

# Nominalism and Realism Again

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In the years since Daniel Schwartz's publication of "Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law" in 1992 and my response "Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment" in 1999,<sup>1</sup> scholars seem to have reached a consensus of sorts that revises the rigid divide between a Sadducean-Priestly realism and a Pharisaic-rabbinic nominalism: Sadducean or "priestly" law is predominantly realist whereas Pharisaic law exhibits both realist and nominalist tendencies. Schwartz now agrees that "it is clear that realism is to be found in rabbinic law"<sup>2</sup>; Christine

- 1 Daniel Schwartz, "Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law," in *The Dead Sea Scrolls: Forty Years of Research*, ed. D. Dimant and U. Rappaport (Leiden: Brill, 1992), 229–40; Jeffrey L. Rubenstein, "Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment," *DSD* 6 (1999): 157–83. Schwartz developed these ideas in a second article published in 1992, "Between Priests and Sages in the Second Temple Period," in *Variety of Opinions and Views in Jewish Culture II*, ed. Dror Kerem (Israeli Ministry of Education and Culture, 1992), 63–79 (Hebrew). He further elaborated on his claims in "Qal vahomer Arguments as Sadducean Realism," *Massekhet* 5 (2006): 145–56 (Hebrew), and "On Pharisees and Sadducees in the Mishnah: From Composition Criticism to History," in *Judaistik und neutestamentliche Wissenschaft: Standorte, Grenzen, Beziehungen*, ed. L. Doering et al. (Göttingen: Vandenhoeck & Ruprecht, 2008), 133–45. And see the following note.
- 2 Daniel Schwartz, "Priestly Judaism vs. Rabbinic Judaism: On Natural Religion and Religion of Choice," chapter 2 of *Judeans and Jews: Four Faces of Dichotomy in Ancient Jewish History* (Toronto: University of Toronto Press, 2014), 40, and throughout section III. (Henceforth: Schwartz, *Dichotomy*). A version of this chapter of *Judeans and Jews: Four Faces of Dichotomy in Ancient Jewish History*, including some more detailed responses to my 1999 article, was added to the Hebrew section of this volume (pp. 139-54 below) after the present article was already in proofs. Due to the late date of the inclusion, I was not able to add cross-references to this Hebrew version or address Schwartz's additional arguments.

Hayes, who wrote a detailed article in support of Schwartz's initial thesis, suggests "the difference between rabbinic law and Qumran law is not that the former is exclusively nominalist while the latter is realist. Rather, as I have been arguing, rabbinic law differs from Qumran law in that it incorporates a strain of nominalism according to which epistemological certainty in general, and empirical considerations in particular, may occasionally be devalued or overruled in the determination of law"<sup>3</sup>; Vered Noam, in her study of corpse-impurity, concludes: "Tannaitic halakhah embodies a realistic perception coupled with certain 'nominalistic' aspects"<sup>4</sup>; and Aharon Shemesh, in his book on Qumranic and rabbinic law states: "'Realism' is a dominant characteristic of priestly halakhah ... Many rabbinic halakhot exhibit similar realistic perceptions. Nevertheless, over the course of time, rabbinic literature developed a growing tendency toward a nominalistic perception of the law."<sup>5</sup> This view is not far from what I suggested, that both priestly and rabbinic law was fundamentally realist, but that a degree of nominalism developed in rabbinic law as the worldview of rabbinic Judaism became increasingly different and estranged from that of the Bible. So on one level there is little need to reenter this battleground. However, there still appears to be disagreement and confusion over a number of issues, including the extent of rabbinic realism; the understanding of particular discrepancies between priestly and Pharisaic-rabbinic law; the relationship between realism, "nature," and "natural"; the degree to which nominalism is attested in priestly law;<sup>6</sup> and the role of exegesis in determining law. Here I will address these and other concerns with the hope of achieving greater

- 3 Christine Hayes, "Legal Realism and the Fashioning of Sectarians in Jewish Antiquity," in *Sects and Sectarians in Jewish History*, ed. Sacha Stern (Leiden: Brill, 2011), 129. See too p. 132: "The rabbis are not categorically anti-realist or anti-empirical. However, appeals to the natural order, to 'the way things really are' and to empirical considerations are weighed among other considerations and at times overruled."
- 4 Vered Noam, "Ritual Impurity in Tannaitic Literature: Two Opposing Perspectives," *JAJ* 1 (2010): 95.
- 5 Aharon Shemesh, abstract of *Halakhah in the Making: The Development of Jewish Law from Qumran to the Rabbis* (Berkeley: University of California Press, 2009). See too p. 134.
- 6 See Noam, "Ritual Impurity," 101–2, who argues that the Qumran laws on corpse impurity are "moderate augmentations" of biblical law and not a fully developed realist "system."

clarification and continuing the rich insights that have emerged from these scholarly debates.

## I. Legal “Systems” and Comprehensive Legal Epistemologies

At the outset it is important to recall the motivation for proposing a comprehensive and system-wide theory to account for the differences between priestly and Pharisaic-rabbinic law. Many modern scholars, reared in the tradition of Western thought, find it unsettling to be confronted by a large body of data that defies neat and tidy conceptualization. Law, in particular, should be principled, rational, and, in some sense, philosophically grounded. That the hundreds or thousands of debates between two legal traditions should be just that—hundreds or thousands of debates over a myriad of diverse and unrelated issues—clashes with our propensity for philosophical generalization. By our standards there appears to be something ignoble, even petty, certainly primitive, for legal thinkers to argue over minutiae rather than over fundamental ideas. That we all routinely use the term “system”—the priestly and rabbinic legal “systems”—presupposes that we are in fact dealing with a “system,” a coherent structure with interrelated and organized elements.<sup>7</sup> A system, we expect, can be conceptualized and described in general and principled ways.

Moreover, the degree of animosity and even violence that resulted from these ancient legal disputes suggests to us moderns that some larger principle must be at work. Is it plausible that the Qumran sect retreated to the Judean desert over a couple dozen disagreements about trivial points of law? Could they have felt so outraged that the Pharisees ate locusts without slaughtering them in the right way and did not understand how impurity travels upstream that they hauled themselves off to a God-forsaken wilderness to lead a purer life? Would the Jewish people indeed have pelted a Sadducean priest with citrons because he had the audacity to pour a water libation on the bottom, rather than the top, of the altar? No, we say to ourselves, there must be something larger, more fundamental, more principled and noble, at stake.

7 See, e.g., Schwartz, “Priestly Judaism vs. Rabbinic Judaism,” n. 60. “Here I allude to yet another difference between the two legal systems.” But I do not mean to single Schwartz out, as we all do this.

This same impetus has produced efforts to discern general principles and ideas underlying disparate opinions within rabbinic law itself. Most common, perhaps, is the search for systemic differences between the Houses of Hillel and Shammai, or “schools” as they are often called, implying “schools of thought.” R. Eliezer’s atypical and idiosyncratic rulings have been analyzed along similar lines, most notably by Yitzhak Gilat.<sup>8</sup> Likewise, scholars have sought fundamental differences between the “schools” of R. Ishmael and R. Akiba, and even among the opinions of the students of R. Akiba. Attempts have also been made to discern general principles behind the debates of various Amoraim.<sup>9</sup> This interest, of course, begins within the Talmuds themselves, as Amoraim often attempt to find a more general principle underlying several opinions of a given Tanna and to associate the rulings of several Tannaim on disparate particular questions with the same principle. The Bavli Stammaim in turn introduce even more general and abstract principles to encompass a greater breadth of tannaitic opinions, a trend that continues among the talmudic commentators.<sup>10</sup> There is certainly much to recommend these endeavors, as the particular rulings of many sages sometimes are indeed functions of more general principles or abstract ideas. At the same time, due caution is needed, as we can frequently discern incongruities between the principles articulated by later sages and the earlier positions they purportedly explain. In many cases, the more abstract and general the principle, the greater the degree of incongruity.

Schwartz in fact begins his Hebrew article “Between Sages and Priests” with a survey of earlier scholars who proposed systematic, comprehensive explanations for the divide between the two “systems” of law.<sup>11</sup> (In this article I follow Schwartz in treating “Sadducean,” “Qumranic,” and “priestly” law as synonymous, as sharing a fundamentally similar legal outlook, and likewise Pharisaic and rabbinic law, despite the complexities of this issue,

8 Yitzhak D. Gilat, *Rabbi Eliezer ben Hyrcanus: A Scholar Outcast* (Ramat Gan: Bar-Ilan University Press, 1984).

9 Barak Cohen, *The Legal Methodology of Late Nehardean Sages in Sasanian Babylonia* (Leiden: Brill, 2011).

10 Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization* (Tübingen: Mohr Siebeck, 2002); Jeffrey L. Rubenstein, “The Explanation of Tannaitic Sources by Abstract Principles,” in *Netivot Ledavid: Jubilee Volume for David Weiss Halivni*, ed. Y. Elman, E. Halivni, and Z. Steinfeld (Jerusalem: Orhot Press, 2004), 275–304 (Hebrew).

11 Schwartz, “Between Priests and Sages,” 63–64.

of which we are all aware.) He mentions the theories of Abraham Geiger, who argued that differences in political philosophy underpinned the legal disputes between the Pharisees and Sadducees; J. Z. Lauterbach, who saw the Sadducees as principled biblical literalists as opposed to the Pharisees who relied on oral traditions; Louis Finkelstein, who sought a sociological explanation, arguing that Pharisaic law reflected the interests of the urban classes while Sadducean law was that of land-holding aristocrats; and Yaacov Sussman and others, who see the Sadducean law as embodying “strictness” where the Pharisees tend toward “leniency.”<sup>12</sup> Schwartz briefly notes the problems with each of these comprehensive and large-scale theories—and then immediately proceeds to propose his own comprehensive and large-scale theory of realism vs. nominalism. The motivation to find such an explanation is understandable, the appeal clear; but given these failures of the theories of the past, one might have concluded that the problem is not that the correct theory has yet to be discerned, but that the endeavor itself is futile. Ancient Jewish law in any given manifestation, whether priestly or rabbinic, is simply too diverse, complex, and multifaceted; too vast in the different areas it encompasses; too protean in its own sources and history, to be characterized under a single conceptual or theoretical rubric.<sup>13</sup>

The rabbis, in particular, were not a monolithic group, not simply a new name for the Pharisees, but an amalgamation of individuals and groups or schools, of which the Pharisees in whatever form they survived the destruction were but one element. Shaye Cohen’s classic article, “The Significance of Yavneh: Pharisees, Rabbis, and the End of Jewish Sectarianism,” brilliantly emphasizes that rabbinic Judaism managed to include different views of all sorts and achieved a form of coexistence, even if we recognize that there is a degree of anachronism in the extent to which Cohen argued that dispute was encouraged or idealized.<sup>14</sup> “The end of Jewish sectarianism” was accom-

12 Schwartz, “Between Priests and Sages,” 64, with complete references. On this question see Cana Werman and Aharon Shemesh, *Revealing the Hidden: Exegesis and Halakha in the Qumran Scrolls* (Jerusalem: Bialik Institute, 2011), 141–42 (Hebrew).

13 Certainly on a smaller scale one will find many principles and general values underpinning a number of particular laws in many legal traditions. Cf. the observations of Yair Lorberbaum in this volume, section IV, “Are Generalizations of the Type ‘Halakhic System X is Realistic/Nominalistic’ Possible?”

14 Shaye J. D. Cohen, “The Significance of Yavneh: Pharisees, Rabbis, and the End of Jewish Sectarianism,” *HUCA* 55 (1984): 27–53; Daniel Boyarin, *Border Lines:*

plished by absorbing disparate earlier elements and tolerating a diversity of opinion. That the opinions are attributed to individual Tannaim, and that these Tannaim number in the hundreds, point to a diverse, heterogeneous body of legal tradition. There may be some hyperbole in Cohen's claim that "rabbinic Judaism is dominated by pluralism, the ideology which allows the existence of conflicting truths. The truth is many, not one."<sup>15</sup> But whether we call rabbinic Judaism truly "pluralistic" or simply diverse and inclusive, this characteristic suggests that rabbinic law will not easily be identified with a single legal theory.

Moreover, as Seth Schwartz has suggested, priests were probably represented in significant numbers among the early rabbis: "We may speculate that the rabbis whom later tradition assigned to the immediate post-Destruction period were the battered, drastically reduced remnant of the large pre-Destruction class of legal/religious functionaries, many of whom were probably priests and/or sectarians."<sup>16</sup> He notes that many Tannaim are identified as priests, including R. Tarfon, R. Ishmael, R. Zadok, R. Yose the Priest, R. Judah the Priest, R. Eleazar b. Azariah and others.<sup>17</sup> Indeed, in Schwartz's view, "some of the material of priestly origin actually preserved in the Mishnah, Tosefta and halakhic midrashim is attributed to named priests,"<sup>18</sup> and he accordingly concludes that "the priestly Rabbis' contribution to Rabbinic Judaism was apparently considerable."<sup>19</sup> Catherine Hezser has collected a list of rabbis of priestly descent, both Tannaim and Amoraim, and likewise suggests that they "might have constituted a considerable proportion of the entire rabbinic network."<sup>20</sup> Azzan Yadin has argued that R. Ishmael was of priestly descent, and demonstrated affinities between the interpretive

*The Partition of Judaeo-Christianity* (Philadelphia: University of Pennsylvania Press, 2004), 155–201.

- 15 Cohen, "Significance of Yavneh," 47.
- 16 Seth Schwartz, "The Political Geography of Rabbinic Texts," in *The Cambridge Companion to Rabbinic Literature*, ed. Charlotte Fonrobert and Martin Jaffee (Cambridge: Cambridge University Press, 2007), 77.
- 17 Seth Schwartz, *Josephus and Judaeo-Politics* (Leiden: Brill, 1990), 101–2.
- 18 *Ibid.*, 104.
- 19 *Ibid.*, 105.
- 20 Catherine Hezser, *The Social Structure of the Rabbinic Movement in Roman Palestine* (Tübingen: Mohr Siebeck, 1997), 267.

methods and halakhic rulings of R. Ishmael and the authors of MMT.<sup>21</sup> For that matter the Pharisees, too, probably counted a fair share of priests among their number. Even if we do not believe that Josephus, a priest, was a card-carrying member of the Pharisees, his claim to have joined the group for some time is certainly plausible and such affiliation may well have been an attractive option for other young priests.<sup>22</sup>

It is therefore no surprise to find that priestly descent continued to count a great deal among the rabbis themselves. Hezser observes of the Palestinian Amoraim that: "Some rabbis wanted Torah scholarship to be the major criterion for determining a rabbi's status. Nevertheless hereditary criteria such as priesthood seem to have continued to play a role."<sup>23</sup> Geoffrey Herman has documented the importance of priestly lineage among Babylonian rabbis: leading Babylonian sages were of priestly descent (Shmuel, R. Hisda, Rabbah, Abbaye, R. Ashi, etc.), others married daughters of priests (Rava, R. Pappa, etc.) and many Amoraim whom Geonim considered heads of the academy were priests or married into priestly families, suggesting that attaining the highest ranks among the Amoraim depended on priestly lineage to some extent.<sup>24</sup> The esteem of lineage in the Sassanian world is well known, and lineage in the Roman empire was likewise extremely important, despite various measures taken over the centuries to expand Roman citizenship. However important knowledge of Torah in theory as the exclusive measure of a sage's merit and status, in practice lineage continued to be a crucial factor.

The presence of rabbis of priestly descent and the significance of priestly lineage among rabbis (and Pharisees?) makes it difficult to see our issue in terms of the "dichotomy" that Daniel Schwartz proposes, or to accept the claim that sages and priests "illustrate the sociologists' classic distinction

21 Azzan Yadin, "4QMMT, Rabbi Ishmael, and the Origins of Legal Midrash," *DSD* 10 (2003): 130–49. See, however, the comments of Werman and Shemesh, *Revealing the Hidden*, 141–43.

22 Whether Josephus was a Pharisee, as he claims in *Life* 12, is debated by scholars; see Jonathan Klawans, *Josephus and the Theologies of Ancient Judaism* (Oxford: Oxford University Press, 2012), 6–7, 137–39, and the literature cited there. In *Life* 198, Josephus refers to a Pharisee named Jozar who "came of a priestly family."

23 Hezser, *Social Structure*, 269.

24 Geoffrey Herman, *Hakohanim bebabel bitequfat hatalmud* (Master's thesis, Hebrew University, 1981); see too Jeffrey L. Rubenstein, *The Culture of the Babylonian Talmud* (Baltimore: Johns Hopkins University Press, 2003), 80–101.

between ascribed and achieved status.”<sup>25</sup> Rabbinic status also depended in part on “ascribed” facts of lineage. Moreover, it would have required some study of tradition for a priest to achieve status among Sadducees. Clearly he had to master the requisite knowledge so as to know what to do in the temple on a daily basis, and much more study would have been required to know how to deal with complicated or rare situations, and presumably even more study to achieve high status among his priestly colleagues as an authority on priestly tradition. The Qumran sect likewise engaged in a great deal of biblical study, and the status of the Teacher of Righteousness, whoever he was, probably owed a great deal to his knowledge, as perhaps did the status of other leaders of the group, not all of whom need have been priests. Consequently there was probably a substantial overlap between the status-claims of priests, Qumran sectarians, and Pharisees-rabbis in practice, even if in theory their authority devolved from different sources.<sup>26</sup> It is worth recalling that Louis Ginzberg concluded of the version of “the Damascus Document” known from the Cairo Geniza that it was the work of Pharisees because many of the laws had such affinity to Pharisaic-rabbinic halakhah (“with the exception of a single passage.... in our document we have a Pharisaic book of law”).<sup>27</sup> Discovery of the Qumran scrolls made it clear that this was a mistake. But it seems very unlikely to me that a great scholar like Ginzberg could have identified the “priestly” law as Pharisaic if the two legal traditions are in fact as fundamentally different as Schwartz posits.

Over and above this larger point, Schwartz tries to dismiss attestations of realism among the rabbis by focusing on their attribution to priests, to rabbis of priestly descent, or to other anomalous figures. He notes that Vered Noam has shown Eliezer b. Hyrcanus’ views are particularly realistic, but claims that for this reason he was excommunicated, and also suggests that he may have been a priest. Schwartz recognizes that a number of realistic opinions are attributed to R. Dosa b. Hyrcanus and opines that this sage was “the flagship for the realistic point of view,” but explains that Dosa’s

25 Schwartz, *Dichotomy*, 22.

26 Cf. Lutz Doering, “Jewish Law in the Dead Sea Scrolls,” in *The Hebrew Bible in Light of the Dead Sea Scrolls*, ed. N. David et al. (Göttingen: Vandenhoeck & Ruprecht, 2012), 457–58.

27 Louis Ginzberg, *An Unknown Jewish Sect* (reprint; New York: Jewish Theological Seminary, 1970 [1922]). Chaim Rabin came to the same conclusion, *Qumran Studies* (Oxford: Oxford University Press, 1957), esp. 82–94.



opinions are rejected by other rabbis. A realist opinion attributed by the Bavli to a Galilean traveler is an aberration because other sources suggest the term "Galilean" was pejorative or disdainful "and should not be assumed to represent the views taught by rabbis who stood behind that work." Similarly, Christine Hayes notes that the realist view in the calendar controversies in *m. Rosh HaShanah* are attributed to a "priestly figure," R. Dosa b. Hyrcanus (or Harkinas), and R. Eleazar b. Zadok, a priest.<sup>28</sup> But so what? If rabbinic Judaism is so overwhelmingly nominalist as a function of achieved status, we should not find any realist opinions advocated by rabbis. Whatever the origins of Dosa b. Hyrcanus/Harqinas, Eleazar b. Zadoq, and R. Eliezer b. Hyrcanus, they are rabbis because of their knowledge of Torah, and their opinions, according to Schwartz's theory, should not differ in this respect from those of other rabbis. On the other hand, if we see these rabbis as possessing older "priestly traditions" (and it is not clear that their opinions are older than, or coeval with and simply different from, those of their disputants), then what is to say that a great body of rabbinic tradition is not older and priestly, even if not identified as such, much as Seth Schwartz suggests? Many mishnaic traditions are unattributed, not identified with a particular sage, and could originate in older priestly traditions, especially traditions that have to do with sacrifices and purities.

Nor are Daniel Schwartz's other efforts to dismiss such realist traditions among rabbis persuasive. R. Eliezer was not banned (in the rabbinic imagination) because of his priestly realism, but because he refused to accept the majority decision (in the famous "Oven of Akhnai" stories of the Bavli and Yerushalmi; no tannaitic source dismisses R. Eliezer's opinions or suggests he was banned). Not all of Dosa b. Hyrcanus' opinions are disputed and rejected. No evidence suggests the Bavli disregards all traditions ascribed to Galileans, or even that this was such a term of opprobrium, or that the opprobrium attached to their legal traditions rather than their social status or provenance. The realist opinion (in Schwartz's view) attributed to the "sons of the high priests" in *m. Ketub.* 13:2 and opposed by (the nominalist)

28 Hayes, "Legal Realism," 127–28 and n. 16. Hayes in fact writes that the "text therefore supports Schwartz's claim that realist approaches to the law are more typical of priests and groups with a priestly orientation." This is not really what Schwartz claimed, at least not in his original article. At issue is not what was "more typical," but whether realist approaches to law fairly could be said to characterize rabbinic Judaism too. On Dosa b. Hyrcanus as representative of realism see too Schwartz, "On Pharisees and Sadducees," 140–43.

R. Yoḥanan b. Zakkai remains a legitimate rabbinic opinion, and nothing in that mishnah itself suggests R. Yoḥanan b. Zakkai's opinion is to be preferred. Many parties, groups, and schools, as well as individuals of many sorts, and a considerable number of priests too, contributed opinions to the immense body of rabbinic tradition.<sup>29</sup> There is a tremendous danger of reductionism in any attempt to subsume these under a single rubric. And the same can probably be said, though to a lesser degree, of priestly law, which also had a long history and devolved from many sources.

## II. Realism, Nature, and the *Qal vaḥomer*

One of the major problems in Schwartz's thinking on our subject is a slippage from a focus on legal realism to "nature" and the "natural." In the follow-up articles to "Law and Truth," Schwartz attempts to hold on to his original thesis, even while conceding something to rabbinic realism, by focusing on the explicit debates between the Pharisees and Sadducees preserved in rabbinic sources. In a number of these debates, the Sadducees advance a *qal vaḥomer* argument that is rejected by the Pharisees. Schwartz attempts to portray such reasoning as "natural": the title of a chapter of his new book uses the term "Natural Religion" for the Sadducean system, and the subtitle of one section is "Arguments a fortiori – Natural arguments."<sup>30</sup> The claim is that such arguments are natural, and natural arguments are a type of legal realism (since legal realism devolves from the real/natural world), and therefore we have evidence of Pharisaic-Sadducean debates turning on realism (natural arguments) vs. nominalism. But this shift to the terminology of "nature" and "natural" is very unfortunate, as it only serves to obfuscate matters further.<sup>31</sup>

29 Aharon Shemesh, *Halakhah in the Making*, 134: "The fact that the School of Shammai's attitude resembles that of the priestly halakhah should not surprise us. In not a few cases, the halakhic stance of the School of Shammai is much closer to the sectarian halakhah than that of the School of Hillel."

30 See too "On Pharisees and Sadducees in the Mishnah," 139: "Now it should be noted that arguments *a minori ad maius*, what the rabbis call *qal vaḥomer* arguments, are very natural arguments."

31 Let me point out, in passing, that even Schwartz's leading examples of legal realism based on the mention of "nature" or "creation" are not straightforward. Schwartz, "Law and Truth," 231, observes that CD 12:14–15 rules that locusts (*hagavim*) "must be slaughtered by immersing them in fire or water, כִּי הֵיא מִשֵּׁפֶט בְּרִיאָתָם – 'for such is what their nature requires.'" They believed locusts were

It must be stated at the outset that there is very little natural or logical about a *qal vaḥomer* argument. Argumentation and inferences of any sort are clearly not found in nature, and should not be confused with standard usage of the term “nature.”<sup>32</sup> Schwartz uses “natural” here in opposition to “artificial,”<sup>33</sup> in the sense of “commonplace” or “intuitively obvious,” meaning that they are the type of arguments all human beings would make, and need not even be associated with a particular legal tradition. But even this is questionable. If *qal vaḥomer* arguments were so natural, they would be found among the general thinking of all peoples and cultures, from the Australian aborigines to the South American Amazon tribes. And even if they are natural in this strained sense of the term, it is a jump to suggest that they will necessarily be part of the legal system or legal reasoning of any given culture. Long ago David Daube made these and other points in his response to Saul Lieberman’s claim that the *qal vaḥomer* and other rabbinic hermeneutical principles were so natural that the rabbis could have developed them independently and hence they need not be seen as the product of Hellenistic influence despite some striking parallels in terminology.<sup>34</sup> Daube noted that: “Medieval Icelandic law is of a high standard; if the norms of exegesis here discussed were so natural, we should expect to find them there, but there is no trace of them.”<sup>35</sup> He concluded that the *qal vaḥomer* (and the other rabbinic exegetical methods ascribed to Hillel) “is ‘natural’ in the sense of ‘grown out of intelligent observation, consistent and useful.’ (So, presumably, is the theory of relativity.) But (like the theory of relativity) it is not ‘natural’—not

created out of these elements, and therefore consumption of locusts “is to be determined on the basis of the realities of nature.” But how exactly does the law emerge from the ontology? There is nothing necessarily “natural” or “realistic” that entails that a creature created of fire and water need be slaughtered by fire or water. This strikes me more as a type of analogical thinking that may or may not be grounded in legal realism. What would we say for domestic animals? What is “their nature” (*beri'atam*) and how does “what their nature requires” work out to ritual slaughter (*sheḥitah*) in whatever form they practiced it? The formulation “for such is what their nature requires” is certainly suggestive, but it need not correspond to legal realism.

32 Cf. Lorberbaum, “Realizm hilkhati,” *Shenaton hamishpat ha'ivri* 29 (2013): 130 n. 180.

33 Probably an Enlightenment notion; see n. 43.

34 David Daube, “Rabbinic Methods of Interpretation and Hellenistic Rhetoric,” *HUCA* 22 (1949): 239–64.

35 *Ibid.*, 254–55.

even the first four norms—in the sense of ‘obvious, readily hit upon by any student of these matters.’”<sup>36</sup>

Nor is a *qal vaḥomer*, strictly speaking, a type of logical inference, though it can be presented and misrepresented as such. Schwartz offers us a misleading example to argue that a *qal vaḥomer* is “straightforward and anchored in simple logic”: “If I don’t have enough money for my own bus-fare then it is all the more so clear that I do not have enough for my companion too, but if I have enough for the two of us then it is all the more so clear that I will have enough if my companion decides to walk.”<sup>37</sup> This particular *qal vaḥomer* expresses a mathematical proposition. The first half states that if  $x < y$ , then  $x < 2y$ , where  $x$  is the amount of money one has, and  $y$  is bus-fare for one person; the second states that if  $x \geq 2y$ , then  $x > y$ . But most *qal vaḥomer* arguments cannot be translated into mathematics, and that is why they are not natural or logical. (And even this *qal vaḥomer* is not, strictly speaking, logically entailed, as there is no logical reason why a bus company could not offer a super-discount such that two people could ride more cheaply than one, as a way to drum up business or to attract attention, or to have their buses appear full, and suchlike.) Even Schwartz’s sense that *qal vaḥomer* arguments are common sense (“we use them intuitively all the time”<sup>38</sup>) is misleading. We may use some types of these arguments all the time, but not the technical, legal *qal vaḥomer* used to adjudicate thorny legal issues, as Daube also noted.<sup>39</sup> For example, the argument, “If you get punished for breaking a window, how much the more so for knocking down the whole house” is a far cry from, say, the famous *qal vaḥomer* ascribed to Hillel “proving” that the Passover offering supersedes the Sabbath. Hillel’s technical, legal *qal vaḥomer* was obviously not as straightforward as our examples about bus-fare and breaking windows or else the Benei Betera would not have needed Hillel to explicate it for them (in the well-known

36 Ibid., 256–57.

37 Schwartz, *Dichotomy*, 41. In “*Qal vaḥomer* Arguments as Sadducean Realism,” 155, the example is similar: “Any simpleton knows that if the money in his pocket does not suffice to buy something inexpensive, *qal vaḥomer* it will not suffice to buy something expensive.”

38 Schwartz, *Dichotomy*, 41.

39 Daube, “Rabbinic Methods,” 255–56.

fictional rabbinic story<sup>40</sup>), nor would they have appointed him Nasi on the basis of such an obvious and “natural” demonstration.

A *qal vaḥomer* is in fact a type of analogy.<sup>41</sup> It is predicated on the fact that two items (or cases, laws, concepts, etc.) are similar in many respects, but can be related in such a way that one appears to be “weightier” (superior or greater or stricter, etc.) than the other. The apparent logic rests in the argument that if an additional quality or factor is true of the superior or greater item, it will be true of the “lighter” (inferior or lesser) too. The logic is only apparent, however, because it presupposes both the analogy, that the two items are in fact similar, as well as the direction of the relationship, that one item is in fact superior or greater than the other, for the “logic” to work, and these considerations are not matters of logic (except in the case of mathematics, as in Schwartz’s example). Remove the similarity or the direction of the relationship between the items and the logic of the *qal vaḥomer* falls apart. That is why the standard rabbinic attack on a *qal vaḥomer* points out that the putative “lighter” entity has a characteristic that the “weightier” item does not, which means that it is not necessarily “lighter.” For this reason too one can frequently reverse a *qal vaḥomer*. Consider the following: “I can legally take money from my pocket. But I can’t legally take money from your pocket. You, who can legally take money from your pocket, *qal vaḥomer* can legally take money from my pocket.” The same argument can be used to prove that I can legally take money from your pocket. The problem of course is that the claim to “weightiness,” that you but not I can take money from your pocket, is a chimera, as there are countless things I can do that you can’t.

By no means do I want to suggest that Schwartz is unaware of these features or how such arguments work. He notes that, “If the facts, as to what

40 *T. Pes.* 4:13–14; *b. Pes.* 66a; *y. Pes.* 6:1 (33a). However, in the PT story the *qal vaḥomer* is rejected by Hillel’s interlocutors, and a similar difficulty is raised in the Bavli’s discussion of the story, which again shows the problems with the method. That Hillel embraced this method (to the extent the stories preserve a grain of historical truth; cf. *t. Sanh.* 7:5) with such salutary results again vitiates the claim that the *qal vaḥomer* was more characteristic of Sadducean than Pharisaic method.

41 See Moshe Bernstein and S. A. Koyfman, “The Interpretation of Biblical Law in the Dead Sea Scrolls: Forms and Methods,” in *Biblical Interpretation at Qumran*, ed. M. Henze (Grand Rapids, MI: Eerdmans, 2005), 79, which discusses the *qal vaḥomer* as found in the corpus of Dead Sea Scrolls. They characterize the method as “fundamentally ... an argument from analogy supported by logic” (attributing this description to Rabbi Jeremy Wieder).

is 'light' and what is 'heavy' and as to what the relevant status of one of them is, the conclusion about the relevant status of the other follow ineluctably." But I believe he has not appreciated that this is a very, very big "if," as the "facts" about what is light and heavy can generally be called into question, because we are generally not dealing with math or the intuitively obvious.<sup>42</sup>

That *qal vahomer* arguments are problematic and uncertain, that they can be reversed, and that they are easily undermined, underscores that such arguments are not natural or logical. I am not even sure if we can grant Schwartz's claim that they are "the most natural" of the rabbinic hermeneutical techniques (*middot*), as only they "are a function of content alone (*hi hayehidah hamufneit kelapei tokhen biload*) and not of the text."<sup>43</sup> For "natural" here has a

42 In "Qal vahomer Arguments as Sadducean Realism," 153, Schwartz even refers in a footnote to the spurious *qal vahomer* asked by R. Yose b. Tadaï of Tiberias of Rabban Gamaliel in *Derekh Eretz Rabbah*, ed. Higger, 267–68 (the attribution varies in the parallels): "I am permitted [to cohabit] with my wife, but forbidden with her daughter. So the wife of another man, with whom I am forbidden, how much the more so should I be forbidden with her daughter." But this *qal vahomer* does not differ formally from any other *qal vahomer* argument, and should have served to underscore the problems with the method itself. If a *qal vahomer* attributed to a rabbi can be specious, how much the more so a *qal vahomer* attributed to the Sadducees. Indeed, Schwartz acknowledges that some *qal vahomer* arguments attributed to the Sadducees are "extremely weak," such as the argument in *m. Yad. 4:7*: "If I am responsible for the damage caused by my ox and ass, about which I have no commandments, then is it not logical (*eiho din*) that I am responsible for the damage caused by my slave and maidservant, about whom I do have commandments?" But he does not follow this observation with the conclusion that *qal vahomer* arguments *in general* are problematic and uncertain. Rather he argues that "it was apparently important to the Tannaim to attribute *qal vahomer* claims to the Sadducees, because this fits with the general picture we have seen."

43 "Qal vahomer Arguments as Sadducean Realism," 155. Even this point can be questioned. Hayes, "Legal Realism," 129, notes that analogies are a type of taxonomic thinking that "can be employed in ways that reflect a realist approach or a nominalist approach. The analogies of a realist tend to be based on appeals to nature" while "the analogies of a nominalist are arguably less naturalistic and empirical." As an example she presents a rabbinic *gezerah shavah* that extends incest prohibitions based on the appearance of the word "depravity" in Lev 20:14 and Lev 18:17 (from *b. Sanh. 75a*). She argues that this analogy is "artificially manufactured on the basis of a linguistic connection between the *verses* rather than the cases analogized." I am troubled by the use of "artificial" here. The notion of "artificial" in opposition to "natural" is to the best of my knowledge an Enlightenment notion (although the word "artificial" is used already in the Renaissance). In any case Hayes is really using these terms for the "contextual" or

very specific meaning that relates to common sense notions found in a given culture. But even if we do grant this point, it does not mean such arguments are “natural” in the sense of inhering in an ontological reality or in the real world, and they should not be connected with legal realism. That “content” upon which they are predicated has nothing to do with nature, but is the complex culture of ancient Jewish concepts, institutions, rules, traditions and so forth. Schwartz has made a significant and fascinating observation that rabbinic sources have a propensity to attribute *qal vaḥomer* arguments to Sadducees, as well as to heretics of various types.<sup>44</sup> The explanation for this tendency must be sought elsewhere, and not connected with legal realism or nominalism (or “nature”).<sup>45</sup> That rabbinic sources attribute such arguments to the Sadducees thus may tell us more about (anachronistic) rabbinic perceptions than about Sadducean/priestly legal methods, even if the legal positions attributed to the Sadducees are accurately preserved.

Let me turn to a specific example that exemplifies the confusion that results from portraying *qal vaḥomer* arguments as “natural.” As an illustration of what “existing in nature” means, Schwartz offers a detailed analysis of the Sadducees’ argument that animal bones should be impure based on a *qal vaḥomer* with human bones.<sup>46</sup> He claims that “the argument depends entirely on the third step – the assertion that if something is impure, the impurity must be somewhere within it.” In fact the argument depends entirely on the sixth step, that “humanity” is superior to “animalness,” which established

“simple” understanding of a text (=natural) and a midrashic reading (=artificial). But this presupposes our modern interpretive biases and simply takes them as “natural.” For the rabbis the *gezerah shavah*, the “connection between the verses,” is not artificial, not unnatural; it is no less indicative of the nature of things than other forms of revelation, like the creation account and “special revelation of cosmic realities” that Hayes points to as the source of knowledge of realists. So it is not clear to me that the rabbinic hermeneutical rules can be fairly characterized as “unnatural” or “less naturalistic” without imposing contemporary notions on these interpretive techniques.

44 See too Hayes on the rabbinic construction of Sadducees and heretics, “Legal Realism,” 133–45.

45 And it may be worth bearing in mind, as Bernstein and Koyfman have noted, that in fact “we know of only one (or perhaps two) possible example(s) of it (= a *qal vaḥomer* argument—J.R.) in the scrolls”; see “Interpretation of Biblical Law,” 79. We would expect more if the *qal vaḥomer* was so characteristic of Qumranic/priestly law.

46 Schwartz, *Dichotomy*, 31.

the direction of the relationship of humans as “weighty” and animals as “light,” and allows the Sadducees to conclude that what applies to humans must necessarily apply to animals. However, that “humanity is superior to animalness” is not necessarily true. Some laws apply to animals, not humans, and animals have all sorts of “natural” characteristics humans do not, and vice versa. Maimonides famously observed near the end of *The Guide of the Perplexed* (3:54) that even the strongest human is not as strong as a mule or elephant, i.e., that animals are “superior” to humans in the quest for physical perfection. In other words, there is nothing illogical or “unnatural” about maintaining that human bones are ontologically different than animal bones, and that they alone convey impurity, hence nothing nominalist about rejecting the *qal vahomer*. A realist can legitimately maintain that the bones of humans, which require burial, which come from a creature created in the image of God, and so forth, therefore convey impurity, whereas the bones of animals, which can be killed or slaughtered for human purposes, do not. For this reason the rabbinic position need not be seen as nominalist, but as a different realism.<sup>47</sup>

At all events, the fact that rabbinic sources are chock full of *qal vahomer* arguments militates against linking this method to a realist/nominalist divide. To explain away this phenomenon Schwartz argues that “the fact that later, and/or when among themselves and not competing with others, the rabbis too are often willing to employ such arguments ... does not undermine the basic point that when they wanted to be consistent, in the face of competitors, they eschewed such arguments.”<sup>48</sup> That is to say, the nominalist rabbis perforce argued against nature/realism when debating their opponents, but

47 Schwartz paraphrases the Pharisaic/rabbinic thinking as follows: “The Torah called them impure so as to serve a certain purpose: The point of the law is to prevent people from retaining bones of their loved ones as mementos, but rather to bury the dead in their entirety, and that was achieved by declaring human bones impure.” This is not exact. The Pharisees actually explain in *m. Yad. 4:6*: “That they are subject to impurity accords with their value (*hibbatan*), such that one not make the bones of his father or mother a memento.” This explanation in the second half of the statement need not be seen as the reason for the law’s promulgation, but as a salutary ramification. The underpinning of the law is given in the first half, that human bones are (ontologically) susceptible to impurity as a function of their preciousness, their real properties, as, say, creatures created in God’s image.

48 *Dichotomy*, 45. He also advances this explanation in “*Qal vahomer* Arguments as Sadducean Realism,” 155–56.



felt happy—inconsistently—to embrace realism when discussing among themselves (since, apparently, such inconsistencies were so widespread no one need be embarrassed about it). Whatever the fundamental issue behind the Sadducean/Pharisaic debates preserved in rabbinic literature—if there is a fundamental issue—it is not the *qal vaḥomer* technique of argumentation, but the substance of the debates, which must be explained on other grounds.<sup>49</sup>

Even more problematic than the association of “natural” with the *qal vaḥomer* is Schwartz’s attempt to portray certain emotional reactions to legal rulings as “natural,” and therefore indicative of legal realism. Schwartz notes that in the case of a neighbor who provides for a wife whose husband traveled abroad without leaving her sufficient funds, the “sons of the high priests” rule that the neighbor must be repaid by the husband whereas R. Yoḥanan b. Zakkai, the arch-Pharisee, rules no repayment is necessary (*m. Ketub.* 13:2). This difference of opinion plausibly may be explained in many ways that have to do with different views of justice and debt, of a husband’s obligations to his wife, of man’s intentions when departing for extended absences, of the nature of society in general and the degree of mutual obligation among its members in particular, of social obligations to the poor, of the function of charity, etc. etc. Schwartz, however, analyzes this dispute as follows:

In my experience, we all feel for the neighbor. It seems to be unfair to deny him his money... what we “feel” is a fact of nature, it originates in our hearts or stomachs or thereabout, and the notion of “unfair” applies to things that we feel are wrong whether or not they violate any law formulated by some appropriate legislature or lawgiver. Those who, in contrast, do ascribe legal authority to such a feeling, those who in our case

49 Note that Schwartz explains the rabbinic turn to increasing nominalism as a reaction against Pauline Christianity, which rejected the commandments, as nominalism makes for a greater disconnect from Christianity (“Between Sages and Priests,” 74; “*Qal vaḥomer* Arguments as Sadducean Realism,” 155–56). This too is implausible historicist speculation that construes rabbinic legal thinking as a polemic against an opponent hardly mentioned in rabbinic sources, especially the tannaitic ones. In addition, there also seems to be something odd and even contradictory about seeing the rabbinic embrace of the *qal vaḥomer*, a “naturalistic”/realistic method, as a response to the disappearance of the Sadducees and appearance of Pauline Christianity, at the same time as the rabbinic trend to nominalism is a response to that same Christianity.

are willing to view the money as an enforceable debt, ascribe authority to nature.<sup>50</sup>

The appeal to Schwartz's personal experience is interesting. Those with other experiences, e.g., with a bunch of misers or mafia protection-racketeers or ruthless Wall-Street bankers (no offence intended) or various other cultures with different notions of justness and fairness, will not necessarily find a shred of sympathy for the neighbor. Notions of fair and unfair are of course a function of culture, not nature, whatever the physiological mechanisms that produce emotional reactions and feelings.<sup>51</sup> How any of this can be mapped onto a philosophical difference between realism and nominalism is difficult to see.

Still more problematic is the conclusion of Schwartz's article, the attempt to explain rabbinic Judaism's nominalism as a product of its diasporic origins (and/or of its alienation from this-worldly concerns).<sup>52</sup> The Babylonian Talmud of course is a product of the diaspora. But what about tannaitic Judaism which originated in Judea? It, apparently, was tainted by diasporic thinking, as two of the early founders of the rabbinic movement, Hillel and Antigonos, were immigrants from the diaspora: Hillel reportedly came from Babylonia, whereas Antigonos had a Greek name (!). (We should recall that Hillel's Babylonian provenance is suspect; that this Antigonos came from Sokho, a town in Judea, and that the Greek name chosen by one's parents need not mean anything anyway; and that most early rabbis did not come from Babylonia or bear Greek names.) And how is the diaspora connected to nominalism? Because it is unnatural:

Most basically, however, I would note that while it was natural to be Jewish in Judea it was unnatural to be Jewish abroad. Just as the natural default for a baby born in Judea was to be Judean, the natural default for a baby born in Alexandria was to be an Alexandrian, for one born in Cyprus—a Cypriot, and for one born in Rome—a Roman. To raise a child as Judean in

50 *Dichotomy*, 29.

51 Cf. Schwartz, "On Pharisees and Sadducees," 139: "The source of authority of such arguments is in our intuition, in our guts—it is natural."

52 Schwartz, *Dichotomy*, section IV, "Priests vs. Rabbis ~ Judea vs. Diaspora." See too the conclusion to "Between Priests and Sages," 74–75, where this idea is implied.

Judea required only non-interference with nature (just as to raise a *kohen*); to raise a child as a Jew in Alexandria, Cyprus, Rome, or anywhere else in the Hellenistic-Roman Diaspora, entailed—just as with raising a child to be a rabbi—the *decision* to do something that was not at all natural. If, as proposed in Parts II–III of this chapter, the basic distinction between the priestly attitude toward Jewish law and the rabbinic one is between the notion that law conforms to nature and the notion that law bespeaks *decisions*, the basic orientation of rabbinic Judaism conforms to that of Diaspora Judaism.

Again, Schwartz has confused “nature” with “culture.” He means here that it is more difficult and challenging to practice and maintain a minority culture within the dominant ambient culture than to conform to the majority culture. Of course (priestly) Judaism in Judea is every bit as complex and un-natural a cultural formation as Hellenistic culture in Alexandria, unless we wish to adopt the perspective of Judah HaLevi or an exaggerated nineteenth-century romanticism. Likewise, Schwartz’s claim that “to raise a child as Judean in Judea required only non-interference with nature” involves a serious misuse of “nature.” Children raised with “non-interference with nature”—I mean the real “nature”—would not turn out to be priestly realists or observant Judeans/Jews, though there is a chance, albeit rather small, that they would turn out like Rousseau’s noble savages with some good qualities, or maybe like Montesquieu’s virtuous Troglodytes with their “natural” goodness (*Persian Letters* 12). And again, whatever we make of this observation about the interaction between majority and minority cultures, any attempt to connect it to the issue of nominalism and realism is misguided.

### III. The Disputes of 4QMMT and the Problem of Biblical Exegesis

A danger in a study of this sort is that of cherry-picking examples that best support one’s thesis, as it is very difficult to know what constitutes a representative sample.<sup>53</sup> To avoid this pitfall, I propose to examine the issues listed

53 It should be noted that neither Schwartz nor Hayes attempt to identify a representative sample or to make an argument about what such a sample might look like.

in MMT and to assess whether they reflect a divide between nominalism and realism. As these are the laws that the sectarians themselves viewed as most central to the rift with their opponents, presumably the Pharisees, they should reflect the fundamental difference between the two legal traditions.<sup>54</sup> We should expect to find particularly blatant examples of realism in the sect's position and of nominalism in the rulings imputed to their addressees, if Schwartz's hypothesis is correct.

At the same time, I will focus on another issue that requires some additional thought, namely the importance of biblical exegesis as a relevant factor in the determination of rabbinic and priestly law. In the most basic terms: do we take exegesis seriously as a method by which priestly (and rabbinic) law was generated? Or is exegesis so flexible, open-ended, and indeterminate that we must look at other factors to explain why interpreters understood the verse in a given way? Was the biblical text a constraint on the production of post-biblical law? Or did nothing constrain the interpreter who could—if he so desired—read *x* as *y* or even as not *x*? The work of Daniel Boyarin in his *Intertextuality and the Reading of Midrash* and of James Kugel in his *In Potiphar's House, The Bible as it Was*, and other works, has taught us that we must take the rabbis and other post-biblical exegetes seriously as readers. Interpretations that appear at first glance to be flagrantly “read in” to the biblical text were, upon deeper study, in fact “read out,” i.e., a product of exegesis. Of course this is not to say that social, political, philosophical, and other historical and ideological factors are irrelevant or can be discounted. All readers cannot help but interpret the text through the prism of “ideological colored eyeglasses” as there is no purely objective, neutral point on which to stand.<sup>55</sup> At the same time, exegesis cannot be seen as *purely* a matter of ideology. While ideology influences or constrains exegesis to a certain extent, the reverse is also true: the text itself influences ideology as an interpreter inevitably frames his beliefs on the basis of his encounter.<sup>56</sup> This is particularly true of a reformist movement like the Qumran community, a “text-based

54 See too Rubenstein, “Nominalism and Realism,” 178, where I suggested this strategy.

55 Daniel Boyarin, *Intertextuality and the Reading of Midrash* (Bloomington: Indiana University Press, 1990), 15.

56 *Ibid.*, 19: “Ideology affected their [=the rabbis—J.R.] reading, but their ideology was also affected by their reading.”

community” as Adiel Schremer has argued so pointedly,<sup>57</sup> a group who attempted “to return to the Torah of Moses” (1QS 5:7–10), to live within the biblical world and by a “bibliocentric” ideology.<sup>58</sup>

Schwartz does not take exegesis seriously as a factor in determining law, and therefore in understanding the differences between ancient legal systems. In response to my charge that he underestimated the importance of biblical exegesis, Schwartz writes:

Indeed, I don’t think the latter issue [i.e., that laws derive from exegesis—J.R.] is of significance, for it ignores the question why some people, like priests, interpret the Bible one way and some, like rabbis, another.<sup>59</sup>

This is not the case at all, as the policy of taking legal exegesis seriously does not “ignore” this question, but insists that one consideration *among others* is textual factors including ambiguities, obscurities, and contradictions, which different interpreters might resolve in different ways, *not all of which can be reduced to ideology*, and certainly not all of which can be reduced to the single issue of a nominalist vs. realist disposition. Nor may we always be able to explain why interpreters made the exegetical choices they did, even if we can understand what textual factors were involved. Different interpreters sometimes chose to fill the gaps in the biblical legislation (and narrative) in different ways for reasons that are often unrecoverable. In other cases we do in fact understand why different exegetes came to different conclusions, and the reasons have to do with broader assumptions that have nothing to do with considerations related to realism or nominalism. For example, the Qumranic interpreters treated the entire biblical corpus as an authoritative source of

57 Adiel Schremer, “‘T]he[y] Did Not Read in the Sealed Book’: Qumran Halakhic Revolution and the Emergence of Torah Study in Second Temple Judaism,” in *Historical Perspectives: From the Hasmoneans to Bar Kokhba in Light of the Dead Sea Scrolls*, ed. D. Goodblatt, A. Pinnick, and D. R. Schwartz (Leiden: Brill, 2001), 105–26.

58 S. Talmon, “Between the Bible and the Mishna,” in *The World of Qumran from Within* (Jerusalem: Magnes; Leiden: Brill, 1989), 21–48.

59 Schwartz, *Dichotomy*, 135 n. 57. Schwartz continues: “Moreover, even an exegetically-derived law held by a community will help shape its worldview.” This is certainly true, but does not help Schwartz’s claim, as it recognizes that a worldview will be influenced by exegesis, and not determine it absolutely. In any case, the issue is what we mean by “exegetically-derived.” The same point is made in “*Qal vaḥomer Arguments as Sadducean Realism*,” 147.

law, whereas the rabbis typically based law exclusively on Pentateuchal legislation.<sup>60</sup> This difference in a fundamental exegetical assumption produced legal disputes that need not correlate with a nominalist vs. realist divide.

In this respect there is a problematic reductionism in Schwartz's claim, as his response quoted above reduces the legal exegesis of both rabbinic and Qumran halakhists to a function of their respective bases of authority: "Some people, like priests, interpret the Bible one way," namely realistically, because their authority derives from the immutable fact of their birth, their "ascribed status," whereas "some, like rabbis, another," namely as nominalists, because their authority stems from "achieved status," the merit acquired through study and learning.<sup>61</sup> This claim strikes me as a variation of the dated views of scholars like Joseph Heinemann who tended to reduce much rabbinic aggadah to expressions of ideology and minimize exegesis: "The aggadists do not mean so much to clarify difficult passages in the biblical text as to take a stand on the burning issues of the day, to guide people and strengthen their faith." Now I am well aware that Schwartz, a sophisticated scholar, understands that both rabbinic and Qumranic halakhists do in fact respond to problems in the text (as did Heinemann). My point is that he does not appreciate sufficiently that the exegetical response to such problems may itself be a powerful force in the determination of law and cannot be fobbed off as an epiphenomenon of something else, be it an ideological response "to burning issues of the day" or achieved vs. acquired status.<sup>62</sup> If this is true

60 Bernstein and Koyfman, "Interpretation of Biblical Law," 73–74.

61 See n. 25.

62 Two systemic assumptions that will influence legal exegesis are (1), whether the Prophets and Writings are also authoritative sources of law in addition to the Pentateuch, and (2), whether laws can be derived from biblical narratives or only from biblical laws. These considerations have nothing to do with nominalism and realism, but may have a profound impact on one's legal conclusions. A particular example is the instructions concerning observance of the Sabbath in Isa 58:13, which both rabbis and the Qumran sect seem to have understood to caution against some sort of business affairs and speech. Those who assume that the Prophets are as authoritative a source of law as the Pentateuch may arrive at different laws of Sabbath observance than those who see the Prophets as carrying less authority. For detailed study see Alex P. Jassen, *Scripture and Law in the Dead Sea Scrolls and Ancient Judaism* (Cambridge: Cambridge University Press, 2014).

for the aggadic texts upon which Boyarin and Kugel studied, how much the more so for the biblical legislation at issue here.<sup>63</sup>

Thus I am asking two interrelated but independent questions: (1) whether realism vs. nominalism best explains the disputes of MMT; and (2) whether exegetical considerations (and other considerations) are paramount. For convenience I follow the composite text and discussion of the initial publication by Elisha Qimron and John Strugnell in DJD X, to which the pages and line numbers refer.<sup>64</sup> I make no pretense to novel contributions to the understanding of the halakhot, and follow the interpretations of the editors, with the observations of Joseph Baumgarten,<sup>65</sup> Lawrence Schiffman,<sup>66</sup> Moshe Bernstein,<sup>67</sup> Menahem Kister,<sup>68</sup> Yaacov Sussman,<sup>69</sup> and others where apposite. The following survey is necessarily brief, and certainly these complicated issues require more detailed study. But even a superficial survey should provide some insights into the present inquiry, if only a starting point for discussion.

The editors divide the text into seventeen "halakhot," although some treat more than one legal issue. The first two are very fragmentary. The third, also somewhat fragmentary, concerns whether sacrifices may be accepted from gentiles (pp. 149–50; B 5–8), a controversy attested by Josephus (*War*, 2.172). The editors suggest the dispute may derive from the understanding of Lev

- 63 For some recent work on Qumranic legal exegesis, see Bernstein and Koyfman, "Interpretation of Biblical Law," 61–87; M. Kister, "A Common Heritage: Biblical Interpretation in Qumran and Its Implications," in *Biblical Perspectives: Early Use and Interpretation of the Bible in Light of the Dead Sea Scrolls and Associated Literature*, ed. M. E. Stone and E. G. Chazon (Leiden: Brill, 1998), 101–11; Vered Noam, *From Qumran to the Rabbinic Revolution* (Jerusalem: Yad Izhak ben Zvi, 2010), 330–36 (Hebrew); Werman and Shemesh, *Revealing the Hidden*, 51–71.
- 64 Elisha Qimron and John Strugnell, *Qumran Cave 4*, vol. V. *Miqsat Ma'ase ha-Torah*, DJD X (Oxford: Clarendon, 1994).
- 65 Joseph Baumgarten, "The 'Halakhah' in *Miqsat Ma'ase ha-Torah*," *JAOS* 116 (1996): 512–13.
- 66 Lawrence Schiffman, "The Place of 4QMMT in the Corpus of Qumran Manuscripts," in *Reading 4QMMT: New Perspectives on Qumran Law and History*, ed. J. Kampen and M. Bernstein (Atlanta, GA: Scholars Press, 1996), 81–98.
- 67 Moshe Bernstein, "The Employment and Interpretation of Scripture in 4QMMT: Preliminary Observations," in *Reading 4QMMT*, 29–52.
- 68 Menahem Kister, "Studies in 4QMiqsat Ma'ase HaTorah and Related Texts: Law, Theology, Language and Calendar," *Tarbiz* 68 (1999): 317–71 (Hebrew).
- 69 Yaacov Sussman, "The History of Halakha and the Dead Sea Scrolls—Preliminary Talmudic Reflections in the Light of MMT," *Tarbiz* 59 (1989–90): 11–76 (Hebrew).

1:2, “When any of *you* presents an offering,” the “*you*” (*mikkem*) meaning Israelites/Jews and not gentiles. Israel Knohl suggests that the source may be Lev 22:25, “Nor shall you accept such [animals] from a foreigner for offering as food for your God, for they are mutilated, they have a defect; they shall not be accepted in your favor.”<sup>70</sup> Although the previous verses are dealing with blemished animals, which Lev 22:25 emphasizes also cannot be accepted from gentiles, an interpreter may have decontextualized the verse and generalized it to a blanket prohibition. Be that as it may, I cannot see how the two positions can be mapped onto a systemic nominalist/realist divide. Even if we accept that the Qumran community believed Israelites/Jews to be a holy people, and that gentiles are ontologically different and profane, how this translates into a prohibition on gentile sacrifices is by no means clear, as we are dealing with their animals or grains. To say that only holy people (Jews) can bring holy sacrifices reflects analogical thinking of sorts more than legal realism. In any case, the rabbinic ruling could simply reflect a different realist view that the ontological difference between Jews and gentiles is irrelevant to the matter of donating a sacrifice to the temple (though it may matter in other cases, such as marriage, inheritance, etc). Moreover, the position that gentiles may not bring sacrifices is attested in various rabbinic sources.<sup>71</sup>

In this case, however, it is not difficult to see that ideological factors will be involved, as evident from Josephus’ account of the debate, which centers on the impact of rejecting Roman-sponsored sacrifices on Roman-Jewish relations. MMT’s ruling can be seen as nominalist, motivated by anti-Roman values and “political” goals, and not due to any different sense of reality than the rabbis, who may have held different values. So if we discount those exegetical factors and attribute the sectarian prohibition to their negative view of gentiles, or an effort at social distancing, or general hostility (as Heinemann might have done), there is still no nominalist/realist divide.

The fourth dispute (B 9–11; pp. 150–52), as reconstructed by the editors on the basis of the Temple Scroll (11QT), concerns leaving the cereal offerings (*minḥah*) of peace offerings (*shelamim*) overnight, i.e., whether they must be eaten before sunset (so the sect) or may be eaten until midnight or even until

70 I. Knohl, “The Acceptance of Sacrifices from Gentiles,” *Tarbiz* 48 (1979): 342 (Hebrew).

71 Knohl, *ibid.*, and see Y. Gilat’s comments to Knohl’s article in *Tarbiz* 49 (1980): 422–23.



dawn (so the rabbis).<sup>72</sup> The editors point to Lev 7:15, which requires of the peace offering that it be “eaten on the day that it is offered; none of it shall be set aside until morning,” as the basis for the rabbinic view, which concluded that the cereal offerings have the same restrictions as the sacrifice itself.<sup>73</sup> The authors of MMT apparently interpreted “the day that it is offered” as referring to the day itself, not including the night, and took the final clause, that it not be “set aside (*yanniah*) until morning” to mean not “left over” until morning.<sup>74</sup> Here it is even more difficult to find a nominalist/realist divide. Both opinions are most plausibly seen as nominalist, as there does not seem to be much of an ontological difference between cereal offerings that are not consumed after a maximum of twelve or twenty-four hours (depending what time of day the offering took place). If one insists on seeing MMT’s view as realist, as grounded in a belief that the cereal offering experience an ontological transformation at sundown, becoming rotten or dangerous in some real way (or that the flesh of the peace-offerings really rots pretty quickly, and the cereal offerings therefore become contaminated by them), then the rabbinic view could be equally realist, the difference simply being how long each party believes a cereal offering (or peace-offering) takes to decompose or experience ontological change. But as Lorberbaum argues, if this is the case we are dealing more with a debate over an empirical fact, namely when grain or meat goes bad, and not a matter of legal realism, which deals with intangible realities.<sup>75</sup> In short, realism vs. nominalism does not seem a helpful axis to understand this dispute.

The fifth dispute concerns the ritual of the red heifer (Num 19:1–22) and involves the issue of the *tevul yom* known also from rabbinic tradition, the Temple Scroll, and other sources, namely whether the purification process requires that one wait until sunset to become fully pure or whether the

72 The editors refer to *m. Zebah*. 6:1, which requires the cereal and other offerings be eaten until midnight. Schiffman, “Place of 4QMMT,” 87 notes that *m. Ber*. 1:1 explains that all things limited “until midnight” are really permitted until dawn, the earlier limitation a preventative measure.

73 Cf. *Temple Scroll* 20:11–13; Yadin, *The Temple Scroll* (Jerusalem: Israel Exploration Society, 1983), 2:89.

74 See the editors’ discussion, p. 151, of the influence of other biblical verses that led to this interpretation.

75 Lorberbaum, “Halakhic Realism,” section III.

immersion itself suffices (B 13–16; pp. 152–53).<sup>76</sup> As Baumgarten has noted, an exegetical issue is at the heart of this controversy: “Although levitical law repeatedly insists on sundown as a necessary sequel to immersion, the Pharisees maintained that this was requisite only for the consumption of sacrifices or *teruma* ... the Pharisees could point to passages such as Lev 14:8, 15:13, and 16:28, which refer to immersion without mentioning sundown.”<sup>77</sup> Once more I cannot see a nominalist vs. realist angle. Both parties would insist those involved in the ritual are “intrinsically” pure, the dispute being over how that purity is achieved.<sup>78</sup> This is a good test case, as the rabbis identified the opposing position as Sadducean (*m. Parah* 3:7) and went out of their way to render the participating priest impure according to the Sadducean law. So both the rabbis/Pharisees and the Sadducees emphasize the issue, but nominalism and realism are irrelevant. This issue is also brought up in the fifteenth dispute relating to the purification process of the leper (B 71–72; pp. 169–70).

The sixth law is very fragmentary. It seems to concern three rulings about the purity of animal hides (B 18–20; pp. 154–55); given the uncertainty of the text it is of limited help for our purposes.<sup>79</sup>

- 76 MMT seems to include the priests sprinkling the water of purification in this requirement, and not only those preparing the cow (mentioned in rabbinic traditions), but this does not impact the fundamental question. There may be additional disputes relating to the performance of this ritual. See Baumgarten, “Halakhah’ in *Miqsat Ma’ase ha-Torah*,” 512–13.
- 77 Baumgarten, *ibid.* Cf. Schiffman, “Place of 4QMMT,” 440, who believes that the rabbinic law devolves from an exegesis of Num 19:9.
- 78 That is, the Pharisees would say that the *tevul yom* is pure enough for this ritual. Kister, “Studies in 4QMiqsat Ma’ase HaTorah,” 334–36, has pointed out that the Pharisees could have accommodated the Sadducees by performing the ritual according to the higher standards of the Sadducees, were they so inclined, and the fact that they insisted the priest be a *tevul yom* was a power-play to invalidate the rival system. But this does not impact the claim that their view of the law was realist in principle.
- 79 The first ruling may have to do with a dispute about the different levels of holiness of various areas of Jerusalem and the Temple, as the law may be related to that of *Temple Scroll* 51:1–6, which prohibits the hides of animals slaughtered outside the sanctuary to be brought into the city of the Temple (=Jerusalem). The second and third rulings are about the hides and bones of animals, and are possibly related to the controversy attested in rabbinic sources between Pharisees and Sadducees over the purity of animal bones, discussed above. (The sect includes the hides and bones in the law of Num 19–20, whereas the rabbis restricted it to

The seventh halakhah concerns the delineation of boundaries of the temple and Jerusalem that define degrees of holiness, and within which various sacrifices must be performed and consumed (B 27–35; pp. 156–57). This complicated issue devolves from two interrelated exegetical problems. The first is the contradiction between Lev 17:3 and Deut 12:20–28 concerning the laws governing the consumption of non-sacrificial and sacrificial meat, a problem engaged by the Temple Scroll and numerous rabbinic sources.<sup>80</sup> The second is rooted in different understandings of how to apply the terms “entrance of the tent of meeting” (*petah ohel mo'ed*), “camp,” and “outside the camp” (*maḥaneh*; Lev 17:2–4), which the Torah uses to describe the tabernacle and Israelite camp in the desert, and the term “place” (Deut 12:21), which describes the temple and city of Jerusalem. The authors of MMT claim the tabernacle/tent of meeting corresponds to the temple, the Israelite camp corresponds to Jerusalem, while “outside of the camp” corresponds to the “camp of cities,” apparently meaning the rest of the territory of Israel.<sup>81</sup> Rabbinic sources mapped the biblical tabernacle and camp onto the temple and Jerusalem in different ways, and sometimes understood the same biblical terms appearing in different laws in different ways, as Kister has shown.<sup>82</sup> If

the flesh.) The editors note, however, that the third law appears to be limited to the hides of clean animals, viz., that one who carries hides of clean animals, not those of unclean animals, “may not have access to the sacred [food].” They are at a loss to explain this distinction, concluding that “the subject of the impurity of the various kinds of hides is a very complicated one.” To say the least. Exactly what “access to the sacred [food]” means is likewise unclear. The editors refer to “special meals”; Schiffman takes this law as tantamount to conveying impurity (“Place of 4QMMT,” 448). Either way, if the restoration of this law is correct, the MMT position appears to be nominalist, as a realist would probably conclude that the hides of unclean animals should convey “impurity” in the same way as those of clean animals, given that the hides are similar. However, a realist could argue the hides are ontologically different even if they appear to be similar to our sense perceptions.

- 80 Qimron and Strugnell, 156–57; cf. *Temple Scroll* 52:13–16. See the detailed discussion in Kister, “Studies in 4QMiḡṣat Ma'ase HaTorah,” 335–39, and Werman and Shemesh, *Revealing the Hidden*, 60–61.
- 81 Kister, “Studies in 4QMiḡṣat Ma'ase HaTorah,” 337–38; Schiffman, “Place of 4QMMT,” 88–90.
- 82 Kister, “Studies in 4QMiḡṣat Ma'ase HaTorah,” 339. Cf. *t. Kelim* (B. *Qam.*) 1:12, which sets out the well-known rabbinic view of ten levels of holiness decreasing with greater distance from the holy of holies. On realist and nominalist views of the holiness of the Land of Israel, see Alexander Dubrau, “Heiligkeitskonzepte

one insists on looking at the positions in terms of nominalism and realism, then the views of both parties appear to be realistic, the debate being over the ontological status of different areas. But here exegesis seems to be the real driving force behind the dispute, as the contradiction between the biblical passages is obvious, and how one correlates the biblical camp to the temple and Jerusalem is by no means clear. Rabbinic sources themselves are divided on these issues, some arriving at conclusions similar to those of MMT and other Qumran texts.<sup>83</sup> It is therefore difficult to claim this exegesis is merely a function of a realist or nominalist legal “system.”

The eighth halakhah deals with the slaughter (or sacrifice) of pregnant animals, which the sect prohibits and the rabbis permit (B 36–38, pp. 157–58).<sup>84</sup> The prohibition against the sacrifice of such animals is found in the Temple Scroll.<sup>85</sup> The formulation in MMT “on the same day” points to Lev 22:28, “it and its offspring (*beno*),” which the sect apparently interpreted to include a mother and her fetus, and not only to baby animals. This can plausibly be seen as an exegetical dispute over the meaning of “its offspring,” whether it applies to unborn or born offspring. This dispute does not fit neatly with a nominalist/realist divide. If we view the MMT position as realist (a fetus is in reality a separate being, though not independent of its mother yet), the rabbis are hardly nominalists, but simply adopt a different realist view, that a fetus is still part of the mother until it emerges as an independent being at birth, and is not in reality the mature animal to which the laws apply.<sup>86</sup> This is, after all, why we have discrete terms for embryos and fetuses, and

von *Eretz Israel* in rabbinischen Texten der Spätantike,” in *Heilige, Heiliges und Heiligkeit in Spätantiken Religionskulturen*, ed. P. Gemeinhardt and K. Heyden (Berlin: de Gruyter, 2012), 157–58.

- 83 Kister, “Studies in 4QMiqṣat Ma’ase HaTorah,” 339. See too Yadin, “4QMMT,” 143–44, on the affinity between the hermeneutics of R. Ishmael and MMT.
- 84 The editors suggest that this dispute is twofold, including the related prohibition of eating a live fetus within a dead animal without ritual slaughter. In *m. Ḥul.* 4:5, R. Meir requires a mature fetus be slaughtered if it survives the slaughter of its mother (and prohibits its slaughter on the same day). But the majority opinion disagrees, and no rabbinic opinion requires slaughter of, or applies “it and its young” to, an immature fetus. For other relevant rabbinic sources see the references 157 n. 115. The same analysis would apply to this dispute.
- 85 *Temple Scroll* 52:5–6.
- 86 Indeed, rabbinic sources seem to reflect this view with the term “the fetus is a limb (*yerekh*, i.e., part) of the mother” (*b. Ḥul.* 58a; *b. Git.* 23b).

do not generally refer to them as “animals,” “offspring,” “young,” etc.<sup>87</sup> For the rabbis offspring are (real) offspring and fetuses are (real) fetuses and the law of one does not apply to the other. In addition, R. Ishmael seems to hold a position similar to that of MMT, that the fetus is an independent being, which again would suggest that we cannot readily distinguish the priestly and rabbinic views.<sup>88</sup> (I might also note, in passing, that it is hard to apply realism to the details of the laws of slaughter [*shehitah*], that it requires a certain type of knife, must be performed at the jugular vein or in any specific way, and suchlike. What “natural” or “independently existing situation” explains such laws?)

The ninth halakhah concerns prohibitions against Ammonites, Moabites, *mamzerim*, and men with disfigured genitals from “entering the congregation,” which is then explained as entering the sanctuary and marriage (B 39–40; pp. 158–59). The Torah lists these same classes in Deut 23:2–4, and the rabbis too prohibited these classes from marrying Jewish women, although they permitted Jewish men to marry Moabite and Ammonite women. The wording of MMT is fragmentary but seems to prohibit also marriage or intercourse between Jewish men and these women. The rabbinic limitation of the law to Moabite and Ammonite men appears at first glance to be a highly “artificial” (by our standards) exegesis (“a Moabite [Deut 23:4] not a Moabites, an Ammonite [Deut 23:4] not an Ammonites”<sup>89</sup>), but is surely the result of the fact that Ruth the Moabites married Boaz and was an ancestor of King David to boot. So an interpretive debate is undoubtedly a factor. Here the realist/nominalist debate seems more fitting, as the rabbinic limitation to male Moabites and Ammonites appears to be arbitrary; if marriage to these people is intrinsically dangerous, why should there be a difference between males and females? But this tends to presuppose contemporary notions of equality of the sexes, which was certainly not the case in Antiquity, and is not true of biblical law. Only males were priests, and only females subject to levirate marriage, so there is no reason the rabbis could not have seen Moabite/Ammonite men as ontologically different from their women, and

87 From this point of view we might consider the sect’s position as somewhat nominalist, in that it considers (“names”) a fetus as a full-fledged animal to which the law applies.

88 Yadin, “4QMMT,” 143–44, and n. 59, referring to Geiger; Cf. Sussman, “Preliminary Remarks,” 33.

89 *Sifre Deut.* #249 (ed. Finkelstein, p. 277); cf. *m. Yev.* 8:3.

understood the asymmetrical prohibition accordingly.<sup>90</sup> In any case, other ideological and sociological considerations were surely involved, including the general attitude toward foreigners.

The prohibition against these classes entering the sanctuary again derives primarily from the exegetical dispute over the meaning of “enter the congregation,” the sect understanding it as referring to entry to the temple too. Here the realist/nominalist divide does not play out well: both the sectarian and rabbinic position can be explained on realist grounds: the sect believed these classes ontologically “profane” such that they constituted a danger to the holy sphere of the temple, whereas the rabbis did not. However, it should be noted that even if this analysis holds for the sect’s view of Ammonites, Moabites, and *mamzerim*, it is harder to apply it to men with mutilated genitals, which may have happened later in life. How does such an accident alter their “nature”? So perhaps a nominalist approach is a more plausible understanding of the sect’s view, which we could easily connect with certain values or reasons.

The tenth issue is the sect’s complaint that the blind and deaf should not enter the temple (B 49–54; p. 160). A related provision of the temple scroll prohibits the blind from Jerusalem “lest they defile” the holy city (*Temple Scroll* 45:12–14). Yadin suggested this law derives from Lev 21:17, which prohibits priests with defects, including the blind, from offering sacrifices; the sect inferred a similar prohibition against entering the holy city.<sup>91</sup> If so, the same analysis given for the previous halakhah applies: the sect sees such priests as ontologically dangerous to the holy city/temple, whereas the rabbis do not. However in this case MMT’s concern seems to be more pragmatic. The author is concerned that the blind will mix holy with profane food, as they “cannot see the mixture that incurs reparation-offering (*asham*),” whereas the deaf have not heard the laws and the judgments” and consequently do “not know how to obey the law.” Rabbinic sources allow the deaf at least to handle purities, apparently trusting that they would not mess things up.<sup>92</sup> In this case nominalism and realism do not really apply; the debate is about

90 For the same reason, there is absolutely nothing necessarily nominalist about the rabbinic position permitting niece/uncle marriages while prohibiting nephew/aunt marriages. See Rubenstein, “Nominalism,” 165–68; Schwartz, *Dichotomy*, 31 and references in 132 n. 51.

91 Yadin, *Temple Scroll*, 1:224; 2:136.

92 *T. Ter.* 1:1; see Sussman, “The History of Halakha and the Dead Sea Scrolls,” 34.

an empirical matter of the reliability of the blind and deaf in handling holy foods. The editors also provide other possible exegeses that may ground the debate, including Deut 18:13, 5:24, and 4:9.

A similar analysis applies to the twelfth halakhah, a prohibition against bringing dogs into Jerusalem (B 58–62; pp. 162–64), which may be explained as a concern lest impure dogs defile the holiness of Jerusalem. But again a more pragmatic reason is given, that dogs “may eat some of the bones of the sanctuary while the flesh of the sacrifices is still upon them.”<sup>93</sup> *Mishnah B. Qam. 7:7* offers a similar prohibition against chickens: “One may not raise chickens in Jerusalem because of the sacrifices.” So however we parse the prohibition, realism vs. nominalism does not explain the dispute. In this case biblical exegesis does not seem to be involved.<sup>94</sup>

The eleventh halakhah concerns the purity of streams, the *niṣoq/muṣaqot*. Moshe Bernstein has noted that there does not appear to be an exegetical basis for this dispute.<sup>95</sup> Schwartz claimed that the Pharisaic-rabbinic view according to which impurity does not travel upstream is nominalist, whereas I maintained it was a different kind of realism, not unlike the fact that real pollution will not flow up from a lower vessel to a higher one. Hayes now argues against this possibility, claiming that “it ignores the explicit textual evidence of MMT—that the dispute centers on whether or not the stream forms a connection that combines the lower and upper liquid into a single unit such that the impurity of the former is by definition possessed also by the latter... ‘for the stream of the flowing liquid and the [liquid] that receives from it are like them, *one single stream*.’”<sup>96</sup> But you cannot learn much about the Pharisaic-rabbinic view from the perspective articulated by the MMT authors. Obviously they consider the flow to produce a connection that renders all the liquid into “a single stream” and subject to the same defiling. The rabbis simply disagree about the nature of the connective, that it does not render the two into a single entity for legal purposes. In my view the

93 See too Baumgarten, “‘Halakhah’ in *Miqṣat Ma‘aṣe ha-Torah*,” 515. This is not to say that there cannot be an ontological concern too, e.g., that if dogs were to eat bones with flesh they might violate the ontological holiness of the sacrifice. But in that case we would expect that concern to be articulated.

94 Qimron and Strugnell, 163: “Nor can we find any biblical source from which it might have been deduced.”

95 Bernstein, “Interpretation of Biblical Law,” 63 n. 5.

96 Schwartz makes much the same argument, *Dichotomy*, 139–40 n. 92.

rabbis would not dispute the empirical fact that there is a connection, that water is flowing from the upper vessel to the lower, that all the water, from a certain point of view, forms a single liquid entity; as I noted, they concede that in the case of viscous liquids such as honey and batter that “spring backwards,” the liquid in the upper vessel becomes impure. So it seems clear they recognize that in all cases there is a connection.<sup>97</sup> They disagree that impurity of non-viscous liquids can flow through such a connection from lower to upper, just as real pollutants in the lower vessel would not reach the upper, even though all the water is connected.<sup>98</sup>

The disputes of the thirteenth and fourteenth halakhot (B 62–64; pp. 164–65), the fruits of the fourth year (which the rabbis called *neṭa revai*) and cattle tithe, are about what to do with these products. The rabbis ruled they must be treated like “second tithe,” taken by the owners to Jerusalem (or redeemed and their value taken) and consumed there, whereas MMT rules that they be given to priests. As the editors note, the problem is that the Bible designates the fourth-year fruits as “set aside for jubilation [*qodesh hillulim*] before the Lord” (Lev 19:24) and the cattle tithe as “holy to the Lord” (Lev 27:30), but does not state explicitly how they should be treated, and these

97 *M. Makš.* 5:9; Rubenstein, “Nominalism,” 171.

98 I do not fully understand Hayes’ comment: “Second, there is no textual evidence for a dispute over whether or not impurity in liquids can travel upwards.” There is very little textual evidence about these issues in general, such that we cannot even be sure whether we are in fact dealing with a stream forming this sort of connective (see Yaakov Elman’s impressive meditation on these laws, “Some Remarks on 4QMMT and the Rabbinic Tradition, Or, When Is a Parallel not a Parallel?” in *Reading 4QMMT*). Later in the article Hayes writes: “We may plausibly suppose in light of the evidence of 4QMMT and the thematizing of Sadducean realism in the immediately preceding case in the Mishnah, that the Sadducees object to the Pharisees’ position because it ignores the very real physical connection between the two liquids, asserting instead that they are not deemed to form a single body of liquid with a single status of impurity.” Therefore “the Sadducees are depicted as adopting a realist stance and objecting to the nominalist view of the Pharisees because it is... nonempirical (anyone can see that the liquids join to form a single body!)” (136–37). Again, this description represents the Sadducean view of things, and the Pharisees would respond as above. The depiction of Sadducees and other heretics as judging rabbinic laws to be “unintuitive, illogical, or absurd” (p. 134) does not indicate the laws are indeed to be characterized as such, and cannot be taken as evidence of (self-awareness [p. 138] of) nominalism.



expressions are unclear. An exegetical dispute is clearly at work.<sup>99</sup> If one wishes to minimize the importance of exegesis, then ideology could be seen as the driving force, the rabbis attempting to minimize priestly entitlements by granting these to the owners.<sup>100</sup> Both positions can also be seen as realist, as MMT and the rabbis agree on the holiness of these fruits and animals. And as Aharon Shemesh has noted, indications of both rulings are found in both rabbinic literature and the Qumran scrolls.<sup>101</sup>

The fifteenth halakhah about the impurity of lepers is fragmentary, but the concerns seem to overlap those of the fifth and seventh halakhah, the purification on the eighth day (the issue of the *tevul yom*), and entry to Jerusalem or the temple.<sup>102</sup>

The sixteenth halakhah, concerning the impurity of bones, is also fragmentary (B 72–74; pp. 170–71). According to Baumgarten the authors of MMT hold that bone fragments, no matter what size, transmit corpse impurity, as opposed to the rabbinic ruling attested in *m. 'Ohal. 2:3* that bone fragments must be the size of a barley corn.<sup>103</sup> Strugnell-Qimron suggest the opinions may devolve from different interpretations of Num 19:16–18, though they do not go into detail, and this explanation does not seem too likely to me.<sup>104</sup> (Perhaps: does *ešem* refer to a bone of a certain size or even a fragment?) But even if exegetical factors are not paramount, one need not see a nominalist/realist divide at work. Indeed, this dispute offers a good occasion to engage Hayes' claim that the rabbinic penchant for setting "legal definitions and minima" evidences nominalism, as a realist would acknowledge that even a minute quantity still exists, and would not ignore

99 Azzan Yadin, "4QMMT," has shown that R. Ishmael in fact made the same exegetical move as the authors of MMT, albeit in respect to the law of the first-fruits (Exod 23:19), ruling that they too must be given to priests.

100 Menahem Kister, "Some Aspects of Qumranic Halakhah," in *The Madrid Qumran Congress*, ed. J. T. Barrera and L. V. Montaner (Leiden: Brill, 1992), 571–81, suggests the Pharisaic-rabbinic ruling derives from an ancient custom, and should not be seen as a product of exegesis.

101 See too Werman and Shemesh, *Revealing the Hidden*, 216–20.

102 For a possible reconstruction, see Y. Feder, "The Polemic Regarding Skin Disease in 4QMMT," *DSD* 19 (2012): 55–70, who suggests the authors of MMT also objected to the rabbinic ruling that the leper can return to his house.

103 Baumgarten, "'Halakhah' in *Miqsat Ma'ase ha-Torah*," 515. The editors consider other possible restorations too, p. 171.

104 Baumgarten, "'Halakhah' in *Miqsat Ma'ase ha-Torah*," 515.

that reality in applying a law. According to this line of thought, the rabbis in this case must have a nominalist view of purity, as even a bone fragment smaller than a barley corn is still bone. If impurity were considered a real force, the fragment of bone should nevertheless contaminate. Thus Hayes, writing of the related case of corpse-flesh: "Instead of asserting that even the smallest speck of corpse-flesh causes impurity, the rabbis set an arbitrary lower limit: only a mass of corpse-flesh of a certain minimum size is capable of conveying impurity."<sup>105</sup> I would respond once again that there is nothing necessarily nominalist in setting minima, and this tendency simply indicates a different kind of realism. One need only think of minimum standards of "purity" today, such as rules that allow drinking water to have up to 44 parts per million nitrate and pasteurized milk to have a certain amount of bacteria per liter. Below this threshold the water or milk is not considered dangerous. Likewise the rabbinic standards of impurity of bone fragments in this halakhah and of corpse-flesh may indicate a realist view that such minimal quantities are not "dangerous" or "defiling" simply because there is not enough impure substance to cause the same harm as larger quantities of bones and corpse-material. The same can be said for the other examples Hayes mentions, such as "only non-kosher food of a certain minimum size is capable of rendering kosher food non-kosher."<sup>106</sup> A realist would argue that a little bit of the (ontologically) dangerous non-kosher food has no impact on a large pot of kosher food. Likewise, if a couple of drops of red food-coloring fall into a pot of pea soup, they will not impact the color of the soup. This is not to say that the food-coloring, non-kosher food, nitrate or bacteria are not really present, but that they have no real impact.<sup>107</sup> In some cases the rabbis do not set minimum quantities, such as the prohibition against consuming of

105 Hayes, "Legal Realism," 130. Note her reference to R. Eliezer's position on measurements, viz., that he tends to reject minima (131 n. 29). This again is an attempt to coopt Rabbi Eliezer, whom Hayes calls "a priestly figure," as evidence of the priestly realist view, whereas the fact that he was a rabbi and articulated rabbinic rulings strikes me as evidence of realism among rabbis, as argued above.

106 Ibid.

107 And this may be the sense of the rabbinic term *batel*, used to explain why the small amount of a prohibited substance does not render the larger mixture invalid. It is "nullified" in a realistic way, rendered null and non-existent. Of course this perspective need not accord with modern chemistry.

*ḥameš* on Passover in any amount whatsoever.<sup>108</sup> Are such cases unambiguous markers of rabbinic realism?

The seventeenth halakhah appears to ban marriage between priests, who are designated “most holy” and Israelites, who are just “holy” (2:75–82). Hayes has argued that MMT’s ban on intermarriage is realist, objecting to a mixture of different degrees of holiness.<sup>109</sup> But the rabbinic position is just as realist, equating the holiness of priests and Israelites, or seeing the ontological difference, such as it may be, as unaffected by marriage. Moreover,

108 Hayes also emphasizes the importance of “epistemological certainty” as a test of whether a legal system is nominalist or realist. I confess that I do not completely follow this analysis. Her main example is the calendar controversy, especially the famous story in *m. Roš Haš. 2:8–9* that Schwartz had also adduced as clear evidence of rabbinic nominalism. The solar calendar, which involves no observation and is fixed in perpetuity, offers a high degree of certainty. On the other hand “the rabbinic position takes empirical data into account...; nevertheless, other considerations are allowed at times to trump the empirical element” (128). What would we say of the present-day rabbinic calendar, which is every bit as fixed as the sectarian solar calendar, and therefore should reflect the same degree of empirical certainty? (Is this a rabbinic move toward realism?) Or suppose a new species of fish is found with ambiguous signs of having fins and scales. Both nominalists (who think we just call the fish unclean, but there is no more real harm in eating it than any clean fish) and realists (who believe fish lacking fins and scales really are unclean and therefore harmful) would have to rule whether the fish is clean or unclean, but both would presumably feel uncertain due to the ambiguous empirical evidence.

109 Hayes, “Realism,” 124, who also discusses the prohibition of marriage with gentiles in *Jub. 16:17–18*. Hayes notes that this ban “is rationalized on analogy with the God-given separation of species. The sectarians believed these statuses to be facts of the created order rather than classifications that can be revised by humans—a highly realist stance.” She then claims: “By contrast, the widely attested acceptance of conversion, and of marriage between Israelites and converted Gentiles, in Second Temple and rabbinic Judaism is evidence of a nominalist approach to this particular issue in non-Qumran circles.” But this does not necessarily follow. These circles may have simply believed that gentiles are not ontologically different than Jews (and prohibited intermarriage for social and cultural reasons), or that they are ontologically different but the difference does not prevent marriage after conversion (whatever the other consequences of it), or that immersion and the other conversion rituals have an ontological effect on the nature of the convert, removing the “unholiness” and instilling the same holiness as Jews possess.

Baumgarten has persuasively challenged this interpretation and suggested the prohibition is against marriage with gentiles.<sup>110</sup>

Although the issue of marriage with converts is probably not mentioned in this halakhah, Hayes takes the ruling (in light of priestly law attested elsewhere) to amount to an absolute ban on intermarriage, which would extend to converts, and also indicative of “a highly realist stance. By contrast, the widely attested acceptance of conversion, and of marriage between Israelites and converted Gentiles, in Second Temple and rabbinic Judaism is evidence of a nominalist approach to this particular issue in non-Qumran circles.”<sup>111</sup> Once again, the judgment that the rabbis’ policy is nominalist is precipitous. Consider this tradition attributed to R. Yoḥanan in *b. Šabb.* 145b–146a.

Why are idolaters contaminated (*mezuhamim*)? Because they did not stand on Mount Sinai. For when the serpent came upon Eve he injected her with filth: the Israelites who stood at Mount Sinai, their pollution departed, the idolaters who did not stand at Mount Sinai, their pollution did not depart.

R. Aḥa the son of Rava asked R. Ashi, “What about converts?” He replied, “Though they were not present, their guiding stars (*mazzalaihu*) were present, as it is written: *I make this covenant with its sanctions, not with you alone, but both with those who are standing here with us this day before the Lord our God and with those who are not with us here this day* (Deut 29:13–14).”<sup>112</sup>

An ontological difference between Jews and gentiles is traced to the revelatory moment at Mount Sinai when the “filth (*zohamah*)” with which the serpent contaminated humanity was removed. Until that point, interestingly enough, both Jews and gentiles had been tainted equally due to the serpent’s intercourse with Eve. This would seem to imply that converts, whose ancestors did not stand at Mount Sinai, remain as contaminated as their idolater ancestors. R. Ashi claims that because the “guiding stars (*mazzalaihu*)” of converts were

110 Baumgarten, “‘Halakhah’ in *Miqṣat Ma‘aše ha-Torah*,” 515–16. So too Kister, “Studies in 4QMiqṣat Ma‘aše HaTorah,” 344–46, although Kister believes the sect may have prohibited such marriages.

111 Hayes, “Legal Realism,” 124.

112 Translation from Joshua Levinson, “Bodies and Bo(a)rders: Emerging Fictions of Identity in Late Antiquity,” *HTR* 93 (2000): 346, and see the rich discussion there.

present at Mount Sinai, they experienced the same ontological change as Jews whose ancestors were present. The exact workings of these “guiding stars” or “heavenly counterparts (*mazzalim*)” is unclear, but undoubtedly R. Ashi is arguing for a parallel process by which converts were impacted and transformed by the Sinai experience such that they too were “decontaminated.” If the priestly worldview considered gentiles as ontologically different from Jews such that marriage with converts could be analogized to the laws of mixed kinds (*kil'ayim*), some rabbis considered converts and Jews ontologically identical. The rabbinic view, then, need not be any less realist than that reflected in MMT. This is a good example of my general claim—that rabbinic legal rulings which appear to be nominalist when superficially contrasted with Qumranic realist positions in fact embody a different realist perspective.

What emerges from this brief survey? First, most of these disputes *cannot* be analyzed profitably in terms of a nominalist vs. realist division. In several cases such an analysis is possible but by no means necessary or demanded. Generally where a realist understanding of the law can be imputed to MMT, a different realist view can be imputed to the Pharisaic-rabbinic ruling.<sup>113</sup> In a number of cases the view of MMT is best understood in nominalist terms. Because the disputes in MMT are arguably a representative sample, perhaps the most representative sample, of the division between the two legal “systems,” we should have found blatant examples of realism vs. nominalism among them if Schwartz’s thesis is correct. But we do not, and it is therefore not surprising that only a few of these disputes listed by MMT are adduced by Schwartz (and Hayes) among their evidence.

Second, underlying almost all of these disputes are clear exegetical problems, including gaps in the biblical legislation, contradictions between biblical passages, and terms that are unclear or ambiguous. In some cases ideological considerations are at work, such as attitudes towards gentiles and the status of priests. In many cases the view in MMT is attested in rabbinic sources too, as different rabbis resolved those same exegetical difficulties in different ways, and because rabbis themselves differed on various ideolog-

113 It is also worth noting that in all of these cases it seems that the realist views we might attribute to the authors of MMT (and the realist views we hypothesize for their opponents) are what Lorberbaum calls “intra-halakhic” realism (“Halakhic Realism,” section VI), with “no consequences outside of the halakhic system itself.”

ical issues. The exegetical differences between MMT and their opponents cannot be correlated with a realist vs. nominalist legal approach. Exactly why each side resolved the difficulties the way they did cannot always be known, or is a result of many and diverse factors, and often has to do with the particularities of the issue.

Bottom line: why “some people, like priests, interpret the Bible one way and some, like rabbis, another,” is an extremely complicated question, a function of many factors including the complexities of the biblical text itself,<sup>114</sup> and cannot always be attributed to a larger systemic principle. To ignore the serious exegetical considerations is to return to the approach of Joseph Heinemann that views exegesis purely as the product of ideology.

#### IV. From Realism to Nominalism to Realism

I close with one thought on the development of nominalism within rabbinic law in response to Yair Lorberbaum’s observations.<sup>115</sup> I had argued that living legal systems are generally realist, as law reflects society’s worldview and beliefs about reality, and law will change as the worldview changes. Biblical law, I claimed, was realist, but that changes in worldview by rabbinic times resulted in nominalist elements in areas where rabbinic beliefs deviated from those of the Bible.<sup>116</sup> Bound to the authority of the Torah and inherited tradition, the rabbis could not routinely change the law to accord with changes in their worldview (though midrashic interpretation was helpful in this regard), and this disparity produced an occasional nominalist stance. Law, or at least law whose authority is vested in ancient texts that cannot easily be updated, therefore tends to move from realism to nominalism. Lorberbaum points out that the development of Kabbalah seems to be a counterexample to this claim, as Kabbalah offers a thoroughly realist view of the commandments

114 I.e., the assumptions of the “interpretive community” per Stanley Fish’s term. The Pharisees/rabbis and Sadducean/Qumran exegetes share enough assumptions about the biblical text such that the exegetical possibilities would have been limited.

115 “Halakhic Realism,” section IV. This is Lorberbaum’s third critique of my model. As to the first two critiques, see n. 117.

116 There may, however, be occasional nominalist elements even in biblical law. See Rubenstein, “Nominalism,” 181 n. 72; Martha Himmelfarb, “‘Found Written in the Book of Moses’: Priests in the Era of Torah,” in *Was 70 CE a Watershed in Jewish History?* ed. D. R. Schwartz and Z. Weiss (Leiden: Brill, 2012), 33–36.

as having important theurgic effects in the Sefirotic realm. We have then a development from nominalism to realism in Jewish tradition.

This is certainly an accurate and valuable insight. But it should be emphasized that Kabbalah provides a different worldview, a completely new ontology, hence the legal realism of medieval Kabbalah is radically different from that of the Bible/Second Temple period/rabbis. The rise and popularity of Kabbalah, I would argue, is itself a response to the very process I am describing, the drift from realism to nominalism. Indeed, it reflects what we might call a “nominalist crisis,” namely the potential alienation that results as changing worldviews produce too large a gap between law and reality. When law becomes thoroughly nominalist, when it loses its connection to an underlying ontology—then adherents can lose their motivation to follow the law and ultimately their faith. The problems will be most acute with (what we call) ritual commandments like sounding the shofar, waving the lulav or wearing *tefillin*, as well as prohibitions such as the dietary laws and purity regulations (as opposed to civil and moral laws with clear social functions, although I realize this distinction is not straightforward).<sup>117</sup> This is not to say that reasons cannot be given for such rituals and prohibitions. Theologians and philosophers will always be able to provide novel and creative reasons for the commandments, as did Philo and others throughout the ages. But

117 See Lorberbaum’s first two critiques (“Halakhic Realism,” section IV), which follow in the wake of his criticism of Schwartz for ignoring “value-based-halakhah” and confusing the nominalism/realism distinction with the distinction between commandments-with-rationale/commandments-without-rationale. I accept this line of thought and believe it is a salutary addition to the discussion. Certainly the rabbis will continue to find observance of the law meaningful in cases where they are able to substitute a rationale or value that makes sense to them for a biblical rationale or value that they do not understand or with which they disagree. Likewise, as noted, midrash will help bridge the gap between the biblical and rabbinic worldviews. Yet even civil and moral commandments, the “value-based halakhot,” are not immune from problems, despite the fact they serve practical and social functions. Certainly incest prohibitions and laws of forbidden relationships will continue to produce more stable family structures and laws of buying and selling will continue to provide a mechanism to effect transactions. But if they completely lack a realistic basis, then changes in worldview and social structures can erode the power of these laws too. Economic shifts from agrarian to mercantile to modern-commercial can lead to difficulties with those traditional laws of transactions, and changes in moral sensibilities to challenge laws of forbidden relationships. This issue clearly requires more extensive discussion in another forum.

because these rationales will not be connected to the underlying ontology, they will tend to be didactic, symbolic or allegorical. And these types of explanations will not satisfy all worshippers or provide sufficient conviction. Consider the interpretation of the shofar as a symbol of faith that evokes the ram that Abraham sacrificed, or Philo's explanation of dwelling in a sukkah as a means to recall one's poverty when enjoying the riches of the harvest (*Special Laws*, II.204). Why not symbolize faith some other way or devise a better method to recall poverty if the rituals function simply to accomplish these ends?

Kabbalah responds to this crisis by providing a different worldview, a completely different ontology that reconnects law to reality. In this way a nominalist (or non-realist) understanding of the law again becomes realist. However—and this is the key point—it does not return to the original biblical-rabbinic realism, but changes to a very different realism, a change achieved by the replacement of the classical rabbinic ontology with the kabbalistic one. In my view, then, there was sufficient continuity between the biblical, second temple and rabbinic worldviews such that law was still understood in a fundamentally realist way, though with an increasing nominalist dimension. As the worldviews drifted farther apart with the passing centuries, as the period we call Late Antiquity became the Middle Ages, as the ancient worldview was replaced by the medieval mentalité, Jewish law was perceived increasingly in nominalist (or non-realist) terms, which led to a type of crisis.<sup>118</sup>

Let me emphasize that I do not believe that it is impossible to have a purely nominalist view of law, or a view that accepts “value-based” rationales for the commandments, or that offers symbolic interpretations for laws and rituals. Nor do I claim that such understandings of the commandments will always lead to alienation and crisis. Maimonides, of course, was not a legal realist, and many others have been and continue to be non-realists, both Jews and gentiles. I am simply claiming that the lack of realism *can* have this effect

118 This model is therefore fully compatible with the argument that “the theurgic model in Kabbalah was a reaction to the (non-realistic) rationales for the mitzvot presented in the school of Maimonides,” which Lorberbaum adduces, referring to M. Idel, “Maimonides and Kabbalah,” in *Studies in Maimonides*, ed. I. Twersky (Cambridge, MA: Harvard University Press, 1990), 31–81.



on adherents of a particular cast of mind, and did so in the case of Kabbalah.<sup>119</sup> Consider the following passage from Moshe de Leon's *Sefer ha-Rimmon*:

I have seen men who used to occupy themselves with Torah and the teachings of the rabbis, may their memory be for a blessing, day and night; and they used to serve the Omnipresent with a full heart, as is appropriate. And then, one day, scholars of Greek wisdom came to confront the Lord... They occupied themselves with those books [of Greek wisdom] and their minds were drawn after them until they left the teachings of the Torah... ... I have also seen them during the holiday of Sukkot standing in their place in the synagogue watching the servants of God circling the Torah scrolls in the ark with their lulavim, and the former were laughing and casting aspersions upon them. They said that they were fools, lacking in understanding, while they themselves had neither lulav nor etrog. They contended, "Did not the Torah say that this taking [of the lulav and etrog] was on account of the verse, *And you shall rejoice before the Lord your God seven days?* (Exod 23:40). You think that these [four] species will cause us to rejoice? Vessels of silver and gold and [valuable] garments will cause us to rejoice and delight!"<sup>120</sup>

De Leon is dealing with the dangers of philosophy, and accusing those who have been influenced by philosophical rationalism with antinomianism and rejection of the commandments. Yet the perspective he attributes to his antagonists, I believe, helps us to understand the alienation that can result from a predominantly nominalist (or non-realist) view of the law. These rationalists do not have a realist view of the lulav, such as the belief that waving the species causes rain to fall. They believe the lulav should serve as a symbol and expression of joy, but it does not even serve those functions in this time and place, or not as well as do material possessions. These scoffers are aware of the reasons for the commandment, but no longer find those reasons meaningful or effective. They could wave the lulav because they know what it is supposed to represent, or solely in order to fulfill the

119 Though this was obviously not the only factor, but one among many factors, historical, ideological, and cultural.

120 Translation from Joel Hecker, *Mystical Bodies, Mystical Meals: Eating and Embodiment in Medieval Kabbalah* (Detroit: Wayne State University Press, 2005), 62.

commandment of the Torah, but it would feel like a meaningless gesture. The various kabbalistic and Lurianic interpretations of waving the lulav for its important theurgic effects clearly do much to address this problem. But of course these realist interpretations are predicated on a new ontology.