

The Philosophy of Jewish Halakha

The APJ's Group Session, APA Central 2022



Wednesday, February 23, 8:00 PM – 11:00 PM

Palmer House Hilton, Chicago, IL

APJ Association
for the Philosophy
of Judaism

What is a Halakhic Law?

Israel Cohen (Hebrew University) | 8:00 PM – 8:45 PM

"Everyone strives after the law," says the man, "so how is it that in these many years no one except me has requested entry?" The gatekeeper sees that the man is already dying and, in order to reach his diminishing sense of hearing, he shouts at him, "Here no one else can gain entry, since this entrance was assigned only to you [...]" (Franz Kafka, "Before the Law").

The Jewish Halakhic system consists of a variety of laws that determine the deontic status of particular actions. These laws, by their nature, have a general aspect; they apply to all similar actions under similar conditions. In this paper I examine the relationship between the general aspect of halakhic laws and the fact that these laws apply to particular actions. The analysis I propose is based on a philosophical account of halakhic internal discussion, which appears in the halakhic literature itself. At the same time, my discussion engages – as a source of comparative inspiration – philosophical discussions of legal and moral laws (Berker, 2019; Chappell, 2020; Enoch, 2020) and the laws of nature (Dretske, 1977; Armstrong, 1983; Lewis, 1983).

The paper consists of three parts: In part I, I present a contrast between two competing theses regarding the "metaphysical order" between the general aspect of halakhic law and its individual cases. According to the one thesis, which I call "Halakhic Generalism" (HG), the general aspect underlies each of the individual cases. According to this view, the content of God's word in His legislation applies directly to action-types, and the token prohibitions are derived from the type prohibitions. According to the opposite thesis, which I call "Halakhic Humeanism" (HH), the general aspect is nothing but the sum of all the individual cases. According to this view, the content of God's word applies directly to action-tokens, and the action-type wording of the laws is just the way in which we, with our limited cognitive abilities, mediate the commandment of God over all tokens. In other words: according to HG, God in His legislation determines a

prohibition on *properties of actions*. In contrast, according to HH, God in His legislation determines a prohibition on *sets of actions*. In this part of the paper I also discuss the logical, metaphysical, theological and normative implications of these two views.

In part II I argue that the HH has the power to justify a unique and puzzling halakhic principle. According to this principle, in cases of normative over-determination – cases where the same action is prohibited in virtue of two different halakhic laws or more – then "a prohibition does not apply to a prohibition" (Babylonian Talmud, Tractate Yevamot 32b-34a and more). This principle is considered a central principle and is codified by all the major decisors. Some commentators have seen it as applying only to question of punishment, but many see it as a more basic principle. According to the latter interpretation, the halakhic normative facts do not accumulate (hereinafter: NCP). The latter interpretation is also supported by the similarity of this principle to other halakhic principles – "an oath does not apply to an oath" and "an impurity does not apply to an impurity". Despite the centrality of the principle, its origin and justification remain obscure. I argue that this principle reflects an extensional conception of the halakhic law, and this conception, in turn, is derived from the Humean view.

In part III I compare my justification to alternative justifications for NCP. The two central alternative justifications have been dubbed "Halakhic Naturalism" and "Halakhic Nominalism" in the research literature (Lorberbaum, 2015; Silman, 2012; Wozner, 2016; Zilberg, 1981). Both proposals suffer from ambiguity, so discussing them requires careful reconstructive work. Then, I argue that on the one hand, these reconstructions have one of two problems: either they do not provide the required justification, or they are too implausible. And, on the other hand, some of the reconstructions of the Nominalist proposal incorporate the basic insight of the Humean proposal, but with theoretical costs that the Humean proposal avoids. This leads me to argue that the Humean view provides the best explanation for NCP. This fact gives us a good reason to accept the Humean view, at least as long as no other alternative justification for NCP is offered.

Halakhic Ontologies: Some Preliminary Reflections

Shlomo Zuckier (Notre Dame) | 8:45 PM – 9:30 PM

This paper puts forward a fundamental, maybe the most fundamental, question about Halakhah: What is “Halakhah”? This question is similar to inquiries regarding the definition of “law” in general, but with the complicating factor of Halakhah’s religious element and all that entails. In recent years several studies have probed at the question of how to properly translate the term “Halakhah,” or have raised the question of to what extent Halakhah is aimed at normativity. This paper takes aim at this question in a more direct manner.

This question exists at several levels. First, we may ask, as Rafe Neis does in a recent provocative essay, whether “Halakhah” is properly translated and understood as “Jewish Law” at all. Neis points both to various choices made throughout Jewish Studies scholarship in centering the legal aspects of Judaism and to some roads not taken, including a variety of alternative terms that might accurately characterize Halakhah (or at least particular areas of Halakhah), including “spiritual discipline, paideia, gynecology, ritual, classification, dispute resolution, ethics, scholasticism,” and even “societal discourse.” As several other studies, including a recent volume-length study by Chaim Saiman, have considered on a broader scale, even if one accepts the term “law” as a descriptor of “Halakhah,” it is still necessary to consider the relative weight of administrative law versus expressive law as presented throughout Jewish tradition through the ages.

This paper expands the scope of the inquiry further by asking about Halakhah’s ontology, not just the question of how to translate “Halakhah” but, more fundamentally, what *is* Halakhah? This question is similar to inquiries regarding the definition of “law” in general, but with the complicating factor of Halakhah’s religious element and all that entails. It considers various possibilities with regard to “Halakhah”’s ontology and

meaning: (1) “Halakhah” is identified with prescriptive and *authoritative legal texts*, or maybe the most influential text of this nature (e.g., Shulhan Arukh); (2) “Halakhah” is identified with what is *regularly practiced* in Jewish communities (i.e. social norms), a prospect which has to contend with varying communal practice; (3) “Halakhah” is defined as an objective set of *normative facts*, written on Heavenly tablets, as it were (a view with adherents in both the Second Temple period and the 20th century); (4) “Halakhah,” following its literal sense meaning “the way,” as a *process* by which the Jewish people, building upon tradition, shapes its practice over time, a proposition which must also explain who is entrusted with this responsibility.

While considering each of these possibilities and their descriptive strengths and weaknesses, this paper also considers a related question. What metaphor(s) are most appropriately used to describe Halakhah? Should Halakhah (whether or not it is defined as law) be understood as analogous to science (as Joseph B. Soloveitchik had it), as a discursive tradition (in Asadian fashion), as an ethical system (following Eliezer Berkovits’ position), or as something else entirely?

This paper, in its full form, will explore the ontology of Halakhah not only as an independent analytical question but also as a historical question. It will consider historical debates over the relative weight of pluralism and monism and centralized versus decentralized authority in determining Halakhic conclusions. In addition, it will offer an analytical consideration of the ontology of Halakhah that draws on recent trends in various fields: from the field of critical legal studies, the interaction between law and religion in the academy, especially as it relates to religious legal systems; from cultural historical studies, challenges to the law/narrative dichotomy and the non-regulatory impact of ostensibly Halakhic texts; and from analytic legal theory, the effect of divinity claims on the status, nature, and authority of law.

A Non-Ideal Experimental Philosophy of *Halakhah*

Mark Zelcer (QCC, CUNY) & Leib Litman (Lander College, NY) | 9:30 PM – 10:15 PM

In an attempt at a first experimental discussion of Jewish philosophy we propose a justification and an outline to a philosophical approach to *Halakhah* (Jewish law) that emerges from Joseph Soloveitchik's broad philosophical program.

The justification for our approach appeals to its affinity with Soloveitchik's program. He develops an approach to the *ta'amei ha-mitzvot* problem that emerges organically exclusively from the indigenous Jewish data of the *halakha*. As he sees it, the way to treat the *ta'amei ha-mitzvot* problem is to understand the process by which an ideal Halakhic Agent's phenomenology emerges from his ontology via the commandments, thereby giving us the literal "*ta'am*" or "taste" (viz. phenomenology) of the commandments. To unpack this a bit:

The approach has three components. (1) establishing the ontology as provided by the *halakha*. Halakhic requirements create objects. For example, it gives us social objects like a *minyan* (quorum) or a *beit din* (court). It also provides physical objects like *reshut ha-rabbim* (public domain), *mikvah* (ritual bath), or document (*shtar*). (2) The commandments provide the route to character development. Using the halakhic objects to perform the commandments engenders certain feelings. More precisely it gives rise to a unique phenomenology. When properly performed it creates a specifically halakhic phenomenology. (3) This phenomenology can be uniquely described as the phenomenology of Halakhic Man. It is unique in many ways and does not correspond to any other standard personality type.

Sorting that out is Soloveitchik's philosophical program. Our approach is related but considerably more modest. Ours is non-ideal and focuses largely on (3) above, taking his (1) for granted and his (2) for granted as a general approach. However, instead of Soloveitchik's complete introspective account of an idealized Halakhic Man we use experimental data to examine actual ordinary halakhic Jews in an attempt to grasp a very small piece of the phenomenology that emerges from the halakhic way of life. We do this by looking at data about elicited moral-type judgments from halakhic Jews to explore their phenomenological

experience.

We use data from a study that uses the familiar Trolley Dilemma paradigm. The Trolley Dilemma is unique in its ability to activate almost universal response tendencies (favoring utilitarian responses). The study found that even extremely strong and seemingly universal moral intuitions regarding the Trolley Dilemma can be altered by religious and cultural influences, specifically halakhic influences. The study identified two mechanisms that accomplish this.

The study concluded that cultural influences on judgments to the Trolley Dilemma occur in two ways: first through an explicit process of accommodating to *Halakhah's* knowledge schemas. Second, it found that cultural influence on moral decisions also occurs through a more general integration of a culture's worldview into one's global pattern of judgment and behavior. The action-focused *Halakhic* system of ritual law appears to influence moral intuitions by way of reorienting the individual toward actions and their direct consequence. Given this, we begin to see a non-ideal manifestation of Soloveitchik's solution to the *ta'amei ha-mitzvot* problem by showing that having a conceptual ontology that is molded by halakha, a grounding in halakhic history, and perhaps also guided by a halakhic way of life, generates, at least in the part investigated, a phenomenology that, if not culturally unique, differs from what appears to be universal moral intuitions.

If Soloveitchik's approach is a valid way toward a solution to the *ta'amei ha-mitzvot* problem, what we are discovering is the actual effect that the halakhic ontology, or at least the effect of taking a halakhic conceptual framework seriously, ultimately has consequences for moral judgments and does indeed make Halakhic Men phenomenologically different from other types of people. Future studies should be able to study other phenomenological differences between halakhic Jews and others to come up with a realistic, more complete, portrait of ordinary Halakhic Man.

As a consequence we can also study how close Soloveitchik came in his various descriptions of Halakhic Man. If he is correct, then out of the sources of halakhah should emerge the kind of Halakhic Man he described, or someone who is empirically close enough.

`Cut Off its Head, Will it Not Die`?! : (Un)Intentional Action in the Talmud

Ben-Zion Ovadia (Tel Aviv University) | 10:15 PM – 11:00 PM

P'sik reishah (cutting off its head) is the name of a Halakhic principle which roughly means one should not perform an action if another prohibited action accompanies it – even if one had no intention of performing the accompanying action. This generalization is based on various situations that the Talmud identifies as *p'sik reishah* cases. How to exactly understand this principle, however, is a controversial matter in Halakhic literature.

The concept of *p'sik reishah* originates in Abaye and Rav's quoting "Rabbi Shimon concedes in a case of *p'sik reishah ve'lo yamut* (*cut off its head, will it not die?*)" predominately in Talmudic instances regarding Shabbat observance. This sentence should be read as a rhetorical question: Can a creature live after its head is cut off? This expression is interpreted in the Talmud as referring to a prohibition on the agent, preventing him from performing the action. One is not off the hook from the prohibition of killing a living creature on Shabbat if one cuts off its head even if one 'didn't intend' to kill it – just decapitate it. "*P'sik reishah*" then, is a name for many cases that enter under its umbrella but earns its name from this paradigmatic case.

In their saying "Rabbi Shimon concedes in a case of *p'sik reishah ve'lo yamut* (*cut off its head, will it not die?*)", Abaya and Rava refer to Rabbi Shimon's view that "a person may drag a bed, chair, or bench on the ground on Shabbat provided that he does not intend to make a furrow." Rabbi Shimon permits dragging a bench on Shabbat even if while dragging it, one will make a furrow in the ground (a prohibited action on Shabbat), provided that one doesn't 'intend' to make a furrow. Thus, according to Abaye and Rava, Rabbi Shimon *permits* the unintended consequence of dragging the bench (a furrow) but *prohibits* the cutting off the head of a living creature that has the unintended consequence of killing it. What is the difference between these cases?

Maimonides, for example, argues that the difference lies in the *degree of likelihood* that the prohibited action must be performed as well: if one isn't certain that the prohibited action will result, the ('original') action is permitted. But Rabbi Shimon didn't mention *uncertainty* as a condition for permitting dragging the bench; he seems to hold that even if the making of the

furrow is foreseen with certainty, one is still permitted in dragging the bench, so long as the furrow was not an intention of his.

The rest of this talk is devoted, then, to utilize some views in Action Theory to point out two features of this paradigmatic case that distinguish it from other cases that the Talmud excludes from the category of *P'sik reishah*. The distinction lies in the intentional aspect of the different action's cases. I suggest that these two features can explain our 'harsh' intuitive judgement regarding the original *p'sik reishah* incident - why the excuse "I didn't intend to kill it" is considered ridiculous, whereas in other, presumably very similar situations, the unintended result of an action is more acceptable.

First, despite that in both cases the agent's *purpose* in performing the original action isn't to perform the prohibited action, there is a distinction in terms of *the way in which one performs the action* that leads to the unintended result (the death of the creature/the furrow). The essential question is, then, what exactly intentional action is? Harry Frankfurt argued that intentional action is an action that is done when one *directs* and *adjusts* it to one's goal. Frankfurt's view nicely explains why one's making a furrow isn't *intentional*, since if the furrow was one's goal in dragging the bench, he would have directed and adjusted his actions such that it optimizes the result but obviously, he did not. In the *p'sik reishah* situation, things are more complicated. On the one hand, the goal of killing the creature did not *direct* the agent in his action, since he had no such goal. On the other hand, the action he performed did cause the creature's death in an optimal way. Indeed, it seems that even if the agent's goal *was* to kill the creature, he wouldn't have changed the way in which he actually performed it. The first unique feature of the *p'sik reishah* case is then the way in which the action has been performed – it led to the prohibited consequence in an optimal way.

By itself, though, this unique feature of the *p'sik reishah* case cannot explain our harsh intuitive judgement in this case as compared to other cases, for example, dragging the bench, since one may insist that the creature's death wasn't the agent's goal; his action wasn't *intentionally* to kill that creature. The second unique feature, then, lies in the nature of the relevant action – the act of killing. In a series of papers, Joshua Knobe has basically argued that people have a strong tendency to judge actions that produce harm as actions that were performed

intentionally, more than actions that hadn't produced harm. On this basis, I want to suggest that an agent's statement that "I didn't intend to kill the creature" sounds disingenuous.