaism enables the reappropriation of revelation as nature. First is the rule of the intellect in theoretical and practical Torah study, through which revealed law becomes interwoven with human thought. Second is the elevation of the body. Revelation does not leave natural processes behind but seeks to redeem them through the performance of the commandments. Third is the perpetuity of God's world through the transmission of the oral law.[185] Through all of these processes, "[t]he revelational law is transformed into an "existential law," which is received by the mind and blends with it in its bold free flight…. The heavy weight of laws and regulations is transformed into an intensely attractive force that raises the individual from the mire of impenetrable reality to an existence

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[183] Soloveitchik, *YSS*, 134.

[184] Ibid., 168–169: "The individual who is compelled by the revelation to perform specific acts can attain the consciousness of freedom by identifying with the command and transforming compulsion into a constitution of freedom that is nurtured by God's hidden uniqueness."

[185] Ibid., 107.

full of purpose and yearning…"[186] Soloveitchik thus describes two experiences of normativity: desire and coercion. Desire corresponds to the discovery of the laws or values that inhere in reality; coercion corresponds to the initial state of one who already finds himself in an ethical community. This individual must be disciplined by the commanding norm to re-experience the normative claim as freedom.

Soloveitchik's account of normativity as well as normative experience and character is mainly consistent with the justificatory strategy of *ta'amei ha-mitzvot₂*, though there are differences. It is grounded in the same realist epistemology. Despite the identification of the subject of this cognition with a specific individual in *EEM*, Soloveitchik writes more typologically than historically and eventually identifies Abraham with the Jewish community. Additionally, while there is no discussion of objectification as expression, significant emphasis is placed on objectification as discipline: The individual Jew must be shaped by halakhic practice to experience her normative obligations according to their true nature. The one significant difference is Soloveitchik's discussion of the overall goal of halakha. While in *HaMi* Soloveitchik aims to maintain the autonomy of religion from, *inter alia*, ethics and in his halakhic writings focuses on experiential commandments, in *EEM* and *YSS* he intentionally conflates them and concentrates on ethical duties. Indeed, he identifies the telos of halakha with ethics and only notes in passing other historical obligations accrued by the Jewish community.

This lack of clarity about the relation between religion and morality is endemic to Soloveitchik's *oeuvre*, and a number of scholars have attempted to systematize his view. Commensurate with his metaethical realism, he seems to be skeptical of attempts to ground morality in human reason. He also questions its ability to successfully apply moral norms or

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[186] Ibid., 128. Also see ibid., 149: "Active participation in the work of reconstructing the content of revelation is the goal of Judaism as it wends its way through the three layers of transcendental consciousness."

motivate moral action. In general, it seems that he is committed to the view that God is the supreme moral being, even if his commands seem to violate "mere" human morality.[187] Halakha thus cannot conflict with true morality, though it should not be reduced to the latter.[188]

D. Normative Difficulties

Before proceeding to discuss the connection between Soloveitchik's account(s) of *ta'amei ha-mitzvot* and his theory of halakha, the difficulties in his justification of halakhic norms must be noted. He attempts to justify halakhic norms by arguing that they are expressions of accurate affective cognition of values and a discipline to attain appropriate emotional responses and to achieve value perception. Halakhic practice is both an appropriate response to real features of existence and an effective means to come into contact with that existence. His justification is thus foundationalist since it aims to ground halakhic norms in reality.

It has been noted that the initial subject of religious cognition is not the ordinary individual but either a founder with unique insight or a collective religious consciousness. Both of these options are problematic: It is possible to think of a cultural system, and by extension the collective bearer of a cultural system, as attaining knowledge. However, this is merely shorthand for a description of the accumulated cognitive attainments of discrete individuals. For example, one can speak of the scientific attainments of Europe during the modern period, but in doing so one is a referring vaguely to the specific achievements of men like Galileo, Newton, and

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[187] For a good reconstruction of Soloveitchik's scattered remarks about reason and morality, see Daniel Statman, "Hibitim Be-Tifeysato Ha-Musarit Shel Ha-Rav Solovaits'ik [Perspectives on the Moral Conception of Rabbi Soloveitchik]," in *Emunah Bi-Zemanim Mishtanim: Al Mishnato Shel Ha-Rav Yosef Dov Solovaitsik [Faith in Changing Times: On the Teachings of Rabbi Joseph Dov Soloveitchik]*, ed. Avi Sagi (Jerusalem: Merkaz Ya'akov Hertsog/ha-Kibuts ha-Dati, 1996), 249–64.

[188] On the general issue of the relation between ethics and halakha in Soloveitchik's thought, see Shubert Spero, "Rabbi Joseph Dov Soloveitchik and the Role of the Ethical," *Modern Judaism* 23, no. 1 (February 2003): 12–31; and Shalom Carmy, "Pluralism and the Category of the Ethical," in *Exploring the Thought of Rabbi Joseph B. Soloveitchik*, ed. Marc Angel (Hoboken: Ktav, 1997), 325–46.

Einstein. That is not to say that these individuals worked in a social vacuum, but it means that one can specify more precisely the cognitive subjects. Soloveitchik does identify at least one specific subject of religious cognition—Abraham. But his account of Abraham's religious cognition requires further articulation. It is unclear whether Abraham should be thought of as attaining intuition into some supra-sensible reality or, in keeping with the general naturalism of *EEM*, as apprehending more naturalistic insights. The former provokes questions regarding the nature of Abraham's uniqueness and the reality he accessed. The latter raises the more significant query of why such cognition is unavailable without halakhic discipline.

Soloveitchik's epistemology is problematic in and of itself and when combined with the claim that it is, on the one hand, directly available to specific individuals and, on the other hand, only more widely available after formation by halakhic practice. Soloveitchik is unclear about the status of the transcendent elements of experience. He insists that it is unproduced by thought. It is the "matter" of experience and resistant to conceptualization. He also claims that its presence in religious experience attests to the latter's cognitive nature and realism. But these claims are incompatible. If it resists conceptualization, it is not possible to have knowledge of it. Soloveitchik seems to be beholden to the "myth of the given" identified by Wilfrid Sellars and the contradictions he exposed.[189] The transcendent elements of religious experience must be both immediate and non-conceptual but also able to anchor conceptual claims. Soloveitchik is on firmer epistemological footing when he claims that training in halakhic practice is necessary to access religious reality, but then he needs a new argument, given his realist commitments, for the cognitive nature of the experience granted by halakhic discipline.

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[189] Wilfrid Sellars, *Empiricism and the Philosophy of Mind* (Cambridge MA: Harvard University Press, 1997), 132. Sellars view is further discussed in Chapter Four of this study.

Soloveitchik's epistemology is normatively oriented. Religious cognition of reality grants access to objective values or natural laws. His description of this perception as affective bridges the fact/value dichotomy, for affects can be conative. In the most basic cases, desire can stimulate pursuit and fear can provoke aversion. In this limited sense, Soloveitchik's view is similar to sentiment theorists of value, such as David Hume. [190] However, he, markedly unlike Hume, claims that values and laws actually do exist in reality and are not the result of "merely" human responses to it. But now the ontological "queerness" of these values and norms become apparent: In what way is their existence similar to the existence of ordinary objects of experience? It may be accurate to describe Soloveitchik as articulating a cognitivist "fitting attitude" theory of value, in which values are analyzed "in terms of evaluative attitudes endorsed as fitting…or appropriate."[191] Indeed, Soloveitchik's view could be aided by comparison with another cognitivist fitting attitude approach—John McDowell's sensibility theory of values and "no-priority" view on whether values are the result of human projection or real features of the world.[192] Still, it is unclear whether this ambivalent ontology would satisfy Soloveitchik's robustly realist commitments.

Further, Soloveitchik does not provide a clear account of the lack of intersubjective agreement about these values. Once again, the dual claim that such cognition is directly accessible to unique individuals while training is necessary for others is relevant as is the universality and particularity of these values and laws. If they do exist in reality, why are they

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[190] David Hume, *A Treatise of Human Nature* (London & New York: Penguin, 1969), bk. II; part I: section XI; 367–368; book III: part III: section VI: 667–668.

[191] Daniel Jacobson, "Fitting Attitude Theories of Value," ed. Edward N. Zalta, *The Stanford Encyclopedia of Philosophy*, 2011, http://plato.stanford.edu/archives/spr2011/entries/fitting-attitude-theories/.

[192] John McDowell, "Projection and Truth in Ethics," in *Moral Discourse and Practice: Some Philosophical Approaches*, ed. Stephen Darwall, Allan Gibbard, and Peter Railton (Oxford UK & New York: Oxford University Press, 1997), 215–17.

not available more widely and why are the norms which result from them not more broadly

obligatory? By drawing on some of his fleeting comments, it is possible to reconstruct a

plausible view for Soloveitchik. Natural laws, which as has been shown relate to morality in the

strict sense, correspond to features of reality and the human experience that are universally

accessible. Values, which seem to be more closely related to religion, correspond to the historical

experience of a particular community. These values are exclusively "accessible" to this

community because it only makes sense for them to respond in certain ways to particular events.

This does not mean, however, that these events did not occur or exist in reality but only that they

exist in their "value-ladenesss" exclusively for them. For example, a husband and wife celebrate

an anniversary, say on January 20th. Defined either naturalistically in terms of the position of the

Earth or conventionally in terms of a widely accepted calendar, January 20th exists. However, it

only "exists" as an anniversary, with all the opportunities and obligations that that entails, for the

husband and wife.[193] But this is a significant weakening of Soloveitchik's realism, and it is

unclear whether he would accept it, especially given his pervasive ambiguity about the relation

between religion and morality.

Nevertheless, Soloveitchik's description of the experience of normative force is an attractive

feature of his account. Individuals experience obligations as having a claim on them that they did

not impose and that cannot be changed by an act of their will. Indeed, individuals often

experience such obligations as deriving from the nature of a situation, as inherent in reality itself.

All the same, individuals know that they can violate norms in a way that they cannot violate

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[193] This distinction would also pave the way for establishing the legitimate domains of particularism and universalism in Jewish practice, theology, and practical justification, to which Soloveitchik occasionally commits himself. See Soloveitchik, "Confrontation," Addendum: "The Jewish religious tradition expresses itself in a fusion of universalism and singularism."

physical laws. Whether this experience can be philosophically vindicated is another question, one to which Soloveitchik has not provided an adequate response.

II. Theory of Halakha: *Ta'amei ha-Mitzvot₂* and Halakhic-Legal Practice

Before the relation between *ta'amei ha-mizvot₂* and Soloveitchik's approach to halakhic-legal practice can be assessed, his actual theory of halakha must be ascertained. This is accomplished by putting his previously published and posthumously published writings into dialogue with contemporary legal theory. It is argued that while Soloveitchik's previously published works articulate a formalist conception of halakha and halakhic-legal practice, his other writings, including halakhic responsa, manifest a non-formalist approach that is not easily categorized (A). The influence of Soloveitchik's justification of halakhic norms on this non-formalist theory of halakha is then analyzed. It is argued that it accounts for certain features of the latter, including its conceptions of halakhic-legal authority and decision-making as well as its general conservatism (B). Lastly, some problems with his theory of halakha are detailed (C).

A. Formalism or Non-Formalism?

Soloveitchik's writings manifest two conceptualizations of halakhic-legal practice: formalism (1) and non-formalism (2). The former is found in *HaMa* and allied texts. The latter is intimated in a number of previously published works but is fully expressed in only recently published documents. While the formalist approach is consonant with the Brisker Talmudic methodology and characterizes his approach to theoretical halakhic inquiry (*lomdus*), the non-formal approach is more representative of his own halakhic-legal practice (*psak*).

1. Halakhic Formalism

Previous studies have discussed the Brisker Talmudic methodology in connection to legal theory. Norman Solomon compares the views of the Analytic movement, as he labels its adherents, to legal positivism, which was introduced in the previous chapter. He notes five features of legal positivism, including that (a) laws are the commands of human beings; (b) there is no necessary connection between law and morality; (c) the analysis of legal concepts is intrinsically worthwhile and is distinguishable from moral or political evaluations of the law; (d) legal systems are closed systems; and (e) non-cognitivism in ethics. Analogously, the Analytic movement held (a) that halakhic laws are commands of God; (b) it is thus pointless to inquire into their ethical basis; (c) that the analysis of halakhic concepts is intrinsically worthwhile and distinguishable from any external evaluation; (d) that halakha is comprehensive and separate from morality; and (e) a skeptical view of human morality.[194] While the five features that Solomon notes go well beyond the necessary and sufficient conditions for legal positivism discussed in the previous chapter, they describe characteristics prevalent among positivist writers and serve to highlight the affinity between legal positivism and Brisk as intellectual movements.[195] Solomon also notes that this movement's focus on halakhic analysis and understanding each side of halakhic debates contributed to a hesitancy to make practical decisions. Indeed, despite their positivist conception of law, he claims that when the Briskers did decide on practical halakhic matters "non-legal" considerations were influential.[196]

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[194] Solomon, *Analytic Movement*, 86–89.

[195] As described in the previous chapter, the necessary and sufficient criteria for legal positivism include: 1) the social thesis and 2) the separability thesis. Indeed, Solomon himself notes that ethical non-cognitivism is not entailed by positivism; nevertheless, he claims that it is held independently by many positivists and reinforces their rejection of any necessary connection between law and morality.

[196] Solomon, *Analytic Movement*, 232.

Chaim Saiman notes this reluctance to engage in actual halakhic-legal practice as well. He identifies the Brisker view on the basic ground of the law with positivism: the fundamental authority of the halakhic system resides in divine command. However, he offers a more fine-grained analysis than Solomon and notes the affinities between Brisk and German legal classicism or conceptualism.[197] Legal classicism was a movement that aimed to excavate the legal concepts that underlie ancient Roman or German law. Saiman thus implies that Brisk combined a positivist conception of the law's basic justification with a formalistic conception of legal reasoning. As Ross notes, while formalism is often thought to be a subset of positivism, they can and should be distinguished. In a narrower sense, positivism relates to "law's essentially grounding," or basic justification, while formalism describes "law's nature and its process of deliberation."[198] This leaves open the basic justification of the law. Indeed, Suzanne Stone notes that one of the foremost contemporary proponents of legal formalism holds a view on the law's basic ground that is more akin to a natural law perspective than positivism.[199] In any event, neither Solomon nor Saiman focus directly on Soloveitchik himself, though they do draw on *HaMa* for a philosophical articulation of the Brisker movement.

While legal formalism is a slippery concept, more often used as a label of abuse than a positive identification,[200] Ernest Weinrib advances a sophisticated articulation of it.[201] He writes,

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[197] Saiman, "Legal Theology: The Turn to Conceptualism in Nineteenth Century Jewish Law," 41. One crucial difference that Saiman notes is that legal classicism combined its conceptual inquiries with historical investigations, from which Brisk refrained.

[198] Tamar Ross, *Expanding the Palace of Torah: Orthodoxy and Feminism* (Hanover & London: The University Press of New England, 2004), 64.

[199] Suzanne Last Stone, "Halakha and Legal Theory," *The Journal of Textual Reasoning* 6, no. 1 (December 2010), http://etext.lib.virginia.edu/journals/tr/volume6/number1/TR06_01_stone.html.

[200] Martin Stone, "Formalism," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford UK & New York: Oxford University Press, 2002), 166–205.

"Formalism postulates that law is intelligible as an internally coherent phenomenon."[202] Law can be understood in terms of itself. More specifically, "Formalism…proffer[s] the possibility of an immanent moral rationality."[203] Each of these terms is significant: "Rationality" "expresses the formalist conception of law negatively through a contrast with political justification"; "immanent" "characterizes the law's distinctiveness affirmatively through the claim that the content of the law is elaborated from within"; "moral" "ascribes normative force to its application."[204] The relation among these elements is also crucial. Immanent moral rationality is an "integrative notion"[205]: "Its rationality, for instance, consists in its being immanent to the normative relationships that it orders. Similarly, the law's normativity is a function of its success in embodying in its doctrines and institutions the rationality inherent in it."[206]

These features directly contrast with both legal positivism and instrumentalism. For a formalist, a legal reality follows from conceptual relations between legal forms and not an act of will by a sovereign or the social practices of a community. For example, the specific obligations and responsibilities of an individual creditor and an individual debtor derive from the conceptual relation between these two legal categories and not simply because of certain conventions. Similarly, legal justification is in terms of the "the conceptual structure of legal arrangements"

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[201] Ernest J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law," *The Yale Law Journal* 97, no. 6 (May 1988): 949–1016. Formalism is generally thought of as strictly a doctrine of the nature of law and legal reasoning; however, Weinrib attempts to move from formality to normativity. While this aspect of the account is fascinating, it is not directly related to the present issue.

[202] Ibid., 951.

[203] Ibid., 953–954.

[204] Ibid., 954.

[205] Ibid., 955.

[206] Ibid., 955 fn. 15.

and not the attainment of some extra-legal goal."[207] It is an act of cognitive creativity, yet

"adjudication [is] conceived more as discovery than the making of law."[208] Besides findings of

fact, legal justification and adjudication involves arranging legal considerations "into internally

coherent justificatory structures, so that the components of any single such structure partake of

whatever normative force gives life to the structure in its entirety."[209] Legal reasoning, including

justification and adjudication, thus makes use of purely legal categories and their relations and

strives to articulate a coherent structure.

In *HaMa* and allied texts, including "Beloved" and the correspondence discussed above,

Soloveitchik does articulate a formalist conception of halakha. In terms of its structure he claims

that halakha is an *a priori* and ideal normative system.[210] Recall that according to Kaplan this

means that halakhic categories represent a "network of interweaving relationships" that are only

meaningful in terms of one another.[211] Further, Soloveitchik identifies halakhic-legal justification

with establishing coherent conceptual relations. Recall that, according to him, as a result of the

introduction of the Brisker method "[t]he halakha was changed to a fully deductive method….

The halakha is not a jumbled collection of laws, but a method, an approach, which creates noetic

unity, a fully organic unit."[212] He describes halakhic adjudication similarly: "Phenomena are

psychological impulses that push pure thought on to its path. But at the moment that it begins to

move on its particular path it operates it movements not in subordinance to the phenomena, but

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[207] Ibid., 965.

[208] Ibid., 956.

[209] Ibid., 972.

[210] Soloveitchik, *HaMa*, 24.

[211] Kaplan, "Rabbi Joseph B. Soloveitchik's Philosophy of Halakha," 153.

[212] Soloveitchik, "Beloved," 228–229.

rather in obedience to its normative-ideal lawfulness that is particular to it."[213] The human significance of halakhic problems is merely the stimulus for the halakhic-legal decisor; they do not impinge on halakhic-legal practice itself. Soloveitchik offers an example: When presiding over the case of an *agunah*, a woman abandoned by her husband and "chained" to a failed marriage due to her inability to validly divorce him, the decisor concerns himself only with the relations between halakhic norms and halakhically significant facts and not his emotional response to the case.[214] The legal justification of his ruling results from its coherence with other legal forms and relations.

On the basis of statements like these some scholars and halakhic-legal practitioners have identified Soloveitchik's theory of halakha with formalism. Sagi identifies three characteristics of his theory of halakha: (a) Halakha is a human creation in that while God is its legislator, he gives human beings wide authority to develop it. Sagi concludes, however, that this grant of creative license is restricted to theoretical halakha, while Soloveitchik's view of halakhic-legal practice is better characterized as the discovery of preexisting legal relations. (b) Halakha is a closed system. It is not influenced by historical changes or extra-halakhic considerations but only operates according to its own internal logic. (c) Halakha is a "pure and abstract conceptual system."[215] While Sagi casts doubts about the adequacy of Soloveitchik's theory of halakha as a description of actual halakhic-legal practice, he characterizes it as formalist.

Ross recognizes that Soloveitchik's claims in *HaMa* may be phenomenological but ascribes formalism as an asserted view to his disciples and attributed to him by them. They "portray…the

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[213] Ibid., 223–224.

[214] Ibid., 224. See Chapter Three for further discussion of the *agunah*.

[215] Sagi, "Rabbi Soloveitchik and Professor Leibowitz as Theoreticians of the Halakha."

validity of any religious act and experience as determined *only* by formal halakhic categories."[216]

This view comes in two varieties: a maximalist position and a "softer" application. Maximalists "view…the scope of formal halakha as all-encompassing, acknowledging the possibility of legal lacunae only with regard to questions of application and not with regard to substance. Ideally, every action, decision, judgment, and evaluation…is subjected to the prism of the internal, metahistorical conceptual categories for ultimate validation and justification." "Softer" formalist approaches adopt a distinction between "pure" halakha and public policy. In the realm of pure halakha they agree with the formalists, while recognizing situations and concerns that are not governed by formal halakha.[217] Still, both of these views endorse formalism and attribute it to Soloveitchik in the areas they identify as belonging properly to the halakha. While Ross herself expresses doubts about attributing either type of halakhic formalism to Soloveitchik, she does not substantiate these doubts.

2. Halakhic Non-Formalism

In fact, Ross is correct to hesitate in attributing a formalist theory of halakha to Soloveitchik. As before, the views described in *HaMa* and "Beloved" are contained in phenomenological investigations of the Brisker talmudist, who is not identical with Soloveitchik himself. He intimates as such in *HaMa*, and "Beloved" is a eulogy for his uncle, Rabbi Yitzchok Zev Soloveitchik (1886-1959). And while he seems to endorse the view in his letter, there he

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[216] Ross, *Expanding the Palace of Torah*, 67.

[217] Ibid., 68.

discusses theoretical halakhic inquiry (*lomdus*) as opposed to halakhic-legal practice (*psak*),[218]

and even then certain non-formalist elements are evident.[219]

Moreover, when his own halakhic-legal practice is examined, non-formalist elements are evident. Among Soloveitchik's recently published correspondence are letters that contain responses to halakhic-legal queries; they are halakhic-legal responsa that demonstrate his actual engagement in halakhic-legal practice. While some of the details of the rulings are discussed below, at this point the methodological remarks that introduce two of the responsa are of central concern for they illuminate his theory of halakha.

The first case concerns the permissibility of the depiction of human images on stained glass windows in a planned interfaith chapel at Cornell University. An Orthodox Jewish faculty member on the planning committee of the chapel wrote to Soloveitchik to determine his view.[220] In introducing his responsum, Soloveitchik writes,

> The subject matter must be analyzed under both a formal and a philosophico-halakhic aspect. Since the problem has arisen under unique social circumstances, halakhic formalism and syllogism will not suffice to solve it. Certain historical realities with their deep-seated philosophical meaning must be taken into account. Such an approach is not a novelty in the history of Halakhah, and many a time our rabbis preferred it to the purely abstract analysis.[221]

In contrast to the view expressed in *HaMa* and other texts, Soloveitchik here distinguishes between two modes of halakhic analysis: formal and "philosophico-halakhic." The former does not suffice for problems that arise under unique historical and social conditions. In these cases an approach that comprehends the philosophical import or meaning of these conditions must be

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[218] Soloveitchik, *CCC*, 274.

[219] Ibid., 276.

[220] Soloveitchik responds both to the specific query as well as the general permissibility of an interfaith chapel, despite not being asked the latter question. He answers that both the images and the interfaith chapel are prohibited.

[221] Soloveitchik, *CCC*, 4.

employed. The nature of this other approach and its connection to Soloveitchik's justification of

halakhic norms is explored below, but clearly he recognizes that formalism is inadequate in

halakhic-legal practice.

The non-formal elements of his halakhic-legal practice are even more apparent in another

case. This question was addressed to Soloveitchik by Dr. Samuel Belkin, then president of

Yeshiva University. Written during the Korean War, it concerns the permissibility of establishing

a lottery to select rabbinic students to serve as military chaplains. Non-compliance with the

lottery would be met with professional sanctions. The halakhic issue concerns both the

permissibility of an individual putting himself in a situation, such as a military theater, where he

will likely be forced to violate halakhic norms and compelling an individual to enter such a

situation. In introducing his halakhic-legal analysis, Soloveitchik writes,

> I have undertaken the research into the halakhic phase of this problem, which is fraught with
> grave political and social implications on the highest level of public relations, with utmost
> care and seriousness. Yet, I cannot lay claim to objectivity if the latter should signify the
> absence of axiological premises and a completely detached emotional attitude. The halakhic
> inquiry, like any other cognitive theoretical performance, does not start out from the point of
> absolute zero as to sentimental attitudes and value judgments. There always exists in the
> mind of the researcher an ethico-axiological background against which the contours of the
> subject matter in question stand out more clearly. In all fields of human intellectual endeavor
> there is always an intuitive approach which determines the course and method of the
> analysis. Not even in the exact sciences (particularly in their interpretive phase) is it possible
> to divorce the human element from the formal aspect. Hence this investigation was also
> undertaken in a similar subjective mood. From the outset I was prejudiced in favor of the
> project of the Rabbinical Council of America and I could not imagine any halakhic authority
> rendering a decision against it. My inquiry consisted only in translating a vague intuitive
> feeling into the fixed terms of halakhic discursive thinking.[222]

Soloveitchik rejects a mode of halakhic-legal analysis that does not include emotions and values;

halakhic-legal practice does not abstract from emotional reactions and axiological judgments. He

does not cast off objectivity as such, only an objectivity that purports to exclude these elements.

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[222] Ibid., 24–25.

He claims that in this it is no less objective than the exact sciences, though he qualifies the claim to their "interpretive phase," which may refer to the stage of reconstruction. Recall that it is this stage of scientific inquiry that involves the reintroduction of qualitative elements. He describes his task as the translation of an "intuitive feeling" into the terms of halakhic discourse. Again, the nature of this halakhic intuition is discussed below, here it is enough to note the incongruity of emotionally tinged and axiologically oriented intuition with halakhic-legal formalism.

In addition to recognizing the role of emotions and values in the initial phase of halakhic-legal practice, Soloveitchik recognizes a further stage in rendering a halakhic decision that he explicitly describes as transcending formalism:

> Secondly, I have examined the problem in a double perspective. (A) I employed the method of *pure halakhic formalism* which abstracts from all exigencies of practical life and places the problem on an ahistorical conceptual frame. (B) I availed myself of the method of *applied Halakhah* which transposes abstractions into central realities, theory into facts. No halakhic investigation would be true [to] itself save as a practical *organon*. Under this aspect I gave thought not only to halakhic speculation but also to the concrete situation.[223]

Halakhic formalism is insufficient for halakhic-legal practice and must be transcended to deliver halakhic-legal decisions.

Soloveitchik's approach to halakhic-legal practice therefore cannot be characterized as halakhic formalism. In recognizing the role of affective and axiological intuition, an understanding of the "philosophico-halakhic import" of historical realities, and a gap between the formal halakha and its application, non-formal elements are introduced. Indeed, Blidstein writes that these responsa provide a counter-point to the position that "Soloveitchik viewed the halakhah as the realm of the *a priori*, impervious to social reality, and as subject to a method partaking more of mathematics than of the human sciences,"[224] which was based on *HaMa*. On

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[223] Ibid., 25.

[224] Blidstein, *Society & Self*, 38.

the contrary, "one can sometimes find in these documents a constructive interaction between halakhic positions and extra-halakhic values and concepts."[225] Whether these are, in fact, "extra-halakhic" values and concepts is discussed below. And while Blidstein hesitates over whether this is merely in Soloveitchik's explanation of his rulings as opposed to their substance, his methodological remarks are clear that these elements should be operative in halakhic-legal practice. Thus, while he may articulate halakhic formalism in his descriptions of the approach of Brisk and in his own theoretical halakhic inquiries, when he expresses his approach to halakhic-legal practice it is decidedly non-formalist. Some features of this halakhic non-formalism and its connection to his justification of the halakha are now discussed. This allows another attempt to describe Soloveitchik's theory of halakha in terms of contemporary legal theory.

B. Halakhic Non-Formalism and Halakhic-Legal Practice

Ta'amei ha-mitzvot₂ and the philosophical account of halakha upon which it is based play a significant role in Soloveitchik's non-formalist theory of halakha. This influence can be seen in two areas: his two-tiered account of halakhic-legal authority, which includes his view of decision-making, (1) and his general halakhic-legal conservatism (2).

1. Halakhic-Legal Authority and Decision-Making

The supposition that Soloveitchik holds a formalist conception of halakha obscures his complex position on halakhic-legal authority and decision-making. In fact, he recognizes two subjects of halakhic-legal authority: rabbis, or rabbinic bodies, and the Jewish people. Rabbinic authority derives from three sources and, correspondingly, the decision-making of rabbis operates according to diverse procedures.

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[225] Ibid.

The first source of rabbinic authority is intellectual authority. In *HaMa*, Soloveitchik writes that the halakhic man "recognizes no authority other than the authority of the intellect…."[226] This view of authority is not alien to the formalist conception of halakha: rabbis have authority by virtue of their knowledge and proficiency in discovering the relations among halakhic concepts. However, as noted above, Soloveitchik also introduces the notion that intuition plays a role in halakhic-legal decision-making. In connection with the permissibility of religious Zionist cooperation with secular Zionist groups, he claims that "there exist problems for which one cannot find a clear-cut decision in the *Shulchan Aruch* (code of Jewish law); one has to decide intuitively."[227] Halakhic-legal decision-making does not involve merely operating formal halakhic relations and it is not simply a matter of discursive knowledge. But what is the basis for such intuition's authority and how is it achieved?

Soloveitchik hints at an answer in "Beloved," an otherwise formalist text. He describes his uncle, the subject of the eulogy, as a man who not only learned Torah but who was wed to it:

> When the division between man and Torah shifts entirely from its place not only do the forty nine gates of halakhic thought and cognition open before him, but also the forty nine gates of halakhic vision and feeling. Not just the intellectual soul, but also the soul possessing halakhic vision is given to him by God. The logical halakhic thought is provisioned from the pre-intellectual vision and prophecy, which bursts in a storm from the depths of his personality, which the holy presence washes over him. This mysterious intuition is the source of halakhic creation and innovation. The strict intellect, the master of precise definition and enlightening formula, only thinks what the visionary soul provides it. The man of halakha to whom the Torah is wed and joined "sees" halakhic contents, "feels" halakhic ideas like they were audial, optical, or olfactory, contents.[228]

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[226] Soloveitchik, *HaMa*, 79.

[227] Joseph B. Soloveitchik, *The Rav Speaks: Five Addresses on Israel, History, and the Jewish People* (Brooklyn: Judaica Press, 2002), 50.

[228] Soloveitchik, "Beloved," 219.

Halakhic intuition results from a profound internalization of the Torah. Surely the process by which the Torah is internalized involves intellectual study. But it also requires engagement in halakhic practice as a discipline. As a result, the individual is granted the ability to "feel" and "see" halakhic ideas. One who is wed to the Torah feels the affective responses encoded in it and perceives the values to which it grants access. He is thus able to draw on its emotional and axiological content to arrive at new halakhic-legal decisions. Thus, the rabbinic decisor, as a result of his formation by halakhic discipline, possesses the capacity to intuitively make authoritative halakhic-legal decisions.

Soloveitchik also uses the subjective component of halakhic norms to justify his own halakhic decisions. Recall that he claimed that besides the formal aspect, "central historical realities with their deep-seated philosophical meaning must be taken into account"[229] when he introduced his view on human images on stained glass windows in an interfaith chapel. Soloveitchik then reviews the "formal halakhic viewpoint." He notes that the Talmud records that the scholars Rav, Shmuel, and Levi worshipped in a synagogue in which a statue of the Babylonian king was erected, while they prohibited the placement of an image in a private house.[230] In the medieval period, however, the position was reversed: Human images were allowed in the home, while "the tradition as such…rejected them" in the synagogue. Soloveitchik upholds the medieval view. He then justifies the medieval rabbis' and his own deviation from the Talmudic ruling as follows:

> In order to find an adequate answer we must place the problem in a philosophical and historical perspective. The human figure as a decorative motif in the synagogue conflicts with the very essence of prayer. The latter expresses the creature-consciousness—i.e., the awareness of absolute dependence on and surrender to God. The feeling of centrality of man

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[229] Soloveitchik, *CCC*, 4.

[230] BT Rosh Ha-Shana 24 and BT Avoda Zara 43.

is superseded by one of helplessness, worthlessness and wretchedness. Since any anthropomorphic emblem in the synagogue conveys an anthropocentric idea—it places emphasis on the unique role that has been assigned to man—such a design was ruled out. In the case of the Babylonian synagogue, the king's effigy served as a mere political symbol placed, in all probability, by a royal edict and did not constitute an aesthetic or decorative pattern designed to introduce the motif of axiological supremacy of man into the religious experience—and that is the reason why the Rabbis did not raise any objection to the display of the statue. However, there is a more cogent reason which explains the deviation of practice from Talmudic theory, and this is to be sought in historical circumstances which necessitated such a change. The icon in the Christian world is a typical ecclesiastical motif that suggests to us the Christological idea of God-man which is associated according to Christian faith with the very act of worshipping, *deus absconditus* being too remote and transcendent to be approached through the medium of worship. Hence, the unequivocal iconoclastic attitude of Judaism toward the display of human images in the house of worship. To what our sages in a non-Christian Babylonia did not object, our forefathers in Christian countries were very susceptible. I wish to emphasize that this was not merely a medieval addendum to the law but it expresses its very spirit. As I have emphasized before, the law prohibits the representation of any figure or form which only alludes to a cultic motif, and the human figure in the synagogue, though its objective meaning be of artistic nature, comes under this category.[231]

In addition to Soloveitchik's recognition of the role of historical change in halakhic-legal development, the most significant feature of this position is that it uses the values and affects embedded in halakhic norms to justify a halakhic-legal decision. The essence of prayer is "creature-consciousness," which includes the feelings of "helplessness, worthlessness and wretchedness" and the axiological subservience of man to God. Unless a human image has an alternate purpose, such as a political statement, it conflicts with the essence of prayer because it asserts the axiological supremacy of man and expresses emotions like power, worth, and majesty. Soloveitchik prohibits the depiction of human images in synagogues because it conflicts with the affective and axiological content of Jewish prayer. Presumably, he determined these contents through either halakhic intuition or discursive reconstruction. In either case, his account of the justification of halakhic norms has a direct influence on his halakhic-legal practice.

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[231] Soloveitchik, *CCC*, 6–7.

Soloveitchik recognizes a third source of rabbinic authority: representation. In a lecture on "Recalling the New Month and the Intermediate Festivals" he discusses the nature of rabbinic authority to declare a new month. Some background is necessary: When the Sanhedrin was active new months were declared when it received two valid witnesses attesting to the advent of a new moon. Since the dissolution of the Sanhedrin, however, a pre-calculated solar-lunar calendar is followed. The point of departure of Soloveitchik's discussion is certain liturgical issues relating to the service for a new month and the basis for declaring the new month without the Sanhedrin. He claims that even during the time of the Sanhedrin, "though the essence of the sanctification was done by the court, the court did not sanctify with a doctrine of independent authority, but in the name of all of Israel, and the true sanctifiers are all of Israel in all their lands of habitation, who establish the month by accepting the sanctification of the month…."[232] The Sanhedrin only had authority in this matter because it represented the Jewish people. Now that the former no longer exists, the authority to establish new months reverts to the latter. Elsewhere, Soloveitchik describes this representational authority as accounting for those aspects of the authority of contemporary rabbis that extend beyond the strict domain of halakha.[233]

However, if rabbinic authority is based, at least to a certain extent, on its representation of the Jewish people, the Jewish community itself possesses halakhic-legal authority. Despite generally being a vigorous defender of rabbinic prerogatives,[234] Soloveitchik thus recognizes a role for lay authority.[235] Significantly, in the lecture on the new month he claims that the community's

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[232] Soloveitchik, *SZAM*, vol. 1: 150. See Blidstein, *Society & Self*, 94–104 for further discussion.

[233] Soloveitchik, *The Rav Speaks*, 190.

[234] Walter Wurzburger, "Rabbi Joseph B. Soloveitchik as Posek of Post-Modern Orthodoxy," in *Exploring the Thought of Rabbi Joseph B. Soloveitchik*, ed. Marc Angel (Hoboken: Ktav, 1997), 3–24.

[235] Blidstein, *Society & Self*, 95–96.

authority was manifested in its *practice* of recognizing the declarations of the Sanhedrin in the past and, currently, of following the fixed calendar.

The division between the intellectual, intuitive, and representational authority of the rabbinate and the practical authority of the people is made explicit in Soloveitchik's lecture "Two Types of Tradition." Soloveitchik's discussion is complex and concerns certain claims made by Maimonides about halakhic norms that the latter holds derive from Sinai and which are thus not subject to dispute. However, it is difficult to interpret Maimonides' claim of their origin literally, and the Talmud itself records disputes about them. Soloveitchik explains:

> There are two traditions: A) One tradition is entirely related to the tradition of learning, argument, give and take, and intellectual instruction, that one says this and this one says that, this one gives a reason for his view and that one gives a reason for his view, and they take a count, just as the Torah describes in the case of the rebellious elder. B) A practical tradition of the behavior of the Jewish community in the fulfillment of the commandments and this is founded on the verse, "ask your father and he will tell you, your elder and he will inform you."[236]

Beyond the well-known claim that the Jewish tradition is dual, comprised of a Written Law and an Oral Law, Soloveitchik argues that it is comprised of both an intellectual and practical tradition. The intellectual tradition is one of argumentation, where positions are transmitted discursively. In principle, it is open to alteration because halakhic positions are accompanied by their justifications, which can be challenged, defeated, and revised by succeeding generations. An authorized view is adopted by majority vote, though if later argument swings the balance another view can be adopted. The participants in this tradition are those with the intellectual capacities and knowledge to contribute to it: the members of the rabbinate. In contrast, the practical tradition is one of action, where behaviors are transmitted mimetically. Practices are transmitted without their justifications and cannot be revised. The participants in this tradition

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[236] Soloveitchik, *SZAM*, vol. 1: 249.

are the entire Jewish people, whose collective practice establishes certain behaviors as authoritative. The relation between these two traditions is not static. Norms that had once been part of the intellectual tradition can be incorporated into the practical tradition as a result of being accepted in practice by the Jewish people. In this case, even positions whose discursive "justifications" are known no longer derive their authority from them; rather, they are authorized by the practice of the Jewish people. Indeed, following Maimonides, Soloveitchik explains the indefeasible authority of the Talmud—a corpus of intellectual argumentation—as deriving from its acceptance in practice by the Jewish people.

Elsewhere, Soloveitchik introduces a seemingly different duo of traditions: an intellectual-moral and an experiential tradition. He identifies them, respectively, with the instruction of the father and demonstration of the mother. In his "Tribute to the Rebbetzin of Talne," he writes,

> People are mistaken in thinking that there is only one [tradition] and one [tradition] community; the community of the fathers. It is not true. We have two *massorot*, two traditions, two communities, two [chains of reception]—the [tradition] community of the fathers and that of the mothers…. What is the difference between those two *massorot*, traditions?... Father teaches the son the discipline of thought as well as the discipline of action. Father's tradition is an intellectual-moral one. That is why it is identified with *mussar*, which is the Biblical term for discipline…. What kind of a Torah does the mother pass on? I admit that I am not able to define precisely the [traditionary] role of the Jewish mother. Only by circumscription I hope to be able to explain it…. Most of all I learned…that Judaism expresses itself not only in formal compliance with the law but also in a living experience.[237]

The "intellectual-moral" tradition is clearly identical with the intellectual tradition discussed above; it is the heritage of halakhic-legal argumentation. Correspondingly, it is reasonable to conclude that the practical and the experiential traditions are identical with one another, though Soloveitchik does not claim this explicitly.[238] Not only are authoritative practices transmitted

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[237] Joseph B. Soloveitchik, "A Tribute to the Rebbetzin of Talne," *Tradition* 17, no. 2 (Spring : Special Issue 1978): 75–76.

[238] This identification is also made by Blidstein, *Society & Self*, 101–104.

mimetically but their corresponding experiences are as well. The practical tradition of the Jewish people is composed of objective practices and subjective states.

The authority of the Jewish people and its specifically practical-experiential nature is rooted in Soloveitchik's philosophical account of the halakha and *ta'amei ha-mitzvot₂*. The authority of the Jewish people corresponds to Soloveitchik's recognition of the charismatic social ego as the subject of religious cognition and objectification. The practical nature of this authority correlates with his view that the process from cognition to expression into norms and practices does not take place in an individual's consciousness and may not be discursively accessible or even reconstructable. The notion that this practical tradition is not static but dynamic agrees with his view that "the force and effectiveness of religion, grows commensurately with the increasing participation of the entire society in the religious drama, with continuing embodiments of its formless subjectivity and with the expansion of its objectified form and symbol."[239] The practice of the Jewish people thus plays a central role in the development of halakha. Lastly, the experiential component of the practical tradition coheres with his conception of halakha as a practice that both expresses affects and disciplines emotions.

A significant feature of Soloveitchik's conceptions of halakhic-legal authority and decision-making is that they are directly connected to the justification of halakhic norms, at least in the case of the intuitive basis for rabbinic authority and the practical authority of the Jewish people. If the reason for performing halakhic practice is to discipline oneself to respond appropriately emotionally and to perceive values accurately, then it is crucial that halakhic-legal authorities are actually in touch with this reality and formulate norms accordingly. Rabbinic intuition just is accurate affective cognition and the practice of the Jewish people is supposed to express it in

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[239] Soloveitchik, *HaMi*, 79.

action. Thus, if one accepts Soloveitchik's justification of the halakha, it is evident that these authorities should be followed.

2. Halakhic Conservatism

Another area in which Soloveitchik's justification of halakhic norms influences his halakhic-legal practice is its generally conservative approach. Soloveitchik is known as one of the most prominent halakhic decisors of modern Orthodox Judaism. One might thus expect that he holds a somewhat progressive approach to halakhic change, and, in fact, he argues for some of the signature positions that distinguish modern Orthodoxy from more rigid varieties of Orthodoxy, including endorsing secular studies, support for religious Zionism, and promotion of intensive Jewish education for women.[240] Despite these innovations, he practices a rather conservative form of halakhic-legal practice. This halakhic-legal conservatism is manifested in $ta'amei\ ha\text{-}mitzvot_1$ in that reconstruction begins with the codified halakhic norms and cannot revise them. But the basis for this is the philosophical account of halakha that comprises $ta'amei\ ha\text{-}mitzvot_2$.

This is made clear in *HaMi*. Soloveitchik moves quickly from his philosophical account of halakha to an attack on "religious liberalism." He writes,

> The basic error of religious liberalism is to be discerned less in its ideology than in its methodical approach. Liberalism has travelled the wrong direction—from subjectivity to objectivity—and in so doing has misconstrued both. Religious liberalism is based upon a very "simple' methodological principle. Subjective religiosity...is subordinated to the omnipotent authority of time and change…. Let us admit that modern religious subjectivism is indeed incommensurable with the objective order sanctioned by tradition. One is still tempted to ask how the fathers of contemporary liberalism intend to mould a modern religious act out of the "new" chaotic mass of subjectivity? The method of objectification is, of course, at their disposal. They may project subjective flux upon externality and create a new artificial objective order. But this very method is fallacious…. The fallacy of this movement lies in its utter lack of methodology. Where is the assurance that the philosophers, while exploring modern religious subjectivism, have not erred and strayed?... The liberals of today, instead of religious subjectivity, plunge mistakenly into some other subjective

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[240] Wurzburger, "Rabbi Joseph B. Soloveitchik as Posek of Post-Modern Orthodoxy," 5.

"order"—the moral or aesthetic. There being no boundary line in the subjective sphere, trespasses upon the territory of ethics and aesthetics occur unwittingly.[241]

"Religious liberals" are historicists and claim that religious subjectivity is influenced, if not determined, by historical developments. They further claim that the objectified forms of the halakha are not consistent with the religious subjectivity of the modern individual. Soloveitchik grants for the sake of argument their first contention. However, he questions how they could determine the content of contemporary religious subjectivity besides using the method of reconstruction. They may attempt to express religious subjectivity anew, but then they risk tapping into other areas of consciousness besides the religious, for example the moral or the aesthetic. This argument evidently depends on the account of religious consciousness and its expression that also underlies Soloveitchik's justification of halakhic norms.

This dependence is also expressed in a lecture entitled "Korah and the Commonsense Rebellion against Torah Authority."[242] Here the connection between halakhic-legal practice and halakhic discipline is made central. In Soloveitchik's telling, "Korah...posited that any intelligent person could interpret halakha using common sense; that halakhic analysis was an exoteric competence derived from empirical experience."[243] Korah was a proponent of halakhic egalitarianism and questioned the need for halakhic-legal authority. According to Soloveitchik, "This is a view echoed by modern day 'ritual committees' or the 'responsa commissions' of those unlearned in the intricacies of the halakha. They call their approach 'creative halakha.'"[244] In truth, in a manner similar to science, halakhic norms are not directly derivable from empirical

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[241] Soloveitchik, *HaMi*, 89–90.

[242] Similar points are also made in "Beloved," 247.

[243] Soloveitchik, *Shiurei Harav*, 104.

[244] Ibid.

experience; rather, they are the objectification of religious experience. One must know how to

operate the objectified relations to be a master of halakha. Korah, however,

> was arguing on behalf of religious subjectivism, proclaiming that faith, the inner emotional
> experience as paramount…. According to this approach, the *mitzva*, the outer deed, is
> secondary to the inner feeling. It has value only insofar as it reflects or stimulates or
> otherwise relates to one's inner mood…. [T]he *mitzva* lacks its own integrity and sanctity,
> and is no more than a useful tool for eliciting an inner experience. What follows from this
> reasoning is that the *mitzva* form should be modified in accordance with the changing times
> and even in accordance with the varying subjectivities of different individuals. Is this not
> precisely the argument of the deviationists today who are ready to reinterpret, provide
> substitutions for, or entirely discard *mitzvot*, presuming some higher moral objective under
> the guise of *Rahmana liba ba'i* [the Merciful One desires the heart]? They use 'common
> sense' to gauge the utility, relevance, and 'therapeutic value' of each *mitzva*…. Logically
> Korah was right, if, and this is crucial, the only purpose of the deed is to reflect the
> experience. Actually, however, it is the external *mitzva*, not the inner experience which is
> primary. The Torah acknowledges a tension between objectivity… and subjectivity…. The
> *mitzva* is the realized experience, and the emotion itself, a reflection of the *mitzva*. It is the
> external act which is primary, while the emotion itself seeks to interpret and reflect the act.
> The only solid reality is the *mitzva*, whose integrity and dimensions the halakha can control.
> The intangible and vacillating inner emotion must follow, reflect, and be disciplined by, the
> outer *mitzva*.[245]

Korah and contemporary religious liberals believe that religious practices must either directly

reflect or immediately stimulate emotional experiences. Thus, religious norms must be altered

either to accurately mirror modern individual's religious subjectivities or to evoke the religious

feelings that resonate with them. In contrast, Soloveitchik argues that halakhic discipline must be

primary for the individual. Her emotions must be formed by the norms and practices instead of

determining them.[246] Soloveitchik does not reject the connection between commandments and

religious experience itself, just the direction of that connection for the individual. His

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[245] Ibid., 106–107.

[246] Ibid., 108. Soloveitchik also raises the issue of the confusion of subjective domains here.

justification of halakhic norms thus supports his general halakhic conservatism by arguing that a direct return to religious subjectivity both misses its aim and negates halakhic discipline.[247]

C. Legal Problems

Despite its coherence with his justification of halakhic norms, there are a number of problems with Soloveitchik's theory of halakha. First, besides ruling out a strictly formalist conception of halakha and halakhic-legal practice, it is difficult to determine the precise nature of his halakhic non-formalism. His recognition of the role of values in halakhic-legal decision-making makes it compatible with inclusive legal positivism, natural law, and the post-positivist approach associated with Ronald Dworkin. Inclusive legal positivism conforms to standard definitions of positivism in that it claims that laws are constituted by human practices (the social thesis), and therefore there is no necessary connection between law and morality (the separability thesis). But it also recognizes that legal systems may incorporate moral values into its laws. Conformity with these values could then determine the validity and interpretation of laws. However, the basis for the authority of these values within the legal system is not because of their extra-legal significance but because of their having been positively incorporated.[248] Natural law, in contrast, grants standing to moral values in the validation and interpretation of laws regardless of whether the legal system has recognized them. There is thus an "essential (conceptual, logical, necessary) connection between law and morality."[249] Post-positivism is

[247]Cohen also makes the connection between Soloveitchik's philosophical account of halakha and his halakhic conservatism, but the points he marshals suffer from a lack of clarity. See Cohen, "Incompatible Parallels," 185.

[248] See Marmor, *Philosophy of Law*, 92ff; Coleman and Leiter, "Legal Positivism," 251–252; and Kenneth Einar Himma, "Inclusive Legal Positivism," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford UK & New York: Oxford University Press, 2004), 125–65. See Chapter Three of this study for further discussion of inclusive positivism.

[249] Jeffrie G. Murphy and Jules Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* (Totowa NJ: Rowman & Allanheld, 1984), 11ff. For further background see Brian Bix, "Natural Law Theory," in *A Companion*

difficult to locate. It recognizes that judges must work within their tradition of jurisprudence to render a decision but claims that at the same time they must offer interpretations of that tradition that justifies it morally.[250] There is thus a combination of positivist and natural law features.

Inclusive legal positivism does not cohere with Soloveitchik's basic justification of halakhic norms. The values encoded in the halakha are authoritative for him because they correspond to objective values. Indeed, Soloveitchik seems to subscribe to a "classic" version of natural law theory, in which "the moral order is part of the natural order—moral duties being in some sense "read off" from essences or purposes fixed (perhaps by God) in nature."[251] However, a natural law approach does not resonate with his reluctance to allow explicitly "external" moral values to play a role in halakhic-legal argumentation. For him the values operative in halakhic-legal practice must be *halakhic* values. Correspondingly, while natural law is congruent with Soloveitchik's basic justification of halakhic norms, it fails to account for his theory of halakha. Post-positivism may provide the requisite balance to account for both of these elements. Additionally, its interpretive approach to adjudication fits with Soloveitchik's recognition of non-deductive elements in halakhic-legal decision-making, such as intuition. However, it does not establish a causal or ontological connection between values and legal norms in the way

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to Philosophy of Law and Legal Theory, ed. George Patterson (Oxford UK & Malden MA: Blackwell, 2003), 223–40; John Finnis, "Natural Law: The Classical Tradition," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford UK & New York: Oxford University Press, 2004), 1–60; and Brian Bix, "Natural Law: The Modern Tradition," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford UK & New York: Oxford University Press, 2004), 61–103.

[250] For an early expression of this view, see Ronald Dworkin, "The Model of Rules," in *Philosophy of Law*, ed. Joel Feinberg and Jules Coleman (Belmont CA: Wadsworth/Thomson Learning, 2004), 82–99. For a more developed discussion, see Ronald Dworkin, *Law's Empire* (Cambridge MA: Belknap, 1986), esp. 225–275. For analysis see Marmor, *Philosophy of Law*, 97–108. See Chapter Three of this study for further discussion of Dworkin's approach.

[251] Murphy and Coleman, *The Philosophy of Law*, 15.

Soloveitchik's approach does nor does it explain legal authority and decision-making in terms of this connection.

Additionally, Soloveitchik's conception of halakhic-legal authority is problematic. First, his identification of the authority of the rabbinate as deriving from intellect, intuition, and representation should commit him to a meritocratic approach to rabbinic authority. It should be open to anyone with the requisite knowledge and training that is recognized by the community. However, this conflicts with current Orthodox halakhic norms that restrict the privilege of rabbinic ordination and significant halakhic-legal decision-making to men.[252] While Soloveitchik does not comment directly about the possibility of women rabbis as a practical matter,[253] his general opposition to halakhic gender egalitarianism seems to preclude recognition of them. When forced to explain women's different set of halakhic privileges and obligations, Soloveitchik takes refuge in diverse strategies. Sometimes he combines positivist and formalist approaches, writing that women's "exclusion from the public, political realm emerges out of the unique halakhic structure which has an esoteric justification not subject to commonsense evaluation…. Rather, it is a derivation from a unique conceptualized structure which operates on its own imperatives."[254] Other times, his approach is more metaphysical. In explaining a legal assumption about the desire of women to be married that contributes to the halakhic difficulty of

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[252] For helpful and contrasting discussions of the sources and issues, see Hershel Schachter, "Women Rabbis?," *Hakirah, the Flatbush Journal of Jewish Law and Thought* 11 (Spring 2011): 19–23; and Michael J. Broyde and Shlomo Brody, "Orthodox Women Rabbis? Tentative Thoughts That Distinguish Between the Timely and Timeless," *Hakirah, the Flatbush Journal of Jewish Law and Thought* 11 (Spring 2011): 25–58. While Schacter and Broyde differ on what the precedents establish, it is striking that both decisors conclude, albeit for different reasons, that women should not be ordained.

[253] Indicative of Soloveitchik's contested legacy, both Schachter and Broyde attempt to show that Soloveitchik agrees with them, or at least does not disagree with them. See Schachter, "Women Rabbis?," 19–20; Broyde and Brody, "Orthodox Women Rabbis? Tentative Thoughts That Distinguish Between the Timely and Timeless," 44 fn. 31.

[254] Soloveitchik, *Shiurei Harav*, 110.

dissolving failed marriages, he claimed that it derives from "permanent ontological principles rooted in the very depth of the human personality—in the metaphysical human personality—which is as changeless as the heavens above."[255] There is thus a conflict between the egalitarian implications of Soloveitchik's conception of rabbinic authority and his likely response to women rabbis.

Moreover, Soloveitchik's diverse justifications of rabbinic authority are in tension with one another. They express different basic conceptions of authority and the relation between authorities and their subjects. The representational dimension of rabbinic authority is democratic: Rabbis possess authority because they represent the Jewish people. Indeed, Soloveitchik, following Maimonides, argues that certain types of rabbinic enactments lack validity if not accepted by the Jewish people.[256] The intellectual dimension of rabbinic authority is in principle egalitarian, even if not in practice. Though the intellectual attainment requisite for authority may be the achievement of the few, decisions reached through discursive reasoning are accessible even to those who could not have reached the conclusions themselves. Such an authority can be called upon to rehearse his reasoning to those who are not his intellectual equal and justify his decision to them. Still, in the final analysis, the rulings of this authority do not depend on its acceptance by its subjects. Soloveitchik recognizes that in halakhic-legal rulings that depend on expertise with Biblical and rabbinic texts communal acceptance is irrelevant for validity.[257] In contrast, the intuitive dimension of rabbinic authority is entirely unegalitarian. Intuition, even when identified with a capacity resulting from training and not mystical insight, seems to

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[255] Cited in David Hartman, *The God Who Hates Lies: Confronting and Rethinking Jewish Tradition* (Woodstock: Jewish Lights, 2011), 149.

[256] Soloveitchik, *SZAM*, vol. 1: 241–245.

[257] Ibid.

preclude justification. Invocations of privileged intuition are elitist and render authority

unaccountable. Indeed, Kaplan, an otherwise sympathetic interpreter of Soloveitchik, charges

him with complicity in the development of the ideology of *da'at torah*, which gives unbounded

authority to Torah scholars who are not answerable to the Jewish community.[258] Soloveitchik's

theory of halakha thus encompasses conflicting stances on the relation of authorities to their

subjects.

Soloveitchik also illicitly creates an overly rigid and one-way relation between the

intellectual tradition and the experiential-practical tradition. According to him, elements of the

intellectual tradition can be incorporated into the experiential-practical tradition. They then no

longer need discursive justification and, indeed, become irrevisable. The notion that ongoing and

unproblematic practices do not require discursive justification is a cogent point that recognizes

the pragmatic nature of justification. However, the claim that this renders these practices

incorrigible goes too far. A fully dynamic and two-way relation is more plausible, in which

behaviors can also fall out of practice for any number of reasons, including technical or moral

problems. They would then require discursive justification for their claim to normativity to be

vindicated. As it stands, the relation between the intellectual and experiential-practical traditions

only allows for more halakhic norms to become indisputable. It thus expresses Soloveitchik's

generally conservative orientation to halakhic-legal change.

As has been shown, this orientation, along with other elements of his halakhic-legal practice,

depends on *ta'amei ha-mitzvot₂*. This is a positive conclusion insofar as it demonstrates that there

is an underlying, though not obvious, coherence between his justification of halakhic norms and

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[258] Lawrence Kaplan, "'Even If They Tell You That Left Is Right and Right Is Left, Listen to Them': The Multiple Roots and Functions of Da'as Torah" (presented at the "Agents of the Divine": Reflections on Judicial, Papal and Rabbinic Infallibility Conference, Cardozo Law School, Yeshiva University, New York, 2012).

theory of halakha. However, as argued above, a number of epistemological and metaethical problems plague this justification. Indeed, Soloveitchik's philosophical account of halakha, upon which *ta'amei ha-mitzvot₂* is based, includes a number of premises that have not been sufficiently supported. Consequently, in addition to the difficulties with his theory of halakha itself, to the extent to which his philosophical account of halakha is unpersuasive the latter is even more problematic.

III. Conclusion: Issues and Insights

Soloveitchik presents two approaches to the relation between philosophy and halakha: the halakhic philosophy approach and a philosophical account of halakha. These, in turn, correspond to two accounts of the reasons for halakhic norms: *ta'amei ha-mitzvot₁* and *ta'amei ha-mitzvot₂*. The former involves the method of reconstruction, however that is interpreted, and is meant to provide the basis for an autonomous Jewish philosophy out of the sources of halakha. The latter derives from the philosophical account of halakha and justifies halakhic norms as both expressions of Jewish collective consciousness's affective cognition of reality and a practice that disciplines the individual to perceive values veridically and respond appropriately emotionally.

These two accounts do not compete with one another: *Ta'amei ha-mitzvot₂* is more fundamental. It explains why reconstruction is necessary as a method for deriving the reasons for specific halakhic norms: Despite the realism of Soloveitchik's epistemology, the subjective correlates of halakhic norms are inaccessible directly. Moreover, only it justifies the normativity of halakhic practices through its realistic epistemology and conception of halakhic practice as a discipline. This explains Soloveitchik's focus on experiential halakhic norms and the way they serve as prototypical commandments for him. Lastly, while *ta'amei ha-mitzvot₁* is subordinate to halakhic-legal practice, *ta'amei ha-mitzvot₂* warrants that subordination. Indeed, it grounds

elements of Soloveitchik's non-formalist theory of halakha, including his conceptions of halakhic-legal authority, view of halakhic decision-making, and halakhic conservatism.

Nevertheless, difficulties remain in Soloveitchik's positions, which raise more general questions about justification and authority. He provides an accurate phenomenology of normativity: norms and values are experienced as strictures that can be violated but that ought not be. However, he does not philosophically vindicate this experience. He appeals to a form of normative realism, in which values and norms exist as objective values and natural laws. But the ontological "queerness" of these axiological and moral facts and the lack of intersubjective agreement about them are not adequately addressed. Various strategies to support his view have been noted, including distinguishing between halakhic values and moral laws and assimilating his view to a fitting attitude theory of values. It is unclear whether his view can tolerate such dilutions of its realism; however, they may be the best candidates for accounting for the diverse types of obligations included in normative discourse with varying (universal and particular) scopes and the unforced force of normative obligations.

As mentioned, Soloveitchik also seems to recognize the pragmatic nature of justification. Practices do not stand under an *a priori* requirement of justification; when they are part of the practical tradition they are in order as they are. He also rightly notes that norms can transition from requiring justification to no longer requiring it; norms can become part of the practical tradition. However, he does not recognize a reverse process, in which practices that had previously not required justification are rendered problematic and now require it. This provokes questions about justification: it seems correct that practices do not initially require defense, but under what circumstances does it become necessary?

Additionally, Soloveitchik's theory of halakha is directly connected to his justification of halakhic norms. Thus, any problem with his justification of halakhic norms undermines his approach to halakhic-legal practice. Lastly, there is a tension among Soloveitchik's justifications of rabbinic authority, each of which describes a different relation between the authority and its subjects. Sorting out this relation is a desideratum for any account of legal authority. It must be ascertained whether the authority is a representative, an expert whose reasoning is in principle though perhaps not in practice accessible to everyone, or a possessor of intuition, whose insights are only available to the initiated.

Despite these problems, there are elements of Soloveitchik's philosophy of halakha that are insightful and should be preserved in any account of the relation between the justification of halakhic norms and halakhic-legal practice. First, when both the true nature of his justification of halakhic norms and his theory of halakha are uncovered, it becomes evident that they are strongly linked: The justification for the halakhic norms also explains their content. Normative justification and legal justification are thereby linked. Second, at least some forms of halakhic-legal authority and decision-making clearly track the justification of halakhic norms. It is thus clear why following halakhic-legal authorities allows one to achieve the aim of halakhic practice. Third, the conception of halakha as a discipline, the aims of which cannot be attained in one action, is rich and deserves further elaboration. Lastly, Soloveitchik seems to recognize the mixed nature of halakhic norms, including both particularistic halakhic values and universal moral laws. He does not adequately disentangle these strands, but this heterogeneity itself ought to be retained. Halakha contains both imperatives about what Jews ought to do and what everyone ought to do. Making sense of the nature of, and bases for, these different claims is necessary for any justification of halakhic norms and authority.

CHAPTER THREE

'The Wisdom of Torah Implementation': Berkovits' Halakhic Teleology

Eliezer Berkovits[1] rejects a predominant characteristic of modern Jewish thought: the reduction of Judaism to a private 'religion' modeled after Protestant Christianity.[2] Indeed, he claims that "Judaism is not a religion but a comprehensive religious civilization."[3] Moreover, for him Jewish civilization has one goal: to establish the world as the Kingdom of God. This means constructing an order that embodies the ideal of *sedeq*, a unity of justice and equity. This is the telos of the commandments and, consequently, halakhic-legal practice. Indeed, Berkovits articulates a teleological philosophy of halakha:[4] The commandments mandate actions for the achievement of this religious-*cum*-moral ideal. Halakha, in turn, is "the wisdom of Torah implementation."[5] Halakhic-legal practice is the implementation of the commandments to ensure that their purpose is advanced under changing circumstances. In the context of *ta'amei ha-*

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[1] Berkovits was born in Oradea (present day Romania) in 1908. He studied at the Hatam Sofer Yeshivah in Pressburg, Slovakia, and the Hildesheimer Rabbinical Seminary in Berlin. While at the latter, he also enrolled at the Friedrich-Wilhelm University in Berlin. In 1933-1934 he received his ordination and doctorate. From 1933-1939 he served as a communal rabbi in Berlin. After escaping Nazi Germany, he served as a communal rabbi in Leeds, U.K. (1939-1946), Sydney, Australia (1946-1950), and Boston, Massachusetts (1950-1958). In 1958 he became the head of the Department of Philosophy and Jewish Thought at the Hebrew Theological College in Skokie, Illinois; he also served as an unofficial communal rabbi in a local synagogue. In 1975 he moved to Israel where he engaged in research, publication, and private instruction. He died in 1992. See Meir Roth, "Eliezer Berkovits Keti'oratikan shel ha-Halakha [Eliezer Berkovits as Theoretician of Halakha]," Dissertation (Bar Ilan University, 2010), 385–388 for further biographical details.

[2] Batnitzky, *How Judaism Became a Religion*.

[3] Eliezer Berkovits, *Not in Heaven: The Nature and Function of Halakha* (New York: Ktav, 1983), 85 henceforth NFH; in this Berkovits echoes the views of Mordechai Kaplan. For Berkovits' most enthusiastic endorsement of these elements of Kaplan's thought see "Judaism: A Civilization," *Judaism* 30, no. 1 (Winter 1981): 53–58; see *Major Themes in Modern Philosophies of Judaism* (New York: Ktav, 1975), 149–191, henceforth MT, for his critique of Kaplan. Henceforth *MT*.

[4] I draw the label "teleological" from Ross, *Expanding the Palace of Torah*, 81. However, she does not develop it into a comprehensive description of Berkovits' philosophy of halakha.

[5] Berkovits, *NFH*, 1.

mitzvot, the commandments themselves are justified as means for achieving this end. The actions mandated by the commandments, however, have more complex relations to this end: Some are mere means, while others advance the order of *sedeq* by being themselves acts of *sedeq*.

Berkovits' justification of the commandments involves philosophical inquiry into the sources of moral normativity and motivation. Though he describes *sedeq* as morally attractive, he maintains that its normativity derives from God's command. In fact, he argues that only the divine will can ground unconditional moral obligation. He rejects human autonomy as a source of normativity in favor of "theonomy." Nevertheless, in his theory of halakha he claims that autonomy is redeemed in halakhic-legal practice. The Torah is "not in heaven."[6] Its realization is humanity's responsibility: Human beings must implement the Torah so as to achieve its purpose. In this, they are guided by halakhic principles which direct the implementation of the commandments. Halakhic-legal practice is guided by the goal of establishing the world as the Kingdom of God and realizing the ideal of *sedeq*. Berkovits thereby constructs a direct connection between the justification of the commandments and halakhic-legal practice, which results in a robust justification of halakhic practice. Yet, his theory of halakha is susceptible to two interpretations, which have different implications for the share of autonomy in Judaism, the relation between *ta'amei ha-mitzvot* and halakhic-legal practice, and Jewish philosophy.

In the following, Berkovits' justification of the commandments and its relation to his theory of halakha is examined. It is first argued that he presents a teleological justification of the commandments. However, it is also contended that, among other problems, this justification relies on a controversial view of moral normativity (I). It is then contended that he presents a teleological theory of halakha as well. This creates a direct connection between the justification

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[6] See Deuteronomy 30: 12 and BT Bava Metzia 59b.

of the commandments and halakhic-legal practice, thereby presenting a robust justification of

halakhic practice. However, it is further contended that his theory of halakha is susceptible to

two interpretations. Some of the different implications of these interpretations are then explored

and their adequacy is assessed. Lastly, difficulties with his theory of halakha are catalogued. The

most important of these problems results from the very same feature of his approach that is

responsible for the robustness of his justification of halakhic practice and raises a general

question about the relation between normative justification and legal authority (II).[7]

I. The Telos of the Commandments

In his major English work of philosophy of halakha, *Not in Heaven: The Nature and

Function of Halakha* (*NFH*), Berkovits writes,

> Halakha is the bridge over which the Torah moves from written word into the living deed.
> Normally there is a confrontation between the text, which is set, and life, which is forever in
> motion…. How to face the confrontation between the text and the actual life situation, how to
> resolve the problems arising of this confrontation, is the task of the *Torah she'baal Peh*, the
> Oral Law. This second Torah…accompanies the *Torah she'be'Ktav*, the Written Word, along
> its journey of realization in the innumerable concrete situations through which the Jewish
> people passes in the course of its history. It is the wisdom of Torah implementation in the
> daily life of the Jewish people. It renders Torah into *Torat Hayyim,* living teaching and
> relevant law…. Halakha is the application of the Torah to life.[8]

Berkovits draws a distinction between the Written Torah and the Oral Torah, and he identifies

the halakha with the latter. However, the halakha is not a text or body of knowledge but a certain

type of "wisdom," a wisdom of implementation. It is a practice the purpose of which is the

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[7] Berkovits aimed to compose comprehensive statements of Jewish philosophy. Nonetheless, examination of his literary corpus reveals many motifs that he never fully thematized. This justifies David Novak's judgment that most of his thought "is incomplete," a characteristic Novak incorrectly ascribes to Berkovits being an "essayist." See "A Relevant Traditionalist," *First Things*, June 2003, http://www.firstthings.com/article/2007/01/essential-essays-on-judaism-34. One of the goals of the present examination is to demonstrate some of the major impulses of Berkovits' thought that unite it into a coherent structure. This involves drawing out connections that, though not directly stated, are strongly implied. This does not mean that my goal is to harmonize his literary corpus, but it means that I read his works with charity and show how they *could* fit together.

[8] Berkovits, *NFH*, 1–2 transliteration in original.

realization of the Written Torah in the world. Thus, to understand Berkovits' philosophy of halakha it is necessary to comprehend his view of the Written Torah. In the following, a brief description of his approach to religious and philosophical inquiry is offered, which allows an initial interpretation of the status of his claims regarding the Torah and the halakha and which provides background for understanding many of his other positions (A). Then his account of *ta'amei ha-mitzvot* is examined, beginning with his view on revelation and the highest good (B), and proceeding to the way the commandments advance that good (C). The first part concludes with an evaluation of his justification of halakhic norms and of his general view on normative justification (D).

A. Philosophical and Religious Positivism: David Hume and Judah ha-Levi

Berkovits embraces positivism in both religious and philosophical inquiries. He claims that experience directly yields knowledge without the need for human contribution. This has consequences for his methodological approach to Jewish philosophy (1) and his philosophical and religious positions (2).

1. Methodological Positivism

Berkovits' methodological positivism determines what he takes to be one of the two criteria of adequacy for Jewish philosophy. In his *Major Themes in Modern Philosophies of Judaism* (*MT*)*,* a collection of essays devoted to the evaluation of the thought of twentieth-century Jewish philosophers, he concludes that they have failed to articulate adequate Jewish philosophies. He claims that "at this time we have neither a theology nor a philosophy of Judaism that does justice to the essential nature of Jewish teaching about God, man, and the universe as expressed in the classical sources of Judaism, nor one that can be maintained with contemporary philosophical

validity…. Judaism is awaiting a reformulation of its theology and philosophy. It will, however, be accomplished by means of an intellectual strength that draws its creative inspiration as well as its contents from the classical sources of Judaism—Bible, Talmud, and Midrash."[9] Jewish philosophy must have contemporary philosophical validity, but it must also correspond to the classical literature of Judaism.

In his own examinations of Jewish texts and practices, Berkovits gives the impression that his approach involves simple description. In *Man and God: Studies in Biblical Theology* (*MG*), he undertakes a thorough analysis of key Biblical words and phrases. He claims thereby to be able to answer theological questions, like "What is the faith, what is the message of the Bible…? What is the biblical teaching and testimony about God?"[10] His remarks about his method are meager, consisting only in an argument for reading the Bible as a single document.[11] Beyond this, the text need only be read with care to reveal "the message of the Scripture as a whole."[12] A similar method appears to characterize his study of the halakha. In introducing the rationale and method of *NFH*, he writes, "It is essential that Halakha regain its original nature and function. As a contribution toward that end, we have undertaken this study as an attempt to define the nature and purpose of classical Halakha. On the basis of what we have found, we have also given some indication of the direction in which we believe it is incumbent upon us to move in the present situation."[13] Berkovits advocates changes to contemporary halakhic-legal practice; however, he

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[9] Berkovits, *MT*, vii.

[10] Eliezer Berkovits, *Man and God: Studies in Biblical Theology* (Detroit: Wayne State University Press, 1969), 7. Henceforth *MG*.

[11] Ibid., 8. This claim is supported by shifting the object of interest from the prehistory of the Bible to its reception.

[12] Ibid., 7–8.

[13] Berkovits, *NFH*, 2.

sees these changes as restorative. He aims to return halakhic-legal practice to its "authentic"

state. To do that, he must first present an accurate description of the original nature and function

of halakha. Anticipating the attacks his project would receive from more conservative Orthodox

thinkers, he protests, "in…my work I was determined to be guided exclusively by the traditional

halakhic material as I found it and as I have learned to understand it over the years."[14] He thus

appears committed to the view that the nature and function of the halakha are antecedently given

facts accessible through methodical investigation. The aim of Jewish philosophy and philosophy

of halakha is simply to describe Judaism and halakha as found in their literary sources.[15]

2. Epistemological and Religious Positivism

Though Berkovits' methodological positivism is more of an implicit tendency than an

explicit position, his positivism is clearly articulated in his epistemological and religious

positions. The most extreme expression of this approach is his statement that "facts enjoy the

privilege of not having to conform to logic."[16] More cautiously, he maintains that reason only

operates *a posteriori* on the deliverances of experience. This epistemological position was

influenced by a particular reading of David Hume's philosophy.[17] In fact, he wrote his

dissertation, entitled *Hume and Deism* (*HD*), on Hume's philosophy of religion. While it is

mainly a work of history of philosophy, Berkovits argues that Hume was the first modern

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[14] Ibid.

[15] While this is the general theme of his approach, as will be discussed, there are also other impulses in his work.

[16] Eliezer Berkovits, *Faith After the Holocaust* (New York: Ktav, 1973), 75. Henceforth *FAH*.

[17] I use the term "positivism" despite the negative connotations it has developed instead of the more neutral "empiricism" because it is used by Berkovits himself and it draws out the affinities between his epistemological, hermeneutic, and legal views.

philosopher of religion and endorses his approach.[18] In his telling, Hume criticized deists like John Locke and John Toland for confusing philosophy with religion and thereby discovered the "inherent nature of religion and work[ed] out an appropriate research method."[19]

Hume's philosophy is based on what Berkovits describes as "critical positivism." The critical element anticipates that of Kant, in that it "investigates the nature of understanding, its capacities and limits."[20] But on the basis of this investigation it comes to "positivist" conclusions rooted in a "theory of human nature."[21] The validity of certain concepts, like causality and morality, are identified with psychological propensities in human nature to respond in specific ways to certain events, like the habit of associating conjointly recurring events with one another[22] and the feeling of sympathy[23] respectively. Similarly, Berkovits identifies Philo's arguments in the *Dialogues on Natural Religion* with Hume and interprets them as "show[ing] that it is impossible to base religion on reason alone."[24] But this skeptical claim is only to clear the ground for other sources, which are explored in the *Natural History of Religion*. There Hume reflects on religion on the basis of his "theory of human nature"[25] and locates its root in religious inclination or feeling.[26]

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[18] Eliezer Berkovits, "Hume und Deismus [Hume and Deism]," Dissertation (Friedrich-Wilhelms-Universität zu Berlin, 1933), 86. Whether Berkovits accurately describes Hume's philosophy of religion is immaterial; this work provides information about Berkovits' own philosophical premises, philosophy of religion, and theory of religion.

[19] Ibid.

[20] Ibid., 27.

[21] Ibid., 29.

[22] Ibid., 27.

[23] Ibid., 29.

[24] Ibid., 50.

[25] Ibid., 29.

[26] Ibid., 83.

The motivation for religion is not rational inquiry about the First Cause but the affectively impelled quest regarding God's relationship to humanity and the world.[27] Further, Hume claims that though the religious inclination is innate, it requires certain experiences to actuate it. His attention is thus drawn to historical religions, which for the deists had merely served as foils to true philosophical religion.[28] Nevertheless, Hume restricts himself to exploring the common experiences of fear and hope that initially trigger the religious inclination, for he is interested only in "exposing the motivating forces that lead man to religiosity."[29] Berkovits maintains that this query is separate from the question of the validity of religion, which can only be verified by particular historical experiences.

In Berkovits' major work of Jewish philosophy, *God, Man, and History* (*GMH*), he draws on Hume's critical positivism in the areas of theoretical philosophy (a), practical philosophy (b), and philosophy of religion (c) in order to ground the validity of Judaism on the basis of a unique historical experience.

(a) The core of Hume's critical positivism is his empiricist conception of reason. As articulated in *An Enquiry Concerning Human Understanding* this is the claim that ideas derive only from external and internal experience and from reflection on these experiences. Reason is not originative: It can only operate on ideas that derive from experience[30] and is concerned only with matters of fact or relations between ideas.[31] Thus, causal relations, the basic element of

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[27] Ibid., 34.

[28] Ibid., 52; 85.

[29] Ibid., 65 fn. 24.

[30] David Hume, "An Enquiry Concerning Human Understanding," in *Enquiries Concerning Human Understanding and Concerning the Principles of Morals*, ed. L. A. Selby-Bigge and P. H. Nidditch (Oxford UK: Clarendon Press, 1975), sec. II: 13.

[31] Ibid., sec. IV: Part I: 20.

theoretical knowledge, cannot be known with certainty. Belief in a causal relation between two events only arises from a habit to associate them after experiencing their constant conjunction. Purported laws of nature cannot be known with certainty, for they are simply based on the fact that they have not been violated yet.[32] Later in the work, however, Hume offers two related arguments against accepting testimony regarding the occurrence of miracles.[33] The first is based on the concept of a law of nature and its evidentiary weight relative to testimony about a miracle, and the second is based on the credibility of most reporters of miracles.

Berkovits marshals arguments drawn from Hume's empiricism in support of the possibility of the miracle of revelation to respond to Hume's own arguments against miracles.[34] First, he exploits the fact that Hume's argument is only aimed against accepting miracle reports. For the participants in God's revelation, however, "[t]he event itself brought the awareness of its own certitude."[35] Berkovits recognizes that this proves nothing for those who did not undergo the experience and thus undertakes to show both the possibility of the event and the credibility of testimony supporting it. His basic strategy is to assert the priority of experience over the claims of reason. He divides the question into two sub-questions: revelation's logical possibility and its practical possibility. As regards the former, he argues that *a priori* conceptions of God or the human being that rule out the possibility of revelation have no weight because the only knowledge that can be acquired about God or the human being derives from experience. And

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[32] Ibid., sec. IV.

[33] Ibid., sec. X.

[34] Berkovits revisited these arguments in "The Miracle: Problem and Rationale," *Gesher*, no. 7 (1979): 7–14.

[35] Eliezer Berkovits, *God, Man, and History* (Jerusalem: Shalem Press, 2004), 17. Henceforth *GMH*.

revelation is a type of experience.[36] Likewise, he argues that there is nothing in other experiences that could exclude its practical possibility, for "there cannot be anything in our experience that may exclude *a priori* the possibility of the emergence of some utterly unexpected event."[37]

However, this is not something Hume would have denied. Perhaps aware of this, Berkovits extends the argument beyond what Hume's empiricism would support. He contends that predictions based on probability only compare like cases to like cases. But the Bible claims that revelation is *sui generis*. First, the event only occurred once. Second, its character as a personal encounter between a human being and God places it outside of the boundaries of possible scientific knowledge. Evidence in support of it can only come from personal testimony.[38] He then turns to Hume's second argument and focuses on his claim that miracles are never attested by a group of men of "good sense," "integrity," and "credit and reputation" but by "ignorant and barbaric nations."[39] Berkovits demurs and claims that from what we know of the prophets' lives and messages the possibility they were lying or mistaken is so slight that admitting it would cast doubt on the very existence of honesty or verity.[40]

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[36] Ibid., 20.

[37] Ibid., 21.

[38] Ibid., 25–27.

[39] Hume, "An Enquiry Concerning Human Understanding," sec. X; Part II: 92 – 94.

[40] Berkovits, *GMH*, 31. Obviously, this argument is circular since the only knowledge that we possess about the prophets' life experience is from the Bible itself, whose truthfulness their character was meant to support. Perhaps he means to rest his argument more on the content of the Bible's message. Still, this is a non sequitur; the content of the message is irrelevant to its source. In any event, Hume's argument against the credibility of miracle reports only works when joined together with his first argument. Having undermined the latter, at least to his satisfaction, Berkovits may not have felt the need to respond fully to the former. For contemporary critiques of Hume's argument, see David Johnson, *Hume, Holism, and Miracles* (Ithaca: Cornell University Press, 1999); and John Earman, *Hume's Abject Failure: The Argument Against Miracles* (Oxford UK & New York: Oxford University Press, 2000).

(b) Hume's empiricist conception of reason also rejects its originative role in human action and morality. In the *A Treatise of Human Nature*, he writes, "Reason is, and ought only to be the slave of the passions, and can never pretend to any other office than to serve and obey them."[41] Reason can operate instrumentally once a passion or desire is given; but it cannot originate actions. Further, Hume identifies the source of morality with the natural feeling of sympathy that is common to human beings.[42] While Berkovits does not adopt this positive position, he agrees about the lack of connection among reason, obligation, and action. He writes, "Reason as such may neither command nor induce action ….The source of all obligation is a will, and the motivation of a will is a desire."[43] For Berkovits, like Hume, reason cannot create obligations nor motivate actions. These can ultimately only derive from desire.[44]

(c) Berkovits also embraces what he takes to be Hume's positive position on the nature of religion. He writes, "the foundation of religion is not the affirmation that God is, but that God is concerned with man and the world, that, having created this world, he has not abandoned it…."[45] For Berkovits, like Hume, religion is about God's relationship to humanity and the world. While Hume's opponents were English deists, Berkovits' adversaries are rationalist Jewish philosophers like Saadia Gaon (882-942) and Moses Maimonides, though Hermann Cohen (1842-1918) lies just in the background.[46] Berkovits claims that they too make the mistake of

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[41] Hume, *A Treatise of Human Nature*, bk. II; part III; pg. 462.

[42] Ibid., bk. II: part I: section XI: 367–368; book III: part III: section VI: 667–668.

[43] Berkovits, *GMH*, 103.

[44] As described below, this negative argument is crucial for the view of normativity that supports Berkovits' account of *ta'amei ha-mitzvot*.

[45] Berkovits, *GMH*, 15.

[46] Berkovits, *MT*, 1–36.

identifying religion with philosophy. This issues in three problematic consequences: living in accordance with the commands of the Torah is subordinated to intellectual comprehension; revelation is rendered essentially unnecessary; and the God of religion is replaced by the First Cause of Aristotle.[47] While these are mainly religious as opposed to philosophical difficulties, in the last case he maintains that religious rationalists have illicitly smuggled attributes of God into the conception of the First Cause.[48]

Berkovits styles himself as following in the footsteps of Judah ha-Levi (c. 1075-1141) "in recognizing the independence of the religious realm, while nevertheless maintaining a healthy respect for the faculty of reason in its own domain…. Revelation and reason do not conflict…but neither has reason a chance to absorb revelation, nor need revelation defame the intellectual faculty of man… to establish its own validity."[49] Religion originates in the experience of revelation. Because reason only operates *a posteriori*, revelation and reason do not conflict. Experience delivers new truths that could not be known through reason; thus revelation is not absorbed by reason. Furthermore, according to Berkovits, the content of revelation is not information that could be known from any other experience. Revelation proclaims God's relationship to humanity and the world by preforming it. Berkovits claims, "We can be aware of the relationship with God and man only by having had a share in such a relationship."[50] The encounter with God reveals that he is concerned about human beings and the world.[51] But

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[47] Berkovits, *GMH*, 4–7.

[48] Here, too, he seems to be following in the footsteps of Hume in echoing Philo's arguments in the *Dialogues*. See David Hume, *Dialogues Concerning Natural Religion and Other Writings*, ed. Dorothy Coleman (Cambridge UK & New York: Cambridge University Press, 2007), chap. 5.

[49] Berkovits, *GMH*, 11.

[50] Ibid., 16.

[51] Ibid., 41.

concern must be expressed to be authentic. For humans to know of God's concern he must reveal it to them.[52]

B. Revelation, Creation, and *Sedeq*

God's expression of concern for the world and humanity in revelation discloses the nature of the world and humanity. It is also charged with normative significance. In revealing the nature of the world and humanity, it unveils their shared telos, towards which the Jewish people is commanded to work. These elements of Berkovits' thought are examined sequentially, beginning with his description of revelation and its relation to creation (1), and then turning to their shared feature—s*edeq* (2). Lastly, the normative implications of this view are examined (3).

1. Revelation and Creation

Berkovits is not clear about the content of revelation. Sometimes he indicates that it is a non-discursive experience,[53] while other times he argues that it must possess determinate content, namely commandments, in order to save humanity from moral relativism.[54] But he is unequivocal about the experience of revelation, which involves dichotomous movements by God and ambivalent reactions by the human being.

In revelation God both discloses himself and hides himself. He discloses himself because that is the only way to make known his concern for humanity and the world. Yet, his presence endangers the human being both ontologically and morally. Since God is the source of being, the

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[52] Berkovits' view regarding the uniqueness of revelation also supports his methodological positivism, at least as it relates to the Bible. If revelation reveals a truth that cannot be known from any other sources, then the proper way of understanding it involves fixing one's attention exclusively on its record. Indeed, it encourages Berkovits' goal in *GMH*, which he describes as "to ask Judaism to teach us Judaism." See Ibid., 11.

[53] Ibid., 32.

[54] Berkovits, *MT*, 113.

exposure of his presence threatens to collapse being into himself. Since God is the human being's creator, revelation threatens to destroy her freedom. Exposed to God's presence, the human being would be compelled to obey him. But that would negate the purpose of revelation because "[w]ithout freedom, the relationship would be of no value for man would cease being a person. The encounter is significant because it happens between God and a person who is free to be himself."[55] God desires to have a relationship with an other, not to collapse the other ontologically or morally back into himself. Thus, to enter into relationship with humanity he must disclose himself as a "hiding God."[56] Correlative to God's dual movement of disclosure and concealment, the human being responds in an ambivalent manner, which corresponds to her nature as a creature of God. Being a creature of God entails antithetic characteristics: one is dependent on God yet independent of him. One is dependent on God insofar as one's existence derives wholly from him. One is independent of God because one was brought into being as a separate entity. This dual nature is expressed through the concept of creation.[57]

In fact, Berkovits argues that revelation and creation must be understood in connection with each other. Creation only realizes its full meaning in the context of revelation; creation is the origin viewed through the prism of revelation. He writes, "Understanding by means of the encounter that man and his world are God's own, man understands the religious idea of creation. Creation, as the unsevered bond between existence and its divine origin, is the prime manifestation of God's concern, which we found in the encounter."[58] Revelation and creation

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[55] Berkovits, *GMH*, 36.

[56] Ibid., 34–35.

[57] Ibid., 37–38; 62.

[58] Ibid., 62–63.

both express God's concern for humanity and the world as well as reflect on their nature. Creation "necessarily involves God in the destiny of the world,"[59] for conceiving of the universe as having been brought about through creation "introduces the concept of value and purpose into the very core of reality."[60] Because they were brought into being by an act of God, the world and humanity have a value and purpose. They are directed towards the goal that God intended for them in creating them. But the value and purpose of creation cannot be known from creation. Since creation can only be understood through revelation, it is only in revelation that creation's value and purpose can be discovered. Further, since God both discloses and hides himself in revelation, his purpose in creation can only be known as it relates to humanity and not in an absolute sense.[61]

In describing revelation in this way, Berkovits references the Biblical story about Moses' request to "see God's face." God denies this request for "no man can see my face and live." However, in response to Moses' further request to know God's ways, he shelters Moses in the cleft of a rock and allows him to see "his back" (Ex. 33: 12-23). Berkovits, like many commentators before him, offers an interpretation of the types of knowledge of God that can and cannot be revealed to humanity. The human being cannot apprehend God's "face" or absolute essence; this is the element of God that is hidden from humanity in the encounter. [62] But like other biblical commentators, he focuses on the proximity of this story to the revelation of God's thirteen attributes of mercy (Ex. 34: 6-7). The only knowledge of God that humanity can possess

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[59] Ibid., 65.

[60] Ibid., 76.

[61] Ibid., 76–77.

[62] Ibid., 57.

is knowledge of God's moral dispositions.[63] The knowledge of God disclosed in revelation is

moral. Consequently, creation must have moral value and purpose.

2. The Highest Good: Sedeq versus Tohu

Berkovits discusses the purpose and value of creation in *MG*, where he draws further

connections between creation and revelation. Indeed, he introduces the idea of the highest good

as the common feature of the two events. The occasion of this discussion is a prophesy of Isaiah:

> For thus said the Lord that created the heavens, He is God; That formed the earth and made
> it, He established it, He created it not *tohu*…, He formed it to be inhabited: I am the Lord,
> and there is none else. I have not spoken in secret…. I said not unto the seed of Jacob: 'Seek
> ye Me *tohu*'; I the Lord speak *sedeq*, I declare things that are right. (Isaiah 45: 18-19)[64]

These verses correlate creation and revelation through the opposition of *sedeq* and *tohu*, the

primordial chaos. God's command to the Jewish people is declared not to be *tohu* but *sedeq*.

Creation is explicitly proclaimed not to be *tohu*, and it is implied here and stated explicitly

elsewhere that it is also *sedeq*.[65] Both creation and revelation are not *tohu*, formless, worthless,

or without purpose; rather, they are acts of *sedeq*.

Berkovits nowhere gives a definition of *sedeq*. In fact, he claims that Western civilization

lacks the concepts to fully express the idea, for it often opposes *sedeq's* various constituents, like

justice and equity, to one another.[66] He describes *sedeq* inductively as follows:

> It would seem that *sedeq* is the most comprehensive concept for that which is right. It is the
> idea of the Good. It subsumes *mishpat* [justice], *s'daqah* [charity], *emunah* [faithfulness] or

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[63] Ibid., 50–57; 183 fn. 15: "The only image of God…we know is reflected in the relational attributes, expressing God's desire for 'mercy, justice, and righteousness on earth.' To do justice and righteousness and to judge the cause of the poor and needy is, according to Jeremiah, the meaning of knowledge of God."

[64] Cited and translated in Berkovits, *MG*, 335. *Sedeq* and *tohu* are left untranslated in text.

[65] Ibid., 333.

[66] Ibid., 236.

emeth [truth], and *y'shu'ah* [redemption]. All these are aspects of *sedeq*.… *Sedeq* is not a legal concept, but the highest moral good. It is for this reason that *mishpat* [cannot] be defined in purely legal terms. As an expression of *sedeq* it continually tends to merge with *hesed* [loving-kindness], *rahamim* [compassion], *s'daqah*, and *y'shu'ah*.[67]

Sedeq is the *summum bonum*, and as such it is undefinable. It can only be understood as the union of lower order values, in particular the immediately subordinate values of *mishpat* and *s'daqah*. Berkovits defines the former, which is ordinarily translated as "justice," as "balancing the claims of two parties against each other."[68] In contrast, the latter "represents a bond between…two [beings] that motivates the one to act toward the other with kindness and charity…."[69] It also refers to actions that manifest this bond. Normally, these two attributes are opposed to one another;[70] however, they are united in *sedeq*. Thus, as the union of *mishpat* and *s'daqah*, *sedeq* is a good that unites impartial justice with concern for the other, charity or equity. Additionally, according to Berkovits, *sedeq* is not simply a moral or legal ideal; it allows "the earth to be inhabited." It contributes to human flourishing.[71]

Indeed, according to Berkovits, *sedeq* is the "very principle of creation" and God's continuing "ways with the world."[72] However, the world is not currently governed completely by *sedeq*. This deficiency is inherent in creation, for God alone is perfectly good, realized *sedeq*. Creation means the bringing into being of something separate and outside of God. By definition, then, creation cannot be perfectly good; it must retain elements of *tohu*. Nevertheless, *sedeq* is

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[67] Ibid., 331.

[68] Ibid., 332.

[69] Ibid., 295.

[70] Ibid., 151.

[71] Ibid., 335.

[72] Ibid., 340.

the telos of the world. It must be transformed from *tohu* to *sedeq*. This cannot occur at the end of days with the passing away of the created world, for then God's intention in creating the world would be denied. The reign of *sedeq* must be accomplished in history: God's goal is not immediate duplication of his own goodness but the emergence of *sedeq* out of *tohu*.[73] In *Judaism: Fossil or Ferment* (*JFF*) Berkovits invokes the daily *Aleinu* prayer and describes this goal as the establishment of the Kingdom of God. In comparing it with the Christian idea of the Kingdom of God, he stresses that it must be accomplished in this world through human effort.[74] The transformation of *tohu* to *sedeq* is accomplished in history by humanity.

3. Revelation: Imitatio and Command

While Berkovits places responsibility for the telos of revelation with humanity, its origin remains in God. Revelation reveals God's purpose for the world to human beings and recruits them to its advancement. God's own acts of *sedeq* and its subordinate values "are archetypes of values" for human beings.[75] In revelation the human being comes to know that "in imitation of God, [she] should strive in *sedeq*."[76] In disclosing God's moral attributes, revelation has normative significance for the human being. Berkovits describes this significance in two interconnected ways: as model and as law. He summarizes their relation in comments on a verse from Jeremiah: "[I]n this should one glory; In his earnest devotion to Me. For I the Lord act with kindness [*hesed*], justice [*mishpat*], and equity [*s'daqah*] in the world; For in these I delight" (10: 23). Berkovits explains that God's behavior manifests *mishpat* and *s'daqah* because he desires

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[73] Ibid., 348.

[74] Eliezer Berkovits, *Judaism: Fossil or Ferment?* (New York: Philosophical Library, 1956), 125. Henceforth *JFF*.

[75] Berkovits, *MG*, 340.

[76] Ibid.

their realization. They thus become law for the human being. Just as God acts towards creation according to these values, the human being must act according to them in her relationships. She is obligated to imitate God.[77] But now recall that *sedeq* is the union of *mishpat* and *s'daqah*. Thus, the human being is obligated to relate to the world in *sedeq* and to strive to realize *sedeq* in it. For Berkovits, "The Kingdom of God is established by man's imitation of God. "[78]

Berkovits' account of revelation raises a number of questions: First, how exactly does one imitate God? Concern for the other and even the thirteen moral dispositions are highly vague directives. And his description of *sedeq*, while denoting a unity of justice with equity, is not very informative as to its content and manner of achievement. Second, recall that in addition to these values, Berkovits identifies God's revelation with the commandments of the Torah. But how do these commands relate to these values? Even if some commandments can be interpreted as expressions of concern, the thirteen dispositions, or *sedeq*, it is not obvious how others fit into this rubric. Berkovits' position seems too abstract at the same time as it is too concrete. Further determination of *sedeq* and its subordinate values as well as an explanation of how the commandments manifest and advance them are needed. Third, Berkovits moves quickly from God's presentation of a model for humanity to *imitatio dei* being its law; however, it is not obvious how this connection is substantiated. Berkovits does describe God's dispositions and their aim as morally attractive. Yet, he writes of imitation becoming a law for the human being because it is the expressed desire of God. He thus seems to imply that it is God's command that makes these actions and their telos normative. However, the account of normativity that lies behind this claim is not at all obvious.

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[77] Ibid., 89.

[78] Berkovits, *JFF*, 126.

C. *Ta'amei ha-Mitzvot* and Moral Philosophy

Berkovits' response to these questions appears in his discussion of *ta'amei ha-mitzvot* in *GMH,* where he offers a teleological justification of the commandments. That is, he offers a justification of the commandments in terms of their purpose. The proximal purpose of the commandments consists in their being acts of concern for the other or part of a regimen for the creation of dispositions of concern for the other. The distal purpose of the commandments is the creation of a world wholly permeated with concern for others or, stated otherwise, regulated and organized by *sedeq*. The telos of the commandments is therefore the establishment of the world as the Kingdom of God. In addition to connecting the particular commandments to moral ideals and messianic goals, this teleological account elucidates the content of these ideals and goals. Just as connecting actions with an end justifies them, so linking an end with the actions that advance it renders it more determinate. Further, as part of justifying the commandments, Berkovits engages in moral philosophical analysis: He presents accounts of moral normativity and motivation as well as grapples with questions about autonomy and heteronomy.

Berkovits introduces a number of complications into his account of *ta'amei ha-mitzvot*, such as relativizing the validity of his claims about the purposes of the commandments and distinguishing between their moral and religious purposes. Beneath these complexities, however, lies a unified justification of the commandments in terms of one religious-*cum*-moral purpose. In order to reveal this account some reconstruction of his arguments is required. Thus, in the following, his preliminary remarks about the project of *ta'amei ha-mitzvot* are analyzed (1), before turning to his accounts of the "ethical" (2) and "religious" (3) purposes of the commandments. Lastly, the process by which halakhic practice operates through history to create the Kingdom of God is sketched (4).

1. Ta'amei ha-Mitzvot within the Boundaries of Mere Experience

Berkovits introduces his account of *ta'amei ha-mitzvot* with the caveat that it is impossible to know the intention of God in an absolute sense. Instead, "[w]hen asking about the purpose of the law…we ought to consider those aspects which seem significant in the context of our human condition and its problems."[79] This may seem to introduce an element of subjectivity into the justification of the commandments, as if it involves mere homiletic reflection on Jewish practice. This interpretation is further encouraged by a remark in an essay entitled "What is Jewish Philosophy," where he writes that "[t]ere can be no interpretation of the divine commandments that has absolute validity."[80]

However, recall that for Berkovits religion itself, as opposed to philosophical metaphysics, is only concerned with the human condition: Its object is not the Absolute but God's relatedness to the human being. This qualification thus only means that the account will not transcend the proper concerns of religion. Further, recall that besides transcending the bounds of religion, knowledge of God's absolute essence is beyond the boundaries of human knowledge. According to Berkovits, knowledge can only derive from experience. But the only experience of God stems from the encounter with him in revelation. And in the encounter God restrained himself in order to relate to humanity. No wonder, then, Berkovits claims that God's purposes can only be known in the context of the human condition and its problems; any other purposes he might have are beyond human knowledge. Thus, Berkovits' qualifications of his justification of the commandments, though genuine, do not undermine the intended validity of his claims. They are

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[79] Berkovits, *GMH*, 90–91.

[80] Eliezer Berkovits, "What Is Jewish Philosophy?," *Tradition* 3, no. 2 (Spring 1961): 125–126.

meant to be as rigorous as any that can be made in religion. Indeed, as is shown below, he argues that claims about the purposes of the commandments regulate halakhic-legal practice.

2. *The Ethical Purpose: Concern for the Other and Sedeq*

The next qualification is the division between the "ethical" and "religious' purposes of the commandments. In this sub-section, their "ethical" purpose and the philosophical positions upon which it is based are explored. In the next sub-section, the "religious" purpose of the commandments is discussed, and it is argued that it too should be described as ethical.

a. Two Problems of Philosophy of Halakha

Berkovits claims that the question of *ta'amei ha-mitzvot* is actually comprised of two related questions corresponding to two types of commandments. The first group is the *mitzvot beyn adam le-havero*, or "the laws that order the relationship between man and his fellow." Let us call them the interpersonal commandments or, following Berkovits, the ethical commandments. The second group is the mitzvot *beyn adam le-makom*, or "those of purely ritual nature, as between man and God." Following Berkovits, let us call them the ritual commandments. He also notes that the commandments, especially those that are not readily identifiable as ethical, comprise a comprehensive normative system that aims to regulate every element of a Jew's life. [81]

The interpersonal commandments and the ritual commandments present complementary problems relating to justification:

> Now the ethical significance of the laws affecting human relations can be readily acknowledged. The laws of the second group, however, the purely ritual part, present a serious problem of interpretation. One may accept the need for some basic ritual practices and yet be nonplussed by the elaborate system of Jewish ritual law. What is the purpose of the numerous rules and regulations that seem to suggest a purely mechanical observance?…. On the other [hand], the ethical code of the law regarding man and his fellow is not free of

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[81] Berkovits, *GMH*, 91.

problems …. [I]f the validity of the law were to depend on the arbitration of the intellect, the paramount importance of the revelation of the law would be abolished…. [W]e seem to be left with an insoluble dilemma. The validity of the law must be rooted either in reason or revelation. But if the law has intellectual validity, what need is there for revelation; and if the law is not acceptable to reason, what use revelation?[82]

The first question is the classical query regarding the reasons for the commandments (*ta'amei ha-mitzvot* proper). It applies most immediately to ritual commandments like the prohibition to eat meat and milk together or the prescription to wear phylacteries. These commandments are problematic because they lack any obvious reason: Why is it prohibited to eat milk and meat together and required to wear phylacteries? Indeed, as Meir Roth points out, Berkovits makes clear his commitment to the need for justifications for the commandments here, for according to him, "if the law is not acceptable to reason, what use revelation?"[83] Further, Berkovits conceives of reasons for the commandments in terms of their purposes. Since the ritual commandments seem to lack purposes, it appears "not acceptable to reason" to practice them. In contrast, knowledge of their purposes would provide a reason for them and, consequently, justify them.

The second question does not relate to the reasons for the commandments but to the reason for the command (*ta'am ha-tzav*). It applies most obviously to interpersonal commandments like the prohibition of murder or the prescription of charity. In contrast to the first group, these commandments seem only too justified. Their reason seems clear: it is immoral to murder and it is moral to give charity. These moral prohibitions and prescriptions, according to Berkovits, are accessible to human reason. The question concerning them is not about their purpose; rather, it is that since they could be known through reason, why was it necessary for them to be revealed. In summarizing these problems, Berkovits writes, "It is not easy to say which is the less perturbing

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[82] Ibid., 91–94.

[83] Roth, "Eliezer Berkovits as Theoretician of Halakha," 164.

difficulty: The question of what need there is for revelation, if the laws are to be accepted on the basis of their rationality; or our all-encompassing ritual code, which seems difficult to associate with any spiritual significance."[84]

b. Two Problems of Moral Philosophy

Berkovits answers these questions by posing two problems in moral philosophy: "One is the source of ethical obligation; and the other is the examination of human behavior in light of this obligation."[85] The former concerns the source of moral normativity, that is, how do unconditional obligations arise. The latter concerns the method of inducing behavior in accordance with moral obligations, that is, moral motivation.[86] Berkovits loosely follows the "critical positivist" method he attributes to Hume: He delimits the power of reason in originating both normativity and motivation in order to clear the way for other sources.

Berkovits poses the problem of moral normativity in the language of obligation. Though he does not explicitly state it here, he assumes that moral normativity must be unconditional. He describes the moral imperative elsewhere as possessing "the quality of absolute obligation" [87] and notes the "absoluteness of the ethical coordinates."[88] Moral obligations at least claim

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[84] Berkovits, *GMH*, 94.

[85] Ibid., 95.

[86] Roth confuses these questions, identifying normativity with motivation. See "Eliezer Berkovits as Theoretician of Halakha," 161–171. Consequently, he identifies Berkovits' view with what Statman and Sagi call the weak divine command theory. However, Berkovits cannot have anything other than a type of strong divine command theory, wherein God is the legislator of the moral law. See *Religion and Morality* (Atlanta: Rodopi, 1995), 23–24; 104–107. This becomes even clearer when Berkovits' proximal source is examined. See W. G. de Burgh, *From Morality to Religion: Being the Gifford Lectures Delivered at the University of St. Andrews, 1938* (London: Macdonald and Evans, 1938), 1–2; 111–143; 205.

[87] Berkovits, *MT*, 82.

[88] Ibid., 89.

unconditional normativity; the question is whether that claim can be vindicated. He describes the

problem as follows: "As to obligation, it is not enough to know the rational essence of the good

and the right; one must also understand why it is imperative to adhere to the good and the

right."[89] He distinguishes between the axiological question of the good and the deontological

question of obligation. He then briefly surveys ethical theories in order to argue that "[n]one of

the extant theories of ethics is able to show that ethical obligation has its source in the essence of

the good itself."[90] His brief discussion clarifies the specific problem he raises:

> Let us assume, for example, that hedonism is a logically valid theory. What law is there in reason to forbid a person to behave unreasonably and to act contrary to the pleasure principle? Reason may, of course, describe the consequences of such "foolish" action—but what if one does not care about the consequences? Or consider utilitarianism. Let it be granted that the greatest happiness of the greatest number is indeed the essence of goodness. How can it be proved that one ought to care about it, and that one should be morally condemned if one does not? It is not different with intuitive ethics either. Man may have some innate concepts of good and evil; he may even be able to entertain an intuitive appreciation that he act in accordance with the standards of such an inborn ethical code. But since he is capable of disobeying his moral "instinct," what is there in the intellectual grasp of such intuitive ideas that will obligate him to obey? Perhaps the most interesting illustration of this point is provided by Kant's categorical imperative. At best, Kant has shown that to act so that the maxim of our will may…serve as the principles of a general law is indeed an a priori requirement of "pure, practical reason." However, he overlooked the most important thing: To prove that man is obligated to act in accordance with his famous "factum" of reason. If Kant is right, one may say that an action which does not conform to the categorical imperative is not dutiful, as the term must be understood by practical reason. But he has…not established that it is man's duty to act dutifully in this sense.[91]

In his evaluation of hedonism, utilitarianism, intuitionism, and Kantianism, Berkovits claims that

though each of them may have offered a coherent definition of the good, they have not

substantiated one's obligation to act in accordance with it. For each definition of the moral good,

its proponents may have described the obligations that derive from it, yet they have not shown

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[89] Berkovits, *GMH*, 95.

[90] Ibid.

[91] Ibid., 95–96.

that one is obligated to the moral good itself. But if they have not proven that one is obligated to the moral good itself, then there can be no unconditional moral obligation.

The terminology of contemporary metaethics can clarify Berkovits' point. A debated question in this area of inquiry is the relation between morality and reasons for action. Two positions have been articulated: morality/reasons internalism and morality/reasons externalism. Stated most succinctly, morality/reasons internalism consists in the claim that "[i]f S morally ought to do A, then necessarily there is reason for S to do A consisting either in the fact that S morally ought so to act, or in considerations that ground that fact."[92] That there is a moral reason to do a certain act is always a reason *simplicter* to do that act. Morality/reasons internalism thus upholds morality's claim to unconditionality; one always has a reason do what one morally ought to do. Morality/reasons externalism denies this claim. It maintains that even if an individual morally ought to do a certain action, this does not necessarily provide a reason for him to do that action or at least not an overriding reason. It simply means that morally one ought to perform the action. For Berkovits, the problem of normativity is that moral obligation should be unconditional, but it has not been demonstrated that one is actually obligated to obey moral obligations.

Berkovits describes the second problem as follows: "Assuming the obligatory character of an ethical code, whatever the source of obligation, how is mankind to be induced to act accordingly?"[93] He surveys the main answers to this question as well and finds them all inadequate. He divides them into three categories: Socratic-Platonic, Christian, and Deterministic-Evolutionary. The Socratic-Platonic tradition provides an intellectualist response.

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[92] Darwall, "Reasons, Motives, and the Demands of Morality: An Introduction," 306.

[93] Berkovits, *GMH*, 96.

It holds that "[g]oodness is…knowledge itself, and, like all knowledge, it is teachable."[94] Thus, all wrongdoing results from ignorance. The Christian tradition, in contrast, takes evil more seriously and roots it in fallen human nature. Thus, evil cannot be removed by human means but only by God's grace.[95] Berkovits argues that neither of these traditions stands the test of experience. The Socratic-Platonic tradition is belied by the behavior of individuals and civilizations. Noting the prevalence of *akrasia*, weakness of the will, Berkovits claims, "Man may have ample knowledge of the good, yet more often than not he will act against his better insight."[96] Similarly, he notes that there is "little difference between ages of greater and lesser enlightenment"[97] in terms of the crimes civilizations commit. Given this experience, the Christian tradition initially seems more accurate. However, conjoint with its negative claim it makes a positive assertion: Human nature can be reformed through grace. Berkovits appeals to the particular experience of the Jewish people to contradict it. Christian violence against the Jews, climaxing in the Holocaust, "is irrefutable evidence that…mankind has remained unredeemed."[98] The Deterministic-Evolutionary perspective is comprised of Dialectical Materialism and Bergsonian Evolutionism. In Berkovits' telling, the former claims that if the material conditions of human existence are properly organized, humanity will automatically act properly. However, he argues that this claim is unwarranted given the perspective's materialistic assumptions. In contrast, the latter appeals to *elan vital* to explain matter's unconscious drive for

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[94] Ibid.

[95] Ibid., 97.

[96] Ibid., 100.

[97] Ibid.

[98] Ibid., 101.

moral action. However, Berkovits contends that Bergson's view undermines the possibility of moral action: "[T]he moment ethical obligation becomes a form of compulsion, however ingeniously implanted in the workings of evolution, it ceases being ethical."[99]

In Berkovits' criticism of Bergson's account of moral motivation, another of his assumptions about morality is evident. He writes, "Man acts ethically when, choosing among alternatives, he decides to act in conformity with the ethical demand."[100] Berkovits might disagree with Kant about the source of moral normativity, but he agrees with him about the criterion for morally significant action: An agent must freely choose to comply with a norm for her behavior to be moral. Any account of morality that denies human freedom by compelling the human being to act morally through nature or grace denies the possibility of moral action. Berkovits therefore claims that moral philosophy confronts two major obstacles: It has failed to substantiate unconditional moral obligation. And it has failed to provide an account of moral motivation that stands the test of experience, is philosophically cogent, and preserves freedom.

In addition to a negative evaluation, Berkovits also presents a deeper diagnosis of this failure that allows the resolution of the problems of both moral philosophy and philosophy of halakha. According to him, the root of the failure of moral philosophy is its defective account of reason:

> The misunderstanding of the function of reason has been the tragic mistake which the Western world inherited from the Greeks…. Reason was believed to have authority to command, as well as power to compel…. It was taken for granted that the reasonable was also obligatory. Similarly, it was assumed that once the reasonableness of the good was understood, reason itself would cause man to act ethically…. But reason as such may neither command nor induce action. Reason is the faculty of understanding, of recognition and interpretation, of analysis and synthesis…. The source of all obligation is a will, and the motivation of a will is a desire…. Reason may describe what is; it cannot prescribe what ought to be…. It is always a desire, and not objective reason, which by setting a goal moves

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[99] Ibid., 100.

[100] Ibid.

the will, and it is the will that issues the command. Not everything that is desired and willed is good; but the good does not become an obligation until it is desired and willed.[101]

The Western tradition has misunderstood the relation between reason and action. It assumed that reason determined normativity and motivated action. However, Berkovits claims that reason can neither determine normativity nor induce action. Desire is needed for both. It sets a goal that reason determines how to attain and moves the will that impels action.

As described above, Berkovits receives this conception of reason from Hume. For both of them, reason is not originative but operates on the deliverances of experience. Theoretical reason involves the analysis and synthesis of ideas that derive from sensory impressions. Practical reason consists simply in determining how to achieve goals set by desire. But Hume claimed that all human beings are equipped with a natural sentiment of sympathy that is the origin of moral action. Berkovits does not accept this claim for two reasons: First, as noted, he accepts the Kantian perspective that moral action must be free; it cannot arise from any sort of internal compulsion. Second, he denies the existence of a common human sentiment or reason that results in uniform desires and moralities. History reveals competing desires and moralities.[102]

Instead, Berkovits draws on other English proponents of the belief-desire account of reason, such as Thomas Hobbes and Bertrand Russell. In *Leviathan*, Hobbes reduces all claims about goodness and evil to statements about desire and aversion.[103] Russell recognizes the basic elements of Hobbes' analysis but adds nuance. A dispute about value is not a clash of truth claims but a disagreement of taste. Thus, he too argues, "the whole idea of good and bad has

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[101] Ibid., 102–104.

[102] Berkovits, *NFH*, 83.

[103] Thomas Hobbes, *Leviathan*, ed. J. C. A Gaskin (Oxford UK & New York: Oxford University Press, 1998), bk. I: chapter VI: p. 35. However, see Christine M. Korsgaard, *The Sources of Normativity* (New York: Cambridge University Press, 1996), 21–27 for an interpretation that brings him close to the view maintained by Berkovits.

some connection with *desire*. *Prima facie* anything that we all desire is "good," and anything that we all dread is bad. If we all agreed in our desires, the matter could be left there, but unfortunately our desires conflict…."[104] This situation gives rise to ethics and the distinctive features of ethical discourse. Ethical discourse, claims about what is valuable or good, is an attempt to escape from the subjectivity of desires and grant them universality. They are imperatives that attempt to recruit others to these same expressive judgments.[105]

While Berkovits articulates his diagnosis of the problems of ethical theory in terms of modern (Hobbes, Hume, and Kant) and early twentieth-century (Bergson and Russell) philosophy, the view he presents about the relation between reason and motivation has been discussed in contemporary metaethics in the debate surrounding a second externalism and internalism distinction, which was introduced in a previous chapter. Reason/motives internalism and its contrary, reasons/motives externalism, concern the relation between reasons for action and motivation. This relation has been of interest mainly in connection with the debate between morality/reasons internalism and externalism. At least initially, reasons/motives internalism is the more intuitive position. *Prima facie*, it seems reasons for action should have some connection to motivation. The failure of moral claims to motivate is thus taken to argue in favor of morality/reasons externalism.[106]

Reasons/motives internalism and externalism have each been articulated in a number of different forms. As has been discussed, Leibowitz hold a form of "judgment" reasons/motives internalism. The form most useful for clarifying Berkovits' view on normativity is described by

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[104] Bertrand Russell, *Religion and Science* (New York: H. Holt, 1935), 231.

[105] Ibid, 231-246.

[106] Darwall, "Reasons, Motives, and the Demands of Morality: An Introduction," 305–306.

Stephen Darwall as "metaphysical" internalism or externalism. Metaphysical internalism holds

that "p is a reason for S to do A only if S would have some motivation to A were she aware of p

under appropriate conditions."[107] Metaphysical externalism denies the connection. The most

famous advocate of the internalist view is Bernard Williams, who explicitly traces it to a

Humean conception of reason. His most concise statement of the view is that "[S] has some

reason to [A] iff S has some desire the satisfaction of which will be served by his [A]-ing."[108]

Thus, reasons for action are relative to an agent's "subjective motivational set"; they must be

capable of moving him to act by being properly related to the motivations that he possesses.[109]

Williams' argument for this claim turns on the role that reasons for action play in the explanation

of action. He argues, "If there are reasons for action, it must be that people sometimes act for

those reasons, and if they do, their reasons must figure in some correct explanation of their

action."[110] But for that to be possible, the reasons for action must link up with their motivations.

Williams is clear that motivations can be altered by reflection on one's motivational set. Still,

any modification must begin with preexisting motivations. In contrast, external reasons, reasons

that have no connection to an individual's motivation set, cannot be reasons for action because

they cannot figure in an explanation of the individual's action. Reason itself is incapable of

introducing motivations that are foreign to a motivational set. Significantly, this entails

morality/reasons externalism, for it is not necessary that every individual possess the motivation

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[107] Ibid., 309.

[108] Bernard Williams, *Moral Luck: Philosophical Papers, 1973-1980* (Cambridge UK & New York: Cambridge University Press, 1981), 101.

[109] Ibid., 102.

[110] Ibid.

to act morally. Moral reasons do not necessarily entail reasons for action. Only if moral reasons are properly related to an individual's motivations will they be reasons for action for her.[111]

Berkovits is committed to a similar form of reasons/motives internalism. As indicated, for him obligation only derives from the will, which, in turn, originates in desire. And he, like Williams, takes this view to entail morality/reasons externalism: There is no necessary connection between moral obligations and reasons for action. But Berkovits, unlike Williams, thinks that morality *should* possess unconditional normativity. Berkovits could reestablish morality's connection to reasons for action by claiming, like Hume, that there is some common and natural desire to act morally. Moral reasons would then always be reasons for action because they would always be properly related to individuals' motivational sets. However, this would be problematic for two reasons: First, it is questionable whether such a contingent harmony between morality and human nature could be described accurately as resulting in an unconditional obligation. Second, again, since Berkovits holds that moral action must be freely undertaken, a built-in motivation to act morally might undermine the possibility of moral action. He seems to be left with a conundrum: Morality requires both unconditional obligation and freedom, but his account of reasons and motivations seems to rule them out. Something else is necessary to substantiate morality's claim to unconditionality.

Another feature of Berkovits' discussion of ethical theory is illuminated by comparison with Williams. While the problem of morality's unconditional obligation has yet to be solved, at this point in Berkovits' argumentation the problem of moral motivation has disappeared. Reasons/motives internalism does not allow for the problem of motivation, for since reasons for action are connected to motivations, one is *ceteris paribus* always motivated to do what one has

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[111] Ibid., 111–113; 121–123.

reason to do. The problem of motivation only arises when reasons for action that are external to the individual's motivational set are recognized. But this denies reasons/motives internalism. Berkovits' argumentation is thus only understandable if one anticipates his solution: a special type of will that can generate reasons for action for another individual regardless of her motivation set. A method for producing in the other individual the motivation to comply with these external reasons for action would then be necessary.

c. Reciprocal Solutions: Absolute Will and Moral Training

Berkovits claims that a proper understanding of the philosophical difficulties regarding moral normativity and motivation removes the two problems of *ta'amei ha-mitzvot*. Moreover, the command, or revelation, and the commandments, or the regimen of ritual commandments, present solutions to the problems of moral normativity and motivation respectively; that is, they show how unconditional moral normativity is grounded and how moral motivation is created.

Berkovits claims that the problem of the need for revelation for the ethical commandments only made sense on the assumption that rationality could entail normativity.[112] However, having concluded that all normativity derives from desire, a new appreciation of revelation emerges:

> The essence of justice may be described in terms of reason; its obligation must forever be based on a will. This, however, is tantamount to saying that all law derives its authority from some form of "revelation." The lawgiver must make his will known to establish the law. Let a law be ever so rational, if it has not been instituted as such by the will of the legislative authority, made manifest in one way or another, it is not obligatory; in short, it is no law.[113]

Desire is not reducible to rationality; thus every expression of a will is an event. Further, the expression of the will of someone with authority creates an obligation for those subordinate to him. The occasion of its expression is a type of revelation in that it is not rationally determined

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[112] Berkovits, *GMH*, 103.

[113] Ibid., 104.

by anything that preceded it. Even if a command was fully rational, its normativity could only derive from the expression of the authority's will. Thus, despite their clear ethical significance, the interpersonal commandments would not be obligatory unless they had been commanded by God. Indeed, Berkovits claims, "It is the will of God that makes the good obligatory as the law of God." [114] The moral justifiability of the interpersonal commandments would not secure their normativity; this can only be established by revelation.

Importantly, in Berkovits' view not only is the revelation of the interpersonal commandments now understandable; it is also becomes apparent that it is necessary. While the other proponents of reasons/motives internalism mentioned are satisfied with morality/reasons externalism, he wants to reestablish unconditional moral normativity. To do this, he adduces a unique will, that of God, the revelation of which creates obligations for others. Only the will of God secures unconditional moral obligation: "God alone is the source of objectivity for all value and law." [115] A secular ethics with the very same content as the interpersonal commandments is possible; however, its normativity would only be conditional. It would be valid only for those that desire it or for those under an authority that desires it and only so long as that desire persists. But, for Berkovits, God is the ultimate authority and his will is eternal. Thus, Berkovits argues, not only is revelation required for the normativity of the ethical commandments; it is necessary for any unconditional moral obligation.

However, this creates an additional problem, which is unique to Berkovits' combination of an unconditional moral obligation with a general commitment to reasons/motives internalism. This combination is consistent if one posits, perhaps like Hume, that humans have a natural

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[114] Ibid., 105.

[115] Ibid., 106.

motivation to act for moral reasons. But Berkovits denies this. He establishes unconditional

moral obligation by recognizing God's desire as imposing obligations on human beings. Hence,

despite moral reasons always being reasons for action, and despite the general link between

reasons for action and motivation, external reasons for action have been introduced. An

individual is confronted by reasons that apply to her unconditionally, God's commands, yet she

may be unmotivated to comply with them. Berkovits therefore must provide some means for

creating the motivation to comply with these external reasons.

Berkovits presents the ritual commandments as the solution to this problem.[116] He shows

how they are not merely "ritual" in nature but are auxiliaries to the ethical commandments. As a

foundation for this position he presents what he claims is the Jewish view of humanity, which

contrasts with both Socratic-Platonic moral psychology and Christian theological anthropology.

This view is based on what Berkovits calls "critical optimism." Contra the Socratic-Platonic

tradition, Judaism maintains that knowing the good is not sufficient for moral action, for "the

physical organism…is in essence under the sway of laws of self-centeredness." However, contra

the Christian tradition, Judaism maintains that "an appetite for goodness" is "implanted in human

nature." The latter, however, is initially at a disadvantage to the "self-centered and self-regarding

urges and needs of the physical man."[117] At the outset, the human being lacks sufficient

motivation to act in accord with morality. Thus, Judaic critical optimism claims not that human

beings are good, that they already possess sufficient moral motivation, but that they can become

good through nurturing it. Berkovits explains:

> It is…necessary to foster the emotional force of the desire for the good, to increase its
> intensity and its hold over the emotional pattern of the human personality. In order to achieve

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[116] Ibid., 110.

[117] Ibid., 108–111.

effective ethical conduct, not the mind alone, but, foremost, needs and appetites have to be educated; the seat of desire in human nature must be so influenced that emotional forces are willing to submit to the discipline required for moral action. This, however, is not enough. Beyond the education of needs and desires, it is also necessary to make the physical organism of the human body, the "tool" of all action, receptive to the emotionally accepted purposes of the spirit.[118]

Knowledge is not sufficient for moral action. Moral reasons unconnected to motivation cannot result in moral action. But neither is the human condition hopeless. The motivation to comply with morality can be created. However, this is not an intellectual process. Human corporeality must be recognized and leveraged for moral purposes. Emotions and desires must be educated and bodily reactions must be trained.[119]

Berkovits maintains that there are two main elements to such education and training. The first is negative and works to "increase the intensity of the desire for the good by sublimating some of the egocentric inclinations of the human nature" through the inhibition of natural desires. This "creat[es] reserves of emotional energy" that are then channeled into the desire for the good. The second is positive and directly "educat[es] the human body…for the ethical deed" by making it rehearse actions that do not originate in its own desires.[120] The ritual laws comprise such a form of ethical training:

> The aim is to teach purely subjective emotion, needs, and desires, a new 'awareness,' which is foreign to the organic component of the human personality. It is the awareness of the other, of an order of being as well as meaning different from that of organic egocentricity. The purpose of the inhibitive rules is to practice saying 'no' to self-centered demands; whereas the fulfillment of the positive command is an exercise of saying 'yes' in consideration of an order different from one's own. By such training, one breaks down the exclusiveness of man's organic selfishness. The obedience to the rules and commands is itself an exercise in

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[118] Ibid., 111.

[119] Berkovits notes that this account of motivation is not entirely unique to the Jewish tradition and that Aristotle proposed a similar view. See ibid., 109.

[120] Ibid., 111–112.

behavior that is not purely self-regarding and orients a person to an other; awareness of the other means acknowledging and considering it.[121]

The purpose of the ritual laws is to train the human being and, more specifically, the human body to be responsive to ethical demands. Berkovits describes this responsiveness as a type of awareness, though he makes clear that this intellectualist portrayal is metaphorical. A moral *habitus* is created: dispositions to perceive the concerns of the other and respond to them.[122]

A corollary of this interpretation of the ritual commandments is that they are, as David Shatz notes, content-independent.[123] The prescriptions and prohibitions of the ritual laws do not command or disallow actions that are intrinsically right or wrong; rather, they create situations akin to drills to prepare an individual to encounter successfully situations where the moral stakes are real. Indeed, Berkovits accepts this conclusion directly, arguing, for example, that there is nothing harmful *per se* in non-kosher food.[124] He also notes that the form of the ritual commandments may depend on historical considerations. However, because their ethical purpose is served independently of their content, their validity endures outside of their original context.[125]

Thus, on this account, all of the commandments have a moral purpose. However, their relations to morality differ. The actions prescribed or prohibited by the ritual commandments are merely instrumental to morality. They serve as a means to a moral end that is external to them. In contrast, the actions prescribed or proscribed by the ethical commandments are internally related

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[121] Ibid., 116.

[122] I draw the term "habitus" from Pierre Bourdieu, *The Logic of Practice*, trans. Richard Nice (Stanford: Stanford University Press, 1990), 52–79, which coheres with Berkovits' focus on "material awareness". Further, in a different context Berkovits utilizes the term "habitude." See "Trials of Redemption," n.d., 33ff.

[123] David Shatz, "Berkovits and the Priority of the Ethical," 2012, 10 fn. 52.

[124] Berkovits, *GMH*, 114.

[125] Ibid., 184 fn. 22.

to morality. Crucially, they have moral value *qua* actions as opposed to expressing moral intentions. Berkovits makes clear that "the essence of every [commandment] is a deed."[126] Indeed, this is the reason for his concern with the source of moral motivation, for "[t]he task is to induce man to implant the demands of morality in human conduct."[127] He places a premium on the deed's effectiveness because "in order to be, the deed must be effective and it must be so in the place where it belongs—in the external world, in history."[128]

Based on comments like these, David Hazony describes Berkovits' thought as a form of consequentialism.[129] This description is misleading. Berkovits does posit a *summum bonum* that human beings are meant to advance—*sedeq*. But the label "consequentialism" implies that all the mandated actions are externally related to *sedeq*, which is incorrect. He does hold that the actions mandated by the ethical commandments contribute to the establishment of the world as the Kingdom of God. But they do this by being themselves acts of *sedeq*. His account should thus be labeled teleological, which is neutral about the relation between the actions and their end. In sum, in Berkovits' ethical account of the purpose of the commandments, he provides a teleological justification of them, according to which the "ritual" commandments are means for the development of a moral *habitus* and the interpersonal commandments are moral actions.

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[126] Ibid., 187 fn. 30.

[127] Ibid., 106.

[128] Ibid., 138.

[129] David Hazony, "Human Responsibility in the Thought of Eliezer Berkovits," Dissertation (Hebrew University, 2011), 63–64.

3. The 'Religious' Purpose: Material God-Orientation and Sedeq

Despite this ethical justification of the commandments, Berkovits is concerned that religion not be reduced to morality. Indeed, as early as *HD*, he stresses its independence from morality.[130] This reduction is particularly problematic for him as regards the ritual commandments because they are seemingly devalued by being reduced to a moral means.[131] He thus maintains that they also have a religious purpose:

> On the religious plane, the indirect method of ethical concern becomes direct religious commitment. The training by the indirect method conditions the human organism for non-egocentric action; the origin of the law in the divine will, however, turns the non-egocentric conditioning into theocentric behavior. The "awareness" established is not directed merely toward some outside order, but toward a divine one. It is not just "an other" which the organic component of the human being senses, but the "Wholly Other" that is God. From the ethical standpoint, inhibiting some of the radical self-regarding impulses is a negative act; but in the religious context, by inhibiting one fulfills a divine command. Not only does one learn to submit to an outside will; one obeys the will of God.[132]

Though the religious function of the ritual commandments is accomplished by the same actions as the moral purpose, because of their divine origin they fulfill an additional task: the creation of a relationship with God. Moreover, because they primarily mandate actions, one's body and not merely one's soul is brought into relationship with God. The practice of the ritual commandments serves to create "a material 'awareness' of the divine Presence."[133]

This is significant for a number of nested reasons: First, it allows the whole human being to worship God. Contrary to the claims of other philosophical and religious traditions, Judaism insists, according to Berkovits, that the human being is essentially an entity uniting body and

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[130] Berkovits, "HD," 81.

[131] Berkovits, *GMH*, 120.

[132] Ibid., 122.

[133] Ibid.

soul or a "bio-psychic being."[134] And while the soul can relate to God through faith, it is unclear

how the body may encounter him. But Berkovits claims, "If religion is relatedness to God, then

the whole human being must be so related and not man as soul only, for as such he does not exist

in this world. Man, soul and body, must enter in the relationship."[135] By creating a "material

awareness" of God both body and soul may worship him. Second, despite the human being's

essential bio-psychic nature, her actual existence is often bifurcated between body and spirit, or

the desires of the flesh and the ideals of the soul. The ritual commandments achieve the goal of

unifying human nature through the implantation of the ideals of the spirit into the body.

Concurrently, since they never deny but only curb the desires of the body, they vindicate it and

its needs, like sex and other "earthly delights."[136] Indeed, Berkovits describes the

interpenetration of body and soul as "the origin of holiness," for holiness does not reside in an

ethereal realm but in the sanctification of life: "[O]nly life is capable of holiness."[137] The human

being is unified and sanctified by having the spirit implanted in the body. Lastly, the

interpenetration of body and spirit has more than individual significance; it is a principle element

of Berkovits' eschatological vision. He writes, "The real task is to orient the whole world of

man, matter and spirit, toward God."[138] God's purpose, which originates in creation and

advances through the revelation, is to impregnate created being with value. By instilling in the

human body an orientation to God, the ritual commandments begin this process. But

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[134] Eliezer Berkovits, *Crisis and Faith* (New York: Sanhedrin Press, 1976), 59. Henceforth *CF*.

[135] Berkovits, *GMH*, 120.

[136] Ibid., 127.

[137] Ibid., 130.

[138] Ibid., 126.

sanctification must extend to the whole creation. All of matter must be organized according to the axiological purposes of the Creator.[139]

While Berkovits insists that this purpose of the commandments is uniquely religious, there are indications that it too is ultimately moral. First, as noted, the same actions that bring the body into relationship with God train it to respond to human beings. There are no uniquely religious activities that do not also serve a moral purpose. Second, he speaks of these commandments as bringing the body into relationship with God, but recall that the only relationship to God that can be established is through his moral dispositions. This should hold for the body as well as the spirit; no relationship to God is possible except a moral relationship. Third, the goal that the ritual commandments advance in their religious function can only be described in moral terms. While Berkovits often writes abstractly of the interpenetration of being with value, as has been shown, by value he means moral value and, more specifically, *sedeq*. The purpose of creation and revelation is the transformation of being from *tohu* to *sedeq*. Instilling matter with an orientation towards God means organizing the world as the Kingdom of God.

Indeed, Berkovits himself makes the connection between the religious and ethical purposes of the commandments on two levels. First, he describes the sanctification of the body and the wider material world that occurs through the ritual commandments as itself an expression of concern for the other. Though still describing the vindication of matter as "an essentially religious task," he portrays it as an expression of *imitatio dei*, which means the imitation of God's moral dispositions. Just as God meets his other, the human being, with concern, so too the

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[139] This last eschatological element of Berkovits' justification of the commandments is discussed in the next section.

human being must meet all her others, including her own materiality, with concern. Facilitating the body's orientation to God is moral action towards it.[140]

Second, Berkovits claims that the ethical and religious purposes of the commandments are intertwined from a developmental perspective. On the one hand, the ethical purpose of the commandments depends on their religious character, for both their unconditional normativity and motivational effectiveness rest on their religious features. On the other hand, as indicated, since God can only be known through his moral dispositions, a relationship with this "Other" can only be established through imitating his dispositions in one's relationships with "others."[141] Thus, despite Berkovits' insistence that the religious purpose of the commandments is distinct from their ethical purpose, the former is both an expression of the latter and intertwined with it. This does not mean that he has, despite himself, "reduced" religion to "mere" morality. On the contrary, by placing moral action in a religious framework, his account is better described as the sanctification of morality than the secularization of religion. In any event, the ritual laws are teleologically justified by showing how they too are moral acts and increase *sedeq*.

4. Law, History, and the Eschaton

Lastly, it is necessary to sketch the connection Berkovits creates between practice of the commandments, history, and the Kingdom of God to complete his account of the justification of the commandments. As indicated, he claims that practice of even the ethical commandments is not only of intrinsic value but is also valuable because of the commandments' consequences. The commandments do not merely prescribe individual indirect and direct moral actions; they drive a

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[140] Berkovits, *GMH*, 129.

[141] Ibid., 133.

process of transformation of society and the world into the Kingdom of God. Berkovits spells out the relation between individual action and social structure as follows:

> [Judaism] is a religion for the whole of man. It aims at relating life in its entirety to God. It is not, therefore, so much a religion of creed as it is the religion of the deed on earth…. The deed, directed to the outside, is always in relationship to an "other." This other may be the world, a neighbor, or God. However, in order to be, the deed must be effective and it must be so in the place where it belongs—in the external world, in history…. The deed makes history if it is the materialization of the desire and will of a community…. Because the deed is to be effective in the external world of man, the community that it requires must be a living society in reasonable control of its general order of life.[142]

Berkovits makes two connected points: one about the nature of the human being and the other about the nature of action. When the bio-psychical nature of the human being is understood, it becomes apparent that not just the body but also society must be oriented towards God. Since the body must be related to God, the focus of the commandments shifts from intentions to actions. In addition to their objective rightness, actions must be evaluated in terms of their effectiveness. Further, the human being is not only physically embodied but also socially embedded. The effectiveness of an individual's deeds depends on the structure of her society. Thus, society too must be organized with an orientation to God. Because of this, Judaism takes as its primary object a sovereign people. It is only such a politically autonomous social unit that can accomplish the goal of Judaism: "All the material aspects of society, its complete biophysical structure, are…in need of being invested with value and God-centeredness."[143] Indeed, Berkovits claims, "The Biblical conception of the Jewish State is the Kingdom of God on Earth."[144]

The telos of Judaism is not achieved with the creation of a God-centered society by the Jewish people, however. Its aim is the creation of a universal Kingdom of God. Still, progress

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[142] Ibid., 137–138.

[143] Ibid., 140.

[144] Eliezer Berkovits, *Towards Historic Judaism* (Oxford: East and West Library, 1943), 42. Henceforth *THJ*.

towards this goal must begin with one nation, which serves as a model for the rest of the world.

According to Berkovits, this is necessary for two reasons: First, while Judaism's goal is for all of

humanity, humanity as such does not yet exist in history. It must be created out of the individual

nations that are in existence.[145] Second, because the goal is not an abstract ideal, it cannot be

taught but must be modeled.[146]

Berkovits removes any remaining doubts about the moral nature of this telos in his

description of the universal Kingdom of God:

> A universal mankind will come into being only through the reconciliation of all separative
> interests, ambitions, and aspirations in the world. Reconciliation, however, means awareness
> of and care for the 'other.' This brings us back to our starting point: The obligation to care
> we found in the imitation of God; the effectiveness of the caring deed we saw safeguarded
> through the law of God. The harmony of mankind is the end-result in history of a
> development which starts with the individual *mitzva*, the deed of interpenetration of the
> spiritual and the material. The God orientation of the whole of the human being is the
> beginning of a process that aspires to a kind of universalism, or to what we have called the
> God-orientation of all life.[147]

The purpose of the commandments is thus the attainment of a universal reign of *sedeq*, the

Kingdom of God. This process begins with the individual through the prescription and

prohibition of moral actions as well as actions for the development of moral dispositions.

Simultaneously, the body is implanted with an orientation to God, which, as indicated, is both an

expression of concern itself and aids in moral action. But because the deed must be effective in

reality, the social, economic, and political order must be organized according to the principles of

sedeq. Lastly, the first outpost of the Kingdom of God, the Jewish state, serves as an example for

other nations. In imitation of the Jewish people the other nations are recruited to the furtherance

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[145] Berkovits, *GMH*, 143.

[146] Ibid., 142.

[147] Ibid., 142–143.

of *sedeq*, culminating in the establishment of the world as the universal Kingdom of God, the thoroughgoing organization of the world by *sedeq*.

Berkovits is direct about the implications of this teleological justification of halakhic norms: The commandments, *qua* commandments and distinct from the actions that they mandate, are only necessary so long as their goal, which he also refers to as "the purification of mankind," has not been achieved:

> When the task of purification is completed, the law will be fulfilled.… [T]o exercise "mercy, justice, and righteousness on earth" will have become the natural desire of the whole man. When, as the result of the sanctifying deed, mankind as a whole will "delight in these things," the law will no longer be needed. But there are no shortcuts in history. Only through the law will the law be overcome. When that phase is reached, mankind will have fulfilled its destiny, and history will be at an end.[148]

History comprises the period during which "mercy, justice, and righteousness" or, taken together, *sedeq* has not yet become the natural desire of all human beings. When *sedeq* fully interpenetrates all of created being, the commandments as external law will no longer be required and the world will be established as the Kingdom of God.

In sum, Berkovits provides a perspicuous teleological justification of the commandments in terms of the moral ideal of *sedeq* and the goal of the establishment of the world as the Kingdom of God. The commandments and the various actions mandated by them have various teleological relations to this purpose. The commandments *qua* commandments have a strictly instrumental relation to it. The actions mandated by the commandments, however, have more complex relations. From one perspective, the actions mandated by the ritual commandments are simply a means for the creation of moral motivation and dispositions. Thus, they too have an instrumental relation to their end. From another perspective, however, they themselves are moral acts towards one's own materiality. Consequently, they have an internal relation to their end. The actions

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[148] Ibid., 133–134.

mandated by the interpersonal commandments are by all accounts moral actions. They are thus internally related to the end of *sedeq*. But even these actions have a teleological aspect. They also advance the establishment of the world as Kingdom of God. Still, they do this by being themselves acts of *sedeq*.

D. Normative Difficulties

Despite offering a clear justification of the commandments with a corresponding account of normativity and motivation, there are significant difficulties with Berkovits' account of *ta'amei ha-mitzvot*. These difficulties are not all of a piece. Some concern issues that are more essential than others. Further, Berkovits recognizes some of these difficulties and offers resolutions to them, while others are unrecognized and left unresolved.

The first and least essential difficulty is the warrant for the cosmological and eschatological scheme within which Berkovits' justification of the commandments is embedded and upon which it partially depends. On his account, moral action does not just concern relationships between human beings but involves any other. The extension of moral obligations to include one's own body (separate from one's person) and non-human beings is an interesting proposition that could aid in the development of moralities and theologies that are sensitive to the bio-technological and environmental threats of late-modernity. However, it is difficult to make sense of the notion of moral obligations to inanimate matter. Berkovits grounds this obligation in imitation of God's creation of the world and as part of the human contribution to the establishment of the Kingdom of God. It is challenging to determine what would warrant this cosmological and eschatological scheme. Berkovits is not clear which commandments are strictly for the purpose of promoting *sedeq* towards matter, but to the extent to which these accounts are unsubstantiated such commandments are unjustified.

Berkovits does appeal to revelation to warrant his cosmological and eschatological scheme. Indeed, the status of his claims about revelation is central to his account of *ta'amei ha-mitzvot*. The normativity of the commandments as well as morality itself depends on the expression of God's will. As has been shown, Berkovits marshals a number of arguments to support the possibility of revelation and the credibility of the Biblical witnesses. It would be an undue detour to engage in a detailed evaluation of these contentions. Even if his arguments for the possibility of miracles are cogent on Humean premises, which they most likely are not, the veracity of the Biblical record still must be established. Berkovits thereby introduces a great deal of contingency into the justification of the commandments and morality more generally. Ultimately, they depend on uncertain historical arguments.

Additionally, the grounding of the normativity of the commandments in a historical revelation restricts the obligation to practice them to the Jewish people. On the one hand, this is advantageous as it explains why, if the commandments are rationally justifiable, only Jews are obligated to perform them. On the other hand, it engenders difficulties for Berkovits' moral philosophy and eschatology. He maintains that only the absolute will of God can create an unconditional moral obligation. However, by locating the disclosure of that will in a historical and particular revelation to the Jewish people, he denies unconditional moral obligation to non-Jews. They could adopt the same moral practices as Jews, but they could never be bound by them in the same way. Similarly, he describes the revelation to the Jews as the initial stage in an eschatological project that includes the entire world. Non-Jewish nations are meant to be drawn to the model of the Jewish people and to emulate it, organizing their societies according to *sedeq*. Yet, on his justification of the commandments, they can never be obligated to join this project.

Even more significant difficulties concern Berkovits' account of normativity. To explain the need for revelation he separates the axiological question of the good and the deontological question of obligation. But it is not clear that this can be accomplished so easily. Surely one is obligated to advance the good. Similarly, the fulfillment of one's moral obligations is a good. The failure to disentangle these issues is evident in his description of the normativity that issues from revelation. At times he describes it as deriving from imitation of God, while more often he links it to God's command. Using physical metaphors, imitation seems to ascribe more "pull" to God's *sedeq*, while command seems to attribute more "push" to God's will. For *sedeq* to have "pull" though it must be something that human beings independently recognize as valuable. However, Berkovits stresses that even if *sedeq* is valuable, it still would not be obligatory for humanity had God not commanded it.

Berkovits also fails to explicate why God is an authority and his will normative for human beings. It is the singular exception to his account of normativity in that it introduces an external reason for action. Berkovits attributes intrinsic authority to God. This is not a radical claim for a theist to make. If anyone has authority, then surely God does. However, Berkovits does not elaborate on this claim. Thus, despite his efforts, he leaves unclear the relation between *sedeq* and normativity. *Ex hypothesi*, God's authority and the normativity of the divine command cannot derive from the content of the command. Similarly, it cannot derive from a duty human beings possess to obey God, for that simply shifts the question to the normativity of that duty. One is thus left with the claim that it derives from the brute fact of God's role as creator. But what is the normative force of that fact?

Relatedly, Berkovits seems to be inconsistent about the balance between heteronomy, or as he calls it theonomy, and autonomy in revelation. At points, he is clear that there is no autonomy

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before the divine will. However, he also describes revelation as the induction of the Jewish people into fellowship with God,[149] which implies a non-hierarchical relationship. Lastly, while Berkovits has clarified the content of *sedeq* and its subordinate values to a certain extent by showing how the Biblical commandments advance them, they remain rather indeterminate. Correlatively, it is still not obvious how all the commandments can be described as expressions of these values. As opposed to the preceding challenges, Berkovits attempts to resolve these last two difficulties in his theory of halakha. He views halakhic-legal practice as transforming theonomy into autonomy and guiding the commandments to advance *sedeq*.

II. Teleological Theory of Halakha

The major influences on Berkovits' philosophy of halakha have been identified by Roth as Rabbi Jehiel Jacob Weinberg and Rabbi Moshe Shmuel Glasner.[150] In this section the connection between elements of Berkovits' own thought is examined, in particular the relation between his justification of the commandments and theory of halakha. It is argued that the latter closely corresponds to the former. Just as the commandments are justified through their purpose, halakhic-legal practice is guided by that purpose. Principles within the halakha direct the implementation of the commandments to ensure that the telos of the Torah is advanced. Berkovits thus presents a comprehensive teleological theory of halakha. Moreover, the direct connection he establishes between the justification of the commandments and halakhic-legal practice through their purpose represents a robust justification of halakhic practice. If halakhic-legal practice is guided by purpose that justifies the commandments, then the justification for acting according to the halakha can be maintained.

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[149] Ibid., 87.

[150] Roth, "Eliezer Berkovits as Theoretician of Halakha," 313–329.

However, Berkovits' theory of halakha is susceptible to two interpretations, which correspond to different accounts of the nature of law and legal decision-making as well as the relation between philosophical reflection on law and legal practice. These accounts have been introduced in the previous chapter. The first interpretation is that of inclusive legal positivism, a position that recognizes that a legal system may contain moral principles and values. The second interpretation is that of legal post-positivism, an interpretive account of legal decision-making that claims that judges engage in constructive interpretations of the law that combines description and justification. Despite both recognizing a role for moral values in law, the difference between these interpretations is significant for a number of issues, including the share of autonomy in halakha, the relation between *ta'amei ha-mitzvot* and halakhic-legal practice, and the nature of Jewish philosophy.

The outlines of Berkovits' theory of halakha are presented to display its teleological nature and direct connection to his justification of the commandments (A). Examples of his actual halakhic-legal practice are then analyzed to show the consistency between it and his theory of halakha (B). The competing interpretations of his theory are subsequently presented along with their differing implications (C). Lastly, problems in his theory of halakha are discussed (D).

A. Theory of Halakha and Teleology

Berkovits argues for a teleological theory of halakha: Halakhic-legal practice is guided by the telos of the Torah. This contention is twofold: descriptive and prescriptive. He aims to describe the authentic nature and function of the halakha in order to resurrect its practice. His main discussions of philosophy of halakha, included in two related works, *The Halakha: Its Power and Function* (*HPF*) and *NFH*, thus contain both philosophical reflections on halakha and studies

of Talmudic halakhic-legal practice.[151] These studies are of interest as statements of Berkovits'

own theory of halakha rather than as contributions to Talmudic scholarship. On their basis, he

argues for the necessity of halakhic-legal practice in addition to the written Torah (1) and

contends that it is an essentially human endeavor (2) aimed at achieving the telos of the Torah

(3). Further, he presents a theory of rabbinic authority (4) and a historical account of halakhic-

legal practice (5).

1. The Necessity of the Halakha

Berkovits identifies the halakha with the Oral Torah and describes it as the "wisdom of Torah

implementation in the daily life of the Jewish people."[152] In *NFH* he explains the need for it:

> Halakha is the wisdom of the application of the written word of the Torah to the life and
> history of the Jewish people. However, this wisdom and its implementation cannot be
> contained in any book. No written word can deal in advance with the innumerable situations,
> changes of circumstances, and new developments that normally occur in the history of men
> and nations. The eternal word of the Torah required a time related teaching in order to
> become effective in the life of the Jewish people. This was the tradition passed on by the
> living word from generation to generation, the *Torah sh'baal'Peh,* the Oral Torah, beside the
> *Torah she'be'Ktav,* the Written Torah.[153]

The Torah must be rendered effective in life. It contains commandments that aim to organize

society according to the ideal of *sedeq*. Yet, life is characterized by particularity; no historical

period or situation is identical to any other. Some medium is thus required to translate the

commandments into new circumstances so that their purpose is achieved. Berkovits emphasizes

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[151] Eliezer Berkovits, *Ha-Halakhah: Kohah Ve-Tafkidah [The Halakha: Its Power and Function]* (Jerusalem: Mosad ha-Rav Kook, 1981). Henceforth *HPF*. Despite the similarity of their titles, these works are different from each other. *HPF* is written in Hebrew and contains exhaustive discussion of halakhic texts to substantiate Berkovits' contentions. Its audience is scholars with expertise in halakhic literature. *NFH* appeared in English a number of years later and is bare of these discussions. However, there is no noticeable disagreement between them regarding Berkovits' view of the nature, power, and function of halakha. Thus, I primarily present his views as contained in *NFH* and draw on *HPF* for detail.

[152] Berkovits, *NFH*, 1.

[153] Ibid., 71 transliterations in the original.

that this is not a problem that is unique to the Torah but one that afflicts any legal system because of the necessary generality of law and the particularity of life.[154] In this, Shatz points out, Berkovits indicates the problem of "uncodifiability" recently discussed by Rynhold.[155] The world contains too much complexity for rules to fully determine what ought to be done in every circumstance. A process of operationalization beyond simple application is required. It is principles, according to Berkovits, that allow the Torah to achieve the same purpose in different circumstances by guiding the implementation of the commandments.

Berkovits is not the first Jewish thinker to notice this problem or suggest this solution. He marshals a number of medieval Jewish authorities to support his view, including Nahmanides and Joseph Albo (1380-1444).[156] While both fix on the role of principles in enabling the commandments to be applied in new circumstances, the former focuses on the Torah's moral principles. Berkovits follows Nahmanides in this regard, which is consistent with his view of the Torah. If the function of the principles is to allow the implementation of the commandments in new circumstances while preserving their purpose, and if the Torah has a moral purpose, then the principles should be moral.[157] Halakhic-legal practice involves the implementation of the laws of the Torah in new circumstances under the guidance of these moral principles to ensure the advancement of the moral purpose of the Torah.

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[154] Ibid., 73.

[155] Shatz, "Berkovits and the Priority of the Ethical," 5 fn. 28; and Rynhold, *Two Models of Jewish Philosophy*, 151–153. As Rynhold notes, he draws on Hart for this analysis. See Hart, *CL*, 128.

[156] Berkovits, *NFH*, 71–73; Joseph Albo, *Sefer Ha-ʿikarim* (Tel-Aviv: Mahbarot le-sifrut be-siyuʿa Mosad ha-Rav Kook, 1964), bk. III: Chapter 23; and Nahmanides' commentary on Deut. 6: 18, s.v. *ve-'aseta ha-yashar* in *Torat Hayym* (Jerusalem: Mosad ha-Rav Kook, 1993), vol. 6: 60–62.

[157] In an earlier work, Berkovits uses the German legal term "*Ausführungsbestimmung*," or "implementing regulation" to describe these legal principles. See *Was ist Der Talmud? [What is the Talmud?]*, trans. Ruth Morris (Berlin: Jüdischer Buch-Verlag, 1938).

2. Halakhic Authority: Autonomy in the Context of Theonomy

The Torah, according to Berkovits, is the divine law *for humanity*. Not only is it intended to organize human society, it is meant to do this through the participation of human beings. Indeed, he ascribes a large measure of human independence to the implementation of the Torah. The title of *NFH* refers to a Talmudic story that is central to his theory of halakha. The Talmud describes a halakhic debate between Rabbi Eliezer and the sages regarding the ritual status of a peculiarly constructed oven. The former ruled the oven pure, while the latter ruled it impure:

> On that day R. Eliezer brought…every imaginable argument, but [the sages] did not accept them. Said he to them: 'If the *halakha* agrees with me, let this carob-tree prove it!' Thereupon the carob-tree was torn a hundred cubits out of its place…. 'No proof can be brought from a carob-tree,' they retorted…. Again he said to them: 'If the *halakha* agrees with me, let it be proved from Heaven!' Whereupon a Heavenly Voice cried out: 'Why do ye dispute with R. Eliezer, seeing that in all matters the *halakha* agrees with him!' But R. Joshua arose and exclaimed: 'It is not in heaven.' What did he mean by this? - Said R. Jeremiah: That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written in the Torah at Mount Sinai, 'After the majority must one incline.' R. Nathan met Elijah and asked him: What did the Holy One, Blessed be He, do in that hour? — He laughed [with joy], he replied, saying, 'My sons have defeated Me, My sons have defeated Me.'[158]

For Berkovits this story is significant for two reasons: It asserts the primacy of human reason in halakhic-legal practice and indicates the nature of that reason.

Rabbi Eliezer attempts to marshal divine authority to support his ruling, and, indeed, he receives the endorsement of a heavenly voice. However, based on a truncated citation of a Biblical verse (Deut. 30:12), the sages reject this proof and assert that one pays no attention to such a voice in halakhic-legal decision-making. Rather, the majority is followed as described in another Biblical text as interpreted by the rabbis (Ex. 23: 2).[159] Further, the Talmud reports through the testimony of Elijah that God approved of their assertion. Berkovits interprets this

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[158] BT Bava Metzia 59b.

[159] See BT Sanhedrin 2 and BT Berakhot 9a

follow-up story as expressing "an insistence on the human share and responsibility in the interpretation and administration of the revealed Word of God."[160] Halakhic-legal practice is the responsibility of human beings. By citing the verse-fragment, "it is not in heaven," the sages claimed, "God Himself, in the act of revelation, handed the deciding authority to man."[161]

Berkovits maintains that this authority is transferred to humanity for a number of reasons. First, it redeems the "autonomy deficit" introduced in revelation. Despite the theonomy of revelation, God calls the Jewish people to fellowship with him. Only in this way can the eschatological goal of the emergence of the Kingdom of God from created being be accomplished. Human autonomy is introduced into this relationship in halakhic-legal practice:

> Words of the covenant are not dictates from on high…. They invite man to his own contribution and to accept his share of responsibility. Halakha is the final outcome of this covenantal mutuality of recognition…. In the mutuality of the covenant, theonomy and autonomy serve together for a common purpose. The supreme principle of the law to which man is subject is theonomous, its ultimate source of authority is the will of God; the interpretation of the law and its application to innumerable and forever changing life-situations is autonomous.[162]

Second, he claims that only finite human reason can organize human society. The heavenly voice is rejected because halakha "does not aim at absolute truth, nor… universal truth," for such truth is not accessible to human beings.[163] Moreover, even if it were, it would be inappropriate for the purposes of the Torah. Society must be organized by "pragmatic-moral" truth. In *HPF* this contrast is summarized:

> Simple truth is objective truth…the truth of the pure reason of theoretical logic. In…this truth one cannot build worlds for human beings. The halakhic truth is the truth of law, and the law

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[160] Berkovits, *NFH*, 48.

[161] Ibid.

[162] Ibid., 82–84.

[163] Ibid., 56.

is entirely concerned with the establishment and enhancement of life…. Through the power of this pragmatic-moral truth, the world is established as the kingdom of God, and so we are made, as it were, partners with God in the act of creation.[164]

The telos of the Torah is the transformation of the world into the Kingdom of God through the efforts of human beings. Therefore, in the implementation of the Torah by halakhic-legal practice, "one takes into consideration human nature and its needs, human character and its problems, the human condition in its forever fluctuating dimension, the Jew and the Jewish people in their unique historical reality."[165] And, according to Berkovits, this can only be accomplished through finite human reason, which operates within the constraints of pragmatic feasibility and with regard to the unique moral features of situations.

3. Halakhic-Legal Decision-Making

The operation of finite human reason in halakha is elaborated in Berkovits' theory of halakha, which consists of a comprehensive analysis of the halakhic-legal decision-making process. For ease of exposition, it can be divided into two stages: the abstract analysis by a decisor of a given case in view of the basic halakha (a) and the somewhat messier elements of decision-making, including decision procedures in a halakhic-legal court (*beit din*) and the authority of a contemporary decisor confronting precedent (b).

a. Halakhic Reason: *S'bara* and Principles

Berkovits describes "halakhic reason" using the Talmudic term "*s'bara*" and explains its role in Talmudic halakhic-legal practice. According to him, the Talmud privileges human reason in a number of ways. Halakhic positions based on reason are granted equal authority to those that

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[164] Berkovits, *HPF*, 301.

[165] Berkovits, *NFH*, 73.

derive from the Biblical text. Additionally, according to the Talmud, the Torah itself in at least

one instance assumes a norm based on reason to be valid and then establishes its own command

through an *a fortiori* argument.[166]

But, more importantly, *s'bara* is characterized as "practical" and "moral-pragmatic" reason,

and this results in far-reaching capacities. In its implementation of the commands of the Torah it

is not driven by logical consistency as theoretical reason would be. Instead, "[i]t is practical

reason in the sense that it requires consistency in the halakhic endeavor to realize Halakha's two

guiding ideals, as presented to it by the Torah, 'Thou shalt live by them…and not die by them,'

and 'All its ways are ways of pleasantness, and all its paths, paths of peace.'"[167] The consistency

of *s'bara* is constancy in the attainment of the pragmatic and moral ideals expressed by the

Torah. The pragmatic ideal is expressed by the verse, "You shall keep My laws and My Rules,

by the pursuit of which man shall live: I am the Lord" (Lev.18:5), to which the Talmud adds

'You shall live by them and not die by them."[168] While the literal sense of the Bible is an

exhortation and the Talmud understands it as an injunction concerning the preservation of life,[169]

Berkovits takes it to establish the overarching principle of the Wisdom of the Feasible (WoF).

This principle guides the implementation of the Torah's commandments in view of "the

practicality and effective functioning of the material, economic, and social structure of Jewish

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[166] Ibid., 3–4. See BT Bava Kamma 46b and BT Sanhedrin 74a. While the Talmudic texts Berkovits adduces to support his theory of halakha will often be cited, sometimes his own discussion will simply be referenced. The reader may then consult these texts for the original source. My aim is not to describe actual Talmudic practice or even to assess the accuracy of Berkovits' portrayal of it but to present and to evaluate Berkovits' theory of halakha.

[167] Ibid., 81.

[168] BT Sanhedrin 74a

[169] Ibid.

existence."[170] The moral ideal is expressed in a verse in Proverbs that Wisdom's "ways are pleasant ways, And all her paths, peaceful" (3:17). Berkovits takes this to be a "comprehensive description of the nature of the Torah as found in the Torah itself,"[171] which establishes the principle of the Priority of the Ethical (PoE) in halakhic-legal practice.

The central feature of the WoF and PoE principles is that they mediate the implementation of halakhic norms so that the Torah's telos is realized. They guide the interpretation of Biblical texts, serve as the basis of rabbinic injunctions, and circumscribe the application of Biblical commands.[172] Sometimes their underlying verses are directly cited in rabbinic literature; more frequently different verses or other principles are adduced. However, Berkovits interprets these verses and principles as subordinate to the two overarching principles. Each primary verse and principle caps a ramified structure of subordinate verses and principles, each with its own meaning and application. His discussion, though exhaustive in terms of the range of rabbinic material covered, is not well organized. A rough organization can be reconstructed. Some of the structure and operations of the principles are discussed below (i-ii), before the emergency powers of halakhic-legal practice are briefly mentioned (iii).

i. Priority of the Ethical

As indicated, Berkovits describes the primary moral principle as the "Priority of the Ethical" (PoE) and maintains that it is rooted in the Torah's self-description as "Her ways are pleasant ways, And all her paths, peaceful" (Proverbs 3:17). According to the Talmud, this verse indicates

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[170] Berkovits, *NFH*, 77.

[171] Ibid.

[172] Ibid., 19.

that "[t]he Torah in its entirety exists for the sake of the ways of peace [*shalom*]."[173] While peace

is not identical to *sedeq*, Berkovits understands it to mean morality in the broadest sense. In any

case, PoE principles serve a central function in Talmudic halakhic-legal practice. He explains,

> The rabbis in the Talmud were guided by the insight: God forbid that there should be anything in the application of the Torah to actual life situations that is contrary to the principles of ethics. What are those principles? They are Torah principles, like: 'And thou shalt do that which is right and good in the sight of the Eternal One'; or, 'Her ways are ways of pleasantness, and all her paths are peace' or, 'That thou mayest walk in the way of good men, and keep the paths of the righteous.'[174]

Berkovits marshals the verses upon which the PoE principles are based, including the primary

PoE verse (Prov. 3:17), "Do what is right and good in the sight of the Lord" (Deut. 6:19), and

"So follow the way of the good and keep the paths of the just" (Prov. 2: 20).

Berkovits devotes a large portion of *NFH* and even more in *HPF* to exploring PoE in

Talmudic halakhic-legal practice. He describes three ways PoE and its subordinate principles

operate in Talmudic halakhic-legal practice. They influence the interpretation of biblical verses

(1), result in rabbinic enactments that extend biblical commandments (2), and circumscribe

biblical commandments to render them inapplicable when they would result in morally

problematic consequences (3).[175] He also describes different types of relations between the PoE

verses and principles, on the one hand, and halakhic-legal practice, on the other: a PoE verse is

cited in support of an interpretation or position (a), a PoE principle is presented in support of an

interpretation or position (b), and there is evidence of the implicit influence of PoE but no verse

or principle is directly adduced (c).

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[173] BT Gittin 59b. Cited in Berkovits, *NFH*, 19.

[174] Berkovits, *NFH*, 19.

[175] Ibid.

Occasionally, the primary PoE verse is directly cited to interpret the Bible when the text is unclear about the way a particular commandment should be performed (1a). For example, it is used to interpret the Torah with regard to a particular case of levirate marriage. If a married man dies without a child, his brother is commanded to marry his widow. The brother and the widow are allowed to forego marriage; however, they must undergo the levirate marriage refusal ceremony (*halitzah*), before she may marry another (Deut. 25: 5-10). The case concerns a woman who bore a child and then whose husband dies. Because her husband did not die childless, she need not enter into a levirate marriage nor undergo *halitzah*. She then permissibly marries someone other than her former brother-in-law. Subsequently, the child dies. The Talmud offers an *a fortiori* argument to the effect that her first husband should be considered as having died childless, and thus she should be obligated to undergo *halitzah* with her former brother-in-law. However, this argument is countered with the Torah's self-description as "pleasant ways" and "paths of peace." Apparently, it would not be consonant with that character for a married woman to undergo *halitzah*. The verses regarding levirate marriage are then read in a manner to preclude the necessity of her undergoing *halitzah*.[176]

The primary PoE verse is also used as the basis for rabbinic enactments that "establish laws and behaviors that complete the Torah in matters that it did not explicitly dictate."[177] For example, when the Torah commands acts of assistance only for other Jews, such as charity, visiting the sick, and burial, the Talmudic sages often extend the requirements to include non-Jews. Though the primary PoE verse is not explicitly cited, the rationale offered is "ways of peace," which Berkovits takes to reference it directly. Thus, according to him it is a case of (2a).

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[176] Berkovits, *HPF*, 123. See BT Yevamot 87b.

[177] Ibid., 114.

Sometimes a principle that does not reference the original verse at all is cited as the basis for the enactment (2b). For example, the Talmudic sages ruled, extending the Biblical law, that minors could acquire property so that objects that they found would not be taken from them. The reason given for this is the prevention of "hatred." They also ruled that one could acquire objects via one's personal space, without the Biblically required physical conveyance, thus preventing physical struggles over objects. The rationale given for this is the prevention of "strife." In these cases, despite their status as rabbinic enactments and lack of Biblical source, Berkovits claims that "since the source of their enactment is the basic moral imperative 'All its ways are ways of pleasantness, and all its paths, paths of peace,' [they] are also from the Torah."[178]

Berkovits also elaborates on the application of each subordinate PoE verse and principle, articulating the differences among them. This discussion is a testament to his expertise in rabbinic material; however, a summary of it is beyond the purpose of this section.[179] Obviously, the combination of (3) and (c) results in the most controversial instances: Biblical commandments are rendered inapplicable and this is due to the implicit influence of the Torah's moral principles without the invocation of another Biblical verse or a principle that derives from it. One exemplary case involves the stubborn and rebellious son, who, according to Biblical law, can be handed over by his parents to be executed (Deut. 21: 18-21). Talmudic interpretation fixes on his character as a glutton and drunkard and speculates that he is preemptively punished.[180] Still, Rabbi Judah interprets the requirements in a strictly literal manner to rule out any possibility of the law's application. Finally, he concludes "it never happened nor will it ever

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[178] Ibid., 118.

[179] See ibid., 119 – 140 for a detailed discussion.

[180] M Sanhedrin 8: 5.

happen." The Talmud then asks "If so, why was it written?," to which it replies "To interpret it and receive reward for its study."[181] For Berkovits this means that the commandment was a moral challenge for the rabbinic interpreters: to see whether they could reconcile it with the Torah's moral principles.[182]

Berkovits maintains that the most significant area where the rabbinic response to the Torah's moral challenge can be seen is in the Talmudic sages' approach to the laws of marriage and divorce. Significantly, in most of these cases there is no explicit appeal to PoE verses or principles. Nonetheless, he claims,

> It is doubtful whether the halakhic conscience is any more strongly in evidence than in the area of the marriage and divorce laws…. As is the way of the Halakha, great efforts are made to retain the meaning of the legal principle and yet find solutions to the daily problems arising from the confrontation between the written word and the ethical needs of the concrete situation.[183]

He details rulings in which the rabbinic sages sought to remedy the vulnerable position of women in Jewish marriage through enactments without the explicit invocation of PoE verses or principles (2c). A significant example is the introduction of the marriage contract (*ketubah*), which is unnecessary according to Biblical law. This provided a halakhic-legal instrument for the introduction of a range of conjugal rights and obligations, such as forbidding polygamy and increasing alimony.[184]

For Berkovits the most important aspect of Talmudic halakhic-legal practice regarding women was in the area of the dissolution of marriage. This area was of particular concern

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[181] BT Sanhedrin 71a translation Berkovits.

[182] Berkovits, *NFH*, 31.

[183] Ibid., 32.

[184] Ibid., 31.

because of the possibility of *igun*, or "anchoring." As indicated previously, *igun* refers to the situation where a marriage has effectively ended but without halakhic divorce, either through the disappearance of one of the partners or the disintegration of the spousal relationship. The root of this problem lies in the nature of marriage and divorce in Jewish law. For, as Broyde points out, "marriage and divorce in the Jewish legal tradition is different from that of any other…legal or religious system in that [they] are private neo-contractual rights rather than public rights."[185] Since marriage and divorce are based on a private contract between the husband and wife, it can only be created or dissolved by the contracting parties. Halakhic-legal authorities do not conceive of themselves as creating marriages and divorces but only as discovering facts, such as whether the contract is valid, satisfied, or breached.[186] Thus, cases can arise where one party is unwilling or unable to dissolve the marriage and the other party is "anchored" in the marriage.

While technically both men and women can fall victim to *igun*, a second feature of Jewish marriage and divorce results in the problem being more prevalent and problematic for the wife: Men and women have asymmetrical statuses in the creation and dissolution of the marriage contract. Only the man can initiate both the creation and dissolution of the marriage, though the woman must accept the marriage (according to the Bible) or the divorce (based on rabbinic enactment). Additionally, according to Biblical law, the husband can create multiple marriage contracts, that is, polygyny is permitted, while she can only take part in one, that is, polyandry is prohibited. Thus, if the wife was to refuse to accept a divorce or disappear without proof of death, the husband would not truly be "anchored," for he could still enter into another marriage. And while polygyny was prohibited for European Jews by enactment, its violation is not as

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[185] Michael J. Broyde, *Marriage, Divorce, and the Abandoned Wife in Jewish Law: A Conceptual Understanding of the Agunah Problems in America* (Hoboken: Ktav, 2001), 1.

[186] Ibid, 45.

severe as violation of the Biblical prohibition by the wife, and it is waivable by rabbinic authorities. In contrast, the Biblical prohibition for the woman cannot be waived; its violation is punishable by death; and any resultant offspring have the status of bastards (*mamzerim*).[187]

The possibility of cases of *igun* and attempts at their prevention appear as early as the Talmud, and, Berkovits claims, the halakhic moral conscience is evident in the manner in which the Talmudic sages resolved them. He writes, "In many cases the sages decided that it was proper to be lenient on a woman in various matters so that she should not be anchored…. [T]hey permitted divergences from the principles of halakha that are valid in other places."[188] Some of these halakhic principles are Biblical commandments. For example, Biblical law requires two free, male witnesses for testimony to any fact. However, the Talmud presents a case in which one male, a female, a slave, or even an indirect report is accepted as evidence of a husband's death, thus freeing the wife to remarry. The Talmud and medieval authorities offer many explanations for this irregularity; Berkovits, however, fixes on the statement that concludes the Talmudic discussion: "Because of the danger of her becoming an *agunah*, one made it easier on her."[189] Because of the consequences of the usual Biblical laws of testimony in this case, the Talmudic sages altered their application. According to Berkovits, they did this out of moral concern but without citing a PoE verse or principle; it is thus an example of (3c).[190]

Additionally, the Talmud records a case in which the rabbinic sages annulled a marriage because the husband violated a rabbinic enactment. According to Biblical law, a husband who

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[187] See Broyde, *Marriage, Divorce, and the Abandoned Wife in Jewish Law*, 1–14 for a detailed discussion.

[188] Berkovits, *HPF*, 203.

[189] BT Yevamot 87b-88a, translation Berkovits.

[190] Berkovits, *NFH*, 42–43.

sends a bill of divorce (*get*) by messenger to his wife can void it before a local *beit din* so long as she has not received it. This obviously introduces uncertainty about such divorces. An enactment was thus issued that forbids the husband from exercising this right. The Talmud entertains the question of the consequences of the violation of this enactment. Rabban Gamliel contends that despite the husband's Biblical right to void the *get* and continue the marriage, the *get* remains valid and the marriage dissolved. A marriage that is valid according to Biblical law is thus dissolved by a *get* that is only valid according to rabbinic enactment. To support this remarkable conclusion the Talmud offers the rationale that '[w]hen a man betroths a woman, he does so under the conditions laid down by the Rabbis, and in this case the Rabbis annul his betrothal."[191] One marries with the knowledge that the halakhic-legal basis of the marriage is established according to the understanding of the rabbis. Compliance with their enactments is therefore an implicit condition of the marriage, such that their violation renders the marriage annulled. Thus, despite the husband rendering the *get* void, his violation of the rabbinic enactment in doing so renders the marriage retroactively annulled.

For Berkovits this halakhic-legal maneuver is a paradigmatic instance of the influence of the PoE in Talmudic halakhic-legal practice. Moral considerations stemming from the Torah circumscribe the application of a Biblical law even when neither a verse nor a principle is explicitly mentioned (3c). He writes, "The rabbis were fully aware of the legally disadvantaged status of the women…and endeavored to correct the situation."[192] They did this through rabbinic enactments and even overrode Biblical commandments. This Talmudic halakhic-legal practice attests to the halakha's teleological nature. It stems from the Talmudic insight that the Bible's

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[191] BT Gittin 33a.

[192] Berkovits, *NFH*, 45.

claim, "Her ways are pleasant ways, And all her paths, peaceful," means that "The Torah in its entirety exists for the sake of the ways of peace." Implementation of the Torah's commands must advance *sedeq*.

ii. Wisdom of the Feasible

Berkovits' second basic principle is the Wisdom of the Feasible (WoF). It is based on a single Biblical verse, "You shall keep My laws and My Rules, by the pursuit of which man shall live: I am the Lord" (Lev. 18: 5), though it too issues in a structure of subordinate principles. Berkovits claims that it establishes that "the practicality and effective functioning of the material, economic, and social structure of Jewish existence" must be considered in the implementation of halakhic-legal norms.[193] He maintains that WoF principles also operate in Talmudic halakhic-legal practice in a number of different ways (1-3) and that their use is apparent to varying degrees (a-c). Moreover, he insists that WoF does not relate simply to effectiveness but to pragmatic and moral "feasibility."[194]

The highest-order WoF principle is that "The Torah was not given to the ministering angels,"[195] which Berkovits explains as meaning "it is forbidden for the halakha to evade the existing reality, the daily and historical existence of the individual and the nation."[196] Human attributes and social realities are taken into consideration when implementing the commandments. This principle is explicitly utilized in a Talmudic pericope concerning the construction of the Temple. To prevent the workers from accidentally utilizing the materials in a

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[193] Ibid., 77.

[194] Ibid., 12.

[195] Ibid., 8; 77. See also Berkovits, *HPF*, 45–54.

[196] Berkovits, *HPF*, 69.

manner that is ritually prohibited, the Temple was constructed out of materials that were not initially sanctified. Only after its completion was the structure as a whole consecrated.[197] The workers could have simply been exhorted to be meticulous while constructing the Temple; however, it was recognized that such precision was beyond their capacities, and a roundabout method of preventing the violation of ritual law was introduced. The manner of carrying out a Biblical command was determined by the explicit invocation of a WoF principle (1b).

A more interesting—and morally fraught—case where Berkovits sees this principle at work is in the rabbinic interpretation of the Biblical commandment of the captive woman. The Bible (Deut. 21: 10-14) effectively allows an Israelite soldier to rape a woman from a warring nation so long as he then takes her into his house for a trial period. Should he decide not to marry her, he is forbidden to sell her into slavery or otherwise oppress her. Rabbinic literature describes this commandment as prescribed with a view towards man's evil inclination.[198] According to Berkovits, the Torah recognizes the savagery of war and aims to change it. It does this not by directly denying even the most barbaric of human urges but by reforming them. The Torah's restrictions were a "revolutionary breakthrough" considering behavior in war in antiquity as well as today. He claims that it evidences that "according to Talmudic understanding the Torah does not command anything that man, because of his intrinsic nature or the prevailing conditions would not be able to do."[199] As described below, however, Berkovits also claims that the Torah works developmentally; it takes into account "prevailing conditions" and works to change them.

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[197] BT Me'ilah 14b.

[198] BT Kiddushin 21b.

[199] Berkovits, *NFH*, 9.

While the preceding invocations of WoF principles involve the interpretation of Biblical

laws, Berkovits also claims that they circumscribe the implementation of Biblical laws. For

example, as understood by the Talmud, it is a Biblical prohibition to travel a certain distance

outside of the city of one's residence on the Sabbath. As in most cases, this prohibition can be

violated to save a life. According to Biblical law, however, once one has concluded the

lifesaving efforts one may not move beyond one's immediate location until after the Sabbath.

However, the Talmud rules that individuals who cross the boundary to save a life may return to

their place of residence on the Sabbath.[200] Berkovits claims that the sages felt that if individuals

knew that they could not return home afterwards, they would not initially cross the boundary.

The Talmudic sages could have insisted that individual fulfill both of their obligations, to save a

life and to remain in place until the conclusion of the Sabbath. They recognized, however, that

insisting on this would disincentivize individuals to fulfill their obligation to preserve life and

thus allowed them to return home.[201] Since this is a circumscription of a Biblical law and a WoF

principle is not directly adduced, it is an example of (3c).

The most wide-ranging subordinate WoF principle is that of "when it is possible, it is

possible; when it is impossible; it is impossible," which Berkovits refers to as the "principle of

the possible."[202] The use of this seemingly tautological principle demonstrates two crucial

features of WoF: its capacity to introduce apparent inconsistencies into the halakha and its

connection to PoE. Berkovits describes its operation in connection to a set of cases concerning

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[200] BT Rosh Ha-Shana 23b.

[201] Berkovits, *NFH*, 12.

[202] Ibid.

divorce.[203] In the first case, a deathly ill husband on a journey sends a *get* to his wife. He is

childless and, believing his death imminent, wants to relieve his wife of the obligation either to

engage in levirate marriage or to undergo *halitzah* with his brother. But because he is deathly ill

there is a possibility that he will die before the *get* reaches his wife, which would render it void.

The opinion accepted in the Talmud is that, barring evidence otherwise, it is assumed that he is

still alive when the *get* reaches his wife, thus freeing her to marry whomever she pleases. In the

second case, a priest (*cohen*) who is married to an Israelite woman gives her a *get* that is

formulated to become effective just before his death. There are certain tithes that can only be

eaten by a *cohen* and his household. Now, however, uncertainty has been introduced into the

woman's status as member of that household. It is unknown when he will die, and thus when she

will become divorced from him. The opinion accepted in the Talmud is that she must

immediately cease to partake of the tithes. Thus, in this case, in contrast to the previous one, it is

immediately assumed that he may have died. The Talmud puzzles over the differences in these

cases and concludes that, while in in the second case it is "possible" to be concerned that he may

have died, in the first case it is "not possible."[204] That is, the consequence of assuming that the

husband died in the second case is simply that his wife must not partake of priestly tithes, while

the consequence of not assuming that the husband is alive in the second is that his wife will have

to engage in levirate marriage, undergo *halitzah*, or even become "anchored."[205]

This application of the "principle of the possible" demonstrates that it is not as tautologous as

it initially seemed. Berkovits claims, "The category of *Efshar*, the possible, represents what in

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[203] Berkovits, *HPF*, 112ff.

[204] BT Yevamot 87b.

[205] While it is clear that this is a case of (b) because a principle is directly invoked, it is uncertain whether it is an interpretation or a circumscription of a Biblical commandment.

view of human nature and with proper attention to human needs is practically or morally

feasible."[206] It is not logically or physically impossible to be concerned that the husband might

have died in the first case; it would just have unpleasant consequences for his wife. But it is not

feasible from a practical or moral perspective to burden the wife in this manner. In contrast, in

the second case the practical and moral stakes are low; the wife must simply refrain from certain

foodstuffs. Thus, apparent inconsistencies are introduced into the halakha because of differing

practical and moral consequences. But Berkovits argues that, in fact, this is constancy in the

operation of *s'bara*. Halakhic-legal reason does not aim to apply its assumptions in the same

manner in every case but to decide cases in a manner that practically furthers the Torah's goals.

Other rulings evidence the operation of WoF principles in terms of pragmatic feasibility in

the economic field. Berkovits writes, "As the 'wisdom of the feasible,' halakha safeguards the

effective pragmatic functioning of the economic and social structure of an autonomous Jewish

society."[207] The paradigmatic example relates to the Biblical commandment canceling debts in

the Sabbatical year (Deut. 15: 1-12). Initially, this is advantageous to poor debtors. However,

Hillel the Elder recognized that it created a disincentive for wealthy individuals to lend money as

the Sabbatical year approached. He consequently instituted the *prosbul*, which, as introduced

previously, is a halakhic-legal instrument that transforms private debts between the creditor and

the debtor into public debts between the debtor and the *beit din*. Such debts are not canceled by

the Sabbatical year, and thus the *beit din* could collect the debts and return them to the creditor.

Clearly, this involves the circumvention of the Biblical commandment. Berkovits argues,

however, that it is warranted by virtue of the principles and telos of the Torah. Indeed, the

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[206] Berkovits, *NFH*, 12.

[207] Ibid., 73.

Mishnah describes the *prosbul* as having been enacted because of "the establishment of the world."[208] In addition to ensuring the availability of credit for the poor as the Sabbatical year approached, it removed a moral hazard for the wealthy as they were liable to violate the prohibition against not giving to the poor (Deut. 15: 9).

Other enactments have the operation of the economic domain as their object even more directly. This is the case even when no WoF principle is adduced and there is a deviation from a Biblical commandment (3c). For example, it was ruled that if an individual claims that another individual possesses goods that had been stolen from him and the second individual claims that he purchased them from a third party without knowing they were stolen, the second individual swears regarding the amount that he paid for the goods and the first individual purchases them from him.[209] Thus, the original owner of the property is required to purchase goods seemingly stolen from him. According to Berkovits, this enactment, which violates the owner's property rights according to Biblical law, was necessary to "protect normal functioning of…business transactions."[210] If every buyer was concerned that the goods he purchased could be taken from him because they had been stolen, market transactions would be impossible.

While this last case may seem solely concerned with the economic order, Berkovits insists that such concerns involve moral considerations: "Concern about the material welfare of society is not materialism, but an expression of moral responsibility for the life of the people."[211] There

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[208] M Gittin 4: 3. Thus, regarding the classification of the case, since a principle—"the establishment of the world"—is invoked, it is an instance of (b). However, it is unclear whether it should be understood as a rabbinic enactment, extending the Biblical commandment of granting loans (2), or a circumscription of the Biblical commandment concerning the Sabbatical year (3), or both.

[209] M Bava Kamma 10: 3.

[210] Berkovits, *NFH*, 16.

[211] Ibid., 18.

is therefore a connection between WoF and PoE. This is not surprising for, as indicated, Berkovits claims that *sedeq* is not simply a moral ideal; it is also conducive to human flourishing. And if the purpose of halakhic-legal practice is to implement the Torah in manner that achieves its telos, it ought to be guided by pragmatic as well as moral considerations. Indeed, he writes, "the halakha makes reality the material for the establishment of our world as the kingdom of God."[212]

iii Emergency Powers

In addition to the operation of PoE and WoF principles, Berkovits attributes emergency powers to halakhic-legal practice. These should be interpreted as part of the teleological operation of halakhic-legal practice, perhaps as extensions of WoF. They aim to ensure the continuity of the project of the Torah in moments of crisis while allowing the violation of specific commandments.

Berkovits divides the emergency powers into three types: The first type consists of actions that are undertaken "to guard a situation." He contends that "when there are behaviors opposed to the laws of the Torah, or even moral sensitivity whose source is the Torah, then it is possible to do things 'not from the Torah' to rectify the crooked."[213] An example of this is Elijah's sacrifice on Mount Carmel (I Kings 18), despite the ban on sacrifices outside the Temple.[214] The second type consists of actions that are undertaken when "it is time to act for God," that is, when "it is appropriate to breach the law for the sake of a purpose whose importance is superior to

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[212] Berkovits, *HPF*, 13.

[213] Ibid., 106.

[214] Berkovits, *NFH*, 65. See BT Yevamot 90a

some individual commandments, and [this is done] for the sake of heaven."[215] An example of this, which is discussed below, is the compilation of the Mishnah, despite the prohibition of writing down the Oral Torah.[216] Lastly, the third type consists of actions described as "temporary ordinances." An example of this is the irregular offerings that Ezra brought when the Jews returned from exile (Ezra 8). For Berkovits "temporary ordinances" differ from the other emergency powers in that they do not, strictly speaking, violate a Biblical commandment. They concern unanticipated situations, where there is a legal gap, and a novel ruling is required.[217]

b. Decision Procedure and Contemporary Halakhic-Legal Authority

The preceding discussion abstracted from the "messier" elements of halakhic-legal practice, including decision-making within the context of a *beit din* and a decisor confronting halakhic precedent. In this sub-section Berkovits' approach to these elements of halakhic-legal practice is presented. It is argued that he balances procedural and substantive concerns and preserves the capacity for contemporary decisors to respond to the unique features of cases that confront them.

According to Berkovits, the Talmudic story of Rabbi Eliezer and the heavenly voice has another lesson for halakhic-legal practice. Not only is the heavenly voice rejected in favor of the opinion of finite human reason, but the final decision is reached according to the procedural rule of the majority. As is indicated in the pericope, the validity of this rule is grounded in a rabbinic reading of a Biblical verse (Ex. 23:2). He explains that it, along with other procedural rules of adjudication, has an important, though limited, role in halakhic decision-making. On the one hand, there must be a way of coming to a decision when proponents of opposing positions cannot

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[215] Berkovits, *HPF*, 106.

[216] Berkovits, *NFH*, 67.

[217] Berkovits, *HPF*, 106–107.

convince one another. A decision procedure is required "so that disputes do not proliferate in Israel," which would not be conducive to "proper order in the life of the nation."[218] Since the Torah is meant to organize a society, standardized practices must be established. Majority rule in particular is an advantageous procedure for this because, Berkovits claims, it is commensurate with the demands of justice.[219] On the other hand, he limits its applicability: It only applies when both positions are equally reasonable, though he is not clear who determines their reasonability. It also only governs the deliberations of a sitting court. A decisor surveying past decisions is not bound to follow the position endorsed by the majority of previous decisors. Majority rule is merely a fair means of resolving a dispute. Thus, the minority opinion is not invalidated.[220] If a later decisor thinks it is more reasonable and appropriate to his situation, it can still be applied.

Berkovits points to a number of features of Talmudic halakhic-legal practice that attest to the merely pragmatic validity of majority positions and the continuing relevance of minority positions. An opinion in the Mishnah contends that minority views are preserved so that later decisors can rule in their favor if they seems more reasonable to them.[221] Additionally, in ending a dispute between the schools of Hillel and Shammai, the Talmud writes as follows: "These and these are the worlds of the living God, but the halakha follows the school of Hillel."[222] This dictum is interesting for a number of reasons: First, it recognizes both positions as valid even while deciding according to one of them. Second, the Talmud explains that the reason for the

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[218] Ibid., 117.

[219] Ibid., 32.

[220] Ibid.

[221] Berkovits, *NFH*, 7–8. See M Eduyyot 1: 4.

[222] BT Eruvin 13b.

ruling in accordance with school of Hillel was due to the moral character of its members. Berkovits explains that since "the whole Torah is for the sake of peace," the character of the school of Hillel meant that their rulings would best approximate that goal.[223] Third, in understanding how both interpretations can be "the word of the living God," Berkovits fixes on the interpretation of Rabbi Shlomo Yitzchaki (1040-1105), also known as Rashi, who writes, "at times one reason is valid; at other times, another reason. For reasons change in the wake of even only small changes in the situation."[224] The vagaries of situations call for different halakhic positions; each position is right for its unique circumstance.[225]

Indeed, according to Berkovits, the responsibility of the decisor is to choose from among the previous positions, even those of the minority, or to construct his own position in view of his understanding of the specific situation that confronts him. This is the meaning of the Talmudic dictum that "a judge must be guided only by what his own eyes see."[226] Berkovits takes this to be "one of the basic principles of halakhic authority," and interprets it to mean that "in all matters in which a [halakhic decisor] makes a decision, he must follow his own understanding."[227] This is so even when a previous authority has already offered a ruling, for perhaps confronted by new circumstances, he would have changed his mind.[228]

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[223] Berkovits, *HPF*, 118.

[224] BT Ketubot 57a, s.v. *ma kamashma lan*, translation in Berkovits, *NFH*, 53.

[225] Berkovits, *NFH*, 53.

[226] Ibid., 74. See BT Bava Batra 131a.

[227] Ibid., 54.

[228] Ibid., 55.

Correlative to this principle directed at the decisor that commands independence from previous authorities is a principle directed at the Jewish people that commands obedience to contemporary decisors. In the Bible (Deut. 17: 8-9) it is written, "If a case is too baffling for you to decide…you shall… appear before…the magistrate in charge at the time…." The Talmudic sages fix on the command to go to "the magistrate in charge at the time," which in Hebrew seems to mean literally the "magistrate that will be in those days." This appears superfluous, for what other magistrate could one approach? The Talmud replies, "This is to teach you that once a person has been appointed to be the [decisor] for the community, may he be ever so insignificant, he is like the mightiest among the mighty."[229] Berkovits claims this establishes the principle that "You have only the judge of your own days to turn to."[230] One must consult the decisors of one's own day and ascribe to them full authority relative to previous decisors.

Berkovits also strives to buttress contemporary halakhic-legal authority in his interpretation of the Mishnaic ruling that a *beit din* cannot annul the rulings of a previous *beit din* unless it is greater in numbers and wisdom.[231] Following Maimonides,[232] he argues that this ruling is restricted to enactments and does not apply to interpretations of the Torah. Further, he restricts it to cases where the reason for the enactment was not explicitly given, the enactment concerns a value judgment as opposed to a practical concern, and there is no rationale arising from the

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[229] BT Rosh Ha-Shana 25b translation in Berkovits, *NFH*, 74

[230] Berkovits, *NFH*, 75.

[231] Ibid., 56–57. See also Eliezer Berkovits, "Koham shel ha-Hakamim: Divrei Bet Din Haviro [The Authority of the Sages: The Words of a Fellow Court]," *Sinai* 87, no. 1–2 (1980): 1–25. See BT Gittin 36b for original source.

[232] *Mishneh Torah*, vol. 2: Book of Judges, Laws of Rebels, 2:2.

Torah itself against the enactment. In all other cases, the enactment may be annulled by any *beit din* and it might even lapse of itself.[233] The binding force of precedent is thus sharply limited.

Berkovits' approach seems to confront an obstacle in the form of canonical texts like the Mishnah and Talmud. He acknowledges that one cannot directly disagree with them. However, this seems to conflict with his empowerment of contemporary halakhic-legal authority and, moreover, transforms the halakha into a literary canon or legal corpus. Following the account given by Maimonides,[234] he explains that the composition of the Mishnah and Talmud did contravene Biblical commandments, including the prohibition of writing down the Oral Torah and prescribing obedience to contemporary halakhic authorities. However, he maintains that they are a type of emergency regulation so that "the Torah should not be forgotten from Israel" during the exile. Further, again based on Maimonides, he suggests that the authority of the Mishnah and Talmud depends on their continual acceptance by the Jewish people.[235] Should the Jewish people reject them, contemporary decisors would regain their authority, and halakhic-legal practice would reclaim its dynamism in pursuit of *sedeq*.

4. Rabbinic Authority: Democracy in the Context of Theonomy

In addition to premising the authority of the Mishnah and Talmud on the Jewish people's acceptance, Berkovits claims that the halakhic-legal authority of rabbis is based on democratic legitimacy. He argues that the vesting of authority of halakhic-legal decision-making in certain individuals is no less democratic than the restriction of legislative powers to elected officials and

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[233] Berkovits, "The Authority of the Sages: The Words of a Fellow Court," 10 – 11.

[234] *Mishneh Torah*, vol. 1: Introduction.

[235] Berkovits, *NFH*, 116.

judicial powers to appointed judges. Decisors and communal rabbis similarly derive their authority from popular acceptance. He cites Maimonides, who writes, "It is a commandment of the Torah to appoint judges and officers in all provinces and in all districts, for it is written: "Judges and Officers thou shalt give unto yourself in all your gates."[236] For Berkovits this means that "it is the people who set up the Sanhedrin and other courts. These institutions function because they are accepted by the people. To this day a rabbi has to be elected by the community and no matter how great a scholar he may be in Talmud and Halakha, he has authority only in the community in which he was elected by the people."[237]

In *Towards Historic Judaism (THJ)*, Berkovits discusses the character of the ideal halakhic-legal authority. While expertise in Biblical and halakhic sources is a desideratum, it is not sufficient. He writes, "Rabbinical authority…is not that of an office; it is the authority of a calling, of an ideal…. It [is] an authority of being, the authority of a personality in which an ideal has taken concrete shape."[238] The character of rabbinic authorities must be shaped by the ideals of the Torah. But since the whole Torah is for the sake of peace, this means that rabbinic authorities must be judged by their moral character. This is advantageous for the advancement of the purpose of the Torah, for they are responsible of the implementation of the Torah in order to accomplish its moral telos.

Berkovits even claims that the Torah is more respectful of minority rights than democratic governments. The state coerces recognition of its basic legitimacy on a dissenting minority. In contrast, he maintains that Torah rule cannot be forced on a minority: "For a society to function

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[236] *Mishneh Torah*, vol. 2: Book of Judges, Laws of Sanhedrin, 1:1. Biblical quote from Deut. 16: 18.

[237] Berkovits, *NFH*, 114.

[238] Berkovits, *THJ*, 102–105.

democratically and yet in accordance with Halakha, it would have to be unanimous regarding its acceptance of Halakha. This is, of course, utopia; maybe 'at the end of days'...."[239] Currently, rabbis only have the power of persuasion; they must engage in authentic halakhic-legal practice to make halakha practice morally and practically attractive.

5. Halakhic History: Development and Crisis

This is no easy task. Alongside his theory of halakha, Berkovits also discusses its history. This discussion has two components: First, he offers an ideal developmental history of halakhic-legal practice, which shows how halakha has operated in the past and how it ought to operate in the present and future (a). Second, he describes how halakha underwent a crisis, which has rendered it incapable of operating according to its authentic nature and function (b).

(a) Berkovits' ideal developmental history of halakhic-legal practice is based on Maimonides' discussion of the sacrificial commandments in the *Guide of the Perplexed*. In attempting to justify these commandments, Maimonides confronts a problem. According to his conception of God and worship, nothing could be less justified than these laws. God should be served with intellectual contemplation not bloody offerings. However, he explains that God acted through "wily graciousness and wisdom" in commanding them. God recognized that given the ancient Israelites' conceptions of God and worship, they could not accept a religion without animal sacrifice. Animal sacrifice was therefore tolerated but limited and modified in a manner that emphasized monotheism.[240] Similarly, Berkovits claims that while God aimed to introduce lofty moral ideals, he had to reckon with the moral capacities of the ancient Israelites.

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[239] Berkovits, *NFH*, 117.

[240] Maimonides, *The Guide of the Perplexed*, 1963, vol. 2, pt. III: 32.

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Indeed, God himself had to operate in accordance with WoF principle in implementing PoE principles as seen in the case of the captive woman. Berkovits writes,

> The goal and values are…forever. But they are taught and applied with the wisdom and understanding that time-conditioned reality cannot be changed overnight. The method of the Torah is to acknowledge reality, to take human nature into account and apply the eternal word to it so far as is possible. Thus to teach values and guide behavior, indicating the goal towards which the guided change has to move.[241]

The Torah introduced humanity to moral ideals, culminating in *sedeq*; yet, it was necessary to do so in manner that acknowledged that human nature and society change incrementally. The Torah thus tolerated many existent practices that conflicted with its moral ideals, while indicating the direction that they ought to be reformed. The completion of this process, eliminating the immoral practices and realizing the Torah's moral telos, is the task of halakhic-legal practice.

Berkovits' primary example of this process is the changing status of women. Initially, the Torah mainly tolerated the non-personal status of women that was prevalent in the ancient Near East. However, it introduced some changes that indicated the nature of its ideals and the direction in which it desired society to develop. This is evident in the case of the captive women. The second phase, which occurred primarily in the time of the Mishnah and the Talmud, advanced the Torah's ideals by establishing women's personal status. As indicated, the rabbis introduced reforms to protect women in their marriages and in the event of divorce. Still, they did not complete the implementation of Torah-teaching into reality. The third phase is our own: The Torah's ideal of the complete personal status of women must be realized in halakhic practice and Jewish society.[242]

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[241] Eliezer Berkovits, *Jewish Women in Time and Torah* (Hoboken: Ktav, 1990), 31. Henceforth *JWTT*.

[242] Ibid., 2.

(b) This historical account and, indeed, his entire theory of halakha represent Berkovits'

view on *ideal* halakhic development and *authentic* halakhic-legal practice. In his view, however,

halakha has undergone a crisis. With the loss of sovereignty not only were the Jewish people

exiled from their land, but halakha was exiled from reality and into literature.

The exile of the halakha from reality follows directly from the exile of the Jewish people. In

THJ, Berkovits explains that the Torah and reality should have a dialectical relation:

> On the one hand we have Torah, trying to give shape to that raw lump of life which is so
> reluctant and evasive; on the other, hand, each bit of Torah-shaped life—in social
> institutions, in economic arrangements, in the relations between man and his neighbors, in
> the street and in the market as well as in the places of worship—living Torah reacting on the
> intentions of Sinai. For just as Torah shapes life, so does Torah-shaped life, in its turn, direct
> and thus unfold life.[243]

Halakhic-legal practice is the medium of this dialectical relation. But Berkovits argues that this

relation can only exist when the Torah and reality can fully confront and shape one another. In

NFH he explains that when the Jewish people ceased to be a sovereign nation, Judaism ceased to

be an autonomous civilization. Halakha no longer responded to the problems of a Torah-shaped

life but confronted the demands of an alien culture and civilization. It thus became protective,

bent merely on preserving the Jewish people as opposed to achieving its proper telos.[244]

Additionally, in response to the physical exile and persecution of the Jewish people, the

transmission of the wisdom of halakhic-legal practice from teacher to student was disrupted. It

became necessary to compile earlier rulings in writing. Halakha was also exiled into literature.

This process began with the Mishnah, which still preserved minority opinions, continued through

the Talmud, which restored the deliberations behind the rulings, and reached its apotheosis in

Maimonides' *Mishneh Torah*, which simply states its ruling apodictically. Despite the practical

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[243] Berkovits, *THJ*, 32.

[244] Berkovits, *NFH*, 85–86.

necessity of halakhic codes, according to Berkovits, "Codification is contrary to the very nature of Halakha. It works like shackles upon its creative vigor."[245] The exile of the halakha into literature has only deepened in the twentieth century, preventing the Torah from grappling with new circumstances and problems that confront it. This is even true in the State of Israel, where halakha has the opportunity to return to reality yet remains exiled in literature. He writes, "Orthodoxy is, in a sense, halakha in a straightjacket. Having had to transform the Oral Torah into a new written one, we have become Karaites of this new [Written Torah]."[246] In fact, *NFH* and *HPF* can be read as manifestos for the renewal of a halakhic-legal practice equal to the Jewish people's return to sovereignty. In this way, a medium will be readied for the transformation of the State of Israel into the first outpost of the Kingdom of God.

Thus, corresponding to his teleological justification of the commandments, Berkovits presents a teleological theory of halakha. He explains that halakhic-legal practice is necessary to implement the Torah's commandments to achieve its telos. Simultaneously, as a human endeavor, it redeems the autonomy deficit that results from the theonomy of divine revelation. Halakhic-legal practice is characterized by the use of *s'bara*, which strives for constancy in the attainment of the Torah's purpose. Central to this is the operation of PoE and WoF principles, which derive from Biblical verses and issue in ramified structures of subsidiary principles. The PoE and WoF principles guide the implementation of the Torah's specific commands, ensuring that such norms advance and do not conflict with the Torah's telos. On an operational level, halakhic-legal practice is controlled by both the substantive concerns of *s'bara* and the need for formal decision procedures. But such rulings can be revisited by later decisors. Indeed, Berkovits

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[245] Ibid., 90.

[246] Berkovits, *CF*, 95.

stresses both the requirement that the decisor exercise independence and the obligation of the Jewish people to abide by the decisions of contemporary decisors. He grounds the decisor's authority in a democratic theory of halakhic-legal authority, while noting certain moral qualification as also necessary. Lastly, he incorporates his theory of halakha into an historical account of ideal halakhic development and actual crisis.

B. Consistency and Constraint: Halakhic-Legal Practice

Berkovits' own halakhic-legal practice is mainly consistent with his justification of the commandments and theory of halakha. It is guided by PoE and WoF principles to advance the telos of the Torah. However, it is somewhat less radical than his theory of halakha would predict. While in his theory he touts the contemporaneous nature of halakhic-legal authority, in his actual practice he is concerned with recruiting earlier authorities to his own view. In fact, much of his halakhic-legal writings are devoted to the clarification of the positions of previous authorities. This renders them complex. Still, simplified discussions of two halakhic issues suffice for presenting the character of his halakhic-legal practice. And an interpretation of the slight discrepancy between his theory and practice is then offered (1-2).

1. Conditions in Marriage and Divorce

As a halakhic-legal decisor, Berkovits was intensely involved in the area of marriage and divorce. Recall that he claims that the halakhic conscience found its highest expression in the Talmudic sages' concern for the welfare of women in this area. He saw the failure of modern decisors to offer a solution to the problem of *igun* as evidence of the inability of contemporary halakha-legal practice to realize the authentic nature and function of halakha. He writes,

> How far removed we are from the care and concern for the well-being of the daughters of Israel! The rabbinical establishment does not seem to pay much attention to the suffering,

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and often disillusionment with Judaism itself, caused by its fear to accept halakhic responsibility for the solution to the present-day *agunah* problem. Its members seem indifferent to the many violations of the teachings of the Torah, especially in the areas of ethics and morality, that are due to the unresolved status of the *agunah* problem! Ultimately, the situation involves a high measure of [desecration of God's name] for which [it] is responsible. This, surely, is not halakhic Judaism.[247]

While in earlier periods the problem of *igun* mainly concerned husbands who disappeared, today it results from recalcitrant husbands, who refuse to free their wives for remarriage through a *get* even after deterioration of the spousal relationship. The *get* is used as a bargaining chip in the civil divorce settlement, a means of financial extortion, or an instrument of revenge.[248]

In his Hebrew halakhic work, *Conditionality in Marriage and Divorce: Halakhic Clarifications* (*CMD*), Berkovits presents three methods to prevent the occurrence of *igun*, corresponding to three different cases. One case does concern situations, such as during wartime, where the husband is at risk of disappearing. The method requires the husband's preemptive commission of a scribe and witnesses to compose and execute a *get* should he not return after a certain time.[249] The other two methods concern recalcitrant husbands and dissolve the marriage without a *get*. They retroactively annul the marriage based on the husband's violation of conditions upon which the marriage is made contingent *ab initio*.

In the first case, Berkovits proposes that during the marriage ceremony conditions are explicitly stipulated by the bride and groom. His discussion of this proposal evidences a number of features of his halakhic-legal practice. First, his proposal encounters difficulties from classical halakhic codes as well as contemporary decisors; yet he labors to show that it is not rejected by

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[247] Berkovits, *JWTT*, 124.

[248] See Broyde, *Marriage, Divorce, and the Abandoned Wife in Jewish Law*, 1–13; 43–58; 73–78 for a review of these developments.

[249] Eliezer Berkovits, *Tenai be-Nisu'in u-ve-Get: Berurei Halakhah [Conditionality in Marriage and Divorce: Halakhic Clarifications]* (Jerusalem: Mosad ha-Rav Kook, 1966), 103–156. Henceforth *CMD*.

them and recruits other halakhic authorities to his position through interpretation. In his discussion of such conditional marriages Rabbi Joseph Karo raises the problem of the survival of any conditions into the marriage.[250] Some authorities are concerned that the conditions are cancelled when the marriage is executed. Other authorities are concerned that the presence of conditions voids the original marriage, but the bride and groom establish a new marriage without the conditions when they engage in sexual intercourse. Berkovits argues that these concerns only apply if the conditions are not stated explicitly and if it is not made clear that neither party desires the marriage without the conditions. Further, if the condition is for the benefit of the bride, such as preventing her from becoming an *agunah*, the husband lacks the authority to cancel the condition and it is assumed that she will not cancel it. Berkovits thus contends that in this situation nearly all authorities would recognize the survival of the conditions.[251]

Berkovits utilizes a form of conditional marriage that was allowed by Rabbi Moshe Isserles as the basis for his proposal. The latter endorses a conditional marriage that was proposed by Rabbi Israel Bruna (1400-1480) in the case of a husband who has an apostate brother. The concern was that should the groom die childless, the bride would fall in levirate marriage to this brother, who she could not be expected to marry and who might refuse to undergo *halitzah*. She would thus be anchored. Rabbi Bruna ruled that the groom and bride may marry on condition that the groom not die childless and his brother not continue to be an apostate. Thus, if the groom does die childless and his brother is still an apostate, the marriage is retroactively annulled.[252]

Berkovits' proposal differs from this case in that it does not concern levirate marriage but the original marriage. He thus confronts the seeming opposition of a wide range of modern decisors,

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[250] *Shulhan 'Aruk* (Jerusalem: Shulhan Aruk ha-Mifoar, 1974), Even Ha–Ezer: 38: 35.

[251] Berkovits, *CMD*, 45; 59.

[252] Gloss on *Shulhan 'Aruk*, Even Ha–Ezer, 157: 4.

who rejected proposals by the French and Turkish rabbinates in the late nineteenth and early twentieth centuries in the collection of responsa, *There are No Conditions in Marriage*.[253] Berkovits directly counters some of the objections to conditional marriages presented in that work. However, he generally aims to acknowledge their arguments while distinguishing his own proposal from those earlier attempts. He focuses on the French proposal, which simply made the marriage contingent on the absence of a civil divorce without a concurrent *get*. Consequently, if a couple that had entered into both halakhic and civil marriages received a civil divorce and the husband does not immediately grant a *get*, the halakhic marriage would be retroactively annulled. A number of objections were offered to this proposal. The objection that Berkovits describes as "delving to the depth of the matter" contends that such a condition is "a stipulation against what is written in the Torah," a condition to violate a Biblical commandment that is thus void.[254] According to the halakha only the husband has the right to grant divorce.[255] Despite the use of retroactive annulment, since its execution is made independent of the husband's will or actions—once the civil judgment is rendered, he either grants a *get* or the marriage is annulled—it violates the Torah and is void.

In contrast, Berkovits makes the marriage directly contingent on the behavior of the husband. He lists a number of conditions that could be stipulated and would retroactively annul the marriage, including violating the enactment against polygyny, attempting to extort money from his wife, or simply refusing to grant a *get* because he rejects the Torah. Crucially, he also includes any behavior that constitutes "act[ing] against [the wife] in a manner that is opposed to

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[253] Yehuda Lubowski, *Eyn Tenai Be-Nusin [There Are No Conditions in Marriage]* (Vilnius: Karenas-Kowalski, 1930).

[254] Berkovits, *CMD*, 89.

[255] See Deut. 24: 1; BT Yevamot 112b; and *Mishneh Torah*, vol. 1, Book of Women, Laws of Marriage, 1: 1-2.

the moral principles of Judaism."[256] Further, he assigns a *bet din* the power to ascertain whether the husband has violated these conditions, which he describes as the "the laws of the Torah and Jewish morality."[257] Thus, the status of the marriage does not depend on the subjective judgment of the *bet din*, which would be problematic because it too would deprive the husband of his right over the dissolution of the marriage. It is determined by the husband's compliance with what Berkovits claims are objective standards that he accepted as conditions of the marriage. It also reverses the objection about "a stipulation against what is written in the Torah." The conditions do not nullify the husband's Torah-granted right to dissolve the marriage; they hold him accountable to the Torah's moral principles to which he is already obligated. This claim evidences Berkovits' commitment to the existence of moral principles within the halakha. It is not specific actions that trigger the retroactive annulment of the marriage but violation of the Torah's values.

In the second case, the marriage is made contingent on conditions that are incorporated into every marriage through rabbinic enactment. Thus, the bride and groom need not explicitly stipulate them. This proposal is based on the halakhic-legal procedure of *hafka'at kiddushin* (expropriation of betrothal). There are a few instances of its use in the Talmud. Indeed, the classic case was discussed above: The sages retroactively annulled a marriage because the husband violated the enactment banning the cancelation of a *get* after it had been sent to the wife by a messenger. As discussed, in response to the objection of how rabbinic courts could dissolve a marriage valid according to Biblical law, the anonymous voice of the Talmud replies, "When a man betroths a woman, he does so under the conditions laid down by the rabbis, and in this case

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[256] Berkovits, *CMD*, 72.

[257] Ibid., 96.

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the rabbis annul his betrothal."[258] Rashi explains elsewhere, "All who betroth a woman

according to the opinion introduced by the sages of Israel in Israel, he betroths that [it] should be

established as a betrothal according to the words of the sages."[259]

According to Berkovits, Rashi's language implies that this broad condition cannot be waived

by the bride and groom. Further, it does not conflict with the right of the husband to dissolve the

marriage, for the "opinion" and "words" of the sages are enactments that are known to him when

he enters into the marriage. This provides a powerful tool for the prevention of *igun*, for

enactments could be instituted to cover a broad range of cases. These conditions are similar to

those offered by Berkovits in the previous proposal, including specific actions as well as

"behavior opposed to…Jewish moral principles."[260] However, once again, the proposal confronts

difficulties from earlier authorities. A number of medieval commentators restrict the authority to

expropriate marriage to the Talmudic sages. Nevertheless, Berkovits argues that many other

authorities can be interpreted as extending this authority to contemporary rabbis, especially if the

consequences of violation are explicitly stated in the enactment.[261] Still, former British Chief

Rabbi Immanuel Jakobovits points out that the canonical authorities seem to rule out its use.[262]

Even Rabbi Jechiel Jacob Weinberg in his endorsement of *CMD* acknowledged that traditional

decisors "recoil and their souls strain to allow conditions in betrothal and marriage."[263] Indeed,

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[258] BT Gittin 33a.

[259] BT Ketubot 3a, s.v. *kol ha-mikadesh* .

[260] Berkovits, *CMD*, 97.

[261] Ibid., 205.

[262] Immanuel Jakobovits, "Survey of Recent Halakhic Periodical Literature," *Tradition* 8, no. 4 (Winter 1966): 105.

[263] Berkovits, *CMD*, 11.

Berkovits admits that "[e]ven though according to the law it is possible to expropriate betrothals…the great sages restrained their hands from [it] in practice."[264] Nevertheless, he notes that historically it was done and support for it can be found, especially considering the dire current situation.[265]

Berkovits marshals authorities that allow the expropriation of betrothal in practice, including Judah Gaon, Hai Gaon, Rabbi Asher ben Jehiel, and Nahmanides, and he interprets others as having remediable concerns, especially Maharam Alshaker (1466-1522). Berkovits interprets the latter as allowing expropriation of marriage as long as many or all the Jewish communities in a country accept the enactment that establishes the implied conditions. Berkovits endorses this proposal and recommends that national rabbinic and communal organizations collaborate to institute enactments that would become implied conditions in all marriages performed in their region. Violation of these conditions would result in the retroactive annulment of marriages. If the enactments were properly crafted, the problem of *igun* could be solved.[266]

In view of Berkovits' theory of halakha, the intensity of his engagement with halakhic precedent is surprising. Certainly, he allows himself to disagree with canonical authorities, but this is only when all possibility of reinterpretation is exhausted. When disagreeing with these authorities he marshals other authorities that support him or recruits them to his view through reinterpretation. Further, far from rejecting the canonicity of the Talmud, he aims to restore the authority to expropriate betrothals that was part of its halakhic-legal practice. His argumentation is thus less radical than one would expect on the basis of his theory of halakha.

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[264] Ibid., 198.

[265] Ibid., 198–201.

[266] Ibid., 205–206.

Still, his halakhic-legal practice deviates from common Orthodox approaches. In fact, the Orthodox rabbinic establishment rejected his proposals. The journal that offered to publish *CMD* withdrew that commitment and published a critique that would not even mention his name.[267] It was even alleged—apparently falsely—that Weinberg withdrew his endorsement.[268] In truth, despite its conservatism when compared with his own theory, Berkovits' practice diverges from the characteristic traditionalism of most contemporary Orthodox decisors. As Menahem Kasher, the author of the critique of *CMD*, points out "the moral principles of Judaism," upon which Berkovits conditions marriage, is not a traditionally recognized halakhic category.[269] Thus, Kasher, a representative of the Orthodox mainstream, rejects a major component of Berkovits' theory of halakha—its guidance by moral principles. Indeed, the combination of their lack of explicit endorsement by canonical authorities and the fact that they were not widely practiced in the past would decisively count against conditional marriages for many Orthodox decisors. Due to the severity of the consequences of a legal error—bastardy, such decisors would aim to satisfy as many authorities as possible. This effort inevitably leads to conservative results as countless halakhic-legal concerns must be considered. In contrast, Berkovits' approach can be described as an attempt to "carve a path" through the previous authorities to a resolution. Indeed, Roth points out that Berkovits, unlike the general practice of decisors, indicates the solution toward which he aims at the outset of his discussion.[270] He then recruits as many authorities to his view as

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[267] Menahem Kasher, "Be-Inyan Tenai Be-Nusin [Concerning the Matter of Conditions in Marriage]," *Noam* 12 (1969): 338–55.

[268] Marc B. Shapiro, *Between the Yeshiva World and Modern Orthodoxy: The Life and Works of Rabbi Jehiel Jacob Weinberg, 1884-1966* (Oxford UK: Littman Library of Jewish Civilization, 2002), 191–192 fn. 83.

[269] Kasher, "Concerning the Matter of Conditions in Marriage," 145.

[270] Berkovits, *CMD*, 13–14; Roth, "Eliezer Berkovits as Theoretician of Halakha," 278–279.

possible and satisfies as many halakhic concerns as possible, though he is antecedently committed to offering a solution to the problem of *igun*. This is not to endorse Blu Greenberg's comment that "when there was a rabbinic will, there was a halakhic way."[271] Berkovits is constrained by halakhic-legal precedent; he simply uses more of the halakhic-legal tradition and reads it more creatively than others.

Moreover, Berkovits would claim that his commitment to resolving the problem of *igun* is itself part of the halakha. As indicated, he saw the persistence of the problem as a desecration of God's name; the halakha was being used by husbands to oppress their wives. The specific commandments regarding marriage and divorce were producing results that conflicted with the moral principles of the Torah. Consequently, according to him, the commitment to finding a solution does not derive from the imposition of a foreign agenda on the halakha but from the PoE in the halakha itself. As to the objection concerning the lack of strong precedent in favor of his proposal, he would respond by invoking the contemporaneous nature of halakhic-legal authority: He, the decisor, must rule independently even if his ruling diverges from precedent because the present situation did not appear before any earlier decisor. Correlatively, the Jewish community must place their confidence in contemporary authorities, like himself, and not rely on those of the past. Commitment to this view of authority is also manifest in his arguments against the claim that only the Talmudic sages possessed the authority to expropriate betrothals.

Lastly, by attenuating the husband's exclusive right to dissolve the marriage, Berkovits may have seen himself as continuing halakha's trajectory of incrementally replacing the Torah-tolerated non-personal status of women with the Torah-taught personal status. He might claim that by making the marriage contingent on behavior in accordance with the moral principles of

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[271] Blu Greenberg, *On Women and Judaism: A View from Tradition* (Philadelphia: The Jewish Publication Society, 1994), 44.

the Torah, he is simply creating a broader coherence between specific commandments and the moral vision of the Torah. In addition to resolving an ethical difficulty that arose in the application of the Torah to a specific situation, his efforts advance the telos of the Torah by reordering the relationship between husband and wife to conform more fully to *sedeq*.

2. Autopsies

Another example of Berkovits' halakhic-legal practice that merits discussion is his analysis of the permissibility of autopsies. As discussed in a previous chapter, the Mishnah codifies a Biblical prohibition against desecrating the dead, though what actions constitute desecration is disputed.[272] In a Hebrew article Berkovits prefaces his analysis by reflecting on the question's context and import: "The question is very serious, precisely since the establishment of the State of Israel…. There is no doubt, that the people of Israel in the land of Israel require excellent and advanced medical service."[273] Having returned from exile, the Jewish people confront the responsibility of establishing the necessary institutions of a modern state, including medical care based on autopsies. Halakha-legal practice thus confronts a challenge that it previously avoided, for in the Diaspora non-Jews could be relied upon as both the subjects and objects of autopsies. Halakha is thus called back from its exile from reality.

Berkovits begins his discussion by stating, "ostensibly the matter seems very simple."[274] Except for the prohibitions against idolatry, murder, and sexual immorality, even Biblical prohibitions can be overridden to save life (*pikuah nefesh*). This is so even when it is not certain

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[272] M Sanhedrin 6: 4-5.

[273] Eliezer Berkovits, "Birur Halakha ba-Din Nituhei Matim [Clarification of the Halakha in the Matter of Autopsies]," *Sinai* 69, no. 1–6 (1971): 45.

[274] Ibid.

that life will actually be saved; even the possibility of saving a life warrants overriding the prohibition. Thus, since by means of autopsies medical knowledge will be gained that may save lives, they ought to be permitted despite the desecration of the dead involved. However, during the exile, halakhic-legal practice was not only exiled from life; it was exiled into literature. Contemporary decisors, like Berkovits, confront precedents that were established under different conditions with which they must reckon in providing a ruling for new situations. Indeed, Rabbi Yechezkel Landau (1713-1793) ruled that the category of saving a life or even possibly saving a life only includes cases when the patient who could benefit from the knowledge gained from the autopsy is "before us." For him this excludes most autopsies because in such cases "there is no patient who needs it, [the doctors] only want to learn this knowledge in case a patient appears who needs it. Certainly, we do not override any Biblical or rabbinic prohibition because of this weak suspicion."[275]

Berkovits defuses Landau's ruling by setting it in its historical context. In doing so, however, he does not ignore the ruling. He argues that even Landau would rule differently in the present situation. Two features of the present situation differ from those of the eighteenth century: modern knowledge of pathology and scientific collaboration. While in the eighteenth century each illness was thought to have a discrete cause, by the twentieth century it had been discovered that there are families of diseases. Thus, the likelihood of gaining useful knowledge from any autopsy increases significantly. Consequently, since Landau only prohibits autopsies because he thinks that it is merely a "weak suspicion" that life-saving knowledge will be gained from it, he too would allow them in the present situation. Additionally, in the eighteenth century there was no means of communication that allowed medical discoveries to be shared rapidly. When Landau claims that the patient that stands to benefit from the autopsy must be "before us," he did not

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[275] Landau, *Noda' Bi-Yehudah*, vol. 1: 126–127, Yoreh De'ah, Responsa 210.

mean that she must literally be in the same room. He simply meant that it must be known or reasonably believed that there is patient that will benefit from the procedure. However, in the twentieth century the medical research community spans the globe, communicating new discoveries and life-saving procedures. Berkovits thus concludes, "in our time all the patients in the world are like they are found constantly in front of us" and claims that even Landau "would agree that the possibility of saving a life overrides the desecration of the dead."[276]

Not content with establishing that even Landau in the present situation would permit autopsies because they could be life-saving, Berkovits adduces another argument. By reflecting on the nature of the prohibition of desecration of the dead as described by the Talmud and Rashi, he argues that any action towards the dead that is for the benefit of the living is permissible: "[D]igrace of the dead is…precisely when one does something to the dead in a manner of disgrace because one does not care about his dignity, but what one does because of the needs of the living is not disgrace of the dead. [For] everything that is done for the living, because of concern for the needs of the living, is based on the glory of all living [beings], and what is done for the sake of [that] is no desecration of the dead."[277] This claim "goes behind" previous decisors, like Landau, and argues based on the Talmud and medieval commentators. Landau had identified autopsies with desecration of the dead, which then led to the question whether this prohibition could be overridden by the possibility of saving lives. Berkovits now argues that they do not cause the desecration of the dead and could be performed even without that possibility.

This argument coheres with Berkovits' theory of halakha. First, the prohibition of the desecration of the dead has moral import, for whether it applies depends on whether the action

[276] Berkovits, "Clarification of the Halakha in the Matter of Autopsies," 47–48.

[277] Ibid., 54.

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demonstrates lack of concern for the dignity for the dead. And concern for the needs of the living *ipso facto* does not demonstrate lack of concern for the dignity of the dead. The application of this prohibition is thus guided by PoE principles. Second, since according to this argument the autopsy need only benefit the living, it also demonstrates Berkovits' use of WoF principles. The halakha is concerned for the material well-being of human society as well as its moral character. Indeed, as indicated, these two concerns are inseparable. Lastly, overall Berkovits is motivated by the belief that the Torah has the creation of a model society as its aim. Modern medical care is crucial for a modern state, and thus halakha must enable it to function.

In sum, Berkovits' halakhic-legal practice mainly corresponds to his justification of the commandments and his theory of halakha. It manifests a teleological approach, in which the application of specific commandments is guided by PoE and WoF principles. Additionally, it aims to realize the ideals of the Torah in relationships governed by the halakha as well as to create a functioning and ideal society. He uses halakhic-legal practice for the creation of a Kingdom of God. In pursuing these aims, he does not shy away from disagreeing with previous authorities; he asserts the claim of contemporaneous halakhic-legal authority. Still, his exercise of this authority is not as a radical as one would expect given his theory of halakha. The latter, however, actually provides an explanation for this discrepancy. According to him, halakhic-legal practice aims to organize society. This cannot be accomplished by a lone decisor offering rulings that are rejected by other authorities. It requires building consensus so that rulings are applied broadly. It is therefore reasonable that in his halakhic-legal practice he would eschew his more radical arguments and offer those that might be accepted by traditionalist decisors. Yet, concurrent with this effort, he offers arguments in his theory of halakha to shift their approach to one more capable of achieving the telos of the Torah.

C. Legal Theory: Moral Principles and Law

Berkovits' recognition of moral principles and a telos in halakhic-legal practice raises questions in legal theory concerning legal validity and adjudication. These queries aid in clarifying his theory of halakha and its relation to the justification of the commandments; they are also of intrinsic interest. First, the questions in legal theory are discussed (1), before returning to reinterpret Berkovits' theory of halakha in view of them (2).

1. Moral Principles in the Law: Inclusive Positivism and Post-Positivism

Ross distinguishes two types of positivism prevalent in Orthodox philosophy of halakha, formalist positivism and non-formalist positivism, and identifies Berkovits with the latter. For her, positivism "refers merely to a theory regarding law's *essential grounding*, whereas the terminology of formalism and non-formalism refers to theories regarding law's *nature* and its *process of deliberation*."[278] By grounding the normativity of the commandments in revelation, Berkovits seems to subscribe to positivism. But whereas formalism defines the nature of law "in terms of clear-cut rules and legal concepts," non-formalism also recognizes an "ultimate purpose" and "ideological principles, ethical standards, policy considerations, and even political theories"[279] within the law. Thus, by including moral principles and a telos within halakha, Berkovits advocates non-formalism.

Further, according to Ross, since for formalism the halakha consists of "clear cut rules and legal concepts," it can "run out." That is, situations can arise to which no legal norm applies. There is a gap in the law and the decisor must exercise discretion. In contrast, for non-formalism, "there are no legal lacunae, because when there is no relevant rule the broader principles

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[278] Ross, *Expanding the Palace of Torah*, 64 emphasis in original.

[279] Ibid., 65.

apply."[280] But Ross also claims that for non-formalism, discretion "lies in the application of those general principles *within* the law in a manner that realizes their purpose..."[281] Thus, she equivocates in her use of the term "discretion." She uses it to denote cases where the halakha has run out and the decisor must retroactively legislate. This is what has been referred to as "strong" discretion. But, she also uses it to denote any case where the decisor's ruling is not directly entailed. This is "weak" discretion.[282] This inconsistency evidences a lack of clarity about positivism, its varieties, and their implications. All forms of positivism recognize indeterminacy in legal application and distinguish this from cases where there is a true legal gap. They differ concerning what is included in the law and thus with what frequency gaps arise and "strong" discretion becomes necessary.

A more perspicuous contrast than between "formalism" and "non-formalism" is between inclusive and exclusive legal positivism. As discussed, positivism is defined by subscription to (1) the social thesis, that is, "what counts as law in any particular society is fundamentally a matter of social fact or convention," and (2) the separability thesis, that is, "there is no necessary connection between law and morality."[283] (1) entails (2): If law derives from a social fact or convention, and since there is no necessary connection between social facts or conventions and morality, then there is no necessary connection between law and morality. (1) also allows for the possibility of "strong" discretion.[284] Since the law derives from having been enacted through a

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[280] Ibid.

[281] Ibid.

[282] Dworkin, "The Model of Rules," 92–96.

[283] Coleman and Leiter, "Legal Positivism," 241.

[284] Henceforth I will simply use "discretion" to denote "strong discretion" unless otherwise noted.

social fact or convention, it can in principle run out. However, depending on what they allow to be included in the law, forms of positivism differ on the frequency of cases of discretion.

How (2) is understood is significant in this connection. No one denies that there is often an overlap between moral imperatives and legal rules. For positivism the question about the connection between morality and law concerns the relation between morality and criteria of legal validity: Can conformity with moral values and standards be a criterion of legal validity, such that an otherwise validly enacted law is declared legally invalid because it is immoral, or a moral imperative is declared legally valid because of its moral content despite not being positively enacted? Inclusive positivism delivers an affirmative answer to either of these questions, whereas exclusive positivism answers both in the negative. This disagreement has implications for discretion because the inclusion of moral principles in the criteria of legal validity significantly extends the scope of the law and decreases the frequency of discretion.

These varieties of positivism and their differing implications are best understood through their dialectical history. Recall that according to Hart a legal system is constituted by a union of primary and secondary rules. Primary rules are rules of obligation and concern actions. Secondary rules are rules about rules; they specify the criteria of legal validity, change, and adjudication. Foremost among them is the rule of recognition, which specifies the ultimate criteria of legal validity.[285] In his early critique of Hart's *CL*, Dworkin offers a number of arguments against positivism. In particular, he points out that judges sometimes appeal to principles that are not found in the recognized sources of the law. Often these are moral principles, such as "No man may profit from his own wrong," which indicate that the judge is

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[285] Hart, *CL*, 94–98.

drawing on his own moral reasoning instead of any positively enacted law.[286] While positivism

may describe these as instances of discretion, this is inconsistent with judges' rhetoric and the

authority assigned to them.[287] In the "Postscript" to *CL*, Hart responds to Dworkin and articulates

the basis of inclusive legal positivism.[288] He argues that such invocation of moral principles can

be accommodated within positivism. Moral values and principles can be criteria of validity if

they are incorporated into the law through positive enactment. Their legal authority then derives

from this enactment and not their moral status. When judges invoke moral principles they are

often, though not always, drawing on these elements of morality in the law.[289] This extends the

range of the law and limits the area of discretion, though it does not preclude it.[290]

Exclusive legal positivists, however, claim that the incorporation of moral principles

undermines the concept of legal authority. As will be discussed below, Raz argues that law's

authority consists in it providing content-independent and preemptive directives. Legal directives

are content-independent because their normativity derives from their source. They are

preemptive because they aim to foreclose further practical deliberation by their subjects. If the

law were to require its subjects to reflect on the same considerations that it is meant to settle,

then it would not be an authority. But the incorporation of moral values and principles into the

law does just that by directing its subjects to reflect on what should be done morally in the

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[286] Dworkin, "The Model of Rules," 87–92.

[287] Dworkin, *LE*, 130–150.

[288] See Himma, "Inclusive Legal Positivism" for a historical discussion of inclusive legal positivism.

[289] Hart, *CL*, 259–272.

[290] Marmor argues that to be a form of legal positivism, inclusive legal positivism must hold that the rule of recognition in a legal system must be based on a social fact or convention and all valid laws must be traceable to this source. It may, however, incorporate morality into the criteria of legal validity at a lower level. See Andrei Marmor, "Exclusive Legal Positivism," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford UK & New York: Oxford University Press, 2004), 1115–116.

circumstances. Instead, Raz claims, legal systems that seem to incorporate moral principles should be interpreted as assigning judges "limited and guided legislative power." It picks out instances in which the judge should exercise discretion but also mandates what types of considerations should guide her.[291]

However, in addition to Dworkin's specific criticisms about moral principles in legal reasoning, his rejection of positivism stems from an argument regarding the nature of interpretation. Indeed, he uses such considerations to articulate his own post-positivist legal theory. In *Law's Empire* (*LE*), he claims that positivism fails to realize the complexity of legal interpretation, which combines description and justification.[292] When interpreting a social practice like law an individual "proposes value for the practice by describing some scheme of interests or goals or principles the practice can serve to express or exemplify."[293] All interpretations of law are constructive; the interpreters "try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice."[294] On the level of adjudication this means that "the judge's decision…must be drawn from an interpretation that both fits and justifies what has gone before as far as that is possible."[295] In delivering a legal decision the judge presents principles that describe legislation and precedent as well as justify them. Crucially, to render a justifiable

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[291] Ibid., 116–118.

[292] Dworkin, *LE*, 53.

[293] Ibid., 52.

[294] Ibid., 90.

[295] Ibid., 239.

decision a certain amount of reconstruction of the legal tradition and practice may be necessary; the requirements of fit and justification trade off against one another.

This is true of philosophy of law as well as legal practice. Indeed, Dworkin claims that "no firm line divides" them.[296] Both require constructive interpretation that negotiates description and justification. In his own account of legal practice, Dworkin claims "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice."[297] This itself is a constructive interpretation of the legal practice of liberal democracies, thus the specific moral principles that Dworkin identifies may be particular to such nations. They describe and justify the legal practices of these nations in terms of purposes for law that liberal democracies accept. But his argument is general: Propositions of law are true in other legal systems if they figure in or follow from principles that provide the best constructive interpretation of the community's legal practice in terms of that community's view of the purpose of law. Obviously, the attribution of that purpose is also an interpretive claim that may be evaluated by how well it both describes and justifies the practice.

Dworkin's debate with positivism is therefore not primarily about the possibility of moral principles within a legal system but about the relation between these principles and judicial deliberation. It cannot be avoided then by the adoption of inclusive positivism. For the latter, moral values and principles can be criteria of legal validity by virtue of being positively incorporated. In appealing to them the judge is applying antecedently given standards. The possibility of discretion still exists though it is limited. In contrast, for Dworkin the moral

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[296] Ibid., 90.

[297] Ibid., 225.

principles in judicial rulings are the result of constructive interpretations. The judge does not find them antecedently given. And because of the interpretive nature of judicial decision-making the line between adjudication and discretion is blurred. It is unclear when, if ever, there are legal gaps and the judge legislates.

But Dworkin's disagreement with inclusive positivism runs deeper. The latter respects the basic positivist insight that there is a difference between what the law is and what the law ought to be. The judge's legal responsibility is to apply the law as it is, though this may involve moral reflection if the law mandates it. Dworkin, however, claims that this distinction is untenable. As the interpretation of a social practice, determining what the law is perforce involves the judge in its normative justification. Further, inclusive positivism refrains from any normative stance in its theorizing. In contrast, Dworkin claims that legal philosophy cannot abstract from justificatory considerations as well. The theorist too describes as well as justifies the law. Normative justification occurs at all levels of legal discourse.

2. Interpreting Berkovits Interpreting Halakha

The best description of Berkovits' theory of halakha is inclusive positivism. For him, the basic normativity of the commandments derives from the revelation of God. The commands of God as manifest in the Torah constitute the rule of recognition in the halakhic-legal system. Berkovits labors to show how PoE and WoF principles derive from Biblical verses. They are moral criteria of halakhic-legal validity that have been positively incorporated into the Torah. And though he assigns a high degree of independence to decisors, this authority is explicitly delegated by the Torah. Lastly, although he limits the frequency of discretion by the incorporation of PoE and WoF principles, he explicitly recognizes its possibility under the rubric of "temporary ordinances." Since the commandments and halakhic principles are valid because

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of their positive enactment by God, it is possible for them to run out and then the decisor must deliver "a ruling for the hour."

However, Berkovits also offers some remarks that render his view more similar to post-positivism. Indeed, Roth has compared his halakhic-legal approach to Gadamer's interpretive theory.[298] However, this underestimates the inclusive positivism that characterizes most of his halakhic-legal writings and misses the more apt comparison with Dworkin in these other instances: Berkovits occasionally describes decisors as offering constructive interpretations of the halakhic-legal tradition and halakhic practice.

In *CF* Berkovits discusses some of the same instances of Talmudic halakhic-legal practice that he analyzes in *HPF* and *NFH*, but his description of them is substantially different. Recall that in those works he describes the case of the sages accepting testimony regarding the death of a husband that would not ordinarily be admissible in order to prevent *igun*. He describes the same case in *CF* with a different emphasis:

> [I]t is the authentic halakhic problem situation. There is the written law of the Bible… [I]t is in conflict with another obligation of the Torah-true Jew, the care and concern for a woman whose husband has disappeared…. [T]here was no written code to consult. On the basis of the rabbis' understanding of the overriding Torah-purpose formulated nowhere explicitly, but absorbed into their own consciousness as the result of a life of dedication and commitment to Torah and its living realization, they gave the answer, a halakhic solution to a halakhic problem.[299]

In *HPF* and *NFH* Berkovits describes this deviation as the circumscription of the rules of testimony by higher-order principles that are traceable to explicit Biblical texts. Here, in contrast, he describes it as resulting from the 'overriding Torah-purpose' that is not stated explicitly

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[298] Roth, "Eliezer Berkovits as Theoretician of Halakha," 234–238.

[299] Berkovits, *CF*, 87–88.

anywhere in the Torah. The Talmudic sages drew on their own understanding of the purpose of

the Torah to arrive at their decision.

Similarly, recall that in *HPF* and *NFH* he adduces Hillel the Elder's establishment of the

prosbul as a classic example of the operation of the Torah's WoF principles. Here he writes,

> Where did Hillel find the authority for his innovation? Where was it written in the Torah? It
> was, of course, not found in any text, in any code. He found it within himself. There was a
> clash between equally valid laws, principles and concerns of the Torah. He had to find a
> resolution to the conflict. There was no text…to tell him which course to follow. He could
> find the solution…within his own understanding of the comprehensive ethos of Judaism as
> he was able to gather it in his own heart and in his own conscience from the totality of the
> Torah-teaching and the Torah-way of life.[300]

In this case, Berkovits is not clear about whether the principles educe from the Biblical text. But

he is explicit that the ruling did not directly derive from the combination of principles and rules.

Even if the WoF principles are explicitly stated, it was not obvious how they should combine

with the rules of the Sabbatical year. Only the "comprehensive ethos of the Torah" allows a

resolution. And he is adamant that this is not explicitly stated in the Torah but results from the

decisors' interpretation of the Torah as a whole.

Berkovits adopts this view for contemporary halakhic-legal practice as well, especially in his

interventions into debates about conversion. He was concerned about the halakhic status of

Reform and Conservative conversions and their implications for Jewish unity. If Orthodox

decisors refused to accept the conversions of other denominations, schism within the Jewish

people threatened. In a Hebrew article Berkovits undertakes an examination of the halakhic

issues in a manner similar to his discussions of Talmudic halakhic-legal practice in *HPF* and

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[300] Ibid., 86–87.

NFH and his actual halakhic-legal practice.[301] In *CF*, in contrast, he describes the general

approach that should be taken by a decisor:

> He will accept the authoritative validity of the laws on conversion at the same time that he will acknowledge the importance of the reality of [all of Israel] and [love of Israel], and will then seek a resolution of the conflict from the source and the quality of the comprehensive ethos of Judaism, from what Judaism is about in its totality, according to his understanding and commitment…. This is not a purely subjective decision; but just because of the subjective element involved in it, it will be a truly halakhic solution to a genuinely halakhic problem.[302]

Once again, there is a conflict between the specific halakhic laws and Jewish values. Though he

is not clear about the source of these values, he is unequivocal that the resolution must derive

from the "comprehensive ethos of the Torah" and that this is not explicitly stated in the Torah.

While it is not a completely idiosyncratic imposition on the Torah, it is certainly the decisor's

interpretation of it.

In *CF* Berkovits eschews the language of positivism in describing Talmudic halakhic-legal

practice and the approach that should be taken by contemporary decisors. Halakhic-legal rulings

are made in view of the purpose or comprehensive ethos of the Torah. But these are not simply

given in the Torah. The decisor must engage in constructive interpretation of halakhic practice to

deliver decisions. He must adduce a purpose that it can be seen as a fulfilling. Halakhic-legal

practice itself therefore involves the normative justification of halakhic practice. Further, while

he is equivocal about the status of the overarching principles, it is plausible to understand them

as also constructed through interpretation. In rendering decisions the decisor offers constructive

interpretations of the halakhic-legal tradition. He delivers a ruling that derives from principles

that describe and justify the halakhic-legal tradition. On this interpretation, the frequency of

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[301] Eliezer Berkovits, "Birurim bi-Dinei Gayrut [Clarifications of the Laws of Conversion]," *Sinai* 77, no. 1–2 (1975): 28–36.

[302] Berkovits, *CF*, 126.

instances of discretion decline, for that tradition is the source of almost boundless interpretive possibilities. Berkovits thus articulates a post-positivist theory of halakha in *CF*.

Despite both capturing Berkovits' insistence on the role of moral principles in halakhic-legal practice, these two interpretations have substantial difference like those between inclusive positivism and post-positivism. Recall that Berkovits tasks halakhic-legal practice with redeeming the autonomy deficit that is incurred by the theonomy of revelation. However, the share of autonomy in halakhic-legal practice differs between the two interpretations. On the positivist interpretation autonomy is limited to halakhic-legal application and infrequent instances of discretion. In the former, it is manifest in cases when the combination of the relevant rules and principles is indeterminate. The principle and the rule are both objectively given in the halakhic sources, but the decisor must determine how they should be reconciled in the particular case. Perhaps they are resolved in view of the purpose of the halakha, but this too is antecedently given. Recall that in both *MG* and *NFH* Berkovits elaborates a positivist interpretive method for Jewish philosophy. The faith and the message of the Bible as well as the nature and function of the halakha can be objectively ascertained from the Biblical and rabbinic texts. In the latter, novel circumstances arise and the decisor delivers "a ruling for the hour." Though the decisor is then more autonomous, he is guided by the antecedently given purpose of the halakha.

On the post-positivist interpretation, in contrast, autonomy diffuses throughout halakhic-legal practice. Though instances of discretion nearly disappear, the principles of halakhic-legal practice and even the purpose of the halakha emerge out of the decisor's constructive interpretation. While the decisor must still attempt to accurately describe the halakhic-legal tradition, this concern is balanced against the need to justify it and halakhic practice. Autonomy

penetrates deeper into the halakha and allows a more equal fellowship between God and humanity to emerge.

Additionally, although both interpretations ascribe a direct relation between the project of *ta'amei ha-mitzvot* and halakhic-legal practice, on the positivist interpretation the relation is unidirectional and on the post-positivist interpretation it is reciprocal. Both interpretations present a direct relation between the justification of the commandments and halakhic-legal practice because both conceive of the latter as guided by the purposes that justify the commandments. This creates a robust justification of halakhic practice, for it ensures that it continues to conform to its justification. On the positivist interpretation these purposes are antecedently given and govern halakhic-legal practice. There is thus a unidirectional relation running from the justification of the commandments to halakhic-legal practice. In contrast, on the post-positivist interpretation there is no firm boundary between reflection on the halakha and halakhic-legal practice. The decisor offers constructive interpretations of the halakhic-legal tradition and halakhic practice that combine description and justification. Thus, halakhic-legal practice itself involves the normative justification of the commandments. Lastly, while Berkovits' methodological positivist approach to Jewish philosophy is strongly stated in *NFH* and *MG* and coheres with the positivist interpretation of his theory of halakha, the post-positivist interpretation opens up new possibilities. Indeed, the post-positivist impulse cannot be restricted to halakhic-legal practice but extends to Jewish philosophy. In *CF* the "Torah-purpose" and "comprehensive ethos" are not antecedently given. Rather, they derive from the decisor's interpretation. Jewish philosophy itself is thus a constructive interpretation of Jewish texts and practices: The telos of the Torah and the nature and function of the halakha arise from human interpretation.

The inclusive positivist and post-positivist interpretations of Berkovits' theory of halakha thus have significantly different implications and cannot be reconciled with one another. The positivist interpretation better accounts for most of his writings. The post-positivist interpretation draws on an underdeveloped strand in his *oeuvre* and it is unclear whether he would relinquish the rhetorical strength of the claim to objectivity that the positivist approach encourages. However, there are advantages to the post-positivist interpretation. While too weighty a claim to defend here, it may simply offer a more adequate account of interpretation.[303] Moreover, by creating a reciprocal relation between reflection on the halakha and halakhic-legal practice, an integration of theory and praxis emerges. This is philosophically advantageous and coheres with Berkovits' life and thought.

Since Karl Marx the separation of theory and praxis has been the object of criticism. If thought is conditioned by social relationships that are organized by material factors, then a theorist's distance from the predominant social and material conditions of his society distorts his thought. It renders him incapable of comprehending his own society, including its forms of oppression. The ideal of disengaged reflection thus fails to attain its own objective. Based on this insight Antonio Gramsci pointed out the success of the clerics of the Catholic Church compared to secular intellectuals in maintaining their connection to predominant social and material conditions.[304] Because priests were both intellectuals and ministered to the community, they combined engaged theory with reflective practice. But one need not embrace Marxism to recognize the advantages of the union of theory and praxis. In the pragmatic tradition, C.S.

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[303] See David Couzens Hoy, *The Critical Circle: Literature, History and Philosophical Hermeneutics* (Berkeley: University of California Press, 1982) for a helpful discussion of the issues involved.

[304] Antonio Gramsci, *Selections from the Prison Notebooks*, ed. Quintin Hoare and Geoffrey Nowell Smith (New York: International Publishers, 1971), 328–329.

Peirce reconceived beliefs as habits of action and doubts as the disruptions of practice. The aim of reflection is to resolve doubts and restore action. A humbler but more realistic task is assigned to philosophy. It is called back from "paper doubts" to the pragmatic, whether instrumental or ethical, concerns of life.[305] By uniting legal philosophy with legal practice, post-positivism continues this turn in modern philosophy. Positivism separates itself from normative legal practice and claims to objectively describe law. Post-positivism recognizes that legal philosophy is continuous with legal practice and that both involve normative claims. Thus, interpreting Berkovits as a post-positivist allies him with this productive philosophical movement.

Moreover, concern with the unity of theory and practice is consonant with Berkovits' life and thought. He, as compared to other modern philosophers of halakha, is distinguished both by having served in communal roles throughout most of his life and by the extent of his practical halakhic-legal writings. The two are related: Serving as a communal rabbi brought him into contact with the practical concerns of Jewish communities.[306] Unsurprisingly if one takes Gramsci's perspective, Berkovits' engagement with the concerns of the Jewish community influenced his reflection on halakha. Indeed, Berkovits notes the importance of contact with the realities of the Jewish community for the halakha and the decisor. For him there is no such thing as the halakha *simplicter*. Each Jewish community has its own halakha, which develops in interaction with the community's social and material conditions.[307] Thus, Berkovits argues, "Since halakhah deals with the concrete situation, it is essential that the halakhist himself be

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[305] Charles S Peirce, *The Essential Peirce: Selected Philosophical Writings*, ed. Nathan Houser and Christian J. W. Kloesel, vol. 1 (Bloomington: University of Indiana Press, 1992), 11–127; 28–55; 109–123; 124–141. See Chapter Four for further discussion of Peirce.

[306] Indeed, his lifelong interest in solving the problem of *igun* stemmed from a tragic situation that he confronted as a young rabbi in Berlin under the Nazi regime.

[307] Eliezer Berkovits, "The Role of Halacha: Authentic Judaism and Halacha," *Judaism* 19, no. 1 (Winter 1970): 66–76.

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personally involved in the life of the community within which the problems arise. There is no halakhah of the ivory tower. The attitude to human needs is decisive. Without understanding, without sympathy and compassion, one cannot be an authentic halakhist."[308] Berkovits combines reflection on halakha, theoretical analysis of halakhic-legal practice, actual halakhic-legal practice, and communal service. The result is an engaged philosophy of halakha that conceives of halakha as a teleological practice for the betterment of human society and a reflective halakhic-legal practice that ensures that halakhic practice is continually guided by this purpose.

D. Legal Problems

On any interpretation Berkovits creates a direct connection between the justification of the commandments and halakhic-legal practice, which issues in a robust justification of halakhic practice. However, his theory of halakha encounters a number of difficulties. A central problem is the relation between the inclusive positivist and post-positivist interpretations. They both have some textual basis, though the former is better supported. As has been shown, they have different implications and cannot be resolved with one another. They are also afflicted by somewhat different difficulties.

Some difficulties burden both interpretations but in different ways. Berkovits claims that the autonomy deficit introduced by grounding the normativity of the commandments and morality in revelation is redeemed in halakhic-legal practice. As indicated, the share of autonomy in halakhic-legal practice differs depending on whether a positivist or a post-positivist interpretation is adopted. But on neither of these interpretations is the deficit adequately redeemed.

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[308] Berkovits, *CF*, 98.

On the inclusive positivist interpretation, autonomy merely consists in the application of the commandments in situations of indeterminacy and infrequent instances of discretion. This seems unequal to balancing out the heteronomy of revelation. Moreover, it does not answer the related question regarding the normativity of the divine command. *Ex hypothesi*, it cannot derive from the content of the command. Similarly, it cannot derive from a duty human beings possess to obey God, for that simply shifts the question to the normativity of that duty. Berkovits is thus left to claim that it derives from the brute fact of God's role as creator. But the normative force of that fact is unsupported.

On the post-positivist interpretation, autonomy penetrates deeper into halakhic-legal practice. Consequently, the distinction between what is given by God and what is constructed by human beings is blurred. Revelation still stands at the origin of the commandments. But since even the basic principles of the halakha and telos of the Torah are now subject to human interpretation, it takes on the appearance of a merely formal anchor of normativity: It is what must be posited to make the halakha and morality normative. But since normativity cannot be generated by mere posit, the real justificatory work is done in the constructive interpretation of halakha in halakhic-legal practice. But without an ultimate ground of normativity how does such justification operate on Berkovits' account? He needs a new account of normativity, yet his "critical positivism" seems to deny any source except divine command.

Some difficulties afflict only a positivist interpretation and can be resolved by the adoption of a post-positivist interpretation. Shalom Carmy questions Berkovits' confidence in identifying the basic values and principles operant in halakhic-legal practice.[309] Similarly, Ross suspects him of

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[309] Shalom Carmy, "Eliezer Berkovits's Challenge to Contemporary Orthodoxy," *Torah U-Madda Journal* 12 (2004): 195.

reading contemporary sensibilities into the Bible.[310] These concerns are valid only on an inclusive positivist interpretation. If Berkovits believes that the values and principles are antecedently given in the Bible and rabbinic literature, then the warrant for his confidence in identifying them can be requested and the similarity between them and modern sensibilities can be questioned. But if he maintains that they result from constructive interpretation, the plausibility of his interpretations may be debated but he no longer carries the burden of showing that he has definitely ascertained the divine intent.[311]

Likewise, some problems only arise on a post-positivist interpretation. While a positivist interpretation claims that there is a definite answer to most halakhic questions, the post-positivist interpretation seems to render them essentially contested. The positivist claims that what is the law in most cases can be derived from the combination of rules and principles. However, post-positivism implicates moral reflection, over which there is often little consensus, in legal practice itself. This is not only problematic for analytic reasons, but also for reasons of legal legitimacy. Intuitively, it is only fair that individuals should be held responsible for laws of which they could be aware. But if the law is continuously constructed by judges based on their moral reflection, individuals can never know whether they are complying with the law. For similar reasons the positivist interpretation better coheres with Berkovits' democratic approach to halakhic-legal authority. On this account the content of the halakhic-legal tradition is set and rabbinic authority is limited. The Jewish community knows the scope of the rabbinic role and the rules by which it is bound. Additionally, the need for the rabbinic role is clear; the occupant must possess rare expertise in the halakhic-legal tradition. In contrast, on the post-positivist interpretation rabbinic

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[310] Ross, *Expanding the Palace of Torah*, 84–85.

[311] Indeed, he seems to adopt the approaches suggested by Carmy and Ross. See Carmy, "Eliezer Berkovits's Challenge to Contemporary Orthodoxy," 195; and Ross, *Expanding the Palace of Torah*, 146–161.

authority is bound only by the interpretive skill of any particular rabbi. Further, the need for the rabbinic role becomes questionable. If halakhic-legal practice involves normative justification and moral reflection, what qualifies a rabbi more than a layperson?

However, as indicated, exclusive positivists like Raz have argued that even inclusive positivism has difficulty supporting legal authority because incorporating moral reflection into legal practice undermines the very notion of legal authority. Indeed, it seems that a similar difficulty regarding legal authority afflicts any approach that attempts to create a direct connection between the normative justification of legal directives and legal practice. If legal directives are only valid so long as they are independently justified, then it seems that legal authority is otiose. Whenever a legal directive is valid, the subjects of the directive already possess independent reasons to perform the mandated action. The law makes no practical difference.[312] Thus, in Berkovits' thought a central dilemma in the relation between normative justification and legal authority is confronted. On the one hand, practical reason seems to require one to perform only justified or justifiable actions. On the other hand, legal authority seems to be distinguished by its ability to command, that is, to direct its subjects to perform actions that they would not otherwise do and to do them because it commands them. Thus, although the direct connection between the justification of the commandments and halakhic-legal practice creates a robust justification of halakhic practice, it seems to eviscerate halakha's legal character.

III. Conclusion: Issues and Insights

Berkovits presents a teleological philosophy of halakha. The commandments and halakhic-legal practice are media for the transformation of the world into the Kingdom of God by creating a universal order organized by *sedeq*. This end both justifies the commandments and guides

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[312] See Himma, "Inclusive Legal Positivism" for an articulation of this objection in terms of "practical difference."

halakhic-legal practice. The direct connection of the justification of the commandments and halakhic-legal practice presents a robust justification of halakhic practice because it ensures that it tracks its justification. Halakhic practice is continuously adjusted to achieve the purpose by which it is justified.

Within Berkovits' teleological justification of halakhic norms different relations are created between the elements of halakhic practice and its telos. The commandments themselves are simply means to an end. When the Kingdom of God is achieved, humans will act with *sedeq* without the need for external imperatives. In contrast, the actions mandated by the ethical commandments contribute to the creation of the Kingdom of God by themselves being acts of *sedeq*. They are thus internally related to their end. The actions mandated by the ritual commandments are instruments for the creation of moral motivation, though they are also acts of *sedeq* towards materiality. Thus, all elements of halakhic practice are unified by the end of *sedeq*. But while Berkovits describes *sedeq* as a desirable moral order, he insists its normativity can only derive from God's command because only that can generate unconditional obligation. This creates a number of problems for Berkovits' account. In particular, the Jew's obligation to obey God and the normativity of morality for the non-Jew remain unsubstantiated.

Conceiving the former problem as a deficit of autonomy, Berkovits claims that it can be resolved by the exercise of human independence in halakhic-legal practice. The motto of the halakha is that the Torah is "not in heaven"; human beings are responsible for its implementation in the world. However, they must put the commandments into practice in a manner that realizes their purpose; authentic halakhic-legal practice is teleological. In this effort, decisors are guided by the principles of the halakha, such as the Priority of the Ethical and the Wisdom of the Feasible, which direct the implementation of the commandments so that they fulfill their purpose

under changing conditions. Berkovits also assigns a high degree of independent authority to the contemporary decisor before the halakhic tradition; for only he can understand the novel circumstances that confront him and his community. However, Berkovits also grounds halakhic-legal authority in democratic legitimacy. His halakhic-legal practice is mainly consistent with this theory of halakha, though some of its more radical features are attenuated.

Since it recognizes moral principles in halakha, Berkovits' theory of halakha can be interpreted as inclusive legal positivism or legal post-positivism. The former is supported by most of his writings, though the latter is also represented. Further, the latter is philosophically advantageous and consonant with elements of his life and thought. The two interpretations are not reconcilable; they have different implications and difficulties. The most serious of them derives from the robustness of Berkovits' justification of halakhic norms. The direct connection between normative justification and halakhic-legal practice threatens to render halakhic-legal authority superfluous.

CHAPTER FOUR

Ta'amei Ha-Mitzvot and Normative Justification

Normative justification as used in this study refers to the justifications of norms. But normative is meant in a further sense that might seem to render the term a pleonasm: It refers to offering reasons for a norm the acceptance of which by someone entails that the individual ought to comply with it or at least that it is rationally acceptable to comply with it. As such, normative justification is distinguished from providing reasons that rationalize why someone with certain beliefs and motivations, which may be false or aberrant, would abide by the norm. Justification is thereby contrasted with explanation, and the modifier "normative" seems superfluous. However, as indicated at the outset, normative justification has a further specific meaning in this study that may be contrasted with legal justification, that is, the justification of a norm within the context of a legal system, such that were someone to accept the authority of the legal system, the norm would be justified. In contrast, normative justification refers to the all-things-considered justification of a norm. This may involve appeal to the role of a norm within a legal system, but then the legal system as a whole or the authority that mandates the norm must grounded.

In the previous three chapters, the relations Leibowitz, Soloveitchik, and Berkovits establish in their philosophies of halakha between *ta'amei ha-mitzvot* and theory of halakha and, consequently, between normative justification and legal justification have been examined. In this chapter and the next difficulties and problems that emerge out of these examinations are thematized and explored. Specifically, in this chapter a critical account of normative justification informed by the thought of Habermas is offered as a productive framework for *ta'amei ha-mitzvot*. It is critical because it articulates the rational constraints on, and practical consequences

of, the justification of norms, while leaving their substance—the actual reasons offered—to the participants themselves. Additionally, while this account is intellectually responsive to demands for justification and practically responsive to their failure, it is contextualist, that is, pragmatic and intersubjective, rather than foundationalist. As a consequence, it is also pluralist. In the next chapter, the role that authority may hold in normative justification is assessed.

In the following, the shared features of the approaches to *ta'amei ha-mitzvot* of Leibowitz, Soloveitchik, and Berkovits are reviewed and their common problematic concerning justification and rationality is articulated (I). Next, the philosophical assumptions concerning justification and rationality that motivate their accounts are criticized through an engagement with American Pragmatism, while certain problems with an alternative, contextualist account of justification that emerges from this philosophical tradition are noted (II). A more adequate, context-transcending contextualist account of justification based on the thought of Jürgen Habermas is then proposed (III). However, it is contended that Habermas' view of religion and religious language must be modified to be serviceable for *ta'amei ha-mitzvot*. A dialectic is thus developed, in which his account of justification is applied to halakhic norms and simultaneously modified (IV). Lastly, a sketch of the application of this account to a currently contentious issue, infant male circumcision, is offered to display its critical orientation as well as how it might contribute to the resolution of current social conflicts over religious norms and authority (V).

I. An Attempt at a Critique of All *Ta'amei Ha-Mitzvot*

The accounts of *ta'amei ha-mitzvot* of Leibowitz, Soloveitchik, and Berkovits share important features that cripple their attempts to justify halakhic norms. These shared features are described and their individual difficulties are briefly reviewed (A). A general diagnosis of the problem with their approaches to justification is then offered (B).

A. Shared Features of Twentieth-Century Philosophies of Halakha

The accounts *ta'amei ha-mitzvot* of Leibowitz, Soloveitchik, and Berkovits share three central features: First, notwithstanding certain rhetoric to the contrary, in offering reasons for the commandments these philosophers of halakha do provide justifications for halakhic norms by showing why obeying them is at least as justified as any other practical decision. This draws them into philosophical analyses of justification and rationality. Second, despite the different reasons they offer for the commandments, they all combine a foundationalist account of justification with skepticism about the practical normativity of reason. They conceive of justification as the tracing of a norm to a source of normativity; but they claim that reason cannot be this source. Third, they each consequently identify an alternative source of normativity in which, they contend, halakhic norms can be grounded. However, these alternatives are untenable and their conceptions of reason are constricted. The position of each figure is reviewed using this schema and the weaknesses of their respective positions are articulated (1-3).

1. Leibowitz: The Capricious Will

Despite Leibowitz's explicit rejection of the project of *ta'amei ha-mitzvot*, he does offer a reason for the commandments. He only rejects approaches to *ta'amei ha-mitzvot* that subordinate halakhic practice to non-religious value orientations, and he proposes his own theocentric account in their stead: The only reason for every halakhic norm is service of God. As the meaning and value of halakhic practice, this must be an individual's reason for action in complying with halakhic norms. And because of the link between reasons for actions and justifications, this must be the justification for the action in order for it to have religious significance. Moreover, he embeds this position within metaethical and axiological arguments that support it and yield a justification for the commandments. Indeed, he offers two

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justifications with varying strengths: According to the first, commitment to the value of service of God through obedience to halakhic norms is on all fours with commitment to any other axiological orientation and its entailed norms. Thus, halakhic norms are at least as justified as any other norms. In contrast, according to the second, service of God is the only true value because of its capacity to be willed in radical freedom. Hence, halakhic norms are more justified than any other normative system.

Leibowitz subscribes to a form of foundationalism because he holds that norms must be grounded in a source of normativity to be justified. His specific form of foundationalism is a tense combination of Kantian and anti-Kantian insights. He agrees with Kant about the connections among axiological significance, attributability, and autonomy. For an action to have value, it must be attributable to an individual; and for it to be attributable to an individual, it must be willed autonomously. Thus, norms must be grounded in the human will to be justified. But whereas Kant identifies the autonomous will with one that conforms to reason, Leibowitz rejects reason as an external constrain. This is because he holds that reason only operates instrumentally and uniformly. It is inherently coercive, for it stands outside of the individual and forces its conclusions upon him. The rationally unbounded human will is thus the source of normativity.

Leibowitz is encouraged in this non-cognitive position by the fact/value distinction supported by the comparison of the objectivity of factual conclusions with the subjectivity of evaluative judgments as well as reasons/motives internalism. For him, facts and values represent two different orders of being. Reason can determine facts and select means given ends, thus the uniformity in scientific inquiry. However, it cannot establish ends or legislate values, for ends or values are incommensurable. Moreover, evaluative judgments issue in motivation while factual conclusions do not. He thus subscribes to a form of reasons/motives internalism, according to

which the judgment that one has a reason to perform an action issues in the motivation to do it. But in his view one's reasons for action derive from the rationally unconstrained choice of a value. In sum, Leibowitz's decisionist account of justification has a foundationalist structure, albeit one that is "flat." Norms are justified through reasons for actions that stem directly from the values to which an individual commits himself by a rationally unconstrained decision.

However, Leibowitz's account of justification is problematic, for it presents caricatures of both evaluative judgments and factual conclusions, overdraws the fact/value distinction, and misses the link between rationality and attributability. Moreover, in its most radical form where only a contentless value like service of God can be willed with the requisite freedom, the connection between an individual and her action is severed. Indeed, the basic weakness of Leibowitz's account is its constricted conception of rationality, which yields an untenable alternative source of normativity. Since he only recognizes an instrumentalist form of reason that delivers conclusions that all are forced to accept, he must insulate axiological decisions from it to preserve space for autonomy and difference. This is all the more pressing for him as he seeks to justify a marginalized value like service of God and a particularistic practice like halakha. However, once the human will is disconnected from reason it becomes caprice and both the individual who possesses the will and the value the will selects become contentless. The blind will thus cannot serve as the source of normativity. Leibowitz does not recognize the possibility of a form of rationality that could reflect without coercion and evaluate without erasing difference. Such a form of rationality could be a medium for expressing substantive autonomy and reflecting on contentful values.

2. Soloveitchik: Queer Values

While Soloveitchik does not explicitly reject the project of *ta'amei ha-mitzvot* like Leibowitz, he too initially seems to avoid offering a true justification for the commandments. He appears to make halakhic norms the starting point for reflection on the reasons for the commandments. This reconstructive account would not be a foundationalist approach to justification because it would begin with the norms themselves. Indeed, commentators like Kaplan and, more explicitly, Rynhold have argued that Soloveitchik challenges the foundationalist paradigm altogether. However, he actually offers a second justification for the commandments that is clearly foundationalist. This account undergirds his more overt account, explains his focus on experiential commandments, and better corresponds to his theory of halakha and halakhic-legal practice. According to it, halakhic norms are the objectified expression of collective Jewish consciousness's cognition of reality, which contains veridical value perceptions and apt affective responses. Halakhic practice, in turn, is a discipline for the individual to achieve appropriate emotional responses and to attain accurate value perceptions. Thus, even if the specific reasons for a halakhic norm can only be ascertained through reflection on the norm, the justification for the norm, which makes it a fit object for such reflection in the first place, relies on its origin in religious cognition of reality.

Consequently, for Soloveitchik, when properly interpreted, objective values that inhere in reality are the source of normativity. Admittedly, he does describe a second experience of normativity, that of the individual who already finds himself within a normative system and accepts its norms without first perceiving their connection to reality. Still, this is merely an individual's experience and not the actual source of normativity itself. The ultimate goal of the individual is to be formed by these norms so as to reappropriate them on the basis of

encountering this source. Soloveitchik thus justifies halakhic norms by a philosophical account that traces them back to objective values that serve as the source of normativity.

Soloveitchik is less direct in his rejection of reason as the source of normativity than Leibowitz. He maintains that reason is necessary to discover objective moral and religious values, both initially through collective religious consciousness and for the individual reflecting on the norms after the fact. However, he dismisses reason as the source of morality, because he argues that it cannot render determinate rulings, is motivationally inert, and, more significantly for the question of normativity, devolves into relativistic decisionism. Soloveitchik thus asks too much of reason and then underestimates its capacities. He holds that reason ought to be able to motivate as well as to inform and demands that it fully determine particular judgments but claims that it succumbs to relativism. His conception of reason is thus constricted as well. He does not conceive of a more substantive, though modest, role for reason, in which it would serve as medium for reflection on norms while neither fully prescribing values, nor determining the application of norms, nor ensuring the motivation to comply with them.

However, though dismissing reason as the source of normativity, Soloveitchik recognizes the untenability of Leibowitz's suggestion. If reason cannot be the source of normativity for Soloveitchik because he believes that it issues in relativism, the more direct route to relativism through the arational human will is also unacceptable. Rather, he seeks an objective source for norms in reality. Moreover, his realist account better corresponds with the experience of normativity than Leibowitz. According to the latter's decisionist account, obligations stem from an individual's own free choice, but individuals usually feel that obligations have a claim on them beyond their revisable commitments. Recognizing objective values as the source of normativity makes sense of this constraining feature of normative experience.

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But if Leibowitz's account falls into difficulties due to its effort to protect axiological freedom and religious difference, Soloveitchik's account is problematic because it lacks the resources to assert the particularism that it does want to protect. This problem can be articulated from both deontic and epistemic perspectives: If halakhic norms derive from objective values, then non-Jews' lack of obligation by them is not immediately understandable; they should be universally obligatory. And if these values are an objective feature of reality, then their want of common accessibility and the consequent absence of broad intersubjective agreement about them are not explicable. But this raises a further, metaphysical difficulty about these values: their "ontological queerness," such that they exist in the same way as ordinary objects yet issue in obligations. Thus, while better articulating the experience of normativity than Leibowitz, Soloveitchik's suggestion of objective values as the source of normativity is also untenable.

3. Berkovits: Question-Begging Authority

Berkovits' thought corresponds to this schema more directly than Leibowitz or Soloveitchik. He offers a justification of the commandments, articulates a foundationalist account of justification while expressing skepticism about the practical normativity of reason, and proposes an alternative source of normativity. Despite certain comments about the limits of human understanding, which are general epistemological constraints, he confronts the question of *ta'amei ha-mitzvot* without qualms about the appropriateness of the endeavor. For him, if a law is not acceptable to reason, then revelation is useless. Revealed laws devoid of rational justification cannot command assent. Halakhic norms thus require reasons, which he conceives of as purposes. Indeed, he expresses his commitment to the justification of even revealed norms by reversing the initial question about the reasons for ritual laws: He asks about the need for the revelation of ethical laws, for their reasonability seems to render revelation superfluous.

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Ta'amei ha-mitzvot thus divides into two queries: the reasons for the ritual laws and the need for the revelation of the ethical laws. In responding to these questions, Berkovits reflects on justification and rationality. For him justification is teleological and consequently foundational. It is achieved through the adduction of moral purposes that norms either directly or indirectly serve. These purposes advance a moral telos, *sedeq*, which is the *summum bonum* of reality. Norms are justified by pointing towards this ultimate justificatory source.

However, Berkovits contends that even once the norms are traced back to a telos, the whole justificatory structure still lacks normative force. The normativity of the ultimate value is neither inherent as Soloveitchik might claim nor can it be established by reason. Like Leibowitz, Berkovits contends that reason only operates instrumentally and espouses a form of reasons/motives internalism; reason can neither establish obligation nor motivate action, only the will and its desires can accomplish these tasks. Yet, in contrast to Leibowitz and like Soloveitchik, he is concerned about relativism and attempts to restore unconditional obligation. He too criticizes Kant and argues that there is no single practical reason; there are only the reasons of individual human beings, which are really the expression of their wills. Thus, reason cannot establish unconditional obligation. The individual's will merely establishes normativity for him or those who accept his authority; it can only establish conditional obligation. The absolute will of God and thus revelation is necessary to create unconditional obligation even for norms that advance the moral telos. Therefore, after norms are justified by being traced back to a moral end, they are not normative until they are grounded in the divine will, which can exclusively endow the end and thus the norms that advance it with absolute normativity. The divine will is thus the source of normativity and halakhic norms are justified by showing how they accomplish its purpose.

Because Berkovits directly reflects on justification and rationality, the difficulties in his philosophical premises are even more evident. Despite differing with Soloveitchik about the source of normativity, Berkovits' view confronts similar problems concerning particularism and universalism: He implicitly denies unconditional moral obligation to non-Jews even while including them in the eschatological goal. Additionally, to explain the need for normativity-endowing revelation he separates the axiological question of the good and the deontological question of obligation without offering an explanation of this possibility. Moreover, he fails to explicate why God's will is normative for human beings. *Ex hypothesi*, the normativity of the divine command cannot derive from its content. Similarly, it cannot arise from a duty humans possess to obey God, for that simply shifts the question to the normativity of that duty. Relatedly, he is inconsistent about the relation between heteronomy and autonomy in revelation, and his efforts to resolve this inconsistency in halakhic-legal practice are inadequate. Thus, while providing a perspicuous justification for halakhic norms, Berkovits' philosophical premises are deficient. Indeed, it seems that after providing a robust justification of the commandments in terms of their telos, he needs to constrict reason by denying it normative force in order to make room for revelation. He too does not recognize a fuller conception of practical reason that would impose constraints and prescribe consequences for justification, while respecting the givenness of normativity, which could interpret the idea of revelation.

B. Diagnosis: Foundationalist Justification and Constricted Rationality

A study of the accounts of *ta'amei ha-mitzvot* of these philosophers of halakha thus reveals shared features: They all provide justifications of halakhic norms by showing that engaging in Jewish religious practice is at least as justified as any other practical decision. This draws them into analyses of justification and rationality, in which they combine a foundationalist account of

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justification with skepticism about the practical normativity of reason. They each thus identify an alternative source of normativity in which halakhic norms can be grounded: Leibowitz focuses on human will; Soloveitchik claims objective values; and Berkovits fixes on divine revelation.

These argumentational similarities are motivated by common assumptions that lead to a shared problematic: They all concede that justification must be foundational and that, when applicable, reason is universal. But this makes justifying halakhic norms and practices seem hopeless, for it is difficult to derive such an emphatically particularistic normative system and practice from a universal source. Thus, for fear of a universalizing reason, they deny reason's practical normativity. But each of their alternative sources of normativity is untenable: Among other issues Leibowitz's focus on human will devolves into arbitrary choice; Soloveitchik's objective values are ontologically queer; and Berkovits' embrace of divine revelation begs questions about the normativity of God's command.

Moreover, each seems to dismiss practical reason too quickly, often as a result of a contrast between it and theoretical reason. They conceive of theoretical reason as fully determinative and distinguish it from the seemingly complete subjectivity of practical reason. Both Leibowitz and Berkovits explicitly subscribe to a form of epistemological positivism, according to which facts about the world can be established with certainty by proper employments of reason, and contrast it with evaluative judgments. In fact, Leibowitz directly opposes decisions about values with factual conclusions in science. While the latter are objective because they are forced on inquirers by reality itself, the latter are subjective because they are left to the free choice of agents. Soloveitchik too compares evaluative and factual judgments, though he is more hopeful about the parallel: Value perceptions justify norms in the same way that ordinary perceptions would justify other beliefs. But, as has been shown, this proposal is riddled with ontological, epistemic,

and deontic problems. The failures of the justificatory accounts of Leibowitz, Soloveitchik and Berkovits combined with their dependence on a foundationalist account of justification and stark opposition between practical and theoretical reason motivates a reexamination of justification and rationality to construct a more productive framework for *ta'amei ha-mitzvot*.

II. Foundationalism and Rationality

In fact, the foundationalist account of normative justification is under-motived and should be replaced by a contextualist account, which levels the distinction between theoretical and practical reason. Stimulated by the preceding diagnosis, it is first suggested that a comparison and contrast between theoretical and practical reason prompts the search for a source of normativity (A). Then, through an engagement with thinkers associated with the pragmatist philosophical tradition it is argued that foundationalism is unsustainable as an account of justification for theoretical reason and should be replaced by a contextualist account (B). With the contrast with theoretical reason removed, a parallel justificatory account for practical reason is then described and some difficulties with it are noted (C).

A. Foundationalist Justification in Theoretical and Practical Reason

A foundationalist account of normative justification requires norms to be justified by being traced back to a source of normativity. The norms derive their normative force from this source. It is thus a type of general foundationalism, according to which beliefs or norms must be rooted in some certain ground to be justified and thus for it to be rational to commit oneself to them or act upon them.[1] In fact, foundationalism about the justification of norms, or normative

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[1] On foundationalism in general and its relevance to religious belief, see Alvin Plantinga, "Reason and Belief in God," in *Faith and Rationality*, ed. Alvin Plantinga and Nicholas Wolterstorff (Notre Dame: University of Notre Dame Press, 1983), 16 – 93.

foundationalism, is encouraged by a comparison with foundationalism about beliefs, or doxastic foundationalism, for the notion that beliefs must be traced back to a certain ground seems plausible in the case of theoretical reason, specifically empirical knowledge.

Doxastic foundationalism is closely linked to representationalism and the correspondence conception of truth. According to these positions, beliefs purport to accurately represent independently reality and, correlatively, a belief is true if, and only if, it corresponds to an independently reality. Doxastic foundationalism construes justification as aimed at establishing that a belief does accurately represent this reality: A justified belief should be more likely to correspond to this reality. It does this through its positions about proper doxastic structure and the various types of beliefs it recognizes: Proper doxastic structures must have foundations. These foundations are most certain to reflect reality and can anchor the rest of the structure. Fortunately, then, according to this view, there are beliefs that are fully determined by either logic or the world; such beliefs are either immediately justified or need no justification at all, for they are certain to reflect reality. To be justified a belief must either be foundational or be traced back to such a belief by a chain of inferences. Perceptual beliefs, or beliefs directly caused by perceptions of reality, could be foundational beliefs for empirical knowledge.

However, as Habermas suggests in *The Inclusion of the Other* (*IO*), a comparison between theoretical and practical reason and, more specifically, between empirical knowledge and ethics on foundationalist terms establishes a standard that the latter is hard pressed to meet. It quickly becomes a contrast, for it is not obvious what may serve as the foundational norms to parallel perceptual beliefs.[2] While Moore and his contemporaries may have thought that the good was immediately intuitable, the range of disagreement in ethics casts doubt on the certainty about

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[2] Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory*, ed. Ciaran Cronin and Pablo De Greiff (Cambridge MA: MIT Press, 1998), 36–39. Henceforth *IO*.

such purported foundations for practical reason. Consequently, it is not clear what should serve as the objects ethical norms represent or to which they must correspond to be true. It is then tempting to claim that while empirical knowledge is rational because it can be justified by being grounded in the foundation of perceptual beliefs, ethics is not rational because it cannot be justified by being grounded in foundational norms. However, if normative foundationalism is encouraged by doxastic foundationalism, it must be established whether the latter is in fact sustainable. For if empirical knowledge does not have foundations, both the comparison and the contrast with ethics collapse. Norms do not need to be traced back to a source of normativity to be justified and for it be rational to accept them.

B. Pragmatism: From Foundationalism to Contextualism

Despite the initial plausibility of the existence of perceptual beliefs to anchor empirical knowledge, doxastic foundationalism is not tenable. This has been argued persuasively by figures in the philosophical tradition of American Pragmatism, beginning with C.S. Peirce and continuing with W.V.O. Quine and Wilfred Sellars. Their arguments are presented (1-3) because they offer compelling critiques of doxastic foundationalism and articulate more productive, though not unproblematic, contextualist approaches to justification that are applicable both to theoretical and practical reason.

1. *Peirce: Intuitive Cognition, Habits of Action, and Inquiry*

Peirce undermines doxastic foundationalism by rejecting its premises: He refutes the notion of foundational beliefs (a). He also denies representationalism and the correspondence conception of truth (b), while providing a new model for justification (c). In addition to the merits of his arguments, his approach provides important background to that of Habermas.

(a) In a series of essays Peirce marshals a range of arguments against "intuitive cognition," which he defines as a "cognition not determined by a previous cognition of the same object, and therefore so determined by something outside of consciousness."[3] Such a cognition would "refer immediately to its object"[4] and be "determined directly by the transcendental object."[5] Thus, intuitive cognitions would be certain to properly represent and correspond to the world. They would be immediately justified and would not need justification by other beliefs. They could be the perceptual beliefs that serve as the foundation for empirical knowledge.

Peirce methodically removes the resources to defend the claim for the existence of such beliefs. He first notes that the best evidence for their existence is that individuals feel that they have them. For example, when perceptual experience gives rise to beliefs, individuals do not experience themselves as inferring them; rather, perceptual beliefs seem as if they have been immediately determined by the world itself. But Peirce asks whether one can have intuitive knowledge that one has cognized intuitively. He notes that historically many beliefs had been accepted as intuitive only later to be shown to result from inference, including vision from the blind-spot and perceptions of space. Thus, whether intuitive cognition is possible cannot be determined by the feeling that certain beliefs are intuitive. Instead, intuitive cognition must be supported by arguments. He then analyzes some beliefs that are often taken to be intuitive. He examines the evidence supporting the claims that these cognitions are directly determined by their object and unmediated by other beliefs. He argues that a number of beliefs that are thought to be intuitive, such as self-consciousness, the modality of a thought, and beliefs derived from

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[3] Peirce, *The Essential Peirce*, 1:11.

[4] Ibid.

[5] Ibid., 1:12.

introspection, can be better explained as the result of inference. Lastly, he argues that once it has been granted that the intuitive nature of a belief can only be established by inferring that it is intuitive from observed facts, such beliefs have been rendered impossible. This is because other beliefs are invoked to explain the determinations of the purportedly intuitive belief, thus rendering it determined by other cognitions. For example, the object that is posited as its source would be known under a description; one would thus have beliefs about that object that would explain the determinations of purportedly intuitive belief. Otherwise, one would explain the belief as determined by an unknowable thing-in-itself, but that would be no explanation at all.[6]

This brings out a more central point: Once it is granted that the intuitive nature of a belief must be supported by reasons, it no longer serves the justificatory role that it was meant to serve. Such beliefs were meant to serve as the foundations of a doxastic structure; but if they are supported by reasons, they are no longer foundational. Summarizing the implications of his denial of intuitive beliefs, Peirce writes,

> All cognitive faculties we know of are relative, and consequently their products are relations. But the cognition of a relation is determined by previous cognitions. No cognition not determined by a previous cognition, then, can be known. It does not exist, then first because it is absolutely incognizable, and, because cognition only exists in so far as it is known.[7]

Peirce thus articulates a form of epistemic holism, which he makes more explicit when he writes, "No present actual thought...has any meaning, any intellectual value; for this lies not in what is actually thought, but in what this thought may be connected with in representation by subsequent thoughts; so that the meaning of a thought is altogether something virtual."[8] Beliefs are justified and even possess meaning only due to their relations to other beliefs. Therefore, an intuitive

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[6] Ibid., 1:25.

[7] Ibid., 1:26.

[8] Ibid., 1:42.

belief, a belief not determined by a prior cognition but by the world itself, would be a surd. But if there are no beliefs that are fully determined and justified by the world, then there are no beliefs that can serve as the foundations of doxastic structures.[9]

(b) In a later series of essays, Peirce denies representationalism and the correspondence conception of truth. He writes, "And what, then, is belief…? The essence of belief is the establishment of a habit, and different beliefs are distinguished by the different modes of action to which they give rise."[10] Beliefs are thus reconceived as rules for action rather than representations of reality. Though the implications of the denial of doxastic foundationalism for normative foundationalism are discussed below, it is already evident that in Peirce's thought a sharp distinction between them is no longer sustainable.[11]

Corresponding to the shift from representation to habit, Peirce also reconceptualizes truth, which "is distinguished from falsehood simply by this, that if acted on it will carry us to the point we aim at and not astray…."[12] If beliefs are habits of action instead of representations, then truth is efficacy instead of correspondence. In fact, Peirce's view on truth is more complex, for he also writes that "the opinion which is fated to be ultimately agreed to by all who investigate, is what we mean by the truth…."[13] Indeed, there is a tension in his thought between truth that can be

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[9] For a more detailed discussion of Peirce's arguments and their implications, see Proudfoot, *Religious Experience*, 61–68.

[10] Peirce, *The Essential Peirce*, 1:129–130.

[11] Peirce himself does propose a separate account of the justificatory status of the "vital matters" of ethics and religion, which differs from his general account of justification. See Cheryl Misak, "C.S. Peirce on Vital Matters," in *The Cambridge Companion to Peirce*, ed. Cheryl Misak (Cambridge UK & New York: Cambridge University Press, 2004), 150–74 for details. However, it is not clear whether the distinction between such "vital matters" and other actionable beliefs is sustainable.

[12] Peirce, *The Essential Peirce*, 1:123.

[13] Ibid., 1:139.

asserted here and now about beliefs that "carry us to the point we aim at" and truth that would

only be known at the end of inquiry. Habermas exploits this tension in developing his own

"Janus-faced" conception of truth.

   (c) But once foundationalism, representationalism, and the correspondence conception of

truth are discarded, an alternative account of justification becomes both necessary and possible.

Peirce articulates such an account, which he simply labels "inquiry":

> The irritation of doubt causes a struggle to sustain a state of belief. I shall call this struggle
> inquiry…. The irritation of doubt is the only immediate motive for the struggle to attain
> belief. It is certainly best for us that our beliefs should be such as may truly guide our actions
> so as to satisfy our desires; and this reflection will make us reject any belief which does not
> seem to have been so formed as to insure this result. But it will only do so by creating a
> doubt in the place of that belief. With the doubt, therefore, the struggle begins, and with the
> cessation of doubt it ends. Hence the sole object of inquiry is the settlement of opinion. We
> may fancy that this is not enough for us, and that we seek, not merely an opinion, but a true
> opinion. But put this fancy to the test, and it proves groundless; for as soon as a firm belief is
> reached we are entirely satisfied, whether this belief be true or false…. The most that can be
> maintained is, that we seek for belief that we shall think it to be true. But we think each one
> of our beliefs to be true, and, indeed, it is mere tautology to say so. That the settlement of
> opinion is the sole end of inquiry is a very important proposition. It sweeps away, at once,
> various vague and erroneous conceptions of proof.[14]

Peirce presents a pragmatic account of justification. Justification is not a standing condition of

rationality as foundationalism conceives it. It is not necessary to doubt every belief and construct

a doxastic structure from certain foundations. Rather, the need for justification arises from the

disturbance of beliefs construed as habits of action. In coping with the world it becomes apparent

that a present habit of action is inadequate. This disturbs the habit of action and doubts about it

are raised. Justification is the process of resolving this doubt and settling on a new habit of

action. The goal of justification is not, therefore, the attainment of truth conceived as

correspondence to an independent reality but the resolution of doubt. Once doubt is resolved by

the fixation of a new habit of action, justification comes to an end. Consequently, beliefs need

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[14] Ibid., 1:114–115.

not be justified by being traced back to foundational beliefs; rather, they must only be justified on the basis of presently undoubted beliefs. Of course, such beliefs are thought to be true, but truth is not the aim of justification. The aim is a belief that is not disturbed by doubt, and a belief is justified when all actual objections to it have been defeated.

More generally, Peirce's account of justification can best be described as a form of contextualism. His comments about epistemic holism initially seem to encourage coherentism, for the latter accepts the critique of foundationalism and reconceives justification as a relation among beliefs. But in coherentism, like in foundationalism, this justificatory relation is viewed as an objective feature of beliefs. In contrast, his discussion of inquiry makes clear that he provides a central role for an individual's or a community's present beliefs and practices in justification. Justification occurs in the context of these beliefs and practices. It becomes necessary only when actual doubt arises. But when exactly doubt arises depends on what disturbs the habits of action of the individual or community. There is no absolute standard of when a belief must be doubted. In addition, a belief must only be justified in the context of presently undoubted beliefs, and if there is no absolute standard for when a belief must be doubted, then which beliefs are presently undoubted will also be determined by the beliefs and practices of the individual or the community. Lastly, a belief is justified when all the existing doubts about it have been settled, but what doubts exist about a belief is determined by the specific questions that have been raised about it. Thus, justification is not an unalienable property of a belief; new questions and doubts can undermine the justification of a belief that had previously been held as certain.

Andrew Norman details some of the features of contextualism and distinguishes it from both foundationalism and coherentism. He claims that "[t]o contextualist eyes, both foundationalism and coherentism appear hostage to a decontextualizing paradigm: one that restricts

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epistemological attention to the inferential…relations that a belief bears to other beliefs, sense-data, and the like."[15] Contextualism is not unconcerned by inferential relations among beliefs, but these relations are understood in terms of the epistemic practices of a community. For the contextualist epistemic statuses are social statuses and justification is part of the dynamic of a social practice of argumentation. What needs to be justified and what counts as a justification is determined by what a community takes to need justification and counts as a justification. To justify a claim is to defend it against an objection that has been offered. But what counts as an objection and thus calling for a justification is determined by what a community takes to be a challenge to a belief. Contextualism is thus also characterized by fallibilism; new challenges can threaten the justification of a belief that had previously been justified. Overall, contextualism focuses on the "agonistic dimension of epistemic practice;" justification is seen as a communal practice of stabilizing disputed claims, or, as Peirce phrases it, settling opinion. It involves intersubjective recognition of a claim.[16] In this study, the combination of these pragmatic and intersubjective features marks on account of justification as contextualist.

2. *Quine: The Promise and Threat of Contextualism*

Peirce's criticism of foundationalism and articulation of a contextualist account of justification are further developed by Quine. His "Two Dogmas of Empiricism" is aimed at two views that underpin empiricist philosophy. According to Quine, the empiricist approach to philosophy is beholden to two dogmas: the dogmas of analyticity and the dogma of reductionism, which both support foundationalism. He rejects them (a) and in the process

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[15] Andrew P. Norman, "Epistemological Contextualism: Its Past, Present, and Prospects," *Philosophia* 27, no. 3–4 (November 1999): 385.

[16] Ibid., 385–388.

articulates a contextualist account of justification (b). However, Quine's analysis demonstrates both the promise and threat of contextualism (c).

(a) The dogma of analyticity is "the belief in some fundamental cleavage between truths which are *analytic*, or grounded in meanings independently of matters of fact, and truth[s] which are *synthetic*, or grounded in fact."[17] The dogma of analyticity is foundationalist because if there were statements that are true by definition, then these statements could serve as logically foundational beliefs. He argues, however, that the analytic/synthetic distinction is untenable because any attempted explication of the notion of analyticity relies on notions such as meaning, definition, or synonymity that are just as unclear or even depend on it for their own explication. He contends instead that synonymity and thus analyticity are dependent on actual linguistic usage. Terms are synonymous simply if they are treated as such in practice. Consequently, instead of logic determining what is analytic, the latter is what is treated as "true no matter what" by language users. Linguistic practice determines which truths are analytic.

The dogma of reductionism is "the belief that each meaningful statement is equivalent to some logical construct upon terms which refer to immediate experience."[18] It is foundationalist because if statements could be reduced to terms that refer to immediate experience, those statements that were confirmed by immediate experience could serve as empirically foundational beliefs. Quine argues, however, that even the most sophisticated attempts to show how statements about the physical world can be constructed out of statements about sense experience have failed. However, the dogma of reductionism lives on in "the supposition that each

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[17] W. V. O. Quine, "Main Trends in Recent Philosophy: Two Dogmas of Empiricism," *The Philosophical Review* 60, no. 1 (January 1951): 20.

[18] Ibid.

statement, taken in isolation from its fellows, can admit of confirmation or infirmation at all."[19]

But if statements about the physical world cannot be reduced to statements about sense

experience, then they cannot individually and directly be compared to experience.

(b) Quine's counter-suggestion to the dogma of reductionism is that "our statements about

the empirical world face the tribunal of sense experience not individually but only as a corporate

event."[20] Each statement is not evaluated by holding it up against the sense experience; rather

whole networks of beliefs are presented to reality for confirmation or disconfirmation. Indeed, he

develops an alternative image of doxastic structure and justification to counter that of

foundationalism:

> The totality of our so-called knowledge or beliefs...is a man-made fabric which impinges on
> experience only along the edges…. A conflict with experience at the periphery occasions
> readjustments in the interior of the field. Truth values have to be redistributed over some of
> our statements. Re-evaluation of some statements entails re-evaluation of others, because of
> their logical interconnections—the logical laws being in turn simply certain further
> statements of the system…. Having re-evaluated one statement we must re-evaluate some
> others, whether they be statements logically connected with the first or whether they be the
> statements of logical connections themselves. But the total field is so undetermined by its
> boundary conditions, experience, that there is much latitude of choice as to what statements
> to reevaluate in the light of any single contrary experience. No particular experiences are
> linked with any particular statements in the interior of the field, except indirectly through
> considerations of equilibrium affecting the field as a whole…. Any statement can be held
> true come what may, if we make drastic enough adjustments elsewhere in the system….
> Conversely, by the same token, no statement is immune to revision.[21]

Quine, like Peirce, articulates a form of epistemic holism. The justification and even content of a

belief is dependent on its relations to other beliefs. Doxastic structures are thus not vertical

structures with analytic and synthetic foundations; they are networks with various connections

among beliefs. Beliefs closer to the center of the doxastic network are labelled analytic truths,

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[19] Ibid., 38.

[20] Ibid.

[21] Ibid., 39–40.

while those at the periphery are labeled empirical beliefs. But a conflict with experience does not

necessarily call for the rejection of beliefs at the periphery. Beliefs closer to the center could be

revised and the peripheral beliefs kept.

Indeed, though Quine too initially seems to endorse a form of coherentism, he like Peirce

ultimately gives primacy to social practice in justification. He writes,

> Certain statements…seem peculiar germane to sense experience.... But in this relation of "germaneness" I envisage nothing more than a loose association reflecting the relative likelihood, in practice, of our choosing one statement rather than another for revision in the event of recalcitrant experience…. A recalcitrant experience can…be accommodated by any of various alternative re-evaluations in various quarters of the total system; but, in the cases which we are now imagining, our natural tendency to disturb the total system as little as possible would lead us to focus our revisions upon these specific statements concerning brick houses or centaurs.[22]

The beliefs at the periphery and the beliefs at the center of the network are determined by actual

practices of belief revision. Peripheral beliefs are those that are more likely to be revised; central

beliefs are those that are less likely to be revised. In view of recalcitrant experience, the

assessment of beliefs is revised so as to reduce the amount of disturbance of the overall system.

But in principle any belief can be placed at the center, held to be true come what may be, and any

belief can be placed at the periphery, subject to revision. Epistemic strength is explained in terms

of likelihood of revision in practice. There is no one right way to rearrange beliefs; a doxastic

network can be rewoven in all sorts of ways. Thus, Quine too advocates a form of contextualism.

(c) Further, Quine does not see the overall adequacy of reweaving as determined by accurate

representation. Instead, he focuses on predictive reliability at least for science:

> As an empiricist I continue to think of the conceptual scheme of science as a tool, ultimately, for predicting future experience in the light of past experience. Physical objects are conceptually imported into the situation as convenient intermediaries—not by definition in terms of experience, but simply as irreducible posits comparable, epistemologically to the gods of Homer…. The myth of physical objects is epistemologically superior to most in that

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[22] Ibid., 40–41.

it has proved more efficacious than other myths as a device for working a manageable structure into the flux of experience.[23]

This has the result that the status of the entities posited by science and those of Greek mythology are epistemologically on par. They both can be justified by being woven into a network of beliefs. For Quine science is superior in that it has proven more effective in experience. But one might have other purposes for which another network of beliefs might be superior.

Quine's analysis indicates both the promise and threat of contextualism, for if justification is not an objective relation to a foundational source but determined by social practice, there does not seem to be any limits on what may be justified given the right network of beliefs, purposes, and practices of reweaving. Because it is not obvious that everyone should have the same purposes, this allows for the possibility of pluralism. However, it also threatens relativism, because there is no longer any standard to adjudicate among competing truth-claims.

3. Sellars: Myth of the Foundation

Though directed at specific philosophical positions associated with empiricism, Sellars' *Empiricism and Philosophy of Mind* also takes aim at a much wider philosophical trend that underlies foundationalism. In fact, he writes that though his argument is directed against certain positions that accept what he calls the "Myth of the Given," his real target is the "framework of givenness" as such.[24] The framework of givenness is the assumption that knowledge must be founded on some bedrock that can be known independently of any other beliefs. "The given" is thus a more generic specification of the foundational beliefs posited by foundationalism. Sellars' assault on the framework of givenness is thus an attack on foundationalism (a). In its place he

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[23] Ibid., 41.

[24] Sellars, *Empiricism and the Philosophy of Mind*, 14.

offers a fully developed contextualist account of justification and rationality that emphasizes intersubjectivity (b).

(a) Sellars combats versions of the myth that take an empiricist form. He writes, "the point of the epistemological category of the given is…to explicate the idea that empirical knowledge rests on a 'foundation' of non-inferential knowledge of matters of fact…."[25] It is a reasonable intuition that empirical knowledge should be knowledge that is derived from the world and not directly inferred from other beliefs. Philosophical views that accept the Myth of the Given move from this intuition to the problematic position that empirical knowledge must rest on knowledge that is independent of any other beliefs. But there is a difference between directly inferring knowledge from other beliefs and knowledge depending on the possession of other beliefs. Sellars draws out this distinction in capturing the reasonable intuition while rejecting the problematic position.

Sellars exposes the contradictions that the Myth of the Given yields through an analysis of the views of sense-data theorists. Sense-data theorists hold that empirical knowledge is founded on non-verbal episodes of awareness or sensings. Sensings are said to depend on no other knowledge but themselves give rise to knowledge. For a sense-data theorist, to sense a red sense-content x is to know non-inferentially that x is red. Sensings are foundations for doxastic structures, and epistemic facts are thus analyzed without remainder into non-epistemic occurrences. Sellars points out, however, that the sense-theorist thereby demands incompatible things from this 'given.' Though it is particulars that are sensed, it is facts that are known. But this leads to an inconsistent triad:

  i.   *X senses red sense-content s* entails *x non-inferentially knows that s is red.*
  ii. The ability to sense sense-contents is unacquired.
  iii. The ability to know facts of the form *s is ϕ* is acquired.[26]

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[25] Ibid., 15.

[26] Ibid., 21 renumbered to correspond to present organization.

The sense-theorist is committed to (i) because he wants to found non-inferential knowledge of facts solely on non-epistemic sensings, (ii) because he wants sensings to depend on no other knowledge or conceptual capacities, and (iii) because all knowledge of facts involves classification, which requires concept-use and learning. But if the ability to sense sense-contents is unacquired and the ability to know facts is acquired, then sensing sense-content cannot directly entail knowledge. Something else is needed.

To explain what is needed, Sellars restates his criticisms but now directs them against a variation of the sense-data position. This position designates observation reports, or verbal expressions of sensings, as the basic expressions of empirical knowledge. When correctly made, that is, on the occasion of sensings, observation reports are true. Their authority is thought to rest solely on these episodes of awareness. Observation reports are potential foundations for doxastic structures, and again epistemic facts are reduced to non-epistemic occurrences. This view is thus also beholden to the Myth of the Given and afflicted by its contradictions.

But Sellars argues that it is correct to accord observation reports epistemic authority by allowing them to serve as justifications for beliefs, even if it is not episodes of sensing alone that provide that authority. He reconstructs their authority but without reducing epistemic facts to non-epistemic occurrences. Instead, he argues that epistemic facts, instances of knowing, are social statuses that depend on non-epistemic occurrences but not exclusively. To claim that an observation report of a green object, for example, is an instance of knowledge is to attribute epistemic authority to it. One attributes authority to it because "one can infer the presence of a green object from that fact that someone makes this report."[27] Thus, to attribute knowledge to someone is to claim that one could reliably infer that what they report is the case from the fact

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[27] Ibid., 74.

that they have reported it; it is to recognize that their report could serve as a justification for what they report. Sellars thus construes knowledge as part of a social practice: "A report can be correct as being of a general mode of behavior which in a given linguistic community, it is reasonable to sanction and support."[28] To know x is to be recognized by others as a knower of x, to be considered by them as a reliable reporter that x. In addition, he notes that "to be an expression of knowledge, a report must not only have authority, this authority must in some sense be recognized by the person whose report it is."[29] But this entails that the knowledge that is expressed in an observation report is dependent on much other knowledge. To be able to know that x is the case, a reporter must also know that she is a reliable reporter that x is the case. Thus observation reports cannot be the foundation of empirical knowledge, for the former is dependent on a range of other beliefs about the reliability of one's own reporting abilities.

(b) Two important points result from Sellars' analysis: First, empirical knowledge is not wholly reducible to non-epistemic occurrences, but is rather part of a social practice of attributing the epistemic authority to serve as a justification: "The essential point is that in characterizing an episode or state as that of knowing, we are not giving an empirical description of that episode or state; we are placing it in the logical space of reasons, of justifying and being able to justify what one says."[30] Justification thus ceases to be a foundationalist relation between a knower and the world or a coherentist relation among beliefs; rather, justification is an intersubjective relation.

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[28] Ibid.

[29] Ibid.

[30] Ibid., 76.

Second, even the seemingly basic instances of empirical knowledge are dependent on the possession of a battery of other concepts and beliefs. This has implications for justification and rationality:

> [T]he metaphor of "foundation" is misleading in that it keeps us from seeing that if there is a logical dimension in which other empirical propositions rest on observation reports, there is another logical dimension in which the latter rest on the former. Above all, the picture is misleading because of its static character…. For empirical knowledge, like its sophisticated extension, science, is rational not because it has a foundation, but because it is a self-correcting enterprise which can put any claim in jeopardy, though not all at once.[31]

The justificatory relation between observation reports and general empirical propositions is not the vertical one claimed by foundationalism. While the latter depend on the former in the sense that observation reports express, in terms of content, rudimentary beliefs about the world, the former depend on the latter for their epistemic authority, for their capacity to serve as justifications. But once this interdependence is recognized, a different image of the structure of empirical knowledge must be acknowledged. It is no longer a structure with foundations that are rooted in reality but one more like a Quinean network.

Moreover, Sellars too claims that a different standard besides correspondence must be recognized for the adequacy of this network. It is not rational because it represents the world accurately but because of its self-corrective capacity. It is intellectually responsive to challenges to its claims by providing reasons for them and practically responsive by revising them as a result of failures of justification. And if rationality means self-correction, then a rational approach to justification means participating in a game of giving and asking for reasons. Sellars thus also offers a contextualist account of justification, in which the focus shifts from justification and rationality to justifying and reason-giving to others.

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[31] Ibid., 79.

This discussion of Peirce, Quine, and Sellars focused on their criticisms of foundationalism and articulations of alternative contextualist, that is, pragmatic and intersubjective, approaches to justification. They have shown that the notion of foundational beliefs, whether understood as intuitive cognitions, analytic truths and statements that refer directly to immediate experience, or sensings and observation reports, are not viable. But if there are no beliefs that are most certain to reflect reality, then the notions that beliefs ought to represent or to correspond to reality, that they are thus unjustified if one does not have reason to think that they do reflect reality, and that one is irrational for holding such beliefs become implausible. In effect, since representationalism, truth as correspondence, and foundationalism are all mutually supporting and all depend on the existence of foundational beliefs, the denial of the latter causes their common persuasiveness to dissipate. Despite its initial plausibility, doxastic foundationalism in empirical knowledge and theoretical reason is not sustainable.

But once the standards of foundationalism are discarded, new positions on justification and rationality become both possible and necessary. Peirce, Quine, and Sellars subscribe to forms of contextualism, which incorporates pragmatic and intersubjective features. Some of these features are more evident in one thinker rather than another. But common to them all is the pragmatic insight that justification is not a standing obligation nor is it accomplished by tracing a belief back to other beliefs that are certain to represent or correspond to reality. Rather, justification becomes necessary when doubts arise about or challenges are raised against a belief, and it is accomplished by supporting the belief with other presently undoubted or unchallenged beliefs. Further, while it is indicated in Peirce, it becomes clear with Quine and Sellars that justification is not conceived as a property of a belief but as a social practice of readjusting beliefs. Moreover, the intersubjectivity of this social practice is emphasized by Sellars: Justification is not an

attribute of a belief, and rationality is not an attribute of an individual who only holds justifiable beliefs; rather, justification involves offering reasons for beliefs to others and rationality is a disposition of giving and asking for reasons for beliefs. It requires being intellectually responsive to requests for justifications and practically responsive to their failures.

C. Implications for the Justification of Norms and Practical Reason

If doxastic foundationalism has collapsed, then the contrast with normative foundationalism falls away. The notion of foundational beliefs that anchor empirical knowledge encouraged the search for foundational norms to anchor ethics. But once foundational beliefs are discarded, the pursuit of foundational norms is demotivated. Moreover, the contextualist accounts of justification offered by Peirce, Quine, and Sellars are just as suitable for norms as they are for beliefs. Indeed, Peirce breaks down the division between theoretical and practical reason by describing beliefs as habits of action: Beliefs just are norms. Further, if doxastic structures are not evaluated by their correspondence to the world but in view of their efficacy in achieving one's purposes as Quine suggests, then the lack of obvious objects to which norms must correspond is not a failing of ethics. Lastly, if rationality is not the possession of a doxastic structure with a foundation in reality but engagement in self-corrective reason-giving as Sellars claims, then practical reason could be on as firm a footing as theoretical reason. Rationality does not require correspondence with the world but giving and asking for reasons, and this is as possible for norms as for beliefs.

These developments disclose a promise and a threat for both theoretical and practical reason: pluralism and relativism. For if neither beliefs nor norms are determined by reality but are justified through practices of reason-giving in the context of other held beliefs and norms, then there is no one set of beliefs or norms that everyone must possess. This certainly alleviates the

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philosophers of halakha's concerns about the oppressive universalism of reason, but it also raises concerns about relativism. Indeed, while the accounts of justification and rationality of Peirce and Quine are enlightening, certain difficulties about their positions on truth, the locus of the promise of pluralism and the threat of relativism in terms of beliefs, were noted. By reconceiving truth as efficacy in view of the purposes that one holds, Quine accepts the relativistic conclusion that incompatible conceptual schemes can each be true. Depending on one's purposes, the myths of modern science and ancient Greece are on par. Peirce, too, sometimes seems to invite relativism. Indeed, he appears to hold two explications of truth that are in tense relation with one another: One is an attribute of all current undoubted beliefs; the other can only be known at the end of inquiry. The former courts relativism by allowing individuals or communities to hold incompatible and true beliefs, because as long as they are undoubted they are true. The latter invites skepticism by withholding truth to some utopian era of complete knowledge. These worries concerning relativism also accompany any attempt to apply contextualism to practical reason; moral relativism threatens. An approach to justification and rationality is necessary that recognizes the contextual nature of justification, thereby affirming pluralism, but that also prevents relativism about both beliefs and norms.

III. Communicative Reason and Justification

Habermas develops such an account of justification and rationality. His communicative conception of reason escapes the oppressive universalism feared by the philosophers of halakha, while rejecting their skepticism about the practical normativity of reason. Reason is not a source of normativity in which beliefs and norms must be grounded; but it does establish constraints and consequences for justification. Like Sellars, Habermas identifies rationality with the disposition

to engage in the practice of justification.[32] But his context-transcending contextualist account of justification both fulfills the promise of pluralism and avoids the threat of relativism by fully recognizing the role of justification in linguistic practice. It is also compatible and even resonates with some of the insights of the philosophers of halakha about justification. It thus provides a productive framework for normative justification in general and *ta'amei ha-mitzvot* in particular.

This account of justification endorses the pragmatic and intersubjective insights that there is no requirement to ground all beliefs and norms in a foundation as well as that beliefs and norms are justified to others in terms of the undoubted beliefs or norm within a social context. Moreover, it locates a commitment in linguistic practice to offering justifications for claims when they are challenged, thus ensuring intellectual and practical responsiveness to demands for justification. But it also distinguishes on the basis of their role in modern linguistic practice between ethical-claim and aesthetic-claims that only assert their validity within the social context in which they were made, on the one hand, and truth-claims and moral-claims that implicitly assert their unconditional validity, on the other hand. The former suffice with justifications that remain within that social context, while the latter require justifications that aim to transcend it.

The recognition of the assertion of conditional validity implied by ethical-claims and aesthetic-claims fulfills the promise of pluralism. When they are challenged, context-bounded justifications that acknowledge that individuals and communities have diverse conceptions of the good or the beautiful suffice. The recognition of the assertion of unconditional validity implied by truth-claims and moral-claims avoids relativism. When they are challenged, context-transcending justifications that are guided by the goal of one truth or a single morality are required. Even here, however, justification is understood intersubjectively: Context-

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[32] Habermas, *TCA1*, 22.

transcendence is construed as acceptability by an imagined universal society and context-boundedness is construed as acceptability to an actual particular community.

Habermas is perhaps one of the last great systematic philosophers. His communicative conception of reason and context-transcending contextualist account of justification are embedded in a broader social theory and relies on a specific conception of linguistic practice and meaning. Similarly, communicative reason is meant to unify theoretical, practical, and aesthetic forms of reason. The goal in this section is to extract his account of justification from this system in a manner that is coherent as well as productive for the question of normative justification. This involves briefly presenting elements of his system so that his account of justification is plausible while suppressing others.[33] Thus, in the following, the basic aims of his philosophical program and the place of justification within it are sketched (A). His account of justification is then elaborated in the context of his theories of linguistic practice and meaning (B).

A. Habermas' Philosophical Program

Habermas' philosophical program can be understood in terms of two problems: The first emerges from social theory (1), while the second responds to developments in philosophy (2).

(1) Though Habermas has dedicated much of his work in the recent decades to questions concerning theoretical and practical reason, the motivations of his philosophical program are presented in his *Theory of Communicative Action* (*TCA*), which is a contribution to the critical social project of the Frankfurt School.[34] The issue of justification arises within this project as an

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[33] For outlines of Habermas' thought, see Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (Cambridge MA: MIT Press, 1978); and David Ingram, *Habermas: Introduction and Analysis* (Ithaca: Cornell University Press, 2010).

[34] On the Frankfurt School, see Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923-1950* (Berkeley: University of California Press, 1996).

attempt to "clarif[y] the normative foundations of a critical theory of society."[35] He aims to identify the resources for the critique of modern forms of social pathology.

There are certain features of the modern situation that Habermas takes for granted. He follows Max Weber in understanding modernity as characterized by the rationalization of worldviews: Comprehensive mythical or religious worldviews break down and are replaced by a secular realm consisting of a plurality of value spheres, including truth (theoretical reason), morality (practical reason), and beauty (aesthetic judgment). If religion persists, it no longer provides the framework within which all life occurs but is simply one value sphere among others.[36] Further, expert cultures dedicated to these values, including science, law, and art criticism, emerge. Lastly, the economy and government separate from everyday life and are institutionalized as steering media for society that are focused on formal-purposive rationality.[37]

In fact, Habermas identifies the predominant social pathology of modernity as the one-sided development of reason as formal-purposive rationality and its over-extension to social life, which results in the instrumentalization of social relations and decisionist approaches to values and norms. His mentors, Max Horkheimer and Theodor Adorno, similarly diagnosed modernity, but they accepted the identification of reason with formal-purposive rationality. They thus denied that reason could be a source of critique.[38] In contrast, Habermas claims that there is another type of reason—communicative reason—that is always already present in the basic form of linguistic

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[35] Jürgen Habermas, *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason*, trans. Thomas McCarthy (Boston: Beacon, 1987), 396–397. Henceforth *TCA2*.

[36] Joseph Ratzinger and Jürgen Habermas, *The Dialectics of Secularization: On Reason and Religion*, trans. Brian McNeil (San Francisco: Ignatius Press, 2006), 49. Henceforth *DS*.

[37] For Habermas' most comprehensive discussion of modernity, see Habermas, *TCA2*, 153–197; 283–299; 301–331.

[38] Max Horkheimer and Theodor W. Adorno, *Dialectic of Enlightenment: Philosophical Fragments*, trans. Edmund Jephcott (Stanford: Stanford University Press, 2009).

practice—communicative action. Communicative reason recognizes the full spectrum of value spheres, including truth, morality, and beauty, while unifying them through the commitment to justification in linguistic practice.

(2) Parallel to this project in social theory, in his work *Postmetaphysical Thinking* (*PM*) Habermas describes his philosophical program as developing a conception of reason that is "postmetaphysical, yet not defeatist."[39] Postmetaphysical thought is in some sense the philosophical corollary to modern sociological developments. Four changes characterize it:

(a) The relation between theory and practice has been reversed: Whereas traditionally philosophy has glorified reflection over practice, reflection is now seen as emerging from and reflecting back on praxis. (b) The relation between philosophy and science has also shifted: Philosophy too has been affected by the rationalization of worldviews. It is no longer understood as granting access to a substantive form of reason, but, following the lead of the sciences, employs a procedural form of rationality. Correspondingly, whereas philosophy had previously claimed to be the ultimate arbiter of knowledge, now it works fallibly in tandem with science. (c) "Philosophy of consciousness" has given way to "philosophy of language": The subject-object relation of the individual to the world had previously been the locus of philosophical inquiry. Now, following the "linguistic turn," the shared languages of communities and intersubjectivity are explored. (d) Reason has been situated in nature and history: It is no longer understood as a supernatural and timeless attribute of humanity; it is conceived as capacity that has developed through the course of human natural evolution and assumes various forms in cultural history.

While these "postmetaphysical" developments allow the resolution of previously intractable philosophical problems, they have dangers that threaten to render reason "defeatist." Some of

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[39] Jürgen Habermas, *Postmetaphysical Thinking: Philosophical Essays*, trans. William Mark Hohengarten (Cambridge MA: MIT Press, 1992), 116. Henceforth *PM*.

these dangers are directly relevant to Habermas' diagnosis of modernity: (a) The new relation between theory and practice has issued in a productivism that only values economic growth, (b) while the new relation between philosophy and science has promoted a scientism that only recognizes cognitive and instrumental relations between the individual and the world. Others are philosophical positions that deny the existence of resources to combat modernity's social pathologies: (c) The transition from "philosophy of consciousness" to "philosophy of language" has enabled a form of relativistic contextualism that anoints the language of a community as the final arbiter of truth and morality. (d) The situation of reason in nature and history has led to critiques of rationality that interpret it as a form of oppression and seek refuge in the irrational.[40]

Habermas' philosophical project is "postmetaphysical, yet not defeatist" because it reverses the relation between theory and practice, but then discovers within linguistic practice a form of procedural rationality that is not limited to the achievement of economic goals or the technique of scientific method. Instead, it conceives of rationality as the engagement in the process of justification of claims across a spectrum of values or spheres of validity, including truth, morality, and aesthetics. Further, while recognizing that claims are articulated and justified in particular social contexts, he argues that because of their role in linguistic practice, claims to truth or morality aim to "transcend the various contexts in which they are formulated and gain acceptance."[41] Hence their justifications must aim to be acceptable beyond that context.

Communicative reason allows for the critique of modern society and prevents the collapse into productivism, scientism, relativism, and irrationalism. It accomplishes this by exploiting the

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[40] Ibid., 3–9.

[41] Ibid., 50.

commitment to justification implicit in linguistic practice. Justification thus plays a central role

in Habermas' conception of communicative reason and, in turn, broader philosophical program.

B. Theory of Communicative Action, Formal Pragmatics, and Discourse

Not only is the commitment to providing justifications for claims implicit in everyday

linguistic practice, the character of such practice conditions justification and accounts for both its

contextualist and context-transcending features. In fact, this account of justification relies on a

particular theory of linguistic practice, which, in turn, depends on a specific theory of linguistic

meaning. In the following, Habermas' theory of communicative action and formal-pragmatic

theory of meaning are reviewed (1), before his general account of justification is explained (2).

1. Communicative Action and Formal Pragmatics

Habermas claims that the most basic form of linguistic practice is communicative action. He

offers his clearest definition of it in *TCA*:

> I shall speak of communicative action whenever the actions of the agents involved are
> coordinated not through egocentric calculations of success but through acts of reaching
> understanding. In communicative action participants are not primarily oriented to their own
> individual success; they pursue their individual goals under the condition that they can
> harmonize their plans of action on the basis of common situation definitions. In this respect
> the negotiation of definitions of the situation is an essential element of the interpretive
> accomplishments required for communicative action.[42]

Two aspects of this definition are crucial for the relation between communicative action and

justification: Participants aim to *reach an understanding* with one another (a) *about the situation*

in which they act (b). These two aspects are supported by a theory linguistic meaning (c) and

give rise to four related pragmatic presuppositions of communicative action (d).

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[42] Habermas, *TCA1*, 286.

a. Action Oriented Towards Reaching Understanding

Communicative action is not an objectifying description of linguistic practice; rather, it is a

rational reconstruction of the self-understanding of its participants. Its aim of reaching

understanding can thus be further characterized to reveal normative features:

> Reaching understanding is considered to be a process of reaching agreement among speaking
> and acting subjects…. Processes of reaching understanding aim at an agreement that meets
> the conditions of rationally motivated assent to the content of an utterance. A
> communicatively achieved agreement has a rational basis; it cannot be imposed by either
> party, whether instrumentally…or strategically through influencing the decisions of
> opponents. Agreements can indeed be objectively obtained by force; but what comes to pass
> manifestly through outside influence or the use of violence cannot count subjectively as
> agreement. Agreement rests on common conviction. The speech act of one person succeeds
> only if the other accepts the offer contained in it by taking (however implicitly) a 'yes' or
> 'no' position on a...claim that is in principle criticizable. Both ego, who raises a...claim, and
> alter, who recognizes or rejects it, base their decision on potential…reasons.[43]

In communicative action participants understand themselves as aiming to come to an agreement.

This goal determines the process of reaching understanding by placing normative constraints on

it. An individual who is psychological or physically coerced to adopt the claims of his

interlocutor does not understand himself as coming to an agreement with her. Rather, the

individual must be convinced by reasons to accept the claims of his interlocutor.

Correspondingly, when an individual communicates with another with the aim of reaching

agreement she does not merely attempt to influence him causally to adopt her claims. Rather, she

tries to convince him to accept them by offerings reasons for them.

Now these reasons are often not always necessary—the interlocutor may immediately agree

with her viewpoint. But the aim of reaching a rationally motivated agreement stands in the

background of each communicative speech act: Such an act depends on the acceptance of its

content by its recipient for its success. The recipient can either accept it because he is convinced

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[43] Ibid., 287.

by it or reject it because he is dubious of it. Therefore, even when it is not necessary to offer

reasons for her claim, the participant in communicative action aims to convince her interlocutor

to accept it by undertaking the commitment to provide reasons if necessary. The interlocutor

correspondingly relies on her claim because he attributes such a commitment to her. Using

Habermas' terminology, when an individual performs a communicative speech act, she raises

and is understood to raise a "validity claim," that is, she implicitly asserts that her initial claim is

justified and undertakes to provide her reasons for it if necessary. This secondary speech act is

also a communicative speech act oriented towards reaching understanding. Thus, the reasons

themselves may be challenged by the interlocutor, unleashing a process of argumentation aimed

at achieving agreement about both the initial claim and its supporting reasons.

b. Claims, Formal World Concepts, and the Lifeworld

Participants in communicative action aim to achieve agreement about those features of the

situation necessary for the coordination of their activities. Communicative speech acts thus

perform a number of different functions:

> [They] serve (a) to establish or renew interpersonal relations, whereby the speaker takes up a
> relation to something in the world of legitimate (social) order; (b) to represent (or
> presuppose) states and events, whereby the speaker takes up a relation to something in the
> existing state of affairs; (c) to manifest experiences—that is, to represents oneself—whereby
> the speaker takes up a relation to something in the subjective world to which he has
> privileged access.[44]

Participants in communicative action must agree about the description of the physical word in

which they act, the norms that regulate their actions, and the intentions that they have in acting.

When making such factual, normative, or expressive claims, participants in communicative

action consequently commit themselves to providing the reasons for them. Each of these claims

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[44] Ibid., 308.

can be thematized in particular speech acts: assertions, imperatives, and self-expressions. However, Habermas maintains that every communicative speech act implicitly asserts its truth, normative rightness, and truthfulness.

Correspondingly, participants in communicative action assume three "formal world concepts": an objective world, a social world, and a subjective world. The contents of these worlds are not given; rather, they are that about which participants aim to achieve agreement. Maeve Cook suggests that they be understood as "validity dimensions," entirely correlative to the validity claims of truth, moral rightness, and truthfulness.[45] Since the aim is to achieve rationally motivated agreement, the objective and the social worlds are assumed to be accessible to all participants in communicative action. This allows claims to be evaluable by everyone:

> A speaker puts forward a criticizable claim in relating with his utterance to at least one 'world'; he thereby uses the fact that this relation between actor and world is in principle open to objective appraisal in order to call upon his opposite number to take a rationally motivated position…. A definition of the situation by another party that prima facie diverges from one's own presents a problem of a peculiar sort; for in cooperative processes of interpretation no participant has a monopoly on correct interpretation. For both parties the interpretive task consists in incorporating the other's interpretation into one's own in such way that in the revised version 'his' external world and 'my' external world can…be relativized in relation to 'the' world and the divergent situation definitions can be brought to coincide sufficiently.[46]

Though there are differences between the objective world and the social world which are discussed below, because they both must be assumed to be common to all participants in order to enable communicative action, incompatible claims about them launch processes of argumentation aimed to achieve rationally motivated agreement. In contrast, the subjective world can be understood as a residual domain to which the subject has privileged access. Still, the

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[45] Maeve Cooke, *Language and Reason: A Study of Habermas's Pragmatics* (Cambridge MA: MIT Press, 1994), 11.

[46] Habermas, *TCA1*, 99–100.

truthfulness of an individual's self-expressions can be evaluated in view of their consistency with his behavior.

While the three formal world concepts are that about which participants in communicative action aim to achieve rationally motivated agreement, they do this against the background of those features of the situation about which agreement currently prevails. Habermas refers to this network of assumptions as the "lifeworld," or the "the unthematically given horizon within which participants in communication move in common when they refer thematically to something in the world."[47] He writes, "Every process of reaching understanding takes place against the background of a culturally ingrained preunderstanding. This background knowledge remains unproblematic as a whole; only that part of the stock of knowledge that participants make use of and thematize at a given time is put to the test."[48] Obviously, the boundary between the formal world concepts and the contentful lifeworld can shift. Indeed, this is precisely what occurs when a claim that had previously been taken for granted is challenged. Nonetheless, some shared assumptions are necessary for communication to be possible in the first place.

c. Formal Pragmatics

Communicative action is the basic form of linguistic practice because of its role in agents' self-understanding.[49] Further, though action may be coordinated in individual instances through non-communicative means, communicative action is necessary for the broader processes of cultural reproduction, social integration, and personality formation.[50] Even instrumental use of

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[47] Ibid., 82.

[48] Ibid., 100.

[49] Habermas, *BNR*, 39.

[50] Habermas, *TCA2*, 208.

language is dependent on its communicative use, for an interlocutor must first understand the content of a claim to be deceived by it.[51] Indeed, Habermas offers a theory of linguistic meaning—formal pragmatics—that reinforces the centrality of communicative action and the commitment to justification within it.

Formal pragmatics is a pragmatic account of language because it takes the speech act as opposed to the sentence as the basic linguistic unit. It is a communication-theoretic account of language because it understands the communicative function of language as primary over its propositional-representational, illocutionary-instrumental, and expressive-disclosive functions. Communicative speech acts are thus the basic units of language-use. Crucially, according to Habermas, such speech acts only possess meaning and are only understandable in terms of possible justifications. Recall that, according to the theory of communicative action, in performing a communicative speech act an individual raises and is understood to raise a validity claim: She implicitly asserts that her claim is justified. Drawing on Michael Dummett's justificationist semantics, Habermas further argues that "we understand a speech act when we know what makes it acceptable."[52] More generally, he maintains that "[i]t is part of understanding a sentence that we are capable of recognizing *grounds* through which the *claim* that its truth conditions are satisfied *could be redeemed*."[53] While Habermas writes of "truth conditions," this account of meaning applies to any claim for which reasons could be offered and not exclusively those that assert their propositional truth.

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[51] Habermas, *TCA1*, 286–295.

[52] Ibid., 297.

[53] Ibid., 317 emphasis in original.

More recently, Habermas has endorsed, with a few significant caveats, Robert Brandom's inferentialist semantics as the best explication of the internal relation between linguistic meaning and justification. Briefly, for Brandom the semantic content of a speech act is constituted by its inferential role, what would serve as reasons for it and what it could serve as a reason for. Consequently, to understand the content of a speech act an individual must at the very least, first, conceive its speaker as committing herself to the content's justifiability and, second, attribute possible reasons for the speech act to its speaker.[54] Crucially, for Habermas and Brandom the reasons for a claim are constituted neither by objective features of the claim nor the subjective intentions of its speaker; rather, it is "conditions for the intersubjective recognition of a claim."[55] According to Habermas, the justification of a claim is thus the reasons that the speaker could offer to gain the interlocutor's agreement to it. The aim of reaching understanding thus stands behind the basic constitution of linguistic meaning.

Consequently, the link between linguistic practice and justification is reinforced, for as Habermas writes, "The set of grounds available in any given instance is circumscribed by internal relations of a universe of language that can be explored only in and through argumentation."[56] Because linguistic meaning is constituted by justification and justification is intersubjective, making a claim involves the commitment to argue about it. In fact, the relation between communicative action and argumentation is significant for both of the relata: communicative action is conceived as a rudimentary form of argumentation; communicative action and argumentation are continuous with one another; and the aim of argumentation is to

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[54] For Brandom's view see *Making It Explicit*. For a shorter introduction, see *Articulating Reasons: An Introduction to Inferentialism* (Cambridge MA: Harvard University Press, 2000).

[55] Habermas, *TCA1*, 298.

[56] Ibid., 318.

enable communicative action. This indicates both the fragility and resilience of communicative action. Communicative action depends on linguistic understanding, which, in turn, depends on agreement on what would justify a claim. But since justification is intersubjective, what would justify a claim can always be challenged by a participant in communicative action and thus a breakdown of understanding is always possible. However, because the generation of linguistic meaning depends on the commitment to offer justifications, communicative action can continue in argumentation with aim of restoring agreement and returning to action.

d. Pragmatic Presuppositions

This description of communicative action and formal pragmatics indicates their pragmatic presuppositions. Pragmatic presuppositions are implicit and indispensable commitments of a practice. Habermas' most recent discussion of the pragmatic presuppositions of communication is in his work *Between Naturalism and Religion* (*BNR*). There he reflects on the nature of pragmatic presuppositions in general and those of communicative active in particular by contrasting them to Kantian transcendental conditions for the possibility of experience:

> Formal Pragmatics holds that the rational structure of action oriented toward reaching understanding is reflected in the presuppositions that actors must make if they are to engage in this practice at all. The necessity of this 'must' has a Wittgensteinian rather than a Kantian character. That is, it does not have the transcendental meaning of universal, necessary, and noumenal conditions of possible experience, but has the grammatical meaning of 'unavoidability' stemming from the conceptual connections of a system of learned—but for us inescapable—rule-governed behavior. After the pragmatic deflation of the Kantian approach, 'transcendental analysis' means the search for presumptively universal, but only de facto inescapable, conditions that must be met if certain fundamental practices or achievements are to be possible. All practices for which we cannot imagine functional equivalents in our sociocultural forms of life are 'fundamental' in this sense.[57]

Because communicative action itself is a central practice of human life, for which humans currently know of no replacement, its pragmatic presuppositions are unavoidable for us. The

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[57] Habermas, *BNR*, 27.

pragmatic presuppositions of communicative action are assumptions necessary for the possibility of action oriented towards reaching understanding. They do not follow from one another in an entailment relation; rather, they are linked and mutually reinforcing in their roles in communicative action. They have already been indicated in the description of communicative action. They include: rational accountability (i), shared objective (ii-a) and social worlds (ii-b), unconditional claims to truth (iii-a) and morality (iii-b), and rational discourse (iv).[58]

(i) Participants in communicative action must mutually presuppose that they are rationally accountable: "This supposition states that a subject who is acting intentionally is capable, in the right circumstances, of providing a more or less plausible reason for why she…expresses herself this way rather than some other way. Accountability consists…in an agent's general ability to orient her actions by validity claims….."[59] A participant in communicative action assumes his interlocutor has reasons for her claims that she could offer him. For if she did not have reason for her claims that she could offer him, he could not understand her as pursuing agreement with him. Now, this assumption may be mistaken: She might be merely trying to influence him causally to accept her view, or she might be incompetent. Despite its defeasibility, this presupposition is necessary as a starting point for communicative action.

The correlate of rational accountability is the pragmatic presupposition of shared objective (ii-a) and social worlds (ii-b). While similar in some respects, the objective and social words differ in their connection to action, which issues in dissimilar substantiations of the next crucial pragmatic presupposition, or pair of pragmatic presuppositions: unconditional truth-claims (iii-a)

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[58] Though Habermas discusses the shared objective and social worlds as well as the unconditionality of truth-claims and moral-claims together, because of the different relations of the objective world and unconditional truth-claims, on the one hand, and unconditional moral-claims and rational discourse, on the other hand, I find it useful to offer a different order of presentation.

[59] Habermas, *BNR*, 36–39.

and moral-claims (iii-b). The objective world and unconditional truth-claims are thus discussed

first, followed by the social world and unconditional moral-claims.

(ii-a) Though communicative action evidently involves communication, it aims to coordinate

action. In addition to being that about which participants communicate, the world is that which

impinges on them and upon which they act. This creates a complex relation between agents-

communicators and the world, on the one hand, and action and communication, on the other:

> Whether in communicating about states of affairs or in practical dealing with people and things, subjects can refer to something only if they start—each on her own, yet in agreement with everyone else—with a pragmatic presupposition. They presuppose "the world" as the totality of independently existing objects that can be judged or dealt with. All objects about which it is possible to state facts can be 'judged.' But only spatio-temporally identifiable objects can be 'dealt with' in the sense of being purposefully manipulated. To say that the world is 'objective' means that it is 'given' to us as 'the same for everyone'…. Through this formal presupposition of the world, communication about something in the world is intertwined with practical interventions in the world. Speakers and actors reach an understanding about and intervene in one and the same objective world. To achieve secure semantic references, it is important that speakers, as agents, are in contact with the objects of everyday life and they can put themselves in contact with it repeatedly.[60]

The actional and communicative relations to the objective world are linked to each other through

the linguistic practice of reference. Habermas draws on the theory of reference developed by

Hilary Putnam, according to which a common causal connection to objects in the world is

necessary for shared reference.[61] This dual relation to the world establishes it as both given, or

not generated by the participants, and the same for everyone, or shared.

(iii-a) The given character of the objective world is significant for the relation between truth

and justification and is discussed below. Presently, its shared character is pertinent: Because the

objective world is assumed to be shared, participants in communicative action must also

presuppose that truth-claims implicitly assert their unconditional validity: "The supposition of a

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[60] Ibid., 30–31.

[61] Hilary Putnam, *Realism with a Human Face* (Cambridge MA: Harvard University Press, 1990), 37–79.

common world of independently existing objects about which we can state facts is complemented by the idea of truth as a property that assertoric sentences cannot 'lose'…."[62] Truth-claims must refer to the same objective world, even if they offer different descriptions of it. In fact, the assumption of a shared world makes such disagreement possible in the first place. Consequently, the assertion of validity implicit in truth-claims is not restricted to the context in which they are made. Though truth-claims are always made in a particular context, they implicitly assert that they are valid in every context. Now, this assertion may be incorrect. Many truth-claims turn out to be incorrect or only accurate for a subset of phenomena; but the only way to understand their being incorrect or inaccurate is to view them as having asserted their unconditional validity in the first place.

(ii-b) The social world is both similar to and different from the objective world. Like the objective world, it is also implied by language-use: "[M]embers comprehend their 'social world' as the totality of possibly legitimately regulated interpersonal relationships. Like the 'objective world,' this system of references is also a necessary supposition that is grammatically coupled to regulative (as opposed to constative) language use."[63] However, unlike the objective world it is not given to agents but produced by participants in communication and argumentation. In coordinating their action, agents do not causally interact with a preexisting social world, though they may encounter other actors whose actions conflict with theirs. Action oriented toward reaching understanding is thus possible only if shared norms to govern action can be established. Similarly, unlike the objective world, the social world is not the same for all agents as a

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[62] Habermas, *BNR*, 43.

[63] Ibid., 46.

preexisting condition for coordinated action; rather, it must be presupposed that it could become the same for them through rational discourse aimed at resolving disputes about norms.

(iii-b) Consequently, only some normative claims implicitly assert their unconditional validity. This subset is comprised of moral-claims, which are distinguished from other normative claims by their relation to rational discourse:

> Moral norms must be able to command the rationally motivated recognition of all subjects capable of speech and action, beyond the historical and cultural confines of any particular social world…. The validity of such norms "consist" in the universal recognition that they merit. Because moral claims to validity lack the ontological connotations that are characteristic of claims to truth, reference to the objective world is replaced by an orientation toward an expansion of the social world, that is, toward the progressive inclusion of strangers and their claims. The validity of a moral statement has the epistemic significance that it would be accepted under ideal conditions of justification. However, if the meaning of "moral rightness" unlike that of "truth,' is exhausted by rational acceptability, then our moral convictions must ultimately rely on the critical potential of self-transcendence and decentering that is built into the practice of argumentation—and the self-understanding of its participants—with the 'disruptiveness' of idealizing anticipations.[64]

In contrast to truth-claims, which in referring to the world implicitly assert their unconditional validity, moral-claims implicitly assert their unconditional validity by their connection to rational discourse. Moral-claims implicitly assert that they could be accepted under rigorous conditions of argumentation. This claim is more fully explored below. In any case, such rational discourse is a pragmatic presupposition of communicative action and contains its own such presuppositions, which interpret the unconditional validity claimed by both moral-claims and truth-claims.

(iv) Rational discourse is a pragmatic presupposition of communicative action because it simply is a more rigorous form of action oriented towards reaching understanding, though now the action is argumentation, or "cooperative competition for better arguments," that is explicitly oriented towards attaining rationally motivated agreement. It becomes necessary when mutual understanding is elusive in communicative action, and it is aimed at achieving agreement and

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[64] Ibid., 52.

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returning to communicative action. Like communicative action, Habermas offers a description of it in terms of the self-understanding of its participants that preserves its normative features:

> The cooperative nature of the competition for better arguments is explained by the goal or function constitutive for the language game of argumentation: participants want to convince one another. In continuing everyday communicative action at the reflexive level of thematized claims to validity, they are still guided by the goal of mutual understanding inasmuch as a proponent can win the game only if she convinces her opponents that her validity claim is warranted. The rational acceptability of the corresponding statement is based on the convincing force of the better argument. Which argument does convince is not decided by private insight but by the stances that…are adopted by everyone who participates in the public character of exchanging reasons. Now, standards for whether something counts as a good or bad argument may themselves become controversial…. Hence the rational acceptability of validity claims is ultimately based only on reasons that withstand objections under certain demanding conditions of communication.[65]

Rational discourse has pragmatic presuppositions that are crucial for the self-understanding of participants as participants in argumentation. They cannot consciously deny them, while still understanding themselves as engaging in argumentation. The central insight is that "[i]f the process of argumentations is to live up to its meaning, [it] must allow, if possible, all relevant information and explanations to be brought up and weighed so that the stance participants can take can be inherently motivated solely by the revisionary power of free-floating reasons."[66]

The pragmatic presuppositions of rational discourse include publicity and inclusiveness, equal rights to engage in communication, exclusion of deception and illusion, and absence of coercion. The most important presupposition for the purpose of this study is publicity and inclusiveness: Individuals cannot understand themselves as engaged in argumentation while consciously shielding some claims from evaluation and excluding relevant individuals. The latter claim establishes a universal society as the imagined audience for arguments in rational discourse. Participants must offer arguments that they think would be acceptable to those who

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[65] Ibid., 49.

[66] Ibid.

might not share their parochial beliefs and norms. They must also be willing to subject all of their beliefs and norms, though certainly not all at once, to evaluation to determine whether they are, or rely upon, parochial premises. While these presuppositions are often false in practice—arguments are private or exclusive; opportunities to participate are unequal; deception, illusion, and even coercion are present—they are still efficacious. They force participants in rational discourse to make their discussions more public, inclusive, equal, transparent, and free. They push them to offer arguments that abstract from beliefs or norms that they know to be parochial and to subject as many of their beliefs and norms as possible to evaluation.

Now since moral-claims are those claims that can secure agreement in rational discourse, they implicitly assert that they could be accepted in such an idealized form of communication. As is discussed below, according to Habermas, that is what is meant by morality and such agreement is constitutive of a moral-claim's moral rightness. In contrast, while the justification of a truth-claim can also only be understood in the context of rational discourse and thus it too implicitly asserts that it could be accepted by a universal audience, the truth of the truth-claim must be understood in a more realistic manner.

Justification thus occupies a central place in communicative action: The commitment to providing reasons for one's claims enables action oriented towards reaching understanding. Justification itself, understood as argumentation or rational discourse, serves as a forum for concentrated efforts by individuals to achieve agreement about disputed claims and return to communicative action. But justification is also conditioned by that role, which establishes both its contextualist and context-transcending features.

2. Context-Transcending Contextualism

With this background established Habermas' account of justification is understandable. At its core it is a type of contextualism (a), which incorporates both context-transcending (b) and contextual-bounded features (c) at the level of the justification of specific claims. The crucial distinction in his account is not between normative and doxastic justification but between those claims that call for justifications that aim to transcend the context in which they are raised and those claims that suffice with justifications that are restricted to their initial context. This classification cuts across the distinction between beliefs and norms, placing truth-claims and moral-claims in the former category and ethical-claims and aesthetic-claims in the latter group. Indeed, the dissolution of the unfavorable contrast of normative justification with doxastic justification is a central motivation of the account.[67]

a. Contextualism

Habermas' account of justification is contextualist because it conceives of justification as both pragmatic and intersubjective. As described in *TCA*, justification is understood in terms of its role within communication. While the commitment to offer justification is implicit in every communicative speech act because of the latter's aim of achieving understanding, it only becomes necessary to offer reasons for a claim when it is challenged by an interlocutor. Argumentation then ensues with the goal of stabilizing the disputed initial claim and its underlying validity claims through rationally motivated agreement and of returning to communicative action.

In other explicitly philosophical works Habermas critiques the foundationalist account of justification and suggests his own intersubjective account. Though he focuses on normative

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[67] Habermas, *IO*, 36–38.

justification in earlier works, he most fully discusses foundationalism and contextualism in his more recent work *Truth and Justification* (*TJ*), the subtheme of which is the relation of his thought to American Pragmatism. His discussion focuses on truth-claims because, as suggested, foundationalism is most plausible for doxastic justification and empirical knowledge. However, like the pragmatists, Habermas shows how it fails even in that case, thus removing the contrast with normative justification and ethics.

Like Peirce, Quine, and Sellars, Habermas argues that there is no unmediated epistemic relation to the world and thus that representationalism and the correspondence conception of truth are implausible:

> As we cannot grasp reality except in terms of our concepts, the idea that we could somehow step in between the linguistic realm of concepts and 'naked' reality, purified, as it were, of all subjective components make no sense…. This insight destroys the illusion that we might be able to compare propositions and facts in order to determine whether they correspond to or fit with one another. Hence the notion that the world causes representations in the knowing subject that represents objects in the world more or less correctly also falls apart.[68]

For Habermas an unmediated epistemic relation to the world is impossible because human experience is always already mediated by language. The bare world cannot directly cause beliefs that accurately represent it. It is thus impossible to compare beliefs with the world in and of itself to determine whether they correspond to it. But if that is case, then "we cannot identify a class of basic propositions that are self-legitimating and might therefore serve as the beginning and end of a linear chain of justifications."[69] Therefore, the foundationalist or, as Habermas refers to it, semantic-deductive, account of justification collapses for want of foundational beliefs.

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[68] Jürgen Habermas, *Truth and Justification*, trans. Barbara Fultner (Cambridge MA: MIT Press, 2003), 216–217. Henceforth *TJ*.

[69] Ibid., 249.

Instead of grounding in reality, Habermas suggests that the "the truth of beliefs and sentences can be justified or repudiated only by means of other beliefs and sentences...."[70] Beliefs are justified in terms of other beliefs. While this might suggest a coherentist account of justification, in *IO* Habermas is clear that he too proffers a pragmatic and intersubjective account with normative features:

> This failure of foundationalism recommends a...conception of justification as a public practice in which criticizable validity claims can be defended with good reasons. Of course, the criteria of rationality that determined which reasons count as good reasons can themselves be made a matter for discussion. Hence procedural characteristics of the process of argumentation itself must ultimately bear the burden of explaining why results achieved in a procedurally correct manner enjoy the presumption validity. For example, the communicative structure of rational discourse can ensure that all relevant contributions are heard and that the unforced force of the better argument alone determines the 'yes' and 'no' responses of the participants.[71]

Justification is a public practice of argumentation, in which both initial claims and the reasons for them are subjected to intersubjective evaluation. Such claims and reasons are justified to others in terms of shared and currently undisputed claim and reasons. These constitute the lifeworld of a particular community; but they too can be challenged. The lifeworld then "recedes," and they, in turn, must be justified to others in terms of common and presently undisputed claims and reasons. Moreover, such argumentation contains normative features that substantiate why agreement in argumentation should be understood as justification. Specifically, they establish the context-transcendence that allows this account to avoid the relativism that threatens other contextualist accounts of justification.

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[70] Ibid.

[71] Habermas, *IO*, 37.

b. Context-Transcending: Morality and Truth

The context-transcending features of this account emerge from the implicit assertion of unconditional validity by truth-claims and moral-claims in communicative action. Since participants in communicative action implicitly assert the unconditional validity of their truth-claims and moral-claims, they must provide context-transcending justifications for them. Crucially, these claims are context-transcend*ing* as opposed to context-transcend*ent*.[72] In raising a truth-claim or moral-claim a speaker does not implicitly assert that she has somehow infallibly accessed the context-independent truth or morality. Rather, she commits herself to providing justifications that *aim* to transcend the context in which the initial claim was raised. Such justifications must abstract from premises that are known to be parochial and can be criticized for depending on premises that can be shown to be parochial.

The engine of this context-transcendence is the pragmatic presuppositions of rational discourse, specifically the commitment to publicity and inclusiveness, which establishes an imagined universal society as the justificatory audience for truth-claims and moral-claims. The universality of this audience is a limit concept, which creates a "transcendence from within" in Habermas' terms.[73] It is always conceived from within the speaker's context: it is an audience that does not share those beliefs or norms that the speaker knows to be parochial. By imagining such an audience for her justifications, she is motivated to examine her beliefs or norms to determine whether they could be accepted by someone who does not share her background or experiences. This promotes testing of truth-claims and moral-claims with the goal of apprehending the one truth and single morality. Consequently, relativism is denied.

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[72] Jürgen Habermas, "Reply to My Critics," in *Habermas and Religion*, ed. Craig Calhoun, Eduardo Mendieta, and Jonathan VanAntwerpen (Cambridge UK & Malden MA: Polity Press, 2013), 364. Henceforth "Reply."

[73] See Jürgen Habermas, *Religion and Rationality: Essays on Reason, God and Modernity*, ed. Eduardo Mendieta (Oxford UK: Polity, 2002), 67–94. Henceforth *RR*.

Yet, Habermas' accounts of the context-transcending justification of moral-claims and truth-claims confront problems. In the case of moral-claims, he seems to presume the truth of certain metaethical and normative moral positions. In the case of truth-claims, he appears to assimilate truth to justification. These difficulties are discussed in turn (i-ii), which shifts the discussion from the justification of moral-claims and truth-claims to morality and truth themselves.

(i) In maintaining that moral-claims require context-transcending justifications, Habermas seems to assume a cognitive metaethics and universalist normative moral theory. He appears to presume that moral-claims are susceptible to justification and that these justifications must be acceptable to everyone. But these positions are controversial: Subjectivist metaethical approaches, like decisionism and emotivism, maintain that moral-claims are non-cognitive and thus cannot be expected to garner widespread agreement. As has been seen, Leibowitz and Berkovits dismiss the cognitivism of evaluative judgments along with the possibility of universal agreement about them. In *Moral Consciousness and Communicative Action* (*MCCA*), Habermas criticizes such positions and, in the process, argues in favor of his own moral theory: Discourse Ethics. Discourse Ethics identifies morality with vindication in rational argumentation. As indicated, not only do moral-claims require justification oriented towards universal acceptance, the latter is constitutive of morality. Notwithstanding that both truth-claims and moral-claims require context-transcending justification, this indicates a difference between truth and morality.

Subjectivist metaethical approaches are directly opposed by objectivist approaches like moral realism, which defend the cognitivism and often universalism of moral-claims by identifying their object as independently existing moral values. Yet, Habermas dismisses moral realism because of specific philosophical difficulties and general conflicts. As discussed in the critique of Soloveitchik's thought, independently existing moral values present both ontological and

epistemological difficulties: Such values are "ontologically queer" in that it is claimed that they exist like physical objects but give rise to obligations. Likewise, since they are not directly perceptible, their apprehension seems to require a unique form of intuition. Further, Habermas maintains that moral realism clashes with the postmetaphysical character of the modern age and the autonomy of modern individuals.[74] Instead, Discourse Ethics vindicates the cognitivism and universalism of moral-claims through a constructivist metaethical account: Morality is not given but constructed by moral agents.

Habermas develops Discourse Ethics through an engagement with subjectivism. To start, he identifies linguistic practice as the explanandum of philosophical ethics: It must account for the generality, impartiality, and orientation towards reasons that characterize moral deliberation. Metaethical accounts or normative moral theories that require the revision of these practices thus begin at a disadvantage. In contrast, following his theory of communicative action, he aims to reconstruct the pragmatic presuppositions of such linguistic practice.[75] Habermas nonetheless identifies two arguments in support of subjectivism: The first relies on what can be described as the identity premise. It asserts that when moral validity is understood as identical to the validity of truth-claims, all attempts to explain the former have failed. The second can be described as the disagreement claim. It points to the lack of agreement about moral principles as evidence for the non-cognitive nature of moral-claims.[76]

Habermas strategy in combating these arguments is to relinquish the identity premise and then deny the disagreement claim. Instead of identifying the validity of moral-claims with the

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[74] Richard J. Bernstein, *The Pragmatic Turn* (Cambridge UK & Malden MA: Polity, 2010), 193–195.

[75] Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. Christian Lenhardt and Shierry Weber Nicholsen (Cambridge MA: MIT Press, 1990), 43–56. Henceforth *MCCA*.

[76] Ibid., 56–57.

validity of truth-claims, he understands them to be analogous, for they are both assessed through offering reasons with the aim of attaining a single right answer. He thus acknowledges the distinction between facts and values insisted upon by Leibowitz and Berkovits but without sacrificing the possibility of practical *reason*. Indeed, Habermas adduces a principle that could make agreement in moral argumentation possible:

> (U): *All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation).[77]

He describes (U) as a bridging principle that if accepted as a rule of moral argumentation, would make agreement possible when matters that concern everyone can be regulated in their equal interest.

In a second step, Habermas explains why (U) should be accepted in this role. He denies that a foundationalist justification of (U) can be offered. The justification of moral principles succumbs to either an infinite regress or circularity or breaks off at an arbitrary point. This was evident in the analysis of the philosophers of halakha. Their attempts to establish a foundation for normativity were beset by difficulties. Instead, Habermas offers a transcendental-pragmatic argument, which aims to show that "every argumentation, regardless of the context in which it occurs, rests on pragmatic presuppositions from whose propositional content the principle of universalism (U) can be derived."[78] The details of this justification were reviewed above in the discussion of the pragmatic presuppositions of argumentation. It establishes that the justification of moral-claims must be oriented towards universal acceptability. But Habermas argues that more can be derived from (U). Specifically, it entails the basis of Discourse Ethics:

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[77] Ibid., 65 emphasis in original.

[78] Ibid., 82.

(D) Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity as participants in a practical discourse.[79]

Whereas (U) is a principle of moral argumentation, (D) is a moral theory, which identifies morality with that which could be accepted in rational discourse by all affected.

Obviously, (D) is a descendant of Kant's categorical imperative (CI), in particular the formula of universal law ("Act only according to that maxim by which you can at the same time will that it should become a universal law").[80] In addition to their cognitivism, universalism, and constructivism, they share a deontological focus: They concentrate on the validity or invalidity of norms or maxim for human action as opposed to establishing its telos. There are, however, significant differences between (D) and (CI). While (CI) may be deployed by an individual monologically, corresponding to Habermas' appeal to pragmatic presuppositions of communication, (D) requires actual dialogue. Indeed, he describes it as a discourse-theoretical interpretation of the categorical imperative, which acknowledges the imaginative limitations of individuals in determining what norms might be rejected by others.[81] Moreover, whereas (CI) establishes a rule for testing all of the maxims of one's actions, the assessment of norm in terms of (D) only becomes necessary when the morality of an action is challenged. This constitutes part of the critical orientation of Habermas account of normative justification: (D) is not a foundational source of normativity and it does not legislate what norms a community ought to adopt; rather, it serves as a constraint on justification. When moral-claims are challenged, their justifications must aim to meet the approval in a practical discourse of all affected.

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[79] Ibid., 93.

[80] Kant, *GMM*, 4:421.

[81] Habermas, *IO*, 34.

(ii) Initially, Habermas proposed a discursive conception of truth to match (D): "The condition of the truth of a statement is the potential agreement of all others."[82] Truth, like morality, just is acceptance in rational discourse. This echoes Peirce's claim that "The opinion which is fated to be ultimately agreed to by all who investigate is what we mean by truth…."[83] However, this seems to confuse the justification of a claim, which does occur through argumentation, and what makes the claim true, which refers to the world. In *TJ* Habermas articulates this objection:

> It is counterintuitive that a proposition…should be true on the basis…of its ability to survive in discourse. Epistemic conceptions of truth certainly do justice to the linguistic insight that, faced with controversial claims to truth, we depend exclusively on the better reasons because we are barred from direct access to uninterpreted truth conditions. Yet the truth of a proposition does not become an epistemically mediated state of affairs merely in virtue of the fact that we can determine whether its truth conditions…are fulfilled only by means of justification…. The gap between truth and justification cannot be closed even by idealizing the conditions of actual processes of justification. Since any real discourse that takes place in time will remain provincial relative to learning processes in the future, we cannot know whether propositions that today seem to us to be warranted even under approximately ideal conditions will indeed withstand attempts to invalidate them in the future.[84]

Truth cannot be assimilated to justification, even when justification is idealized as the end of inquiry (Peirce) or through the pragmatic presuppositions of argumentation (Habermas). The cautionary use of the word "truth" in linguistic practice alerts us to the fact that even claims justified in ideal justificatory conditions may turn out to be false because truth depends on the world and not human practices.[85] Habermas thus develops a pragmatic "Janus-faced" conception

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[82] Jürgen Habermas, "Wahrheitstheorien [Theories of Truth]," in *Vorstudien Und Ergänzungen Zur Theorie Des Kommunikativen Handelns [Preliminary Studies and Addenda to The Theory of Communicative Action]* (Frankfurt am Main: Suhrkamp, 1995), 136–137, translated in McCarthy, *The Critical Theory of Jürgen Habermas*, 299.

[83] Peirce, *The Essential Peirce*, 1:139.

[84] Habermas, *TJ*, 251–252.

[85] Ibid., 250.

of truth, which distinguishes truth and justification, has implications for the justification of truth-claims, and differentiates truth and morality.

The Janus-faced conception of truth brings into relation the roles of truth in discourse and action. In fact, it reconciles the two explications of truth (the end of inquiry and habits of action) that Peirce presented. The discursive, or epistemic, conception of truth is not abandoned but is supplemented by a realist, or non-epistemic, conception that is expressed in action. Habermas describes these roles and conceptions:

> The practices of the lifeworld are supported by a consciousness of certainty that in the course of action leaves no room for doubts about truth…. Actors rely on certainties of action in their practical dealings with an objective world, which they presuppose to be independent and the same for everyone. And these certainties in turn imply that beliefs that guide actions are taken to be true absolutely…. To the realism of everyday practice, there corresponds a concept of unconditional truth, of truth that is not epistemically indexed…. From the perspective of the routines of the lifeworld, the truth of propositions becomes a topic of discussion only when practices fail and contradictions arise. As a result, what has hitherto been taken for granted and thus accepted as valid comes to be seen as merely 'presumed truths,' that is, as fundamentally problematic truth *claims*…. Only once they make the transition from action to discourse do participants take a reflective attitude and dispute the now thematized truth of controversial propositions in the light of reasons for and against it.[86]

In action individuals operate with a realist concept of truth. Everything that they currently believe is true; they do not relate to their beliefs as if they were merely held-to-be-true. In contrast, in discourse they operate with a concept of truth that is relative to their justificatory practices. They attempt to determine what is true by offering reasons for and against truth-claims. These concepts of truth are related through the functional connection between action and discourse. Individuals move from action to discourse when practical certainties are disrupted; in discourse they aim to settle disputed claims and return to action.

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[86] Ibid., 39.

In fact, the relation between action and discourse and the realist and discursive conceptions of truth establishes justification-transcendent truth as the goal of justification, even while justification can only ever attain the discursive vindication of truth-claims:

> The nonepistemic concept of truth, which manifests itself only operatively, that is, unthematically, in action, provides a justification-transcendent point of reference for discursively thematized truth claims…. This transcending relation guarantees the difference between truth and rational acceptability…. Th[e] very dogmatic constitution of the lifeworld is a necessary condition for the fallibilist consciousness of participants in discourse who anticipate that they might be mistaken even if their beliefs are well grounded.[87]

As indicated, the experience of interacting with and communicating about the world establishes that it is both shared and given. While its shared character establishes universal acceptability as the aim of justification, its given character instills assertions with ontological connotations that survive the transition from action to discourse: The goal of justification is not just a context-transcending truth but a justification-transcendent truth that refers to the way the world is.

This has two related implications: First, truth and morality are differentiated in terms of their relation to justification:

> Looking at a truth-evaluable proposition 'p,' we read it realistically from left to right. If p is true, the proposition is unconditionally valid and merits being recognized by everyone. In order for p to be indeed universally recognized in this way, everyone has to be able to convince herself of the truth of this proposition and to know that p. This knowledge in turn can rely on the truth of p because (and insofar as) true propositions can be supported with good reasons. This consideration rests on a familiar connection between truth and knowledge: someone knows that p if she (a) believes that p and (b) has sufficient reasons for believing that p; and if (c) p is true. Moral knowledge cannot meet these conditions if we take 'rightness' to be an epistemic validity claim because this means that the nonepistemic requirement (c) cannot be fulfilled.[88]

While morality is constituted by justification in rational discourse, truth is only indicated by justification even under ideally rational communicative conditions.

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[87] Ibid., 39; 254.

[88] Ibid., 259–260.

Second, in order to indicate why, if the goal of the justification of a truth-claim is truth that transcends justification, the vindication of a truth-claim in discourse licenses its translation into a practical certainty in action, Habermas establishes an additional condition on the justification of truth-claims. Drawing on the work of Lutz Wingert in response to the Gettier challenge to the Justified-True-Belief model of knowledge,[89] Habermas argues that the justification for p must refer to a causal explanation of the process of coming to believe p. It must refer to a learning process that brought about the belief p.[90] The justification of moral claims, in contrast, require no such reference to learning processes. Indeed, he rejects attempts to interpret Discourse Ethics as a form of moral realism.[91] Such an ontological understanding of morality is not plausible in the modern world and infringes on modern subjects' autonomy. Whereas truth-claims refer to a given and shared objective world, moral-claims construct a common moral order. Despite these differences, they are united in their implicit assertion of unconditional validity. Hence both of their justifications must aim for acceptance by an imagined universal audience.

c. Context-Bounded: The Beautiful and the Good

Habermas also recognizes that in modern linguistic practice some claims are legitimately context-bounded and thus their justification may suffice with acceptance by an actual particular community. In modernity aesthetic-claims have separated from truth-claims. Modern individuals do not conceive of beauty as an objective feature of objects but as part of their experience of them. They thus understand that assessments of beauty are made against the background of certain aesthetic standards, which may not be appreciated by everyone. Similarly, in modernity

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[89] Gettier, "Is Justified True Belief Knowledge."

[90] Habermas, *TJ*, 41.

[91] Ibid., 266–267.

morality and ethics emerge out of a previously undifferentiated normative realm. The moral-point of view is comprised of those normative claims that can be justified in rational discourse and thus is constituted by impartiality. The remaining normative claims are those that articulate a particular individual's and community's conception of the good. Modern individuals are aware of a plurality of competing and incommensurable life projects, which can only be validated against the background of particular values. Consequently, whereas truth-claims and moral-claims implicitly assert unconditional validity claims, aesthetic-claims and ethical-claims only implicitly assert their validity within the context of a certain lifeworld, in which particular aesthetic standards or ethical values are accepted. Correspondingly, whereas the former commit their speaker to providing justifications that are oriented towards acceptance by an imagined universal audience, the latter only commit their speaker to providing justifications that are oriented towards acceptance by the particular community that shares these standards and values.

This context-bounded feature of his account of justification fulfills the promise of pluralism. Since these claims are justified in the context of a particular lifeworld, and as Habermas notes "even if they have the same communicative infrastructure at their disposal, lifeworlds always manifest themselves in the plural,"[92] diverse communities may have different justified ethical-claims and aesthetic-claims. But Habermas' account of the justification of these context-bounded claims also requires discussion. Ethical-claims must be distinguished more adequately from moral-claims (i), and the type of validity claims raised by aesthetic-claims must be clarified (ii). Overall, the pragmatic nature of the distinction between different descriptive claims (truth and aesthetics) and normative claims (morality and ethics) must be appreciated.

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[92] Ibid., 228.

(i) Whereas in English the distinction between "morality" and "ethics" is not obvious, in German the distinction between "*Moralität*" and "*Sittlichkeit*" has a long philosophical history exemplified by the Hegelian critique of Kantian practical philosophy. Hegel criticizes Kantian practical philosophy for its formalism and universalism, which neglects the particular substance of the life of a people, its traditional customs and values. In *Justification and Application* (*JA*) Habermas aims to join the Kantian focus on morality and the Hegelian concern with ethical life by recognizing both moral-claims and ethical-claims, uniting them through the basic commitment to justification and differentiating them by the type of justifications they require.[93]

As communicative speech acts, ethical-claims also commit their speaker to offering justifications for them. Ethical claims of "[w]hat you 'should' or 'must' do [have] the sense that it is 'good' for you to act in this way in the long run, all things considered…." [94] They thus implicitly commit their speaker to justifying that they are actually good or lead to the good life. Such ethical justifications are exercises in "hermeneutic self-clarification" focused on "strong evaluations," which are embedded in a cultural background:

> Ethical questions…take their orientation from the telos of one's own life. From this point of view, other persons, other life histories, and structures of interests acquire importance only to the extent that they are interrelated or interwoven with my identity, my life history, and my interests within the framework of an intersubjectively shared form of life. My development unfolds against a background of traditions that I share with other persons; moreover, my identity is shaped by collective identities, and my life history is embedded in encompassing historical forms of life. To that extent the life that is good for me also concerns the forms of life that are common to us.[95]

Ethical-claims require justifications in the context of shared tradition and form of life. Such justifications draw on their values and aim to achieve intersubjective recognition by others who

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[93] Habermas, *JA*, 1–18.

[94] Ibid., 5.

[95] Ibid., 6.

also share them. The subject of ethical-claims and ethical justifications can be an individual as well as a community as a whole:

> Just as an individual can reflect on himself and his life as whole with the goal of clarifying who he is and who he would like to be, so too the members of a collectivity can engage in public deliberation…with the goal of coming to an understanding concerning their shared form of life and their identity solely through the unforced force of the better argument. In such discourses… participants can clarify who they are and who they want to be…. The strong evaluations that shape the self-understanding of the person or of the community as a whole are here up for discussion. An individual life history or an intersubjectively shared form of life is the horizon within which participants can critically appropriate their past with a view to existing possibilities of action. Such processes of self-understanding lead to conscious decisions that are judged according to the standard of an authentic way of life.[96]

Just as an individual can reflect on what is good for her in an existential-ethical discourse, a community can reflect on what is good for it in an existential-political discourse. Such reflection is similar to rational discourse, though it takes place within the context of its shared tradition and form of life and does not aim to transcend it. Indeed, the crucial distinction between ethical-claims and moral-claims is that while the latter implicitly assert that they are unconditionally valid, "there is no universal validity claim connected with ethical wisdom."[97] Ethical justifications do no need to be oriented towards universal acceptability; they may legitimately appeal to the particular values of a tradition or form of life that is not shared by others.

Yet, it is not initially clear how the distinction between moral-claims and ethical-claims is sustainable except by fiat. Normative claims are not explicitly marked and it seems that any norm might raise moral issues. This distinction is not intended as between natural kinds, however. It is a pragmatic differentiation that occurs during the course of argumentation itself. The type of challenge to a normative claim and defense offered for it renders the claim moral or ethical. Indeed, Habermas writes, "Maxims are the plane in which ethics and morality intersect

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[96] Ibid., 23.

[97] Habermas, *TJ*, 228.

because they can be judged alternately from ethical and moral points of view."[98] The moral point

of view is a modern achievement that developed under the conditions of the confrontation of a

plurality of forms of life and cultures; it is aimed at the impartial resolution of interpersonal

conflicts in the absence of a consensus about substantive values. Moral-claims are those that are

susceptible to this type of assessment. In contrast, the ethical point of view concerns questions

that "are accessible to rational discussion only within the unproblematic horizon of a concrete

historical form of life or the conduct of an individual life."[99]

The recognition of the abiding relevance of the ethical point of view indicates Habermas'

rejection of oppressive universalism. Indeed, he maintains that ethical cultures continue to be

necessary for the creation of moral motivation and the application of moral norms.[100] In this, his

view resonates with the insistences of Leibowitz, Soloveitchik, and Berkovits about the

motivational deficit and applicative shortcoming of "pure" reason, even while rejecting their

skepticism about the practical normativity of reason.

In any case, the distinction between moral-claims and ethical-claims is constituted by the

type of challenge aimed at a claim and the type of justification offered for it as opposed to any

objective feature of the claim itself:

> A mode of examining maxims or a heuristic for generating maxims guided by the question of
> how I want to live involves a different exercise of practical reason from reflection on whether
> from my perspective a generally observed maxim is suitable to regulate our communal
> existence. In the first case, what is being asked is whether a maxim is good for me and is
> appropriate in the given situation, and in the second, whether I can will that a maxim should
> be followed by everyone as a general law.[101]

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[98] Habermas, *JA*, 7.

[99] Habermas, *MCCA*, 108.

[100] Ibid., 105–109.

[101] Habermas, *JA*, 7.

But in actual justificatory practice shifts can occur between these perspectives. A normative-claim that is challenged in terms of the values of a community can provoke a justification that appeals to its universal acceptability. In contrast, a justification for a normative-claim that appeals to the values of a community can itself be challenged on the basis of its universal acceptability. Indeed, Habermas claims that "there is no metadiscourse on which we could fall back to justify the choice between different forms of argumentation…"[102] The important point is that each type of argumentation calls for its specific type of justification. A moral challenge to a norm cannot legitimately be answered by an ethical justification and *vice versa*.

However, an argument may be offered about the proper classification of a claim. During the course of argumentation, it may be objected that what was thought to be an ethical issue actually raises moral questions. Moral arguments, that is, justifications oriented towards universal acceptability, must now be offered to establish either that it does not actually raise moral questions or that it is morally justifiable. Similarly, it may become apparent that what was thought to be a moral issue is not actually susceptible to universal agreement because the competing claims cannot be detached from particular evaluative vocabularies. These claims are, in fact, ethical-claims and can only be evaluated by ethical arguments, that is, context-bounded justifications. Still, there might be an overarching moral question about how to order a public sphere comprised of competing forms of life. Habermas claims that abortion may be an issue of this sort.[103] Likewise, more recently, he has indicated that there may be an overarching species-ethic that underlies communicative action and its pragmatic presuppositions.[104] In general,

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[102] Ibid., 17.

[103] Ibid., 60.

[104] Jürgen Habermas, *The Future of Human Nature* (Cambridge UK & Malden MA: Polity, 2003).

despite not establishing a conceptual distinction between ethical-claims and moral-claims, Habermas provides a framework for pragmatically classifying normative-claims and justifications and for detailing their rational constraints and practical consequences.

(ii) While Habermas has devoted significant attention to the distinction between moral-claims and ethical-claims, he has never intensively focused on aesthetic-claims, which as descriptive-claims have a similar relation to truth-claims. For the purposes of this study, they are significant because he has compared aesthetic-claims to religious-claims.[105] It is clear that his view on aesthetic-claims has undergone development. In *TCA* he presents a subjectivist account of them in which their object is the artist's subjectivity, including feelings, needs, and values. They are therefore expressive-claims that raise a claim to truthfulness.[106] However, in an essay on Walter Benjamin he connects them to the interpretation of the world in light of human needs.[107] Elsewhere he describes them as raising a more substantial claim to disclose the world in a new way.[108] They are world-disclosive-claims. Their object therefore seems to be identical to that of truth-claims: the world. However, they differ from truth-claims in that they articulate experiences of "everything in our speechless contact with reality that is so fleeting, so contingent, so immediate, so individualized, simultaneously so far and so near that it escapes our normal categorical grasp."[109]

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[105] Habermas, *RR*, 83–84. See below for further discussion of this relation.

[106] Habermas, *TCA1*, 305–337.

[107] Jürgen Habermas, *Philosophical-Political Profiles*, trans. Frederick G. Lawrence (Cambridge MA: MIT Press, 1985), 148–159. Henceforth *PPP*.

[108] Jürgen Habermas, "Habermas: Questions and Counterquestions," *PRAXIS International*, no. 3 (1984): 229–49. Henceforth "QC."

[109] Ibid., 236.

Perhaps the best way to grasp the relation between aesthetic-claims and truth-claims is on analogy to the relation between moral-claims and ethical-claims. The differentiation of descriptive-claims into truth-claims and aesthetic-claims is also an achievement of modernity, in this case connected both with the development of science as well as the confrontation of a plurality of forms of life and cultures. Aesthetic-claims refer to those elements of human experience that are neglected by the fact-stating discourse that approximates the language of science, which has proven itself to be distinctively corroborated by learning processes in the world and uniquely capable of achieving consensus among its participants. Like the distinction between normative-claims, this distinction is also pragmatic: What was once understood to be a feature of the objective world can be reconceived an element of an individual's or community's experience of the world. In any case, whereas truth-claims aim to refer to the objective world and state facts about which universal agreement can be expected, aesthetic-claims refer to an individual's or community's experience of the world and portray images about which only limited consensus can be anticipated. Because they draw on particular aesthetic standards for support, only those who share the same form of life or tradition can be expected to agree with them. They too are context-bounded claims that only aim for acceptance by a particular community.

In addition to both being context-bounded, aesthetic-claims have another interesting connection to ethical-claims. Habermas claims that world-disclosive experiences and thus the claims that refer to them make possible new interpretations of needs, which advance the goal of creating a happy as well as emancipated society.[110] They thus seem to have at least some

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[110] Habermas, *PPP*, 129–164. On the general issue of Habermas and aesthetics, see David Ingram, "Habermas on Aesthetics and Rationality: Completing the Project of Enlightenment," *New German Critique*, no. 53 (April 1, 1991): 67–103; and Duvenage, *Habermas and Aesthetics*.

connection to normative-claims. Indeed, if ethical-claims can be seen as those context-bounded claims that are inherently conservative or at least only moderately reformist of an inherited form of life or tradition, then aesthetic-claims can be understood as almost revolutionary claims that aim to transfigure it by providing new orienting images.[111] Such images must, of course, draw on existing expectations or standards, but they put them to new uses or subvert them, which can then issue in new self-understandings, values, and norms.

In sum, Habermas provides a contextualist account of justification. It is pragmatic because it recognizes that there is not standing need to trace beliefs or norms to a certain foundation for them to be justified and for it to be rational to accept them. Rather, although the commitment to offer a justification is implicit in every speech act, justification only becomes necessary when a belief or norm is challenged, and it is accomplished on the basis of other unchallenged beliefs or norms. It is intersubjective because it conceives of justification in terms of acceptance by others. Further, it joins together context-transcending and context-bounded features in order to fulfill the promise and avoid the threat of contextualism evident in the pragmatists. Truth-claims and moral-claims are justified with the goal of one truth and a single morality. Aesthetic-claims and ethical-claims are justified with acknowledgement that different communities may legitimately have diverse conceptions of the beautiful or the good. Indeed, while he is most known for his defense of universalism, Habermas proclaims, "Someone who in the name of universalism excludes another who has the right to remain alien or other betrays his own guiding idea. The universalism of equal respect for all and of solidarity with everything that bears the mark of

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[111] Habermas, *JA*, 79. See Seyla Benhabib, "The Utopian Dimension in Communicative Ethics," in *Critical Theory: The Essential Readings*, ed. David Ingram and Julia Simon-Ingram (St. Paul: Paragon House, 1992), 388–99 for further discussion of this element of Habermas' thought.

humanity is…put to the test by radical freedom in the choice of individual life histories and particular forms of life…"[112] Space must be found within the universal for the particular.

This account is fruitful for the justification of norms because of its critical orientation, which recognizes the practical normativity of reason without succumbing to the oppressive universalism feared by the philosophers of halakha. It does not identify reason with the source of normativity nor does it recognize any other foundation for normativity, whether the human will, the world, or revelation. Instead, it is non-foundationalist in that it acknowledges the givenness of normativity; individuals or communities begin with the norms that they possess. It thus incorporates some of the insights of Leibowitz and Soloveitchik when they write in an interpretive, as opposed to foundationalist, mode about justification. However, unlike them, communicative reason expresses an already present commitment to justification, which establishes rational constraints on, and practical consequences of, justification. There is no standing obligation to justify norms, but individuals and communities must be intellectually and practical responsive to demands for justification. They must be willing to offer appropriate justifications for their claims and ready to modify or to retract them if they fail.

IV. Religious Language, Validity Claims, and Halakhic Discourse

More specifically, Habermas' account of justification provides a productive framework for the justification of halakhic norms. It eschews the search for a basic source of normativity from which halakhic norms could be derived; however, it determines the rational constraints on, and practical consequences, of their justification. Significantly, because it conceives of justification in terms of intersubjectivity, it does this by relating these halakhic norms to the communities, particular or universal, real or imagined, before which they must be justified. The philosophical

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[112] Habermas, *JA*, 15.

project of *ta'amei ha-mitzvot* is thus correlated with, but not reduced to, the social conflicts over religious norms and authority from which it often emerges. It is also offers a path toward their resolution.

However, for this account to be applied to halakhic norms its approach to religious-claims must be modified, for Habermas insists on identifying religion with unique area of culture and a distinctive validity claim. Thus, after a brief exposition of Habermas' view of religion and religious-claims (A), a dialectic is developed between his account of justification and halakhic discourse, in which the latter is modified in the process of its application to the former (B).

A. Religion and Religious Language in Habermas' Thought

Religion and religious-claims were neglected in the foregoing discussion of Habermas' philosophical program and account of justification because, until recently, they have been tangential to his interests. A brief review of his engagements with religion in the context of his wider project is offered (1), followed by a reconstruction and initial critique of his conception of religious language and its validity claim (2).

(1) Eduardo Mendieta identifies three main areas of reflection on religion in Habermas' thought, including sociology, philosophy, and political theory, though he is currently at work on a manuscript which focuses on the relation between philosophy and religion from an anthropological perspective.[113]

In *TCA* Habermas engages the sociological work of Weber, Emile Durkheim, and G. H. Mead to explore the linguistic role of religion as a precursor to communicative action.

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[113] Eduardo Mendieta, "Appendix: Religion in Habermas's Work," in *Habermas and Religion*, ed. Craig Calhoun, Eduardo Mendieta, and Jonathan VanAntwerpen (Cambridge UK & Malden MA: Polity Press, 2013), 405–407. For an earlier analysis and critique, see Maeve Cooke, "Salvaging and Secularizing the Semantic Contents of Religion: The Limitations of Habermas's Postmetaphysical Proposal," *International Journal for Philosophy of Religion* 60, no. 1/3 (December 1, 2006): 187–207.

Historically, religious thought and language mediates between mythical and modern thought and forms of communication. His most concise description of religion in this context is when he writes,

> The core of collective consciousness is a normative consensus established and regenerated in the ritual practices of a community of believers. Members thereby orient themselves to religious symbols; the intersubjective unity of the collective presents itself to them in concepts of the holy. This collective identity defines the circle of those who understand themselves as members of the same social group and can speak of themselves in the first-person plural. The symbolic actions of the rites can be comprehended as residues of a stage of communication that has already been gone beyond in domains of profane social cooperation.[114]

According to Mendieta, in this passage Habermas articulates a developmental conception of religion in which religious ritual and symbols "linguistify" the world; they provide practitioners with the linguistic capacities to make sense of the world through various semantic and syntactic relations and distinctions. Ultimately, however, the "sacred," or the normatively charged collective consciousness of the religious community, is itself "linguistified." It becomes something that can be thematized, discussed, and examined. Such language-use subsequently becomes the source of solidarity instead of the sacred. It is thus unclear what role remains for religion in modernity, once it has sown the seeds of its own destruction.[115]

In his philosophical writings, while strongly rejecting the notion that religion is necessary for unconditional obligations,[116] Habermas recognizes how religion has served, and may continue to serve, a role in the modern world by provisioning semantic resources. Summarizing this line of thought, in *PT* he writes, "Philosophy even in its postmetaphysical form, will be able neither to replace nor to repress religion as long as religious language is the bearer of semantic content that

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[114] Habermas, *TCA2*, 60.

[115] Mendieta, "Appendix: Religion in Habermas's Work," 397–398.

[116] Habermas, *JA*, 133–146.

is inspiring and even indispensable, for this content eludes (for the time being?) the explanatory force of philosophical language and continues to resist translation into reasoning discourses."[117]

These semantic resources have personal, social, and philosophical significance: They provide personal consolation because they "invest unavoidable suffering and unrecompensed injustice, the contingences of need, loneliness, sickness, and death with new significance and teach us to bear them."[118] But religion is not merely a crutch for coping with personal tragedy; it retains visions of utopia for society that can be drawn upon for images of emancipation.[119] Further, philosophy itself has drawn many of its central normative conceptual clusters from religious language, including: responsibility, autonomy, and justification; history and remembering, new beginning, innovation, and return; emancipation and fulfillment; expropriation, internalization, and embodiment; individuality and fellowship. In particular, the notion of an "image of God" has been transformed into the idea of the "identical dignity of all men that deserve unconditional respect."[120] Indeed, religion may yet retain semantic resources for philosophy. Habermas consequently describes a "translation" program of "critical appropriation," in which philosophy's ambition is "to rescue the profane significance of interpersonal and existential experiences that have so far only been adequately articulated in religious language."[121] In *BNR* he distinguishes this project from the Hegelian rationalist endeavor to "subsume the substance of faith into the

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[117] Habermas, *PT*, 51 parentheses in original.

[118] Habermas, *JA*, 146.

[119] Habermas, *PPP*, 129–159.

[120] Ratzinger and Habermas, *DS*, 44.

[121] Habermas, *RR*, 164.

philosophical concept."[122] Instead, following Karl Jaspers, he describes it as dialogic, since it "adopts a critical attitude towards religious traditions while at the same time being open to learning from them."[123]

Also in *BNR* Habermas describes a similar project of translation, in which he makes clear the continuing relevance of specifically "modernized" religion from the perspective of political theory. In the course of a debate with John Rawls and other thinkers about the proper place of religion in political deliberation, Habermas presents a moderate view, in which he makes a distinction between democratic processes of legislation and decision-making, on the one hand, and discussions in the public sphere, on the other hand. While in the former he insists that only "public reasons," which could be acceptable to those who do not share one's religious beliefs, are permissible, in the latter he allows "religious reasons," which may not be acceptable to those who do not share one's religious beliefs, to be offered.[124]

Still, Habermas maintains that in order to participate successfully in political deliberations in the public sphere, the consciousness of religious believers must undergo modernization through its encounter with "the fact of religious pluralism, the emergence of modern science, and the spread of positive law and secular morality."[125] Religious believers must develop a self-reflexive perspective on religious beliefs, in which they respect other traditions' beliefs but do not deny the "exclusive claim to truth" of their own tradition. They must negotiate the relation between the findings of science and religious doctrines in a manner that acknowledges the epistemic

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[122] Habermas, *BNR*, 245.

[123] Ibid.

[124] Ibid., 114–147.

[125] Ibid., 136.

status of the former and reduces the conflicts between them. And they must recognize the priority of "public reasons" in political deliberations by linking individualism and universalistic morality into their own religious traditions.[126]

Concurrently, Habermas places an obligation on non-religious citizens to help religious believers translate their "religious reasons" into "public reasons" so that they can be admitted to the democratic processes of legislation and decision-making.[127] This is for two reasons: First, from a functional perspective, "the liberal state has an interest in the free expression of religious voices in the public arena and in the public participation of religious organizations."[128] Second, again, "[r]eligious traditions have a special power to articulate moral intuitions.... [T]his potential makes religious speech into a serious vehicle for possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language."[129] Thus, even after the "linguistification" of the sacred, modernized religion contributes to personal life, philosophy, and politics through the semantic resources it offers.

(2) Despite his appreciation of the semantic potential contained in religious language, Habermas is unclear about the precise nature of religious language and the type of validity claim its raises. He mentions both its "moral insights" and "truth contents." For the most part, however, he aims to identify religion with a unique area of culture and religious language with a distinctive validity claim. Some features of it may be gathered from scattered remarks: Religious language

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[126] Ibid., 137.

[127] Ibid., 114–147.

[128] Ibid., 131.

[129] Ibid.

"refers to a common ritual praxis and bases itself on…specifically religious experiences…."[130] It is anchored in a "sacred complex," which "combines a specific interpretation of man in the world with the practice of communal worship."[131] It is thus inextricably linked to a particular community and combines normative and descriptive components, both of which occur in the context of the sacred. Indeed, according to him, the ritual organizes the encounter with the sacred, which is a necessary feature of religion.[132] He also describes both religious faith and language as rooted "in religious modes of dealing with *Heil* [salvation] and *Unheil* [doom]."[133] He thus claims that religious language ultimately must appeal to revelation or some other contact with the divine.[134] But this means that it references the "dogmatic authority of an inviolable core of infallible revealed truth" as its basis.[135] Similarly, he claims that religious language's connection to ritual protects it from problematization.[136]

Habermas thus aims to distinguish religious language and religious validity claims from all other communicative speech acts and their validity claims. Religious-claims are contrasted with both truth-claims and moral-claims in that they are "tied to the thick experience in membership in a religious community."[137] Even when religious language seems to command unconditional obedience or assert eternal truths, it merely claims that they apply to everyone and not that they

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[130] Habermas, *RR*, 73.

[131] Habermas, "Reply," 375.

[132] Ibid., 354.

[133] Ibid., 385.

[134] Ibid.

[135] Habermas, *BNR*, 129.

[136] Habermas, *RR*, 75–76.

[137] Habermas, "Reply," 375.

could be accepted by everyone.[138] Indeed, properly modernized religions, as understood by

Habermas, would refrain from offering empirical truth-claims and would recognize the

independent validity of moral-claims.[139]

Habermas even attempts to differentiate religious-claims from other context-bounded claims.

They differ from ethical-claims in their reference to religious themes (the sacred, salvation, and

doom) and their insulation from criticism. Ethical-claims, despite their contextual nature, are

susceptible to unreserved discursive examination. In contrast, religious-claims refer to the

dogmatic authority of revelation and resists problematization due to their connection with

ritual.[140] Religious language is most similar to aesthetic-claims, though here too Habermas tries

to distinguish them. In describing the relation of philosophy and religion, he appeals to the

similarity of religion and aesthetics: "At its best, philosophy circumscribes the opaque core of

religious experience when it reflects on the specific character of religious language and on the

intrinsic meaning of faith. This core remains as profoundly alien to discursive thought as the

hermetic core of aesthetic experience, which likewise can be at best circumscribed, but not

penetrated, by philosophical thought."[141] Moreover, following Cooke's suggestion, Habermas

attributes a world-disclosive character to religious language.[142] Like aesthetic-claims, religious-

claims implicitly assert a world-disclosive validity claim. Nevertheless, Habermas distinguishes

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[138] Ibid.

[139] Habermas, *BNR*, 137.

[140] Ibid., 129.

[141] Ibid., 143.

[142] Habermas, "Reply," 374.

religious-claims and aesthetic-claims because of the latter's exoteric character.[143] Thus, on

Habermas' account, religious-claims can be described as quasi-aesthetic-claims.

But this account of religious language and validity claims confronts a number of problems, which are best articulated through an engagement with examples of religious discourse. However, some points should be noted at the outset. Granted for the moment that religious-claims are inherently connected with a particular community, still Habermas fails to differentiate them from other context-bounded claims because he unduly emphasizes their relative particularism and selectively portrays their "religious" character. Their supposed reference to religious themes and their insulation from criticism, which allegedly differentiate them from ethical claims, relies on a particular characterization of religion's concerns, language, and practice. Not all religious language is preoccupied by the sacred, salvation, or doom. Nor is it clear why the connection of religious language to ritual should protect it from problematization to a greater extent than ethical values are buffered from challenge by their link to ethical practice. Indeed, Habermas' understanding of ritual as concerned with organizing the encounter with the sacred unduly narrows the scope of religious practice in order to differentiate it from ethical practice. Lastly, simple appeals to revelation seldom serve as a justification for religious beliefs or norms. As Nicholas Wolterstorff notes, "in the orientation of most Christians, not to mention of that of other religious people, the pair revelation-faith does not have the looming importance it has had in the history of Christian theology; rarely does one hear someone say, "God told me, so it's true; and that's the end of the discussion."[144]

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[143] Habermas, *PPP*, 145.

[144] Nicholas Wolterstorff, "An Engagement with Jürgen Habermas on Postmetaphysical Philosophy, Religion, and Political Dialgoue," in *Habermas and Religion*, ed. Craig Calhoun, Eduardo Mendieta, and Jonathan VanAntwerpen (Cambridge UK & Malden MA: Polity Press, 2013), 108.

Indeed, as indicated, in Habermas' description of religious-claims they seem remarkably similar to aesthetic-claims, save his appeal to their esoteric character. But aesthetic-claims too are particular to a community that shares certain standards of beauty. Thus, they are also "esoteric" in a certain sense. Any other construal of the esotericism of religious experience, which might connect it ascetic or mystical practices, would rely on a very particular sampling of religious traditions. Still, perhaps their connection to ritual and practice distinguishes them from aesthetic-claims. However, as contended above, the distinction between ethical-claims and aesthetic-claims seems to be more of degree than kind. While ethical-claims rely on settled conceptions of the good, aesthetic-claims draw on accepted standards but put them to new uses or subvert them.

Additionally, Habermas' claim that religious traditions do not articulate those beliefs and norms that they understand to apply universally in manner that could gain universal acceptance confuses the *attempt* to articulate norms oriented towards universal acceptance with *success* in that attempt. Many movements in religious thought, including rationalist theologies and some philosophies of halakha, aim to provide justifications for religious beliefs and norms that they believe could be universally accepted. One may argue that they failed in this endeavor; however, in order to understand them as having failed, one must first conceive of them as attempting to offer justifications oriented towards universal acceptance.

More generally, the very attempt to identify a unique "religious-claim" overly rigidifies the types of claims implicitly asserted in religious language, instead of recognizing the pragmatic nature of the distinction between different types of claims. As contended above, claims are not explicitly marked as asserting a particular validity claim. Rather, the type of validity claim raised by a speech act is determined in the course of its justification by the type of challenge that is

raised against it and the justification that is offered for it. Normative-claims can be challenged and justified from an ethical perspective or a moral perspective. Similarly, descriptive-claims can be challenged and justified as an assertion about the world itself or an experience of it. The same should be true about religious-claims. They can be challenged on the basis of their claim to truth, beauty, morality, or goodness; but it is difficult to locate a distinctively "religious" validity claim.

In sum, Habermas' attempt to distinguish a particularly "religious-claim," which asserts quasi-aesthetic validity claims of world-disclosure, does not seem promising. It is not clear how exactly religious language differs from aesthetic expressions even on Habermas's account nor is it obvious that religious language is actually that homogenous and predefined. Instead, it is useful to develop another approach that Habermas indicates when describing the philosopher's view on religious language: "[R]eligious 'truths' are formulated in concepts that are prior to the usual differentiation in descriptive, evaluative, and normative statements."[145] Religious language would this be a form of "mixed discourse," which implicitly asserts a number of different types of validity claims. Thus, the justification of religious beliefs and norms involves the isolation and justification of diverse validity claims. These validity claims are constituted through justification and require different types of reasons depending on how they are challenged and defended. As such, however, religious language does not differ from other linguistic practices of the lifeworld, for on Habermas' account it is only in regimented forms of discourse that each type of validity claim is isolated, thematized, and evaluated. This approach is further motivated through the application of it to halakhic discourse, which will demonstrate the irreducibility of at least one form of religious language to quasi-aesthetic-claims of world-disclosure.

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[145] Habermas, "Reply," 367.

B. Beyond World-Disclosure: Halakhic Discourse as a Mixed Discourse

Habermas' simple classification of religious-claims as akin to aesthetic-claims is belied by halakhic discourse, which involves the implicit assertion of a wide variety of claims. In addition, the identity of these claims is not predetermined but depends on their process of justification.

There are certainly expressions in halakhic discourse that may easily be understood as world-disclosive: the world is described as *ma'aseh bereishit*, the work of creation, for example.[146] But it need not be understood in this manner. Such a claim can be understood either as a truth-claim, which asserts the world's creation in time, or an aesthetic-claim, which portrays the world as inherently dependent. There is no *a priori* way to determine how it should be taken; rather, it is constituted as a particular type of claim when it is challenged and defended. One who attempts to justify it could aim to establish the event of creation or to depict the dependence of the world. He fixes it as a truth-claim in the former case and an aesthetic-claim in the latter case. The important point is that, if they are challenged, these justifications themselves would require different types of arguments to support them. In the former case they must aim for universal acceptability, while in the latter case they may suffice with acceptance by the Jewish community.

Moreover, the most obvious aspect of halakhic discourse that does not fit in Habermas' scheme is that it is emphatically normative. It neither simply refers to ritual nor merely implies new ways of acting through world-disclosure; rather, it mandates what ought to be done. For example, the Bible not only depicts the world as created but commands, "Remember the Sabbath day and keep it holy.... For in six days the Lord made heaven and earth…and He rested on the seventh day" (Ex. 20: 7). Now assume that the claim "in six days the Lord made heaven and earth" is constituted as an aesthetic-claim. But based on it an overtly normative-claim is raised:

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[146] See, for example, M Hagigah 1:2; BT Hagigah 11b-13a; and Moses Maimonides, *The Guide of the Perplexed*, trans. Shlomo Pines, vol. 1 (Chicago: University of Chicago Press, 1963), pt. I: Prefatory Remarks; *The Guide of the Perplexed*, 1963, vol. 2, pt. II: 29 & III: Introduction.

"Remember the Sabbath day and keep it holy!" Halakhic discourse thus contains both world-disclosive and normative-claims. In this case the normative-claim seems to be understood by the Jewish tradition as an ethical-claim. It expresses a norm that is only incumbent on Jews.[147] Thus, the consequences for Habermas' approach to religious-claims are not wide-reaching. Both aesthetic-claims and ethical-claims only require context-bounded justification. Indeed, recall that Habermas himself contemplates the comparison between ethical-claims and religious-claims. Still, it further calls into question his separations of aesthetic-claims and ethical-claims as well the differentiation of religious-claims from all other claims. Note how these claims interact: The aesthetic-claim serves as the justification for the ethical-claim: World-disclosure and ethical value are codetermining.

More significantly, halakhic discourse also raises claims that are difficult, though not impossible, to understand as anything other than truth-claims and moral-claims. It does this both directly and in support of its ethical-claims. For example, and now turning to classic rabbinic literature, it does not merely prescribe norms related to menstruation or diet but in the process asserts claims about female physiology and the physical properties of cookery.[148] While the norms may be ethical-claims since they are only applied to Jews, their justifications in rabbinic literature invoke what seem to be truth-claims about the world. Thus, on Habermas' account, they must be defended in turn by offering reasons that aim for universal acceptance. Claims about female physiology and the physical properties of cookery cannot be defended merely by

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[147] Indeed, Maimonides claims (*Mishneh Torah*, vol. 1 Book of Judges, Laws of Kings and their Wars, 10: 9), following the Talmud (BT Sanhedrin 58b) that a non-Jew is not allowed to observe the Sabbath. Obviously, this complicates matters regarding the scope of the norm, for, on the one hand, only Jews are bound to observe the Sabbath, but, on the other, non-Jews seem to be prohibited to observe the Sabbath.

[148] As illustrative examples see BT Sanhedrin 87b and *Shulhan 'Aruk*, Yoreh De'ah, 92: 4–6. The latter will be discussed more thoroughly in the next chapter. On the general issue of halakhic discourse and truth-claims see Zohar, "On the Relation Between Halakhic Language and Natural Language."

appeal to canonical texts but must be either justified as claims about a shared empirical world or relinquished.

Similarly, halakhic discourse seems to assert moral-claims, especially in the context of the Noahide laws.[149] For example, and now turning to modern "rabbinic literature," recall that in response to the Supreme Court's ruling on the Defense of Marriage Act, the OU issued a statement in which it claimed that its "Divine system of law represents a system of universal morality, and therefore can stake a claim in the national discourse."[150] The OU explicitly describes its claim as moral and asserts that it is thus universal. This is not simply an assertion about the claim's applicability, as Habermas assumes, but also about its role in extra-communal discourse. But if this claim 'is staked' in that manner, the OU must attempt to justify it in a way that could be accepted by an imagined universal audience.

Halakhic discourse, like law more generally according to Habermas,[151] is thus better described as a "mixed discourse." It is emphatically normative, and it is often understood by its participants to raise both particularistic ethical-claims and universalistic moral-claims. These normative-claims are often supported by descriptive-claims, which are frequently construed by its participants as both particularistic aesthetic-claims and universalistic truth-claims. Habermas' context-transcending contextualist account of justification still provides a productive means to conceptualize the justification of halakhic norms by articulating its constraints and consequences. However, it must recognize that halakhic discourse, despite its complexities, is neither a unique

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[149] For a discussion of the Noahide laws in Jewish thought see Novak, *Natural Law in Judaism*, 149–173.

[150] OU Public Relations, "Orthodox Union Statement on Supreme Court's DOMA Ruling."

[151] Habermas, *JA*, 89. In general in this study, I do not directly engage withHabermas' own writings on law, which are focused on the legitimacy of law in the modern and democratic nation-state. See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge MA: MIT Press, 1996). Henceforth *BFN*.

area of culture nor an expert discourse focused on a single type of claim, like scientific inquiry and truth. Halakhic discourse may involve detailed knowledge of religious texts, but, perhaps like all religious language, it principally takes place within the "lifeworld" of a religious community. It consists of an interlocking network of various types of claims, which are not individually thematized or defined so long they are not challenged. But when a halakhic norm is challenged, the claims that support it must be identified and justified in their appropriate manner. The aesthetic-claims and ethical-claims may be supported by reasons that draw on the Jewish community's particular experiences and values. In contrast, the justifications of moral-claims and truth-claims must consist of reasons that aim for universal acceptability.

On this account, the justification of halakhic norms creates a complex form of intersubjectivity, for embedded within halakhic discourse are both centripetal forces focusing the Jewish community inward and centrifugal forces that refer it beyond itself. By eschewing the foundationalism of the philosophers of halakha in favor of contextualism, it thus allows for the reconciliation of universality and particularity toward which they aimed. Some halakhic norms assert their universal applicability in terms of reasons that everyone could accept, while others insist on their legitimate particularity in view distinctively Jewish values, perhaps service of God or *sedeq*. Yet, they all maintain their basic justifiability.

V. Example: Circumcision

Significantly, this account of justification does not directly provide justifications for halakhic norms. Rather, following Habermas' approach, it is critical: It articulates the rational constraints on, and practical consequences of, the justification of halakhic norms. But it leaves the substance of their justification to actual practitioners of *ta'amei ha-mitzvot*. An example that is relevant given current social conflicts concerning religious norms and authority is instructive. Infant male

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circumcision is a Biblically mandated obligation[152] and is considered by many a hallmark of

Jewish identity. However, it has recently been the subject of a number of controversies,

including efforts to ban it. For example, in 2012 the Kölner Landgericht in Germany ruled that

infant male circumcision constituted "grievous bodily harm" and that the child's "fundamental

right to bodily integrity" outweighed a parent's right to religious freedom.[153] The German

Parliament on December 12th, 2012 passed a bill to maintain the legality of such circumcision;[154]

however, an intense public debate over the practice and religious freedom was launched.

Now the primary challenge to such circumcision seems to concern the irreversible and

apparently medically unnecessary alteration of an individual's body without the possibility of his

consent. It thus combines truth-claims and moral-claims: that such circumcision is medically

unnecessary and that it always morally wrong to impose an irreversible and medically

unnecessary alteration on an individual without his consent. Thus, in the simplest case, if one

could show that the practice is medically necessary or perhaps merely medically beneficial, then

the challenge could be met and the norm would be justified. Neonatal surgery to repair birth

defects is considered uncontroversial, despite the incapacity of an infant to consent to the

procedure. Whether male circumcision actually does have medical benefits is subject to dispute

and cannot be decided by the proposed account of justification. However, it does indicate that

since the challenge relates to a truth-claim, the medical necessity or advisability of circumcision,

for it to be met the justification must aim for universal acceptability. The evidence marshaled to

support the claim that circumcision is medically necessary or beneficial must be such that it

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[152] See Genesis 17:10 and Leviticus 12: 1-3, and codified by Maimonides as Positive Commandment #215.

[153] Kulish, "German Ruling Against Circumcising Boys Draws Criticism," 12.

[154] Kay-Alexander Scholz, "Circumcision Remains Legal in Germany," *Deutsche Welle*, December 12, 2012, http://www.dw.de/circumcision-remains-legal-in-germany/a-16399336.

could be accepted by everyone. One could not appeal to religious texts, the Talmud or *Mishneh Torah* for example, in support of this claim.

Moving to a more complex case, it is possible that the defender of circumcision might concede that it is not medically necessary or even beneficial. Still, he might challenge the claim that it always morally wrong to impose an irreversible and medically unnecessary alteration of an individual's body without his consent. He might contend that so long as the alteration does not cause bodily impairment and is central to a community's sense of identity or view of the good life, then it is morally justifiable. It is crucial to recognize the complexity of this response: Overall it is a moral-claim but it contains a truth-claim and an ethical-claim as premises. Each of these latter claims must be justified independently and in their appropriate manner, and then the initial moral-claim must be justified in the manner appropriate to it. One must show that male circumcision does not cause bodily impairment. This is a truth-claim, and its justification must aim for universal acceptability. One must also show that it is a practice that is central to the Jewish community's sense of identity or view of the good. This is an ethical-claim, and its justification need not aim for universality. It must simply aim for acceptance by the Jewish community. In this context it is appropriate and acceptable to appeal to texts that the community accepts as canonical. Lastly, one must justify the overarching moral-claim. It is not enough to appeal to the importance of circumcision for the Jewish people. A justification of the right of a religious community to engage in such a practice under these circumstances must be offered that aims for universal acceptability. If this justification fails, then the norm is immoral and must be modified or relinquished. Thus, while this approach does not directly provide a justification of halakhic norms, it sets out the "ground rules" of their justification.

An important component of this account's critical nature is that it countenances the failure of the justification of halakhic norms; it is not only intellectually responsive to demands for justification but practically responsive to failures of justification. In such cases, barring certain premises about authority which are discussed in the next chapter, the norm must be modified or relinquished. This account thereby breaks with traditional approaches to philosophy of halakha, which even while engaging in sophisticated philosophical analysis often succumb to apologetics. In contrast, this approach instantiates a critical philosophy of halakha and, more broadly, a critical Jewish thought.

Habermas' own meta-theoretical comments about types of reflection on religion are fitting in this context. In distinguishing his own thought about religion from Christian theology, he writes, "No theology can embrace the unconditional openness to self-revision as long as it has to administer the means of salvation and must be nourished by the lived faith of a practicing community…..[155] Habermas claims that because of its emergence from a religious lifeworld and institutional role for religious believers, theology cannot subject all of its claims to critical evaluation. In fact, however, it seems to be only the institutional role of Christian theology that accounts for its restraint. Philosophy itself, as Habermas acknowledges, emerges from a particular lifeworld, and yet it does not refrain from critical evaluation of it. Though similarly rooted in the lifeworld of a particular community, Jewish thought has never held the same institutional role in the Jewish community as Christian theology holds in the Christian community. It should thus allow for a more critical orientation towards the claims of the Jewish lifeworld. In fact, many years ago, writing about the contribution of Jewish thinkers to German

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[155] Habermas, "Reply," 383.

Idealism, Habermas himself aptly claimed that "Jewish philosophy, in all its versions, has remained critique."[156]

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[156] Habermas, *RR*, 43.

CHAPTER FIVE

Legal Authority and Halakhic-Legal Authority

Legal Authority has two features that stand in a tense relation to one another: On the one hand, authority commands and expects obedience of its subjects. As Thomas Hobbes notes, "Command is when a man saith do this or do not do this yet without expecting any other reason than the will of him that said it."[1] The imperatives themselves as opposed to their content, the actions commanded, are meant to be taken by an authority's subjects as reasons for action. But if an authority commands arbitrary actions, for which its subjects have no independent reasons to comply, then it is illegitimate. On the other hand, as Joseph Raz notes, authority always at least claims to be legitimate; this is how its commands differ from the threats of a gunman.[2] Similarly, Max Weber describes how from the perspective of the subject "the command [of an authority] is accepted as a 'valid' norm."[3] There must be reasons to obey the imperatives of an authority that make them valid. But if those reasons attach to the content of its imperatives, then the authority is unnecessary, for the subjects already possess independent reasons to perform those actions. Authority thus seems either authoritarian, demanding irrational obedience, or superfluous, requiring nothing new of its subjects. This tension is instantiated in the apparently competitive relation between *ta'amei ha-mitzvot* and halakhic-legal authority. On the one hand, if halakhic norms are fully justified, halakhic-legal authority is superfluous. On the other hand, if halakhic-legal authority commands norms that cannot be justified, it is authoritarian.

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[1] Hobbes, *Leviathan*, chap. XXV.

[2] Raz, "Authority, Law, and Morality."

[3] Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and Claus Wittich, vol. 2 (Berkeley: University of California Press, 1978), 946.

A position that mediates between superfluity and authoritarianism is necessary for legal authority in general and halakhic-legal authority in particular. Such a position shows how the legitimacy of an authority is grounded,[4] which then endows its commands with a uniquely legal normativity that is not reducible to the normative justification of the individual actions it commands. In addition to capturing the role of authority in a normative system like halakha, this conception of legal authority has a crucial implication for the justification of norms: It allows for the possibility that a norm that could not be independently and directly justified might be indirectly justified on the basis of its command by a legitimate authority. The legal justification of the norm, it originating in the pronouncement of a legal authority, is thus linked to its normative justification without being reduced to it.

The analysis of *ta'amei ha-mitzvot* and normative justification in the previous chapter prescinded from the role of authority in the justification of halakhic norms. It focused on the justification of a halakhic norm regardless of its command by a halakhic-legal authority. If a halakhic norm could not be independently justified based on its content, it had to be modified or relinquished. In this chapter, the legitimacy of halakhic-legal authority and its implications for the justification of halakhic norms is explored. It examines how a halakhic-legal authority may be grounded and thus under what conditions a halakhic norm might be justified simply because of its pronouncement by such an authority. Crucially, this account of the legitimacy of authority, like that of normative justification offered in the preceding chapter, is critical: Halakhic-legal authority is not grounded; rather, the rational constraints on its grounding and the practical consequences for the justification of halakhic norms are articulated.

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[4] Following Richard T. De George, I refer to the justification of authority as the grounding of authority. This allows a clear distinction between the justification of individual norms and the grounding of authority, which may then enable the justification of many norms on its basis. A grounded authority is a legitimate authority. See *The Nature and Limits of Authority* (Lawrence KS: University Press of Kansas, 1985), 19.

Further, the subject of this chapter is not the substantiation of halakhic-legal authority within the context of the putative halakhic-legal system; it is not concerned with the conferral of certain powers on individuals or institutions by higher-order halakhic norms. Such conferral falls short of answering whether the authority ought to be obeyed by individuals, for it must be established that these individuals are obligated to the halakhic system. Moreover understanding such relativized authority is parasitic on comprehending non-relativized authority.[5] A "bottom-up" perspective is thus adopted, which inquires about what role the fact that a norm has been commanded by a halakhic-legal authority can play in the practical deliberations of individuals.

Specifically, the grounding of halakhic-legal authority by appeal to the Biblical verses traditionally associated with rabbinic authority is ignored:

> If a case is too baffling for you to decide, be it a controversy over homicide, civil law, or assault—matters of dispute in your courts—you shall promptly repair to the place that the Lord your God will have chosen, and appear before the levitical priests, or the magistrate in charge at the time, and present your problem. When they have announced to you the verdict in the case, you shall carry out the verdict that is announced to you from that place that the Lord chose, observing scrupulously all their instructions to you. You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left. (Deut. 17: 8-11)

Though these verses are discussed below in the context of models of authority within halakhic literature, they cannot ground halakhic-legal authority: The identity of "the magistrate" with the traditional claimants of halakhic-legal authority—rabbis—is not obvious and cannot be established by authoritative rabbinic interpretation on pain of circularity. Additionally, the continuity of the authority conferred by the verses after the destruction of the Temple, the traditional referent of "that place that the Lord chose," is debatable.[6] Most importantly however,

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[5] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford UK & New York: Oxford University Press, 1979), 10.

[6] See Michael S. Berger, *Rabbinic Authority: The Authority of the Talmudic Sages* (Oxford UK & New York: Oxford University Press, 1998), 31–39 for a discussion of these verses as the basis for rabbinic authority. In general,

given the concern of this study with *ta'amei ha-mitzvot*, appeal to these verses only shifts the question from the grounding of halakhic-legal authority back to the justification of the commandment to obey halakhic-legal authorities. Investigation of the grounding of halakhic-legal authority would therefore still be necessary.

Lastly, this chapter does not aim to provide an account that would ground the coercive power of halakhic-legal authority. Such an account could be attempted by drawing on work in political philosophy focused on the coercive powers of the modern state. However, it would quite likely be an up-hill struggle against both a major impulse of modern philosophy and a central component of modern identity: freedom of conscience in matters of religion. In any case, this study accepts as given, and perhaps desirable, the condition of modern Judaism, in which obedience to halakhic norms is *de facto* voluntary. Consequently, for its model of authority it draws on an approach that conceptualizes legal authority in the framework of practical philosophy as opposed to political philosophy.[7]

In the following, Leibowitz's, Soloveitchik's, and Berkovits' respective accounts of the grounding of halakhic-legal authority are first reviewed to demonstrate the competitive relation between normative justification and legal authority and to point towards its resolution (I). Raz's service conception of authority is then presented as a mediating position; and its implications for halakhic-legal authority and the justification of halakhic norms are detailed (II). It is next argued that the resultant account of halakhic-legal authority reconciles two models of authority that have

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the question of this chapter differs from those of Berger. He is concerned with the particular authority of the Talmudic sages for subsequent generations, while here halakhic-legal authority in general is investigated.

[7] This is the more specific reason for the lack of engagement with Habermas' *BFN*, which applies Discourse Ethics to the nation-state and, among other goals, aims to substantiate its coercive powers.

been identified in halakhic literature (III). Lastly, it is suggested that it is consistent with modern religiosity (IV).

I. Between Authoritarianism and Superfluity

In addition to the commonalities in their accounts of the justification of halakhic norms, the three philosophers of halakha share similarities in their approaches to halakhic-legal authority. In grounding halakhic-legal authority, they each pursue a dual track: They emphasize its consensual features and connect it to their respective justifications of halakhic-norms. Nevertheless, neither of them adequately grounds halakhic-legal authority. While the grounding of halakhic-legal authority in consent is prevalent in halakhic literature, exclusive reliance on such approaches ignores the issue of under what conditions it is justified for an individual to consent to authority.[8] Indeed, even in halakhic literature such approaches are often paired with qualifications about who may be the object of consent.[9] Thus, beyond noting their nods to consent, such arguments are not analyzed. Instead, the focus is on the respective connections Leibowitz, Soloveitchik, and Berkovits establish between the justification of halakhic norms and the grounding of halakhic-legal authority. The relation they posit between the reasons that justify halakhic norms and the type of halakhic-legal practice that grounds such authority is examined. In the process, the relation between normative justification and legal justification is explored (A-C).

A. Leibowitz: Authoritarian Authority

Leibowitz's account of halakhic-legal authority initially seems promising. At least on one interpretation, he grounds it in the consent of the Jewish people. But he also attempts to ground it

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[8] Joseph Raz, *The Morality of Freedom* (Oxford UK & New York: Oxford University Press, 1988), 90–94.

[9] Berger, *Rabbinic Authority*, 105–107.

by linking the normative and legal justifications of halakhic norms. He conditions the validity of halakhic-legal decisions on their compliance with the value that, according to him, justifies halakhic norms—service of God. However, when this view is examined, it is apparent that it renders halakhic-legal authority authoritarian.

The necessity of halakhic-legal authorities for Leibowitz seems evident from his discussion of halakhic issues. He refrains from offering a formal halakhic-legal opinion because he is not a halakhic-legal authority. Yet, he also claims that the power of changing halakhic norms originally rests with the Jewish people, which can then delegate it to rabbis. On this account, halakhic-legal authority derives its legitimacy from the consent of the Jewish people. But, as indicated, this account alone does not explain under what conditions and to whom the Jewish people should delegate its authority.

Indeed, Leibowitz insists that any halakhic-legal authority, whether the Jewish people or rabbis, is only legitimate when its decisions conform to the value of service of God. He thus aims to ground halakhic-legal authority by connecting it to his justification of halakhic norms. Since the reason for halakhic-norms is service of God, halakhic-legal authorities must advance that purpose to be legitimate. However, as was shown, service of God cannot serve as the criterion of halakhic-legal validity because it is contentless and excludes any other considerations. In fact, Leibowitz identifies other immanent principles of halakhic development, which expose halakhic-legal decision-making to a range of factors. In his own forays into halakhic-legal practice he rules on the basis of other concerns, including his independent philosophical positions.

Nevertheless, Leibowitz insists that individuals must comply with halakhic norms solely because they are service of God. The normative justification of halakhic norms is thus decoupled from their legal justification. Halakhic-legal authorities pronounce norms with which its subjects

must comply as service of God but that were in fact determined by other factors. While this captures the way legal authorities command, it fails to establish their legitimacy. Granted his justification of halakhic norms, it is not clear why, even if one decides to serve God, one should follow the commands of a halakhic-legal authority.

B. Berkovits: Superfluous Authority

Berkovits too claims that the legitimacy of halakhic-legal authorities derives from both the consent of the Jewish people and its link to the normative justification of halakhic norms. But his account suffers from a contrasting problem: Due to the close connection between the normative and legal justifications of the commandments, halakhic-legal authority is rendered superfluous.

Berkovits claims that rabbinic authority is based on democratic legitimacy: Vesting the power of halakhic-legal decision-making in decisors and communal rabbis is no less democratic than the restriction of legislative powers to elected officials and judicial powers to appointed judges. He also offers guidelines for who should be appointed to this position. While proficiency in halakhic-legal texts is necessary, it is not sufficient. The character of decisors and rabbis must be shaped by the ideals of the Torah. But since, according to Berkovits, the Torah has a moral telos, decisors and rabbis must be moral exemplars. Such character will enable them to interpret and apply halakhic norms to achieve their end. Berkovits thus provides a clear grounding of halakhic-legal authority by linking it to the justification of halakhic norms. Legitimate halakhic-legal authorities must be guided by the justification of halakhic norms in their halakhic-legal practice.

However, such a close connection between normative justification and legal justification actually renders authority otiose. Recall that Berkovits' theory of halakha is susceptible to two different interpretations: inclusive legal positivism and legal post-positivism. This problem

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afflicts his account on either interpretation, albeit to different degrees. According to the former interpretation, the antecedently existing moral purpose of the Torah both justifies halakhic norms and guides halakhic-legal practice. But if halakhic-legal practice achieves its goal, halakhic-legal authorities merely restate the moral-*cum*-religious obligations already incumbent on its subjects. Matters are worse for the former interpretation. According to it, the purpose of the halakha does not antecedently exist but is constituted through halakhic-legal practice; halakhic-legal decision-making involves constructive interpretation, which both describes and justifies existing Jewish law. Indeed, halakhic-legal practice is a form of moral reflection. But then a halakhic-legal authority merely repeats its subject's moral obligations. In either case, the directives of a halakhic-legal authority do not make any difference to its subjects' practical reasoning; they just recapitulate the subjects' preexisting duties.

C. Soloveitchik: Towards a Mediating Position

Soloveitchik provides a better approach to the legitimacy of halakhic-legal authority. He too points at a consensual grounding of halakhic-legal authority. But he also provides a grounding that links normative and legal justification without reducing them to each other.

Soloveitchik, like Leibowitz, identifies two subjects of halakhic-legal authority: rabbis and the Jewish people. He identifies three grounds for the legitimacy of rabbinic authority: knowledge, intuition, and representation. Ultimately, however, intuition, the capacity to perceive the objective values from which halakhic norms derive and to determine how the latter ought to be interpreted and applied, is the basic ground. As was argued, Soloveitchik's theory of halakha can best be described as non-formalist, which shifts the focus from knowledge of abstract relations to intuition of objective values. Representation is by definition a derivative form of

authority. And the authority of the Jewish people also stems from intuition of values, though in the form of collective consciousness instead of individual perception.

Soloveitchik grounds halakhic-legal authority instrumentally. For him, halakhic norms are justified through their source in objective values. Since halakhic-legal decisions are supposed to track these objective values, normative and legal justification are linked. Still, they are not reduced to one another since ordinary individuals cannot access these values. A halakhic-legal authority is necessary to allow its subjects to comply with their preexisting obligations. The halakhic-legal authority is like an expert who advises others how to accomplish what they want to achieve. Authority thus mediates between normative and legal justification.

However, this approach suffers from problems at the level of details: First, it depends on an untenable account of the justification of the commandments. Second, although in principle it explains the benefits halakhic-legal authorities provide to their subjects, it renders the former entirely unaccountable to the latter in practice. Because the values at the origin of halakhic norms are inaccessible to ordinary individuals, they have no way to ascertain whether any particular authority or halakhic-legal authorities in general decide halakhic-legal decisions accurately. There is no way of determining whether any such authority actually satisfies the conditions of its legitimacy. Third, this account entirely assimilates halakhic-legal authority, which presumably should be a form of practical authority, to intellectual expertise. A halakhic-legal authority intuits objects that it subjects cannot perceive and shares this information with them. As is described below, such a thoroughgoing assimilation of practical authority and intellectual expertise ignores important differences between them. Still, the structure of this approach provides useful direction for understanding how to ground authority without rendering it authoritarian or superfluous.

II. A Service Conception of Halakhic-Legal Authority

Raz's service conception of authority formalizes and improves features of Soloveitchik's approach. Before sketching it and applying it to halakhic-legal authority, it is useful to determine more precisely the tensions inherent in authority, which are instantiated in Leibowitz's and Berkovits' approaches. Thus, in the following the so-called paradoxes of authority are described (A), before showing how Raz aims to resolve the paradoxes with his service conception of authority (B). A service conception of halakhic-legal authority is then sketched and its consequences for *ta'amei ha-mitzvot* are described (C).

A. The Paradoxes of Authority

Scott Shapiro identifies two related but distinct paradoxes that attach to the concept of authority. The first concerns the compatibility of authority with autonomy, while the second relates to the compatibility of authority with rationality. Both, however, are guided by the same insight: "When authorities are wrong, they cannot have the power to obligate others—when they are right, their power to obligate is meaningless. It would seem that the institution of authority is either pernicious or otiose."[10] When an authority commands an action that cannot be independently justified, it is not clear why anyone should be obligated to follow it. When an authority commands an action that can be independently justified, it is not apparent what contribution that authority's command makes to its purported subjects' reasoning; it merely tells them to do what they ought to do in any case.

To better understand the paradoxes, it is necessary to comprehend the nature of the commands of authorities, or authoritative directives, as reasons for action. As indicated

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[10] Scott Shapiro, "Authority," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules Coleman and Scott Shapiro (Oxford UK & New York: Oxford University Press, 2002), 383.

previously, Hart describes them as peremptory and content-independent reasons for action.[11]

Shapiro explains these features' significance:

> A peremptory reason is a reason that cuts off or excludes deliberation…. [O]nce the command has been issued, the subject is expected to stop assessing the merits of the action in question…. Directives are [also] intended to be content-independent reasons for action, meaning that they are supposed to be reasons simply because they have been issued and not because they direct subjects to perform actions that are independently justifiable.[12]

The commands of an authority are meant to cut off deliberation about the particular action and be obeyed because the action has been commanded by the authority. Now obviously individuals often continue to deliberate about the merits of an action commanded by an authority or perform the action commanded by the authority because of the specific action commanded and not because it was commanded. However, when that occurs the individual does not respond to the command in that manner in which it was intended. The more significant question is whether responding to the commands of an authority in this manner is consistent with canons of reason like autonomy (1) and rationality (2).

(1) The challenge to authority from autonomy has been stated most forcefully by Robert Paul Wolff.[13] His objection, Shapiro argues, concerns the "space of reasons."[14] To act autonomously means to always act on the basis of reasons. But the content-independent reasons that characterize authoritative directives are a strange type of reason for action. One performs an action not because of the nature of the action but simply because the authority said to do it. The

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[11] H. L. A. Hart, "Commands and Authoritative Legal Reasons," in *Authority*, ed. Joseph Raz (Oxford UK: Basil Blackwell, 1990), 92–114.

[12] Shapiro, "Authority," 389.

[13] R.P. Wolff, "The Conflict between Authority and Autonomy," in *Authority*, ed. Joseph Raz (Oxford UK: Basil Blackwell, 1990), 20–31.

[14] Shapiro, "Authority," 390.

challenge from autonomy rejects such reasons as reasons at all because the reason is entirely unconnected with the action it ostensibly justifies. The authority could command anything, even the contrary action, and it would still justify it.

The challenge from autonomy concerns the competitive relation between normative justification and authority that was evident in the thought of Leibowitz and Berkovits because by rejecting content-independent reasons it identifies all reasons for action with normative justifications. All justifications must appeal to the specific content of an action as opposed to its source. The origin of the norm in the directive of an authority can never serve as its justification. Thus, in order to respond to it, one must show that an individual might be justified in acting on the basis of a content-independent reason.

(2) The challenge from rationality is even more relevant to the competitive relation between normative justification and authority. To act rationally, according to this challenge, is to always act on the balance of reasons. But this seems to make actually acting on the basis of an authoritative directive either irrational or impossible:

> [C]onsider any directive issued by an authority and any action A required by that directive. Either the balance of reasons supports A or it does not. If the balance of reasons supports A, an agent should perform A, but not because A is required by the directive, rather because agents should always act according to the balance of reasons. It would seem, therefore, that authoritative directives can never be reasons for action—if a directive gives the right result, the directive is irrelevant; if the directive gives the wrong result, then the obedience to the directive is unreasonable.[15]

When an authoritative directive diverges from the action mandated by the balance of reasons, it is irrational to obey it. But when it corresponds to the action mandated by the balance of reasons, one's actions might conform to the directive but one does not thereby comply with the directive. One performs the action because it is independently justifiable and not because it is commanded.

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[15] Ibid., 391.

By maintaining that one must always act on the balance of reasons, the challenge from rationality too asserts the priority of normative justification over authority. No authority of any form, *qua* authority, can be legitimate. Here too the directive of an authority can never serve as a justification for action. Consequently, in order to respond to the challenge from rationality, one must show that it might be rational to obey an authoritative directive even when it diverges from the balance of reasons.

B. Raz's Resolution

Raz's approach to authority has been described by one of its critics as "the most perspicuous analysis of the concept to date."[16] He proposes a service conception of authority that shows how one might have reason to act on the basis of a content-independent reason and even to act against the balance of reasons. He thus answers the challenges from autonomy and rationality. Significantly, this conception is a "normative-explanatory account of the core notion of authority."[17] It is meant neither to capture all usages of the term "authority" nor to define the concept. Rather, it is intended to elucidate features of a common conception of authority and to show how authority could be legitimate.

Indeed, Raz shows how authority could be grounded, what considerations should guide its directives, and how these directives affect the practical deliberations of its subjects. It has two basic insights: First, authority is a type of normative power, specifically the "ability to change reasons for action."[18] Second, an authority's "role and primary normal function is to serve the

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[16] Stephen Lukes, "Perspectives on Authority," in *Authority*, ed. Joseph Raz (Oxford UK: Basil Blackwell, 1990), 211.

[17] Raz, *The Morality of Freedom*, 63.

[18] Raz, *The Authority of Law*, 16.

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governed…. It is to help them act on reasons which bind them."[19] Raz thus proposes an

instrumental conception of authority. These insights are developed by three related theses: the

Dependence Thesis (1), the Normal Justification Thesis (2), and the Preemption Thesis (3).

(1) The Dependence Thesis is "a moral thesis about how authorities should use their

powers."[20] It concerns the types of considerations that should underlie their commands. It states:

> All authoritative directives should be based on reasons which already independently apply to
> the subjects of the directives and are relevant to their action in the circumstances covered by
> the directive.[21]

The commands of authority should reflect its subjects' preexisting reasons for action, that is,

those reasons for action they possess independently of the authority's commands. In the simplest

sense, the command should advance their compliance with them. This is not to say that an

authority's commands should always advance the interests of its subjects, for individuals often

have reasons to act against their interests, especially if their interests are defined in exclusively

hedonistic terms.[22] For example, the orders of a military commander to his subordinates must

reflect their preexisting reasons for action insofar as they are bound to the defense of their

country; it may also require them to sacrifice their lives.

In any case, legal justification is thereby connected with normative justification because the

former reflects the latter. This is even the case when the authority does not directly base its

directives on its subjects' preexisting reasons for action. The authority may base its directives on

specifically legal texts, principles, or precedents so long as its directives do in fact reflect its

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[19] Joseph Raz, "Authority and Justification," *Philosophy & Public Affairs* 14, no. 1 (January 1, 1985): 21.

[20] Raz, *The Morality of Freedom*, 53.

[21] Ibid., 38.

[22] Ibid., 48.

subjects' preexisting reasons. Indeed, as Raz argues, "Sometimes the best way to reach decisions which reflect the reasons which apply to the subjects is to adopt an indirect strategy and follow rules and considerations which do not themselves apply to the authority's subjects."[23]

(2) The Normal Justification Thesis states the standard manner in which an authority may be grounded, though it does not exclude non-standard groundings. Non-standard justifications are when the normal justification is only partially successful and other considerations, including solidarity or identity, which could not independently ground authority, fill the gap.[24] The Normal Justification Thesis is closely related to the Dependence Thesis. It states:

> The normal way to establish that a person has authority over another person involves showing that the alleged subject is likely to better comply with reasons which apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly.[25]

An authority is grounded when its subjects will more reliably comply with their preexisting reasons for action by obeying the authority's directives, which are based on the former, than by following their own deliberations about their preexisting reasons for action. As Shapiro notes, Raz therefore proposes an instrumental justification of authority because it is grounded by showing how it is an adequate means for its subjects to achieve their preexisting ends.[26] The Normal Justification Thesis thus reconciles autonomy and authority by showing how one might be justified in acting on the basis of a content-independent reason as a means to act in conformance with standard reasons.

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[23] Ibid., 51.

[24] Ibid., 54–55.

[25] Ibid., 53.

[26] Shapiro, "Authority," 409.

Indeed, the Normal Justification Thesis, like the Dependence Thesis, draws normative justification and legal authority closely together. Authority is instrumentally grounded by showing how it allows its subjects to conform to their preexisting reasons for action. It does this because its directives reflect those reasons. Its directives are thus susceptible to a somewhat complicated normative justification, which moves from the directives through the authority to preexisting reasons for action. Legal justification and normative justification are consequently also drawn together without being assimilated to one another.

(3) However, Raz claims that the Normal Justification Thesis and the Dependence Thesis entail a further thesis, the Preemptive Thesis, which establishes the uniquely legal normativity of authority, prying apart, at least in individual instances, normative justification and legal justification. This thesis concerns the specific type of reasons for action constituted by authoritative directives and hence their effect on their subjects' practical reasoning. It states that:

> The fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them.[27]

While accepting Hart's description of authoritative directives as content-independent reasons for action, Raz further characterizes them as preemptive as opposed to peremptory. Directives of legitimate authorities are neither simple, first-order reasons to perform the action commanded by the authority nor do they merely cut off or exclude further deliberation by the subjects. Rather, they are preemptive reasons for action, which combine a first-order reason for action with an exclusionary reason for action. An exclusionary reason for action is a second-order reason to disregard first-order reasons for action.[28] An authoritative directive serves as both a reason to

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[27] Raz, *The Morality of Freedom*, 46.

[28] Raz, *The Authority of Law*, 17–18.

perform a specific action and a reason to disregard other reasons to perform or not to perform it. It consequently obligates the legal subject to perform the action: After receiving an authoritative directive he possesses a reason to perform the action and no reason not to perform the action.

Corresponding to the Dependence and Normal Justification Theses, because the commands of a legitimate authority are assumed to reflect the subjects' preexisting reasons for action, it is not simply added to them. Rather, it replaces them (the first-order reason for action) and excludes consideration of them (the second-order exclusionary reason). This complex effect for practical reasoning is necessary to take advantage of the benefit provided by authority, for it would be negated if the subjects still considered their preexisting reasons for action after receiving an authoritative directive. Further, if the authoritative directive was simply added to the preexisting reasons for action, the latter would be double-counted since the authoritative directive is based upon them.

The Preemptive Thesis demonstrates the uniquely legal normativity that the commands of a legitimate authority possess. From a formal perspective, they are not simply reasons for action but preemptive reasons for action. From a practical perspective, legal authority is rendered ampliative and thus normative justification and legal justification are distinguished. Once an authority is grounded, its directives function as both a reason for action and an exclusionary reason. Thus, even if in a particular instance the balance of reasons is against the performance of an action commanded by a grounded authority and the action cannot be independently justified, still it is justifiable for an individual to perform it. This is because

> [i]f every time a directive is mistaken, i.e. every time it fails to reflect reason correctly, it were open to challenge as mistaken, the advantage gained by accepting the authority as a more reliable and successful guide to right reason would disappear. In trying to establish whether or not the directive correctly reflects right reason the subjects will be relying on their own judgments rather than on the authority, which, we are assuming, is more reliable.[29]

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[29] Raz, *The Morality of Freedom*, 61.

The authority's directive is not justified on the basis of its specific content but because it has been commanded by a grounded authority. Thus, even if the authority is mistaken and its command is not independently justifiable in an individual instance, the subject is still justified in obeying it. The Preemptive Thesis thereby reconciles rationality and authority by showing under what circumstances it is rational to obey an authority and to act against the balance of reasons.

Nevertheless, the legitimacy of an authority and hence the justifiability of obeying its commands in the face of the balance of reasons are defeasible. If it becomes apparent that one is not more likely to comply with one's preexisting reasons for action by obeying its directives, then the authority is no longer grounded and its commands cannot derive support from it. The actions it commands must then be independently justifiable for it to be rational to perform them.

Additionally, because an authority is grounded by showing how it allows its subjects to comply with their preexisting reasons for action, it usually has specific and circumscribed competencies. The authority may enable its subjects to comply with some preexisting reasons but not others. For example, it may enable them to maintain their physical safety or to comply with technical regulations better but be less helpful when it comes to scientific knowledge or military strategy. Thus, if an authority makes a jurisdictional mistake by issuing a directive concerning an area for which its competence has not been grounded, then the directive possesses no legal normativity. It must then be independently justifiable for it to be rational to act according to it.

In certain ways, Raz assimilates legal authority to intellectual expertise. Just as the expert allows those that inquire of him to know facts that there are preexisting reasons to believe, the authority allows those subject to him to perform actions for which they already possess reasons to act. For example, the lecture of the history professor allows her students to gain information about history that they should believe because it is true and not simply because she says it. And

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just as the assertions of a grounded expert preempt its subjects' deliberations about the facts, the directives of a grounded authority preempt its subjects' deliberations about what to do. Once one has reason to trust the expertise of the history professor, one ought to heed her judgment about historical facts even when it conflicts with one's own opinion. However, there are two significant differences between expertise and authority:

First, the authority offers reasons for action, while the expert offers reasons to believe. It is mistaken to understand the directives of a legitimate legal authority as merely informing an individual about her preexisting reasons for action like the expert simply informs an individual about preexisting reasons to believe. Rather, he is obligating her by providing her with a reason for action and excluding countervailing reasons.

Second, on the basis of preexisting reasons for action, a legal authority may create reasons for new actions that none of its subjects previously possessed reasons to perform. This is often the case when the authority is called upon to solve social coordination problems. In such cases, though the subjects might have general preexisting reasons related to the activity that needs to be coordinated, none have a preexisting reason to perform the specific action commanded by the authority in order to coordinate the activity. There may be many ways to coordinate the activity; it is only important that everyone perform the same action. Thus, despite coordinating the activity, there is a certain amount of arbitrariness in the specific action that the authority commands. Still, if the authority is properly grounded, its directive is a reason for action for its subjects. For example, while most individuals have reason to travel safely on the highways, none of them has a reason to drive specifically on the right side of the road. The authority's directive to drive on the right side of the road reflects their preexisting reason to travel safely but introduces a reason for a new action: to drive specifically on the right side of the road.

Intellectual expertise possesses no such capacity to create reasons for new beliefs.[30] These features of practical authority advance beyond the indications offered by Soloveitchik's approach. It clarifies the practical and creative powers of a legal authority.

Raz's service conception of authority solves the paradoxes of autonomy and rationality. It shows how it is consistent with autonomy to act according to content-independent reasons and how it is consistent with rationality to act against the balance of reasons. The instrumental relation between authority and normative justification replaces their competition. It demonstrates that authoritative directives may possess uniquely legal normativity even when they cannot be independently justified. Appeal to the directive of a grounded authority can thus serve as the sole justification for a norm. Additionally, this conception shows how authorities may command actions which no one previously had reason to do. But it also requires that authority itself be grounded by independent reasons. Legal justification and normative justification are not reduced to one another but are linked by an authority that is grounded by independent reasons. This grounding is always for specific competencies, so authority is circumscribed as opposed to total.

C. Halakhic-Legal Authority

Raz's service conception of authority provides a useful model for halakhic-legal authority that is neither authoritarian nor superfluous. While it is has been challenged for only engaging with reasons for action and failing to account for the coercive powers of the nation-state,[31] this feature renders it ideal for modern halakhic-legal practice, which *de facto* lacks coercive power. On this account, because the directives of a grounded halakhic-legal authority reflect its subjects' preexisting reasons for action better than their own deliberations, halakhic-legal justification and

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[30] Ibid., 29–31.

[31] See for example Ekow N. Yankah, "The Force of Law: The Role of Coercion in Legal Norms," *University of Richmond Law Review* 42, no. 5 (May 2008): 1195–1256.

normative justification are mediately linked. Appeal to the directive of a halakhic-legal authority to justify a halakhic norm indirectly adverts to its normative justification. However, because the directives of a grounded halakhic-legal authority may sometimes diverge from its subject' preexisting reasons for action and still be justified, halakhic-legal justification is not reduced to normative justification. Appeal to the directives of a grounded halakhic-legal authority is consequently both valid and ampliative when justifying a halakhic norm. It is valid because the halakhic-legal authority itself is grounded instrumentally in terms of independent justifications. It is ampliative because the halakhic-legal authority may occasionally command actions that are not independently justifiable and may create reasons for new actions.

However, to operationalize this conception for the justification of halakhic norms and authority two further steps are necessary: It must be integrated with the context-transcending contextualist account of normative justification (1) and then applied to the justification of halakhic norms (2) as analyzed in the previous chapter.

1. The Service Conception and Context-Transcending Contextualism

The contextualism of that account of justification is most relevant for the integration of this conception of authority. Its context-transcending features can easily be accommodated once its pragmatic (a) and intersubjective (b) character is appreciated.

(a) The service conception of authority is rendered pragmatic without difficulty. The legitimacy of an authority and the validity of its directives are part of a community's lifeworld. Individuals find themselves as members of societies and communities in which certain individuals or institutions are already accepted as legitimately authoritative. Appeal to them is accepted as a justification for a claim. These can be experts such as scientists or scholars or practical authorities like the government or sport coaches. It is a form of foundationalism to hold

that individuals must begin by doubting any claim to authority. Thus, instead of the assumption that an authority is illegitimate and its directives unjustified until explicitly grounded, a socially accepted authority is grounded and its directives are justified until they are challenged.

Once appeal to a socially accepted authority to support a normative-claim has been challenged, however, the authority cannot be shielded from the demands of justification. It must be shown that one is more likely to comply with one's preexisting reasons for action by obeying its directives than by relying on one's own deliberations in order to ground it and justify its directives. However, this grounding is also pragmatic: It appeals to claims about one's preexisting reasons for action and the reliability of the authority's directives in reflecting them that are currently unchallenged. Obviously, these claims can also be challenged and then they too require justification, but that is no different from the justification of any claim outside of the context of the grounding of authority.

Take the expertise of a Freudian psychoanalyst for example. In some communities and at some point in time, for instance the Upper West Side of Manhattan in the 1960s-1980s, such analysts were socially recognized as experts on Freudian psychoanalysis and thus the mental lives of their clients. This expertise depended on the socially recognized validity of the Freudian framework as accurate for understanding psychic structures and dynamics. If an analyst's expertise was challenged, it would have been necessary to show that one is more likely to come to true beliefs about psychic structures and dynamics as well as one's own mental life by depending on his evaluations than by relying on one's own deliberations. Crucially, however, this assessment would have often been conducted within the context of Freudian psychoanalysis. One would be assessing how good a Freudian psychoanalyst the particular analyst was, while taking Freudianism itself for granted as valid. However, one could also question whether

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Freudianism itself provides true beliefs about psychic structures and dynamics as well as individuals' mental lives. This would be a more radical challenge, for it questions whether the purported reasons for belief upon which the analyst's expertise is based are actually reasons for belief at all. The analyst's expertise would play no role in answering this question. Though this question is conceptually prior to the grounding of a particular expert for it relates to the basis for the expert's legitimacy, it is often pragmatically posterior. In any case, it is no different from the justification of truth-claims outside of the context of the grounding of expertise.

(b) Slightly more complicated is rendering the account intersubjective. While Raz has developed his own account of reasons and norms,[32] the service conception of authority is neutral in relation to it. Still, the intersubjectivity of reasons is relevant to two related components of the service conception of authority: the preexisting reasons for action of an authority's subjects and the grounding of an authority. While Raz's conception at least suggests that individuals possess preexisting reasons for action that are objectively given, the account derived from Habermas insists that reasons are only constituted through a process of justification. A reason is that which would be accepted by an appropriate audience as a justification for a claim. Reasons thus are always susceptible to contestation and revision. But if subjects' reasons for action are not preexisting, it is unclear how an authority's directives can reflect them. Relatedly, if an authority is grounded by showing how its directives do reflect its subjects' reasons for action, the validity of these arguments must also be viewed as intersubjective.

The difficulty of integrating this account of justification and the service conception of authority is mitigated by the former's pragmatic character. At least initially, reasons are taken for granted within a social context. Thus, an authority's directives must reflect those reasons for

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[32] Joseph Raz, *Practical Reason and Norms* (Oxford UK & New York: Oxford University Press, 1999); and *Engaging Reason: On the Theory of Value and Action* (Oxford UK & New York: Oxford University Press, 1999).

action that are currently accepted by its subjects, and the authority is grounded by showing that they do so better than its subjects' own deliberations. In the simplest case, when an authority is challenged, its reliability in reflecting these taken-for-granted reasons for action may be contested. One who seeks to ground the authority must then show that the authority does in fact adequately serve the purpose of allowing its subjects' to comply with them more reliably. Recall the example of a particular analyst being grounded as an expert in Freudian psychoanalysis.

However, in a more complicated case, it may be accepted that the authority reliably serves that purpose, but the validity of these previously take-for-granted reasons for action themselves is challenged. Now, these reasons must be justified before the authority may be grounded in terms of them. But, as already indicated, this is now simply a standard case of the justification of claims. There is no hindrance to integrating the grounding of authority into this intersubjective scheme. So in the example of psychoanalysis, reasons would now be offered for and against the validity of the Freudian account of psychic structures and dynamics. Once that is established, an individual could be grounded as expert in terms of it.

Now recall that Habermas' account of justification is not only contextualist but also context-transcending. While ethical-claims and aesthetic-claims may be justified by explicitly drawing on those values and standards accepted by a particular community, the justification of truth-claims and moral-claims must aim for universal acceptability. This element may also be integrated with the service conception of authority. Additionally, recall that the type of a claim, whether it is truth, moral, ethical, or aesthetic, is not a difference in natural kind but is constituted in its process of justification. Nevertheless, for ease of exposition in the following claims are generally described as if their type is predetermined and static.

To start, regardless of the character of the preexisting reasons for action of an authority's subjects, the argument establishing the legitimacy of an authority is a truth-claim. It must be shown that the authority's directives more reliably reflect its subjects' reasons for action than their own deliberations. Whether the subjects' preexisting reasons for action concern moral-claims or ethical-claims or impinge on truth-claims or aesthetic-claims, this argument about reliability is a truth-claim. When it is challenged, its justification must aim for universal acceptability. While such a justificatory audience may disagree about the validity of the preexisting reasons for action, the justification must aim to convince it that the authority's directives do indeed reflect them better than the subjects' own deliberations. So in terms of the example, one could recognize that an individual is a good psychoanalyst in that he possesses a good knowledge of Freudian doctrine and can reliably apply its categories to individuals, but reject Freudianism as an accurate psychological theory. One could be a good Freudian psychoanalyst but, just because of that, a bad psychologist.

Turning to the preexisting reasons for action, they may be moral or ethical norms or both and may impinge on truth-claims or aesthetic-claims or both. The authority may be understood as a moral authority and its directives may purport to better reflect its subjects' reasons for action that stem from their moral duties than their own moral deliberations. Since on this account of justification moral norms must be universally justifiable, the authority must be grounded by showing how its directives are more reliably universally justifiable than its subjects' own moral deliberations. For instance, the authority may be better at abstracting from its own parochial perspective and articulating reasons that others might accept. In addition or alternatively, the authority may be understood as an ethical authority and its directives may purport to better reflect its subjects' reasons for action that stem from their shared understanding of the good.

Since this understanding need not be universally justifiable, the authority may be grounded simply by showing how its directives more reliably reflect this understanding than its subjects own reflections. For example, the authority may be more deeply immersed in a community's traditions and texts and thus may draw on them in ways that resonate better with the community than the attempts of an individual with less experience.

Furthermore, though legal authority is primarily practical and thus pronounces normative-claims, its directives may impinge on descriptive-claims. As described in the previous chapter, both moral-claims and ethical-claims may presuppose certain truth-claims or aesthetic-claims. For example, a legal authority may pronounce a new traffic regulation on the basis of certain truth-claims about how it will reduce the frequency of accidents. In such cases, the authority either must rely on the independent justifiability of these claims or it must be grounded as an intellectual expert concerning them. In the former case, in every instance its directive may be challenged for faulty presuppositions. In the latter case, it must be shown that the authority's directive more reliably reflect its subjects' preexisting reasons to believe certain claims than their own deliberations.

On this account of justification, intellectual expertise concerning truth must be grounded by showing how its truth-claims are more reliably universally justifiable than its subjects' reasoning. For example, the authority may have better acquainted itself with the facts relevant to its ruling than its subjects. Aesthetic expertise concerning beauty may be grounded by showing how its aesthetic-claims more reliably reflect its subjects' shared aesthetic values than their own reflections. For example, and here again the connection between ethical-claims and aesthetic-claims is evident, the authority may be more deeply immersed in the community's culture and

guiding images and thus may draw on them in ways that are more enlightening to the community than the attempts of a neophyte.

While these norms and claims and thus assertions of authority and expertise may occur concurrently, the crucial point is that the actual legitimacy of a purported authority-*cum*-expert in each of these areas must be grounded independently and appropriately. If an authority is to issue authoritative directives concerning moral norms, it must be grounded as a moral authority. If an authority is to issue authoritative directives concerning ethical norms, it must be grounded as an ethical authority. Further, if its authoritative directives are to impinge on truth-claims or aesthetic-claims by presupposing their validity, it must be grounded as a theoretical expert in these areas. When an authority's directives depend on claims for which it has not been grounded as an authority, they must be independently justifiable or it is not rational to comply with them. Indeed, recall that Raz pointed out that when an authority commits a jurisdictional error by issuing a directive concerning an area for which its authority has not been grounded, it may not be followed as an authority. Thus, on this conception, authority is circumscribed instead of total.

2. A Service Conception of Halakhic-Legal Authority

Halakhic-legal authorities engage in a number of activities. Drawing on Maimonides' elaboration in the introduction to the *Mishneh Torah*, Michael Berger identifies five broad areas: clarification of biblical law, resolution of disputes, legislation, non-halakhic Biblical exegesis, and advice on non-legal matters. Clarification of Biblical law involves the interpretation of the Biblical text in order to render it applicable. It often involves analogical reasoning, exegetical arguments, logical reasoning, transmitted teachings, and accepted practice. The resolution of disputes encompasses both substantive arguments and formal procedures for deciding between conflicting clarifications of Biblical laws. Legislation introduces new commandments that are

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not understood to derive from the Biblical text. Such rabbinic commandments include ordinances (*gezeirot*), regulations (*taqqanot*), and customs (*minhagim*). Ordinances are prohibitions intended to prevent the violation of Biblical laws. Regulations relate to social and religious concerns, such as commemorating post-Biblical salvations and disasters. Customs cover a wide variety of practices, some instituted directly by authorities and others arising from lay behavior. Non-halakhic Biblical exegesis often involves homiletic expansion of the narrative. Advice on non-legal matters range from remedies for ailments to accounts of historical events. [33]

Though Berger is interested in the authority of the Talmudic sages, each of these activities, except perhaps clarification of Biblical law, is also undertaken by later halakhic-legal authorities. In any case, insofar as the current concern is halakhic-legal authority in general, it includes that of the Talmudic sages. Additionally, while it is correct as Berger points out that the binding nature of rabbinic non-halakhic Biblical exegesis and advice on non-legal matters has been a matter of dispute,[34] referring to them as "non-halakhic" and "non-legal" begs this question. The present concern is not with the halakhic status of such claims, whether they are obligatory or not according to halakha, but whether halakhic-legal authority can be grounded in these areas.

In order to answer this question, a catalog of the types of claims that are made in the course of these activities would be helpful. However, such a broad survey is beyond the scope of the present study, which focuses on the role of authority in the justification of norms. Suffice it to note that the full range of claims identified in the previous chapter as encompassed in halakhic discourse is asserted by halakhic-legal authorities. The only seemingly new type of claim that might be added to this inventory is that asserted in the course of interpretations of Biblical and

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[33] Berger, *Rabbinic Authority*, 17–20.

[34] Ibid., 19.

rabbinic texts. However, these claims can be understood as either truth-claims or ethical-claims, depending on one's theory of interpretation. An intentionalist approach might understand them as truth-claims about the intention of the texts' authors, while a constructivist approach would understand them as ethical-claims that correlate a community's texts with its view of the good. However, the difficulty of actually vindicating an interpretation of a text as a truth-claim about its author's intention may argue in favor of construing it as an ethical-claim. It is hard to conceive of an argument that could convince a universal audience of an author's intention.

In any case, given the "mixed" character of halakhic discourse and consequently the claims of halakhic-legal authorities, the circumscribed nature of the service conception of authority is of particular significance. As described in the previous chapter, halakhic discourse is not comprised of a unique religious-claim; rather, it combines a wide-variety of normative-claims and descriptive-claims that are interwoven in often complex ways. It comprises ethical-claims like the commandment to observe the Sabbath, which is applied only to Jews. It also comprises moral-claims like the prohibition of murder, which is applied to Jews and non-Jews alike.

Such normative-claims often depend on descriptive-claims. The latter can either be aesthetic-claims or truth-claims, and it often cannot be determined *a priori* which type it will be. As mentioned, the description of the world as the "work of creation" can be understood as either an aesthetic-claim describing the world as inherently dependent or a truth-claim asserting that the world was created in time. Likewise, the description of humanity as "created in the image of God" (Gen. 1: 27) can be understood either as an aesthetic-claim describing individuals as of superlative value or as a truth-claim asserting that humanity resembles God. Some descriptive-claims are clearer. For example, as indicated previously, prohibitions concerning menstruation seem to depend on truth-claims about female physiology and, as further described below,

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prohibitions concerning the mixture of meat and milk appear to depend on truth-claims about the physical properties of pots and pans.

It was described in the previous chapter how normative-claims and their supporting descriptive-claims must be justified independently and appropriately when they are challenged. The moral-claims and truth-claims must be justified by offering reasons that could be accepted by an imagined universal audience. The ethical-claims and the aesthetic-claims may be justified by offering reasons that could only be accepted by a particular audience, in this case the Jewish community. The same holds for grounding halakhic-legal authority. A halakhic-legal authority often issues directives that aim to reflect both its subjects' preexisting moral and ethical reasons for action. Additionally, these directives often impinge on both truth-claims and aesthetic-claims. Thus, in order for its authority to be grounded in a plenipotentiary manner, it would have to be shown that its directives more reliably reflect its preexisting subjects' reasons both for ethical and moral actions and for truth and aesthetic beliefs than their own deliberations. Such all-powerful halakhic-legal authorities must be shown to be practical experts concerning universal moral-claims and the particular ethical-claims of the Jewish tradition and theoretical experts concerning universal truth-claims and the particular aesthetic-claims of the Jewish tradition.

However, it is possible and indeed likely that halakhic-legal authority could only be grounded in a circumscribed manner, for some areas and not others. For example, it might be grounded as an authority on the ethical-norms of the Jewish community but not truth-claims about the world. It might be possible to show that one is more likely to comply with one's preexisting reasons for action that stem from one's commitment to the Jewish tradition and its texts by obeying its directives than relying on one's own reasoning. In contrast, one might be more likely to comply with one's preexisting reasons to believe by relying on one's own

reasoning about the world than by accepting its claims. Contrariwise, perhaps it is possible to ground halakhic-legal authorities as moral authorities while rejecting their capacity for the vision required for aesthetic judgments. Indeed, the sage is often juxtaposed with the prophet. Consequently, the pronouncements of a halakhic-legal authority only possess authority in the areas for which it has been grounded. It is only for those types of claims that appeal to their authority serves as a justification. In other cases, an independent justification of their claims is necessary when they are challenged.

For example, consider the prohibition of mixing meat and milk. Though the Biblical texts only mention cooking meat and milk (Ex. 23:19; 34:26; and Deut. 14:21), as understood by the rabbinic tradition the fact that it is mentioned thrice prohibits ingesting, cooking, or deriving any benefit from the mixture of meat and milk.[35] This prohibition seems to be an ethical-claim because it is only applied to Jews. Justifying it independently would involve reflection on Jewish values as expressed in traditions and texts that are central to the community. However, it might be the case that an individual or institution has been grounded as an authority on such issues. The prohibition could then be justified by appealing to its authority.

This prohibition has been extended in halakhic literature to include using the same pots and pans for cooking meat and milk because of the assumption that the milk or meat is absorbed during the cooking process only to be exuded when the cookery is used again. If the same pots and pans were used for meat and milk sequentially, the result would be the cooking of meat and milk together.[36] Now this may well be an ethical-claim or aesthetic-claim expressing the same aversion to the mixture of meat and milk manifest in the original prohibition. However, because of the detail in which the mechanics of this absorption and exudation is discussed in halakhic

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[35] BT Hullin 115b.

[36] See *Shulhan 'Aruk*, Yoreh De'ah, 92: 4–6.

codes,[37] it seems that it is understood as a truth-claim. It is claimed that the pots and pans actually do absorb and exude the meat and milk. Thus, a the halakhic-legal authority to pronounce with authority about this prohibition it must be grounded as an expert on the physical properties of cookery. It must be shown that one is more likely to believe true statements about such cookery by accepting its claims than by following one's own deliberations. If the halakhic-legal authority cannot be grounded as an expert on such matters, its claims about them must be independently justifiable. It still may be an authority concerning the ethical norms of the Jewish tradition regarding the mixture of meat and milk. But to the extent to which these norms depend on certain truth-claims about the properties of cookery the latter must be justified separately.

This reemphasizes the importance of the manner in which a claim is justified by its defender. Recall again the example of the Sabbath. As indicated, the prescription of observing the Sabbath, along with its myriad prohibitions, is best understood as an ethical-claim since it is only applied to Jews. This claim may be justified independently. However, it also may justified by appeal to a halakhic-legal authority that is properly grounded in such matters. But recall that this ethical-norm is dependent on the description of the world as the "work of creation," which can be understood as either an aesthetic-claim or a truth-claim. Since it is most likely easier to ground a halakhic-legal authority as an expert about the aesthetic vision of the Jewish community than about cosmology, how this claim is justified is crucial. Assume that it is understood as an aesthetic-claim and the halakhic-legal authority is grounded as an expert on the ways of experiencing the world that are central to the Jewish community and tradition, then the claim may be justified on the basis of its authority. However, if it is understood as a truth-claim, then either the halakhic-legal authority must be grounded as expert in cosmology or the claim must be

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[37] See commentaries *ad loc*. On the general relation between halakhic claims and truth-claims, see again Zohar, "On the Relation Between Halakhic Language and Natural Language."

independently justified. One must either show that one is more likely to believe true statements about the origin of the universe by accepting the claims of the halakhic-legal authority than by following one's own reasoning or directly justify the creation of the world. In either case, the prospects are not promising.

Yet, it is not the purpose of this approach to authority to ground halakhic-legal authority for any area of competence or to deny its possibility. It is left to first-order Jewish thinkers and halakhic decisors to determine the types of claims they raise, whether to truth, moral rightness, ethical goodness, or aesthetic beauty, as well as the sorts of authority they assert, whether to practical authority in morality or ethics or intellectual expertise in truth or aesthetics. Rather, as a critical account, this approach articulates the rational constraints on the grounding of halakhic-legal authority and its practical consequences for the justification of halakhic norms. Halakhic-legal authority must be grounded for specific competencies by showing how one is more likely to comply with one's preexisting reasons for action or belief in that area by obeying its directives or accepting its claims than by following one's own reasoning. If this is done, appeal to halakhic-legal authority to justify a norm is valid and ampliative. The directives of a grounded halakhic-legal authority can serve as a uniquely legal justification for a norm that could not be independently justified. Consequently, halakhic-legal authority is instrumental and circumscribed, and normative justification and halakhic-legal justification are mediately linked instead of reduced to one another.

III. Reconciling Epistemic and Deontic Authority

Not only does this approach to halakhic-legal authority ease the tension between normative justification and authority found in the thought of Leibowitz and Berkovits, it also reconciles two models of halakhic-legal authority that have been detected in halakhic literature. Sagi argues that

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there are two models of halakhic-legal authority present in halakhic literature: an epistemic model and a deontic model.[38] These two models can be illustrated through the interpretation of the passage that is taken to be the Biblical source for rabbinic authority (Deut. 17: 8-11). While this passage was cited in full above, the focus now is its final verse: "You shall act in accordance with the instructions given you and the ruling handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left." Contrasting interpretations of this verse are found in the Talmud and in the Sifre. In the former it is interpreted as follows:

> Is it possible that if they tell you about the right that it is left, and about the left that it is right, that you should listen to them? Scripture says, "to the right or to the left." Meaning [one should follow the sages' instructions only if] they tell you about right that it is right and about left that is left.[39]

Halakhic-legal authorities must be obeyed only when they are correct, when they tell you that right is right and left is left. In contrast, in the Sifre it is written, "Even if they show that right is left and left is right, obey them."[40] Halakhic-legal authorities must be obeyed even when they are wrong.

The former interpretation is associated with an epistemic model of authority, according to which "authority derives legitimation from the possession of knowledge in a certain realm."[41] This grounding of authority has important consequences: "[T]he obligation to comply with their rulings applies only when they are true…. [O]beying them when they are wrong is mistaken and

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[38] Avi Sagi, "Models of Authority and the Duty of Obedience in Halakhic Literature," *AJS Review* 20, no. 1 (January 1995): 1–24.

[39] PT Horayot 1:1. Translation and brackets in Sagi, "Models of Authority," 3.

[40] Translation in Jacob Neusner, ed., *Sifre to Deuteronomy: An Analytical Translation* (Atlanta: Scholars' Press, 1987), para. 154.

[41] Sagi, "Models of Authority," 2.

even forbidden...."[42] Indeed, because of this, Sagi notes that it is questionable whether this model of authority should be considered authority at all. In Raz's terms it is better described as expertise. It even threatens to become entirely redundant since its subjects too are commanded to gain the requisite expertise through learning Torah. All the same, according to Sagi, it is espoused by both medieval and modern halakhists, including Nissim Gaon (990-1062) and Rabbi Chaim Hirschenson (1857-1905).

The latter interpretation is associated with a deontic model of authority, according to which "authority is based on the power invested in the person in authority to determine binding norms."[43] It is supported by either citation of the Deuteronomic verse according to the understanding of the Sifre or the consent of the Jewish people. This grounding of authority has important consequences, for it "implies an obligation of unconditional obedience, meaning that an authority must always be obeyed, even when apparently wrong."[44] This model thus confronts the problem of authoritarianism; it is not clear how such an authority could be legitimate. Still, according to Sagi, it is endorsed by Rashi, Nahmanides, and Rabbi Abraham Isaac Kook (1865-1935).

Despite their respective shortcomings, Sagi claims that each of these models expresses an important element of halakhic-legal authority:

> The epistemic model represents the centrality of the Torah in the halakhic realm…. All Israel have an equal share in the Torah, and, beyond their knowledge, authorities enjoy no special status. In contrast, the deontic model emphasizes the status of halakhic sages as the bearers of the Torah. This model reflects the practical needs of the Jewish collective—the need for uniformity—as well as the religious-theological fact [of the Deuteronomic verse]. Both these elements are necessary and constitutive of halakhah. Supporters of the deontic model must assume that the Jew's primary obligation is to the Torah; the duty of obedience incumbent on

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[42] Ibid., 3–4.

[43] Ibid., 11.

[44] Ibid.

believers relates, first and foremost, to God and His Torah rather than to other people. In turn, supporters of the epistemic model must assume that a system of authority is required, even if only on practical grounds, because not every individual can be a halakhic expert. If the halakhic system is open to interpretation, rulings are necessary to prevent the one Torah from becoming several Torahs, even if 'both are the words of the living God.'[45]

The epistemic model valorizes the value of the Torah, while the deontic model asserts the importance of communal uniformity. But both are necessary. Sagi notes that consequently efforts have been made to reconcile them. Sometimes a distinction is made among the subjects of authority: Only the greatest halakhic authorities possess deontic authority. Other times, a distinction is made between types of rulings: Only clearly mistaken rulings may be disobeyed.[46]

The service conception of halakhic-legal authority provides the resources to reconcile these two models of authority. Like the epistemic model, it recognizes that authority is grounded instrumentally in its capacity to aid its subjects in complying with their preexisting reasons for action. These reasons for action include moral reasons as well as those ethical reasons that stem from the Jewish community's commitment to the Torah, its texts as well as its values and images. Thus, the authority's directives must be generally reliable or at least more reliable than its subjects own reasoning in reflecting those reasons in order to be legitimate. Like the deontic model, however, it recognizes that occasionally a legitimate authority must be obeyed even when its subjects disagree with its directives and even when it is objectively wrong. This is the price of the goods authority brings, including increased reliability in conforming to preexisting reasons for action and uniformity.

In the previous discussion of Raz's service conception of authority, uniformity was discussed in relation to the solution of social coordination problems. In order to resolve such situations, a practical authority can create reasons for a new action, which none of its subjects had a specific

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[45] Ibid., 22.

[46] Ibid., 22–24.

reason to perform before its directive. Such cases can be found in halakhic-legal practice. Indeed, in his discussion of the commandments of animal sacrifice in the *Guide of the Perplexed*, Maimonides writes, "The generalities of the commandments necessarily have a cause and have been given because of a certain utility; their details are that in regard to which it is said of the commandments that they were given merely for the sake of commanding something... The offering of sacrifices has in itself a great and manifest utility.... But no cause will ever be found for the fact that one particular sacrifice consists in a lamb and another in a ram and that the number of the victims should be one particular number."[47] While the commandments of animal sacrifice have a general reason, which for Maimonides relates to the weaning of the ancient Israelites from the idolatrous practices of their neighbors, the details of the offerings are arbitrary. What matters is that a uniform practice is established by the Bible and its halakhic-legal interpreters.

However, there may also be intrinsic value to the solidarity that comes from shared practices, which may be especially relevant for halakhic-legal authority. Uniformity in the conduct of certain activities, especially if they are symbolic or anyway non-functional, is one of the foremost means of producing such communal solidarity. Certainly, this value can be offset if these practices are pernicious or even if uniformity is demanded too insistently at the cost of individuality. But in the absence of such defects or until they become apparent, arbitrariness may be worth the benefits of solidarity. Uniformity in the service of solidarity is thus another reason to empower an authority with the capacity to command obedience even when its directives do not directly reflect its subjects preexisting reasons for action. Nevertheless, since solidarity is a good that is recognized by the authority's subjects, directives that aim to promote uniformity still

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[47] Maimonides, *The Guide of the Perplexed*, 1963, vol. 2, pt. III: 26.

reflect its subjects' preexisting reasons for action in an extended sense. The service conception of halakhic-legal authority therefore reconciles the deontic and epistemic models of authority found in rabbinic literature by balancing the demands of individual commitment to the Jewish tradition and the communal need for uniformity and solidarity.

IV. Conclusion: Authority and Modern Religiosity

Hannah Arendt claims, in her leadingly titled essay "What was Authority?," that "authority has vanished from the modern world, and that if we raise the question what authority is, we can no longer fall back upon authentic and indisputable experiences common to all."[48] The argument of this chapter concerning halakhic-legal authority would seem only to add to her contention. It was noted at the outset that this approach to halakhic-legal authority does not support coercive powers. Indeed, though the differences between Raz's conception of practical authority and intellectual expertise have been indicated, to a large degree practical authority has been analogized to expertise. Indeed, this is crucial to its instrumentalist strategy for reconciling authority with autonomy and rationality. It does not impinge on an individual's autonomy or rationality to depend on the judgment of those who have superior knowledge to them. Indeed, in the modern world where individuals are confronted with ever more technical and specialized areas of knowledge such dependence is necessary. This conception of authority is situated in that context. From its subjects' side it is a form of dependence, while from its side it is form of service by allowing them to comply better with reason. An authority that serves its subjects in this manner is opposed to what Arendt describes as "authentic" and "indisputable" experiences of authority. Such an authority derives from origins and foundations, whether of polities or

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[48] Hannah Arendt, "What Was Authority?," in *Authority*, ed. Carl J. Friedrich (Cambridge MA: Harvard University Press, 1958), 81.

traditions, that have a unilateral claim on their subjects. It demands their reverence and obedience, regardless of its rationality or the benefits it provides to its subjects.

It may seem particularly misguided to situate religious authority, of which halakhic-legal authority is a species, within that context. Conceiving of religious authority as providing a service to religious believers, it may be claimed, is a rejection of its very character as religious, which necessitates submission and humility. Presumably, this objection may be rebutted from two perspectives: the internal perspectives of a religious tradition and the external perspective of philosophical investigation. Echoing Leibowitz, one might argue that it is only God to whom religious believers owe their submission and humility. Religious authorities are legitimate only insofar as they advance service of him. Alternatively, one might contend that if authentic religion requires obedience to tyrannical authorities so much the worse for it. The only valid form of religion is a religion of reason that reconciles authority with autonomy and rationality.

But the more significant contention, which can only be suggested here, is that this very picture of two opposed perspectives, internal and external, is false to modern religiosity. As was argued, modern religious discourse is not comprised of discrete and unique religious-claims but is a "mixed discourse" including a variety of claims. By extension, despite the legacy of particularly Protestant philosophies of culture and religion, religion is not a discrete and unique area of human life. The newspaper attests to the fact that "religion" continues to turn up in those areas from which it is supposed to be differentiated: politics, economics, and science. Likewise, religious believers do not schizophrenically isolate their "religious" lives from their other activities. Both the "religious" and the "non-religious" values that they endorse permeate their lives. To insist on the revival of authentic obedience to religious authority in the modern age smacks of bad faith. If the commitments to rationality and autonomy are constitutive of modern

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identity, modern religiosity cannot be a refuge from them. Philosophically rethinking religious authority so as to reconcile it with them merely explicates this social fact.

Consequently, this approach to halakhic-legal authority possesses a number of advantages: It eases the tension between *ta'amei ha-mitzvot* and halakhic-legal authority. Because of the instrumental nature of authority, a mediated link is established between normative justification and legal justification, in which the latter is not reduced to the former. In general, the directives of a halakhic-legal authority must reflect its subjects' preexisting reasons for action and thus its halakhic-legal practice must roughly track the normative justification of the commandments. However, a grounded halakhic-legal authority may introduce reasons for new actions that are not directly derivable from its subjects' preexisting reasons for action. Additionally, halakhic-legal authority is grounded for specific competencies and thus its legitimacy is circumscribed as opposed to total. But beyond addressing issues that arise out of the study of the philosophies of halakha of Leibowitz, Soloveitchik, and Berkovits, this approach to halakhic-legal authority reconciles two models of authority found in rabbinic literature and explicates a form of religious authority suited to modern religiosity

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CONCLUSION

This study, like all philosophical investigations whether or not its participants are aware of it, arose out of practical concerns. It emerged out of worries about the social conflicts over religious norms and authority that rage in our society, including debates over abortion, same-sex marriage, circumcision, and veiling, which involve the claims of universalism and the legitimacy of particularism. It aims to aid in their resolution. It was suggested at the outset that instead of abstract reflection on the justification of religious norms and authority and their proper role in purportedly secular nation-states, a more intellectually unbiased and practically effective investigation should engage with the tradition of inquiry of a religious tradition involved in these conflicts. Judaism was identified as a productive participant in this dialogue with philosophy because of its role in such conflicts, its unique perspective on some of the underlying issues, and its robust tradition of inquiry into the justification of its religious norms and authority. In the process, philosophy of religion, a field in which this reflection has often been conducted, would be expanded through its engagement with the themes of Jewish thought and law as well as its connections to moral and legal philosophy.

Ta'amei ha-mitzvot and theory of halakha were identified as sites for analysis of the justification of halakhic norms and authority. In the first part of this study the positions of three influential philosophers of halakha on these issues were analyzed and critically assessed. Insofar as the views of Leibowitz, Soloveitchik, and Berkovits underlie specific claims about the universal applicability of Jewish religious norms or legitimate particularity of Jewish religious practices, these examinations are directly relevant to the aim of resolving these social conflicts. They evaluated whether these claims were sustainable in view of their philosophical foundations. More comprehensively, the critical account of the justification of halakhic norms and authority

offered in the second part of the study also aims to resolve these social conflicts. It delimits the boundaries of religious claims, determining whether they could command universal assent, may be validly held by a religious community, or are unjustifiable on any terms. Its implementation was modelled through the example of circumcision.

While this account was applied to halakhic norms and authority, its philosophical foundations abstracted from the Jewish tradition. It draws from Habermas and Raz instead of Maimonides and Mendelssohn. This is because it is contended that they represent the most sophisticated account of justification and conception of authority respectively. As Maimonides urges, "accept the truth from whatever source it proceeds."[1] But if this account is to be practically effective in resolving social conflicts over religious norms and authority, it must be retranslated into the terms and language of the Jewish tradition. This does not involve judaizing Habermas' account of justification or Raz's conception of authority; rather, it entails explicating those features of the resultant account that resonate with themes in Jewish thought and law.

This was already begun in a piecemeal fashion in the preceding chapters. It was indicated how Habermas' account of justification agrees with elements of the accounts of justification offered by Leibowitz, Soloveitchik, and Berkovits, even while rejecting their foundationalist approaches. In the case of Raz's conception of authority, it was shown how it expands on features of Soloveitchik's account of halakhic-legal authority and how it reconciles the deontic and epistemic models of authority present in rabbinic literature. To conclude this study, broader features of critical philosophy of halakha are placed into dialogue with themes from Jewish thought and law as developed by Emmanuel Levinas. This is not meant as a scholarly treatment of Levinas' thought. Rather, it consists of reflections provoked by his engagement with Jewish

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[1] Moses Maimonides, "Eight Chapters," in *A Maimonides Reader*, ed. Isadore Twersky (Springfield NJ: Behrman House, 1972), 363.

texts that are relevant to critical philosophy of halakha. Nevertheless, this will further articulate the unique perspective possessed by Judaism on some of the underlying philosophical issues of these social conflicts, specifically the relations between particularism and universalism (I) and between commitment to one's faith and to one's fellows (II).

It must be noted, however, that these concluding reflections transcend the proper boundaries of this study. They offer normative interpretations of the Jewish tradition and even touch on theological issues in order to display the resonance between them and critical philosophy of halakha. They are thus no longer themselves "critical" but contributions to first-order Jewish thought. Stated otherwise, in contrast to the body of this study, which was philosophical in nature and thus offered truth-claims and moral-claims that aimed to be universally acceptable, the following meditations offer ethical-claims or aesthetic-claims about the Jewish tradition. Still, such "bridging" work is essential in order to reintegrate philosophical reflection into the social context from which it emerges.

I. Universalism and Particularism

Critical philosophy of halakha aims to strike a principled balance between the claims of universal reason, truth, and morality and the validity of communities' particular conceptions of the good and the beautiful. It thereby interprets the tension of Judaism's dual commitment to the idea of monotheism alongside the doctrine of chosenness, the idea of the "unique God" (Deut. 6:4) that constitutes a universal humanity[2] alongside the notion of a "treasured nation" (Ibid. 7:6) that elevates a particular community. More directly, it explicates a related stress in Jewish law: While non-Jews are obligated by Jewish law to obey the Noahide laws, only Jews are bound by the vast majority of halakhic norms. Still, it is claimed both in the Torah and by practitioners of

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[2] See Hermann Cohen, *Religion of Reason Out of the Sources of Judaism* (Atlanta: Scholars' Press, 1995), 41–49; 236–268.

ta'amei ha-mitzvot that the rationality of halakhic practice is recognizable to those outside of Judaism. In the Bible (Ibid. 4: 6) it is written, "Observe [the commandments] faithfully for that will be proof of your wisdom and discernment to other peoples, who on hearing of all these laws wills say, 'Surely, that great nation is a wise and discerning people.'" Maimonides understands this verse to authorize the project of justifying halakhic norms. There must be conceptual space for both universally applicable norms and norms that are valid for particular communities. Critical philosophy of halakha provides this space.

In his essay entitled "The Pact," Levinas reflects on the position of the covenant and halakha in this tension between universalism and particularism in Jewish thought and law. He describes a transformation that the depiction of the Israelite covenant ceremony on Mount Gerizim and Mount Ebal undergoes from its initial proleptic presentation in Deuteronomy (27), throught its represented execution in Joshua (8), and to these texts' interpretation in the Mishnah.[3] This analysis serves as a further bridge between these basic elements of Jewish thought and law and features of critical philosophy of halakha.

In Deuteronomy, Moses commands that a covenant ceremony be performed when the Israelites enter the land of Canaan. It is depicted as follows (27: 1-15):

> Observe all the Instruction that I enjoin upon you this day…. When you cross over to enter the land that the Lord your God is giving you…you shall set up…stones…on Mount Ebal, and coat them with plaster…. Do not wield an iron tool over them; you must build the altar of the Lord your God of unhewn stones…. And on those stones you shall inscribe every word of this Teaching most distinctly [*be'er hetiv*]. Moses and the levitical priests spoke to all Israel, saying: Silence! Hear, O Israel! Today you have become the people of the Lord your God: Heed the Lord your God and observe His commandments and His laws, which I enjoin upon you this day. Thereupon Moses charged the people saying: After you have crossed the Jordan, the following shall stand on Mount Gerizim when the blessing for the people is spoken: Simeon, Levi, Judah, Issachar, Joseph, and Benjamin. And for the curse, the following shall stand on Mount Ebal: Reuben, Gad, Asher, Zebulun, Dan, and Naphtali. The Levites shall then proclaim ('*anah*) in a loud voice to all the people of Israel. Cursed be

[3] Emmanuel Levinas, "The Pact," in *The Levinas Reader*, ed. Seán Hand (Malden MA, Oxford UK, & Victoria AU: Blackwell, 2009), 211–26.

anyone who makes a sculptured or molten image….—And all the people shall respond, Amen….

While the contents of the blessings are never described, a list of curses follows. Their objects include one who insults his parents, encroaches on his neighbor's property, misdirects the blind, subverts the rights of vulnerable people, engages in incest or bestiality, surreptitiously assaults his fellow, accepts a bribe in a capital case, or generally abrogates the law.

In his interpretation of this passage Levinas explicates the context and content of the covenant. The Israelites, their tribes enumerated, are arrayed on two mountains. He presumes that this means that they are facing inward and toward one another, which signals the intimacy of the religious community and the particularity of the covenant into which they enter. He indicates that besides the opening and closing maledictions that target the idolater and the abrogator of the law, the rest of the curses are directed at social injustices. Following rabbinic precedent, he also interprets the injunction that the altar must be composed of unhewn stones as symbolizing peace since iron—the material of armaments—has not defiled them.[4] Lastly, he notes the manner the law must be inscribed, which is translated literally as "most distinctly."

In the book of Joshua, when the actual execution of the ceremony is represented, the description is briefer and a significant change is introduced (8: 30-35):

> Joshua built an altar to the Lord, the God of Israel, on Mount Ebal, as Moses, the servant of the Lord, had commanded the Israelites…an altar of unhewn stone upon which no iron has been wielded…. And there, on the stones, he inscribed a copy of the teaching that Moses had written for the Israelites. All Israel—stranger and citizen alike—with their elders, officials, and magistrates, stood on either side of the Ark, facing the levitical priests who carried the Ark of the Lord's Covenant. Half of them faced Mount Gerizim and half of them faced Mount Ebal, as Moses the servant of the Lord had commanded them of old, in order to bless the people of Israel. After that, he read all the words of the Teaching, the blessing and the curses, just as is written in the Book of the Teaching. There was not a word of all that Moses had commanded that Joshua failed to read in the presence of the entire assembly of Israel, including the women and children and the strangers who accompanied them.

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[4] For example, see Rashi's commentary on Exodus 20: 22 s.v. *va-tihaleleha* in *Torat Hayym*, vol. 2: 283.

While the text stresses the correspondence between the commandment of the ceremony and its execution, a change is introduced: The community does not simply include the tribes of Israel; it is expanded to include strangers, women, and children. Yet, the implications of intimacy and particularity remain: The halves of the people are arrayed on the two mountains facing inward and toward one another and the priests stand in the valley facing each group. The connotation of peace remains as well: The stones upon which the law is inscribed must be unhewn.

The next textual site is a Mishnah that discusses the language in which certain ritual and legal acts may be performed, specifically whether Hebrew must be used. In support of the contention that the levirate marriage refusal ceremony (*halitzah*) must be performed in Hebrew a verse from the Deuteronomic iteration of the covenant ceremony is adduced. It is argued that just as the latter uses the terminology of "shall then proclaim ['*anah*]" (27:14) and must be in Hebrew, so too the former that also uses the terminology of "and make this declaration ['*antah*]" (Ibid. 25: 9) must be in Hebrew. Seemingly only by association the Mishnah then engages in a description of the covenant ceremony by drawing on the versions of Deuteronomy and Joshua:

> How were the blessings and curses [pronounced]? When Israel crossed the Jordan and came to Mount Gerizim and Mount Ebal…. Six tribes ascended the summit of Mount Gerizim, six tribes ascended the summit of Mount Ebal, the priests and the Levites with the Ark were stationed below, in the center; the priests surrounding the Ark, the Levites [surrounding] the priests, and all Israel on this side and on that side…. They turned their faces towards Mount Gerizim and opened with the blessing, 'Blessed be the man who does not make a graven or molten image,' and both groups responded 'Amen.' They turned their faces towards Mount Ebal and opened with the curse, 'Cursed be the man who makes a graven or molten image,' and both groups responded, 'Amen.' [They continued in this manner] until they completed the blessings and curses. After that, they brought the stones, built the altar and plastered it with plaster, inscribing on it all the words of the Torah in seventy languages, as it is said: 'most distinctly' (*be'er hetev*).[5]

The Mishnah further emphasizes the intimacy and particularity of the event by clarifying the arrangement of the people. The ark is in the center, surrounded by the priests and then the

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[5] M Sotah 7:5

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Levites. The rest of the tribes encompass them and thus face them and one another. Everyone

faces inward except the priests who turn from side to side as they perform the curses and the

blessings, which are now described as the inverse of the curses. Thus, the individual who refrains

from idolatry, abrogating the law, and the various social injustices is blessed. Yet, an

interpretation of the inscription of the law is offered that transcends the expansion of the

community found in Joshua. "Most distinctly" is interpreted to mean that the Torah was

inscribed in seventy languages, which in rabbinic literature implies *every* language.

In the interpretive history of this covenant ceremony, there is thus a development in the

relation of particularism and universalism centered on the covenant and halakha. Levinas

explains this development as follows:

> A question about handwriting has been transformed into the language used…. The pact
> which, according to Deuteronomy, was concluded in the presence of all the tribes in front of
> an altar whose stands…are untouched by any tool of iron; the pact which, in Joshua includes
> women, children, and foreigners, has, in this Mishnah, become truly universal: its law is
> written in seventy languages. A message addressed to humanity as a whole! The real
> meaning of this apparently particular ceremony, performed by a people whose members can
> all look upon one another, a community which one gaze can encompass, is that *all* human
> beings are included in the legislation in whose name the pact is concluded…. The transition
> from Hebrew to the universality which I call 'Greek' is, then, very remarkable. The phrase
> *be'er hetev* [most distinctly]…takes on the new meaning of complete translatability. This
> process of liberating and universalizing the texts must, therefore, be continued…. This
> universality is rooted, in some way, in a society which makes itself entirely visible to its
> members congregated on the two mountain tops, visible as if on stage. From the outset the
> society which values the intimacy of its twelve tribes looking at each other, and which aims
> to be one community, is already available or reaching out to humanity as a whole.[6]

The law is that of a particular a community, the ideals of which are characterized by peace,

social justice, and intimacy. The stones are untouched by iron; the curses and blessings focus on

social injustice; each individual sees and faces the other. Simultaneously, the community

expands and displays itself atop of mountains, while the law is translated into every language.

There is a movement from within the particular community to the universal society. However,

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[6] Levinas, "The Pact," 217.

the community never encompasses all nor does it dissolve into the society. Indeed, what the community displays to others is its intimacy and particularity. The law is similarly not adapted to society nor imposed on it; the law is merely rendered intelligible.

Levinas may have a homogenous view of the relation between universalism and particularism in Jewish law; the law as a whole must be translated or universalized. Whether or not this is the case, his construal of this image suggests the complex relation between universalism and particularism in the justification of halakhic norms and authority described in this study. Most basically, the context of the justification of halakha is social: the covenantal community in its intimacy and the universal society to which it displays itself and explains its law. Peace is its foundation; coercive enforcement of authority is not grounded. Face to face encounter, or reciprocity, is its medium; justification is a process of intersubjective recognition.

In addition, the law has its origin in the particularity of a community, which expands to include marginalized groups, and then finds its audience in a universal society. Missed by Levinas is that while in Joshua the participants in the covenant are expanded, in the Mishnah only the audience for the law is universalized. And even Levinas notes that this process of translation is difficult and ongoing. In all cases, the reciprocity of the community, the intersubjective recognition of its norms, is expanded to include those within the community who have previously been excluded. All the claims within halakhic discourse must be justifiable to every member of the Jewish community. But certain claims, those that can be rendered into Greek—morality and truth, must also be justifiable to a universal audience. Nevertheless, the intimacy and particularity of the community is sustained through those claims that can only be paraphrased with difficulty from the Hebrew—ethics and aesthetics. Indeed, the universal message of the covenant and halakha is the enduring validity of particularity even in the context

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of universalization. The community continues to face inwards even as it expands itself, displays itself, and translates its law. Lastly, this whole process of expansion, display, and translation occurs pragmatically in historical and social contexts. Just as the covenantal community is expanded and the halakha is universalized through succeeding texts, the reciprocity of the law is perfected and the audience for the law is universalized through time and in different places.

II. Intersubjectivity and the Trace of God

Because it conceptualizes the justification of halakhic norms and authority in terms of acceptance by an audience, critical philosophy of halakha marks an intersubjective turn in Jewish thought and law. This offers a new perspective on the tension between universalism and particularism in Judaism. As indicated, this tension and its attempted resolution recur in a number of domains: Jewish thought attempts to negotiate it through the relation between monotheism and chosenness. Jewish law prescribes some norms solely for Jews and others for all of humanity. *Ta'amei ha-mitzvot* justifies halakhic norms within an intellectual framework that is shared with others; but it is still insisted that only Jews are bound by most of them.

This suggests that all these instances of tension and attempted resolution stem from a more immediate need for such reconciliation: Jewish life. Modern Jews especially are members of overlapping communities and societies, some distinctively "Jewish" and others aiming at "secularity." The tension between universalism and particularism emerges from this social fact. Efforts at negotiating it in Jewish thought and law express the desire by Jews to achieve intersubjective recognition in these social contexts as both accountable to shared standards and entitled to legitimate difference. By reconceiving justification in terms of universal and particular audiences, critical philosophy of halakha is cognizant of its social roots and practical context of application.

But this recognition provokes two related challenges to critical philosophy of halakha: one philosophical and the other theological. There is a tendency in first-order discourse about halakhic change and in the study of halakha to attempt to disentangle developments that are "internal" to Jewish law from those that are imposed by "external" forces, whether political or economic. Similarly, there is a temptation to distinguish between "authentic" and "apologetic" Jewish thought. Critical philosophy of halakha's recognition of the social origins of Jewish thought and law may therefore be taken to suggest that all halakhic developments result from external forces and that all Jewish thought is apologetic.

But fully recognizing the intersubjectivity of reason means that the historically and socially conditioned nature of Jewish practices, both those of Jewish law and Jewish thought, does not negate their intellectual "seriousness." The dichotomies internal/external and authentic/apologetic only get off the ground if a "real" and non-social element is contrasted with another "squishy" and social element, if the non-social element is reified as "objective" and endowed with authority. But once it is realized that it is always human beings who so authorize it, both sides of the contrast disappear. This does not mean that there are no longer any "real" constraints on Jewish practices but only that they derive from social constraints. Individuals cannot be held accountable or recognized as justified simply by the contents of a tradition but only by others with whom they share this tradition. Critical philosophy of halakha acknowledges that these others include not only actual others who hold them accountable to the present sense of the tradition but also imagined others who may challenge their entitlement to this tradition as presently understood.

Still, this response provokes a theological challenge. Critical philosophy of halakha entails that not only does Jewish law itself contain commandments between the individual and God

(*mitzvot beyn adam le-makom*) and commandments between the individual and his fellow (*mitzvot beyn adam le-havero*) but *commitment* to the commandments involves relations both to God and to one's fellows. In endorsing halakhic norms and engaging in halakhic practice one not only fulfills a commitment to God, one undertakes a commitment to justify them to others. One might therefore object that the theological error of *shituf*, of associating another being with the divine, has thereby been committed. The human other has taken the place of the Wholly Other. Indeed, one might argue that it is not human beings who authorize religious norms but God who commands them.

Nevertheless, another interpretation is possible: Critical philosophy of halakha presents a method of justifying the commandments whereby one may hold oneself accountable both to one's faith as well as to other individuals. Holding oneself accountable to one's faith demands taking its claims to truth, rightness, goodness, or beauty seriously enough to require justification. Because one sees one's faith and its norms and practices as valuable, indeed superlatively so, one commits oneself to the attempt to substantiate that value. Similarly, holding oneself accountable to others requires offering them reasons for one's commitments when they demand their justification. Communicating with others entails making oneself and one's commitments answerable to them.

This dual commitment is the basic impulse behind the project of *ta'amei ha-mitzvot* as first expressed in Deuteronomy: The value of the commandments is expressed through the recognition of their value by others. It continues throughout the ages in the various attempts to show the rationality of Jewish religious practice by adducing reasons for it. This does not mean that one commits oneself to demonstrating to others the universal applicability of one's norms and to insisting that they adopt them. But it does mean holding oneself accountable to shared

standards of reason, truth, and morality and substantiating the legitimacy of particularity in other areas.

Finally, it may be suggested that these two commitments could be linked even more closely. If one were to claim that an object of faith is always encountered indistinctly both in one's faith and in one's interactions with others, then justifying one's commitments to others opens the possibility of justifying oneself before the object of faith. A theme in the philosophers of halakha that have been analyzed in this study is the human nature of halakhic-legal practice. While revelation may be acknowledged as the origin of the commandments, the interpretation, determination, and application of halakhic norms is given over to human beings. As Berkovits stresses, the motto of the halakha is that the Torah is not "in heaven." Consequently, it is never certain whether halakhic practice corresponds to the divine will. The only assurance that can be gained about the validity of halakhic norms is through their vindication in intersubjective dialogue, whether this is the *shakla ve-tarya*, intellectual give-and-take, of halakhic-legal practice or the argumentation of normative justification. God's will is thus apprehended in halakhic norms and practice only dimly and through human others.

Similarly, there is a tradition that identifies interpersonal relations as the site of any possible apprehension of the divine. As discussed in the examination of Berkovits, God tells Moses that he "cannot see [his] face, for man may not see [God's] face and live" (Ex. 33:20). Only God's "back" may be revealed to Moses. God's "back" is also described as his "goodness" and later identified with his attributes of mercy. But elsewhere the human being is depicted as created in the "image [*selem*] of God" (Gen. 1:27), which seems to imply that the visage of the human being has some connection with God's face. There thus appears to be some link among God's "face," "back," and humanity.

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These texts and their themes are drawn upon by Levinas in explicating his view about the relation between morality and religion. According to him, moral obligation to others is not something superadded to experience nor is it a responsibility that is voluntarily assumed. Rather, the normative force of morality is built into the phenomenology of intersubjective relations. In one's encounter with another human being, metonymically referred to as the encounter with her "face," one experiences his obligation to her even before he determines the content of that obligation.[7] While rejecting the view that God is present in one's encounter with the human other, Levinas maintains that an indication of God is detectable in this relationship. He writes,

> To be in the image of God does not mean to be an icon of God, but to find oneself in his trace. The revealed God of our Judeo-Christian spirituality maintains all the infinity of his absence, which is in the personal order itself. He shows himself only in his trace, as is said in Exodus 33. To go toward Him is not to follow this trace which is not a sign; it is to go toward the others who stand in the trace of illeity.[8]

That the human being was created in the image of God does not mean that God's "face" can be seen, that God can be directly experienced, in the encounter with another individual. Rather, only a trace of the divine is apprehensible. Here Levinas relies on the fact that while "*selem*" is often translated as "image," it also evokes the word "*sel*" or "shadow." The human being was created in the shadow of God, so God is not present in the human face but only suggested by it. God is only ever present in human relationships and there he is present in his absence. Similarly, Levinas references Exodus 33 where perception of God's "face" is denied Moses while a view of his "back" is allowed. Only God's retreat is accessible to human beings. This trace or retreat, which Levinas also refers to as *illeity* or that-ness, indicates moral responsibility for the other,

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[7] For brief statements of his approach, see Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority*, trans. Alphonso Lingis (Pittsburgh: Duquesne University Press, 1969), 33–52; 19–219. For an in-depth analysis of his thought in view of contemporary metaethics and moral theory, see Michael L. Morgan, *Discovering Levinas* (Cambridge UK & New York: Cambridge University Press, 2007).

[8] Emmanuel Levinas, "The Trace of the Other," in *Deconstruction in Context: Literature and Philosophy*, ed. Mark C. Taylor (Chicago & London: The University of Chicago Press, 1986), 359.

just as the God's "back" represents his moral attributes. God is not experienced in the encounter

with the other, but his demand concerning the other—moral responsibility—is felt.

In his more explicitly Jewish writings, Levinas makes these textual and conceptual

connections clear when he writes,

> Ethics is not the corollary of the vision of God, it is that very vision. Ethics is an optics, such that everything I know of God and everything I can hear of His word and reasonably say to Him must find ethical expression…. The knowledge of God which we can have and which is expressed, according to Maimonides, in the form of negative attributes, receives it positive meaning from the moral 'God is merciful,' which means: 'Be merciful like Him'. The attributes of God are not in the indicative, but in the imperative. The knowledge of God comes to us like a commandment…. To know God is to know what must be done…. [9]

God or the idea of transcendence that is associated with God is indicated in the phenomenology

of the encounter with other human beings. Such encounters disclose the moral responsibility

individuals have to each other that precede any assumption of obligation.

While Levinas focuses on moral responsibility, there are indications that he can also be

understood as referring to the type of discursive accountability to others that has been explored

in this study. In a theologically oriented essay, he writes,

> Saying opens me to the other before saying what is said, before the said uttered in this sincerity forms a screen between me and the other…. Language understood in this way loses its superfluous and strange function of doubling up thought and being. Saying as testimony precedes all the said. Saying, before setting forth a said, is already the testimony of this responsibility—and even the saying of the said, as an approach to the other is a responsibility for him."[10]

Prior to the content of an utterance—the said, the very act of communication—saying—invokes

a claim that the interlocutor has on the speaker. While Levinas writes of a responsibility *for* the

interlocutor, it can also be understood as a responsibility *to* her. In communicating with another,

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[9] Emmanuel Levinas, *Difficult Freedom: Essays on Judaism*, trans. Seán Hand (Baltimore: Johns Hopkins University Press, 1997), 17–18.

[10] Emmanuel Levinas, "God and Philosophy," in *The Levinas Reader*, ed. Seán Hand (Malden MA, Oxford UK, & Victoria AU: Blackwell, 2009), 183.

one is exposed to the responsibility to account for one's claims to her. Similarly, in *Totality and Infinity: An Essay on Exteriority*, Levinas touches on the sort of reflection involved in normative justification. He writes,

> Reflection can, to be sure, become aware of this face to face, but the "unnatural" position of reflection is not an accident in the life of consciousness. It involves a calling into question of oneself, a critical attitude which is itself produced in the face of the other and remains under his authority.[11]

Just like encounter with the face of the other in the context of action reveals one's moral responsibility for her, the encounter with the other in discourse discloses one's accountability to her. The other possesses a type of authority over the individual. She calls his claims into question; he must justify them to her.

Taken together, Levinas can be understood as expressing and developing strands in the Jewish tradition according to which God can only be apprehended in one's relationships with others and then only indistinctly: God's "face" cannot be seen. Only his "back" can be apprehended, and this glimpse refers one back to other human beings. One always already has a responsibility to these others. This authority that they possess over the individual is most centrally relevant to the morality of one's actions: One is morally obligated to them. However, it also extends to one's normative-claims. The other calls them into question, and an account of them is owed to her. If this discursive obligation can also be understood as a trace of God, then perhaps in justifying one's norms to the other one may be justifying them as well to God.

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[11] Levinas, *Totality and Infinity*, 81.

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