Justifying and (Self-)Defending a Halakhic-Philosophic Account

Shlomo Zuckier

I wish to start with words of thanks: I very much appreciate the APJ's taking up of this paper and topic as a symposium,[1] and the diverse and skilled panel of respondents that they convened: it is not every day (or every year) that leading philosophers and Jewish law scholars can be convinced to read, much less respond to one's work! In turn, I wanted to thank each of the respondents for taking the time and care to read and react to my paper. Particular thanks go to Rabbi Shalom Carmy, who inspired and guided my drafting of an earlier version of the paper, and to Prof. Dov Frimer, whose article (co-authored with Aharon Enker[2]) I encountered when the paper was at a much more developed stage, and who has helped sharpen areas of disagreement, both then and now. Especial thanks go to Prof. Jeff McMahan, who certainly has ventured outside of his regular scope of study in reading a paper on Jewish law, and to Dr. Shlomit Wallerstein for her very helpful summary of my paper in her response.

I.

Probably the most interesting aspect of my experience reading various responses to my paper was how, in some ways, it is impossible to please everyone with a paper proposing a "halakhic-philosophic account." On the one hand, you will inevitably have scholars of Jewish Law such as Prof. Frimer, who will decry the superimposing of "jurisprudential ideas and theories… upon Jewish Law texts." At the same time, you will have philosophers such as Dr. Wallerstein (and, to a lesser extent, Prof. McMahan), who will assert that "simply stating that the limitations of self-preservation are defined in a certain way because God said so is not the type of answer that philosophical debates aspire to." It might be hard to please everyone, and, for those who aspire to do so by trying to determine when the Jewish legal evidence lines up happily with the jurisprudential categories and when it moves in a different direction, it might be hard to please *anyone*. How can one understand a topic where some of the key positions present themselves based on a divinely granted permission, often at odds with *prima facie* logic, if one can only use philosophical reasoning? And how can one ever engage philosophy in a serious way, if all "the answers must emanate from the halakhic sources themselves"? I will leave it to the reader to answer the Goldilocks question of whether the paper imposed too much philosophy onto the Jewish materials, or not enough (or if it was "just right")?

My goal in writing this paper, and, now, in responding to the various, opposed critiques it has received, is to try to fill the excluded middle between the "Jewish Law Particularists" on the one hand and the "Philosophy of Law Imperialists" on the other. Or, to give it a Jewish flavor, I aim to offer a *katuv ha-shelishi* mediating between these two extremes, not to decide between them but to search for a fruitful way forward. I invite symposium participants to weigh in not only of the paper itself but also on the broader question of whether papers of the sort I

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[1] Shlomo Zuckier, "A Halakhic-Philosophic Account of Justified Self-Defense," *The Torah u-Madda Journal* 16 (2012-13), 21-51.

[2] Aharon Enker with Dov Frimer, "*Ha-Gevul bein Tzorech ve-Haganah Peratit be-Mishpat ha-Ivri*," in Aharon Enker, *Hekhreah ve-Zorekh be-Dinei Onashim* (Ramat Gan, 1977), 212-34. For the remainder of this paper, I will simply refer to the author of that paper as "Prof. Frimer."

presented are helpful or productive in any coherent way. To give my personal perspective, thinking through the topic at hand within its Jewish legal sources while considering philosophical literature has allowed me to better understand the Jewish positions, by seeing where they are apparently explained well by contemporary philosophical positions and where they seem to diverge. In general, having "conversation partners" allows the comparand to be better understood; it is much more difficult to appreciate the significance of a legal topic "in its own right" without considering other possibilities.

II.

Let us move on to several substantial, rather than methodological, critiques among the responses. Prof. Frimer raised one, as did Prof. McMahan and Dr. Wallerstein jointly, and Prof. McMahan brought up several other criticisms, as well.

A.

Prof. Frimer argues that the theme of punishment is central to the topic, and he rejects my focus on forfeiture of right to life rather than on punishment. Prof. Frimer argued in his article that there were two principles, each of them necessary, at work in the scenario of *rodef*: (1) saving the attacked party and (2) punishment, while I argued that there were two types of justified killing in self-defense, the first of which, *rodef*, had two principles: (1') saving the attacked party and (2') forfeiture of life by the attacking party by virtue of what they are attempting. I also argued for another track of justified killing in self-defense, based on the model of *ba ba-mahteret*, and building in important ways upon some sources in the Frimer article. The locus of Prof. Frimer's objection, then, is to (2') within *rodef*, to the fact that I prefer to see the second factor in *rodef* as forfeiture of life rather than as punishment. Following Prof. Frimer's goal of reading the "Jewish Law texts" themselves, we might want to reexamine whether the sources point to each of these principles.

Indeed, Prof. Frimer takes this point very far, claiming that not only do I not see punishment as an operative category, but that I deny the relevance of sin to this topic in any form. He writes:

> "… the element of illegality ("aveirah") in [the Rishonim's] justification of the right of self-defense – a point which Rabbi Zuckier chooses to disregard with no apparent explanation."

The reader is referred to the top of page 30 of the original paper, where I write:

> "In Jewish law, the *rodef* forfeits his life by committing certain acts that are generally punishable [albeit only such acts that infringe upon another's basic rights], and in this case condemn him to death."

See also p. 29 n. 31:

> "the claim we are presenting, that attempting to commit acts (i.e., certain *ma'asei averah*) leads to a forfeiture of one's life, regardless of culpability."

I will leave it to the reader to determine whether I have disregarded the role of sin in my paper.[3]

So if we both agree that it is the aspect of *averah*, combined with the saving of the pursued party, that leads to the justification that a third party kill the *rodef*, wherein lies our disagreement? Why do I reject Prof. Frimer's calling this factor "punishment" and instead invoke rights and forfeiture language?

B.

To put it simply, my impetus for this move is that the "punishment" theory is not without its flaws. Prof. Frimer cites in his response the Rambam, Hilchot Rotzeach, 1:8, which asserts the *rodef* rule. The commentary *Or Sameah* to this passage raises an interesting question: what if one is attempting to kill one's fellow in such a way that he would not receive the death penalty (e.g. an indirect killer, like one releasing a snake to bite his fellow)? Could one kill this sort of *rodef* (absent any other option to save the attacked party)? Now, given Prof. Frimer's focus on punishment as a fundamental basis of *rodef*, one would presume that since the snake-handling *rodef* is not committing a crime worthy of death, it would be prohibited to step in. But such a position would seem to be completely arbitrary and unreasonable!? As the *Or Sameah* says there, if the goal is saving the attacked party's life, why should I care whether his act could receive the death penalty or not?[4] For this reason (and considering similar cases), among others,[5] I rejected the punishment theory. Absent the punishment rationale, how are we to explain the justified killing of the third party? I thus argue in the paper that one forfeits one's right to life by threatening the other party's life.

C.

In opposition to this principle of rights and forfeiture, Prof. Frimer writes:

> The very notion that a person can willingly and consciously forfeit his life, while very appealing to the contemporary mind, is foreign to most of Jewish thought.

Now, in a certain sense he is right, while in a different sense (the sense in which I use the term "forfeit") this statement is incorrect. It is clear that Judaism rejects the idea of willful suicide (as is noted, e.g., in Rambam Rotzeach 2:3). But it is also clear that Judaism has a concept of forfeiture of one's right to life; absent that, every executioner would be a murderer! Cases where one is justified in killing are reasonably characterized as cases where the killed party

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[3] See also n. 4 below.

[4] See my n. 33 to the original article, where I point in this direction. I cite it here for the reader's convenience:

> This does not mean that only regarding sins deserving the death penalty may the category of rodef be invoked; this is not the case. There is no one-to-one correlation between the punishment generally deserved by a sinner and the death he receives when he is pursuing a nirdaf, but it is still the case that the impetus for punishment stems from his sin (as well as from an interest in protecting the pursued party) and the fact that it is generally punished harshly (and here it may be punished in a modified form) rather than from the immorality of the act itself, detached from any legal system.

[5] It is also not clear to me that one can be punished for an act one did not commit. Prof. Frimer places a lot of weight on the intent of the killer, but we will see below that this is problematic, as well.

forfeits his right to life. In fact, this is precisely the concept of מתיר עצמו למיתה (one has "permitted oneself to death") or מתחייב בנפשו ("he owes his life [on account of his actions]"), on which more below.[6] How can one permit oneself to die, given Judaism's rejection of suicide? It is clear that a conception of forfeiture of one's right to life is at work here. It is in that sense of the term "forfeiture" that I present the claim that, given the inadequacy of the "punishment" approach, we should understand the permission of a third party to kill as based on forfeiture of the life of the pursuer, not because he sinned and deserves to be punished, but because he is about to kill and in such a case his right to life is forfeit.[7]

D.

Finally, it is worth considering how much evidence in early sources there actually is for the "punishment" approach. While Prof. Frimer cites many Acharonim who project these two possibilities,[8] we would like to find concrete evidence for this position based on primary texts of Jewish law.[9]

Prof. Frimer cites two Talmudic dicta applied in the context of *rodef*, וכי עונשין מן הדין ("And do we punish based on a logical maneuver?") and "קים ליה מדרבה מיניה" (*sic*, "Give him the greater of the [punishments]!") as purported proof that *rodef* is a punishment.[10] However, these proofs have significant weaknesses. Chazal use the rule אין עונשין מן הדין in a variety of contexts, including cases of impurity,[11] which is certainly not considered a punishment in any straightforward sense of the term. Thus אין עונשין מן הדין appears to be used imprecisely, not necessarily denoting that what is at stake is a punishment *per* se. As for the 'lesser of two punishments' case, the Talmud (*San*. 74a) is very precise in its formulation (which does not include the words קים ליה בדרבה מיניה): "A *rodef* who is pursuing his counterpart [to kill him] and breaks vessels, whether belonging to the pursued party or anyone else – he is exempt. Why? Because he owes his life [on account of chasing the person]."[12] A straightforward reading of this would indicate that the person is exempt because he is liable to be killed, not because that liability is due to a *punishment* per se.[13] So it is not clear what, if anything, the Talmudic prooftexts yield for our question.

Prof. Frimer also offers Maimonides' position as a prooftext, invoking his position in the *Guide of the Perplexed* (3:40 cited at p. 216), the *Sefer ha-Mitzvot* (Negative Mitzvah 293, cited at p. 221),

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[6] Consider similarly the concept of אין לו דמים, which also appears in our *sugya*.

[7] Note that the permission to kill in self-preservation is *not* based on forfeiture, especially in scenarios where there is no certainty.

[8] See Frimer, p. 213, n. 4. One can add to this list R. Shaul Yisraeli ("Pe'ulot Z. eva'iyyot le-Haganat ha-Medinah," Amud haYemini, pp. 142-199, esp. part 3), in an article which was formative to my understanding of this *sugya*.

[9] I based the following analysis on the proofs to the "punishment" approached presented in the Enker-Frimer article and the response to my essay that is part of this symposium.

[10] See Frimer's comments on the bottom of p. 214.

[11] See Sifrei Num 125 (to Num 19:11) and Sifrei Num 126 (to Num 19:14).

[12] דאמר רבא: רודף שהיה רודף אחר חבירו, ושיבר את הכלים, בין של נרדף ובין של כל אדם - פטור מאי טעמא - מתחייב בנפשו הוא.

[13] Of course, how to read this line might depend on how one understood the category of קים ליה בדרבה מיניה, but this is not the place for such an analysis.

and the *Mishneh Torah* (Rotzeach 1:8, cited in his response in the symposium) to argue for viewing "punishment" as part of the *rodef* picture. The argument reads the Rambam in each case as requiring criminal intent, which presumably would correlate well with an approach that based the law of *rodef* on punishment (at least partially). Let us cite each source before analyzing them:

> (מורה ג:מ) ודין זה, כלומר הריגת מי שזומם לבצע עברה בטרם יעשנה, אינו מותר בשום פנים כי אם בשני מינים הללו והם רודף אחר חברו להרגו ורודף אחר ערות אדם לגלותה...
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> (*Guide*, 3:40) The law – I mean the prescription to kill him who wishes to accomplish an act of disobedience before he performs it – is only applicable to two kinds of acts: If one pursues his fellow man in order to kill him, and if one pursues someone in order to expose the latter's nakedness.[14]
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> (סה"מ ל"ת רצ"ג) אבל בשעת חפצו והליכתו לעשות הרי אז הוא נקרא רודף וחובה עלינו למנעו ולעכבו מלעשות את העבירה...
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> (*Sefer Hamitzvot*, Neg. Comm. 293) But at the time that he wishes and goes to do [an act of killing], in that case he is called a *rodef* and it is obligatory to prevent and stop him from committing that sin.
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> (רוצח א:ח-ט) ענין הכתוב שכל החושב להכות חבירו הכייה הממיתה אותו מצילין את הנרדף בכפו של רודף, ואם אינן יכולין מצילין אותו אף בנפשו, שנ' לא תחוס עינך .הרי זו מצות לא תעשה שלא לחוס על נפש הרודף. לפיכך הורו חכמים שהעוברה שהיא מקשה לילד מותר לחתוך העובר במיעיה בין בסם בין ביד מפני שהוא כרודף אחריה להורגה, ואם משהוציא ראשו אין נוגעין בו שאין דוחין נפש מפני נפש וזהו טבעו של עולם.
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> (Rotzeach 1:8-9) The meaning of this verse is that should one intend to hit his fellow a deadly blow, we are to rescue the victim at the cost of the aggressor's hands or, if that is impossible, his life.[15] Behold there is a negative prohibition not to have mercy on the life of the pursuer. Therefore the Rabbis ruled that if a pregnant mother is having difficulty in childbirth, it is permitted to chop up the embryo in her innards, whether with a drug or by hand, because he is like one pursuing her to kill her; and if it is after he removes his head we don't touch him because we do not set aside one life before another and this is the way of the world.

On the basis of these formulations, which say "him who **wishes to** accomplish an act of disobedience… pursues his fellow man," "he **wishes** and goes to do [an act of killing]," and "should one **intend** to hit," lead Prof. Frimer to conclude that "there is a requirement of criminal intent to hit the victim, at the very least."[16] But it is more complicated than that. Let us consider the fact that the first two texts are translations from Arabic into Hebrew, where idioms are not always fully preserved. If we look at alternate (ibn Tibbon) translations for the key phrases, we find the following:

> וזה הדין ר"ל שיהרג **מי שישתדל לעשות** החטא קודם שיעשהו אינו מותר כלל אלא בשני המינין האלו, והוא רודף אחר חברו להרגו, ורודף אחר ערות אדם לגלותה,

[14] Translation from Dov Frimer, "The Right of Self-Defense and Abortion," in *Rambam as Codifier of Jewish Law*, ed. Nahum Rakover (Jerusalem, 1987), 195-216, at p. 203.
[15] The first half of this translation is from Frimer, "The Right of Self-Defense," at p. 205; the second half is by this author.
[16] Frimer, p. 220.

אולם **בעת השתדלותו ובקשו** לעשותו אז ייקרא (מתני' סנה' עג א) רודף וחובה עלינו (מ"ע רמז) שנמנעהו מעשות מה שלבו מתאוה ונצר לו כדי למנעו מן העבירה ואם לא רצה לשמוע אלינו נלחם בו.

In place of "him who wishes to accomplish an act of disobedience… pursues his fellow man" and "he wishes and goes to do [an act of killing]," we have "him who might **attempt** to do an act of disobedience" and "he **attempts** and tries to do [an act of killing]," in both cases translating the word "planning" or "wishing" rather as "attempting." I am no expert in Judeo-Arabic and thus cannot check the originals, but given their range of translations it is far from clear that we can understand there being a particular focus on criminal intent in this case, more than, say the very basic intent to carry out the action, if even that.

And while the Mishneh Torah piece appears somewhat stronger, it giveth and it taketh away. For while the phrase חושב להכות (lit., "one thinking to hit") was written by Maimonides himself, there are a couple of problems in reading this particularly as meaning that one must have criminal intent in order to be killed in a *rodef* scenario. First, Maimonides wrote Mishneh Torah in Mishnaic Hebrew, and it is not immediately clear how one might say "attempt to" in Mishnaic Hebrew, so it is possible that חושב להכות is Maimonides' best approximation of "intending to hit." Furthermore, the very next law in Maimonides appears to classify an embryo as a *rodef*, and it is unlikely that an unborn baby would have criminal intent![17] In fact, Prof. Frimer himself addresses this question, and notes (p. 221 n. 44) "it appears to us to explain that Rambam used the language "*rodef*" for any case where there exists a clash of interests, where the interests of one side is favored over those of the other." In such a case, not only has Prof. Frimer retracted his requirement of criminal intent (within Rambam), he has seemingly allowed Rambam to use the word *rodef* to refer to cases that one might not define as *rodef* at all, but as passive threats!

It thus appears that the argument for *rodef* requiring criminal intent, and it being a form of "punishment," is difficult to sustain, taking into account the Jewish law texts themselves.

E.

In relation of Frimer's invocation of the "Principle of Lesser Evils," I will note two things. First, the principle of rights and forfeiture largely takes that principle into account, (while the self-preservation approach largely does not[18]), and I appreciate his explicating these assumptions. Second, I have a forthcoming article relating to the case of Pinehas that builds upon the principles enumerated in this article (especially section V) and – based on the views of several Rishonim – minimizes significantly the significance of culpability in starting a fight.[19]

F.

In one final note, I will preemptively point (or, really, re-emphasize) that the paper is presenting "**A** Halakhic-Philosophic Account of Justified Self-Defense," and not "**The** Halakhic Account." I am aware that some Rishonim have positions that diverge from my presentation; I simply endeavored to present a compelling reading of the Gemaras, mediated through Rishonim and

[17] This is a complicated passage about which much ink has been spilled; my primary point is not to enter that question but to complicate the presumption that *rodef* is a case of criminal intent.

[18] See the top of p. 42 in the original article, where much of this is hashed out.

[19] It is slated to appear in the forthcoming Orthodox Forum volume, *From Fervor to Fanaticism*, ed. Shmuel Hain and Jeffrey Kobrin.

Acharonim, and sharpened by the use of legal philosophy. I don't think the end result of my analysis conflicts in any way with the Halakhic consensus. If the above is true, I consider this experiment to be a success.

III.

A.

A word about intuitions, relevant to Dr. Wallerstein and Prof. McMahan's objections. The paper, to a certain extent, runs into the issue of the trolley problem, which is known as such because (most) people's intuitive reasoning is liable to endorse mutually inconsistent positions. To a large degree, normative ethics is about balancing intuition in particular cases with generalizing principles, as mediated through considering the application in specific cases (applied ethics) and overall meta-principles (meta-ethics). At times the field can become a real muddle as things tend to not line up fully, as in the case of the trolley problem.

I wonder, and this is a very general and inchoate thought, whether there might be an alternate approach available, which is carried out by those who would take a "halakhic-philosophic," or, more generally, a theological approach. What if in certain cases, the deadlock that is created by the morass of normative ethics can be cleared up by theological dicta of sorts, which determine the law's course in certain cases and resolve the difficulty.

In our case, that would play out as follows. It is intuitive to many (although not to Dr. Wallerstein!) that a personal partiality approach allows the killing of only those who pose a direct threat to the defender, and not the innocent bystander, but it is extremely difficult to draw this distinction based on principles. In such a case, I would argue that we should view the Jewish law principle allowing a right to self-preservation in the face of attack (of הבא להרגך השכם להרגו) but *not* in the competition for resources case as *helpful* in resolving the morass. Of course it is not consistent and thus does not stand up to analytic consistency from a philosophic standpoint (that was the problem in the first place!), but it does confirm our intuitions and allow for a clear law to be in place. In fact, this is the way that all (secular) legal systems work, as well. A law is put in place that may be inspired by, or even be (largely) consistent with, jurisprudential approaches, but is by no means fundamentally beholden to them. The difference is that a theological legal system is accompanied by a Divine approbation. Just like in the case of a *hok*, there is a point at which one can no longer use logical principles to justify or even understand the laws, but (in this case, at least,) it is certainly possible to see their wisdom and logic, as they cohere with human intuition and would lead to the healthy governing of society.

[And, to respond to Prof. McMahan's question of what to do when human intuition and Jewish legal tradition conflict, the two options in such a scenario are attempting to understand the law in light of our intuition (which is what all interpretation is), and, if that fails, to submit to the law even if we cannot understand it.]

Such an approach might frustrate a philosopher (or two!), but it might be precisely the difference between a philosophical approach and a halakhic-philosophic one.

B.

Prof. McMahan pushes me to flesh out further details within type 3 (pp. 49-50), where killing by the threatened party is justified based (on my view) not on the *rodef* category but based the category of *mahteret*, serving as a threat, even without malicious intent or taking any action against the threatened party, on a personal partiality basis.

A few questions are raised:

1. Why would the Torah (or God) support the killing of one innocent person to save another in this case?
2. Why would my presentation allow for killing a person blocking a cave filling with water, but not killing a bystander positioned next to the murderer?
3. Would I draw a distinction between the person in the cave, who I would permit to kill, and a person on a narrow bridge (a common situation, certainly, for Rabbi Nachman!) where the intuition is not to allow to kill.
4. Why would there be lower levels of certainty required to act within the *mahteret* category than there are to act within the *rodef* category?

I believe that some of these questions are related. Because it will help clarify things, let us begin with the fourth question. It is precisely because of my understanding that there are *two distinct principles at work here* that there is *more* leeway for the *mahteret* category than for the *rodef* one. The principle of *rodef* is an objective one, based on justice; anyone who is able to do so must save the attacked party, and, if necessary, kill the pursuer, who has forfeited his right to life. The principle of *mahteret* is meant to allow people to function in the world, a world that at times can be dangerous. People have to be able to function in their homes, and (in the expanded version of *mahteret* beyond the home) they have to be allowed to function in the world. This means that they may be given a dispensation, a concession, if you will, to do things that it might actually be better if they refrained – but such is life. "The Torah was not giving to ministering angels" but to real people, and at times they must be given dispensations in order to be able to function. [To Dr. Wallerstein's point, this is what I mean by a "right" as a trump card.] For this reason *mahteret* has lower standards in order for it to apply than does *rodef*. And this is why the Torah provides a dispensation for one innocent person to kill another. (So much for points 1 and 4.)

On to point 2: I do not think I committed myself at any point to not allow for killing a bystander *if done indirectly*. If one *targets* the bystander and kills him, that would be problematic, unless he was trying to remove the bystander from his way.

And on point 3: I see no real distinction between killing a person whose presence in a cave (or a womb) poses a threat and running away across a bridge, where one incidentally knocks another person to their death (if necessary for their survival). I see no intuitive difference between the two cases.

IV.

As Rabbi Carmy noted, a much earlier version of this paper presented a two stage argument – first arguing for a particular understanding of self-defense in Jewish law, distinguishing self-defense from third party intervention, and then arguing that this understanding can be

extended to corresponding categories in the context of war. In the process of reworking and editing the paper for publication, the war context was shed, and the remaining article – significantly expanded – focused solely on individual self-defense.

The project as it relates to war is born of what I see as a deep problem with the primary sources most often used to justify killing in war – the Netziv (*Ha'amek Davar* to Gen. 9:5) and Maharal (*Gur Aryeh* to Gen. 34:13). These sources are both too weak in some ways and too strong in others, and, despite their vast deployment, it is not at all clear that they can bear the brunt of sustaining a compelling account of just war within Jewish tradition. The idea is that, if one can carry over the argument presented in my paper on self-defense to war, these sources of *rodef* and *ba ba-mahteret* might be able to both ground the ethical basis of war and also offer several "helpful" ramifications on a theoretical level:

1. In cases of self-defense (=*mahteret*), there will be a justification for starting a war (*jus ad bellum*) – even when it is preemptive and based on suspicions rather than certainty of attack.
2. This approach would streamline with what is a common position on the differential standards necessary for justifying self-defense as opposed to third party intervention in war, applying various distinctions (including possibly collateral damage in certain scenarios).
3. Such a construction might also create a set of (fairly common) scenarios where both sides of a conflict are justified in their decision to enter war. Absent such a structure, Jeff McMahon, our esteemed respondent, has argued that the entire structure of classical just war theory would crumble.

Many of these considerations are taken for granted and practiced in military conflicts in a routine manner, although they are not necessarily sufficiently justified in theory.

I hope to write on this further, assuming I find the right opportunity.[20] If and when I do, I will certainly keep Rabbi Carmy's considerations in mind.

V.

I will allow myself the privilege of an excursus on the principle that Prof. Frimer's response opened with, a piece of advice from Prof. Haym Soloveitchik[21]:

> [H]e explained that during my studies, I would be exposed to various jurisprudential ideas and theories. I will, undoubtedly, find many of these very convincing and enlightening. I would, therefore, be tempted to adopt these new concepts and superimpose them upon Jewish Law texts. He advised me to do my utmost to resist such temptation. While comparative law is enriching when it comes to sensitizing one to fundamental issues, essential questions and

[20] A preliminary version of this was given in a paper entitled "Just War in Jewish Law: A New Approach," at UBC on May 14, 2015, and a slightly divergent, Shiur version at Congregation Rinat Yisrael, on Shavuot Eve (May 24th), 5775.

[21] I should stress that, in the several lectures I have heard and number of conversations I have had with Dr. Soloveitchik, I have always learned a great deal.

appropriate terminology, the answers must emanate from the halakhic sources themselves. Jewish Law must be allowed to speak in its own voice.

I find the idea that study of Jewish Law not use philosophical categories but only internal ones in formulating its answers to be very interesting. Firstly, I wonder whether this is best construed as a principle on the basis of a critical historical perspective (A) or on the basis of a theological perspective (B) (or both). I see these two options as diverging as follows:

A. One might argue that imposing 20th century jurisprudential categories onto antique and medieval texts cannot possibly capture the intention of their original authors.
B. Alternatively, the principle might be theological, that true Jewish law that remains within the canon (*masorah*?) of the study of Jewish law may not insert "external" philosophical positions (products of *sefarim hitzonim*?) in the process of understanding Jewish law. In other words, there may be no philosophical inquiry in the Beit Midrash!

The first version of the critique seems sound to me, but I did very clearly note at the outset of my paper that I was not attempting to capture these positions in this historical context but to isolate them as part of a constructive, forward-looking view of the legal system, such that these concerns likely should not stick.

If the second approach is to be taken, it would be fascinatingly similar to the rejection of historicism and psychologism that is described by Rabbi Joseph B. Soloveichik (Prof. Soloveitchik's father) in his analysis of his grandfather Rabbi Hayyim Soloveitchik's Talmudic approach in "מה דודך מדוד", now extended to a third verboten field (although, ironically, by a historian of Halakha!).[22] The question of using "outside wisdom"[23] is an important one for the entire Brisker line, going back to a "proto-Brisker" the GRA, who is cited both as an early proponent of secular wisdom and as someone closed off from anything in the world outside Torah. Rabbi Hayyim Soloveitchik, who was cited in my paper (n. 93), was infamously called "The Chemist" for his analytic method seen as overly scientific. There may well be a pedigree to this principle.

For either formulation of this rule, I see reason for caution, as one wants to be sure that the Jewish legal system is not overwhelmed or redefined by surrounding philosophical theories, from either a historian's or a theologian's viewpoint. But neither reason is cause to abandon the cause wholesale.

If, as Rabbi Joseph B. Soloveitchik wrote, "Out of the sources of Halakhah, a new world view awaits formulation,"[24] one hopes that the worldview be conversant in jurisprudential categories!

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[22] In the relevant passage, the greatness of R. Hayyim is described as his having "purified halakha from all forms of external influence," including a refutation of "the act of psychologization and historicization." See also Hershel Schachter, *Nefesh Ha-Rav* (Brooklyn, NY: Flatbush Beth Hamedrosh, 1994), pp. 12f.
[23] See, e.g., bSan 90a.
[24] *Halakhic Mind* (New York, 1986), p. 102.