

Halakhic Realism*

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I. Introduction

At first glance, “halakhic realism” seems to be something concrete and tangible, but upon further reflection it is difficult to imagine a more elusive matter. In the following study, I intend to offer a conceptual, phenomenological, and methodological framework for the inquiry and discussion of “halakhic realism,” or what is sometimes referred to as “halakhic ontology” or “halakhic naturalism.”

I will begin with a personal comment. During my early 20’s, after several years of yeshiva study, I went to study at the university, where I registered for general philosophy and law. Many of the subjects which I encountered in law school were similar to those I had studied during my yeshiva years—criminal law, property law, torts, family law, and so on—which are treated in those talmudic tractates I studied intensively at yeshiva: *Bava Qamma*, *Bava Meš’ia*, *Bava Batra*, *Ketubbot*, *Giṭṭin*, *Sanhedrin*. But after only a few weeks of study at law school, I began to feel the profound difference between these “disciplines.” Whereas in the university the discourse related primarily to the social, ethical, and political aims of legal rules, in the yeshiva the discussions concerning these selfsame subjects centered primarily around “concepts” and “entities,” ontological considerations, bizarre causal connections, and *haluyot* (“applicabilities”). I found myself wondering about the source of the

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difference between the two approaches: Is it a matter of style and language, or is it perhaps rooted in differing world-views? Or might the difference be anchored in differing approaches towards legal logic and legal reasoning? Moreover, if this difference is real, what is its source: the general historical-cultural context? the Jewish context? the legal tradition? the religious/theological element? At the time, I had neither the tools nor the time to deal with these questions. The present paper affords me an opportunity to begin to answer these questions.

“Realistic” approaches are ubiquitous in all branches of halakhah: it is difficult to imagine any realm of halakhah from which realism is absent. It seems natural for realism to be an integral part of the religious-ritualistic aspects of halakhah, such as the laws of Shabbat and festivals (Rosh Hashana, Yom Kippur, Passover, Shavuot, and Sukkot, with the complex of commandments and rules associated therewith); purity and impurity; sacred things (i.e., sacrificial offerings and atonement, the Temple); as well as agricultural laws, forbidden foods, forbidden sexual relations, etc. Realism also relates to matters of language—for example, the subject of the “name of God” and its inherent powers, and by extension those commandments relating to curses (reviling God’s name, cursing one’s father and mother) and blessings, as well as matters related to prayer, vows, and oaths. Yet “realism” is also integrally related to the legal-social aspects of halakhah: criminal law (*dinei nefashot*), laws of property, torts, legal documents (such as divorce writs and contracts), legal institutions (the Sanhedrin of 71, the courts of 23 and of 3), family law (marriage and divorce etc.), personal status (*kohen*, Levite, Israelite, *halal*, *mamzer*, *yabbam*), and more. Regarding all these and many other matters, one finds differing realistic-ontological views among various halakhic authorities and at various times and places.¹

Research concerning all the varied aspects of the relation between halakhah and ontology must of necessity be conducted within a textual-historical context. Generally speaking this has revolved around a particular body of halakhah, at times even upon a limited group of halakhot, certain specific halakhists, or even one particular halakhah. This area of research may well be too extensive and complex to be encompassed by a brief series of conceptual and methodological comments, sophisticated and polished as they may be. But one cannot avoid such a discussion, as an adequate conceptual analysis

1 For studies which reveal realist-naturalist aspects in the bodies of halakhah mentioned above, and others, see the notes below.

and methodological consciousness are a necessary framework for any examination, particularly regarding our subject, which is a kind of crossroads of several major subjects, including halakhah, ontology and epistemology, hermeneutics, legal theory, religious studies, and history.

I will begin my discussion, in Section II, with several theoretical observations that will serve as a kind of conceptual framework for the arguments and distinctions to be presented further on. An appropriate point of departure for the discussion of halakhic realism is the distinction between ethical and legal laws (i.e., prescriptive laws) and laws of nature (i.e., descriptive laws). Halakhic realism tends to undermine this distinction. Various aspects of this “subversive” tendency form the background for a number of the methodological and phenomenological comments that will be proposed in this section. The blurring of the distinction between ethical-legal-halakhic rules and laws of nature (or the state of matters in nature) seems to bring halakhic realism closer to ethical realism and to common philosophical doctrines of natural law. But this similarity is only apparent. In the second half of Section II, I shall note the profound differences between halakhic realism and ethical realism (and natural law). This comparative discussion constitutes an important contribution to identifying the salient characteristics of halakhic realism, in its varied appearances throughout the history of halakhah.

In Section III I outline three levels in the discussion of halakhic realism—the halakhic level, the meta-halakhic level, and the level of rationales for the commandments (*ta'amei ha-miṣvot*). These levels are embodied in separate and distinct literary genres, whose interrelation is complex. The distinction between these levels of discussion will emphasize the difference between halakhic realism as a component of halakhic discourse and argumentation (i.e., the first level of discussion) and halakhic realism as a theoretical-philosophical explanation external to halakhah (the third level). As such, it will help to sharpen the distinction between halakhic realism and ethical realism (and natural law). Whereas the most significant and interesting realm of discussion involving halakhic realism is the halakhic one, the principal, and apparently only, realm of discussion in ethical realism (and of natural law) is the meta-ethical one, parallel to the second level of discussion here, i.e., the meta-halakhic.

A central concern related to the subject of halakhic realism is that of the various aspects of the ontological dimension of halakhah, with its complex branches and offshoots. Any discussion of halakhic realism involves its opposite,

which I have designated as “halakhic non-realism”: that is to say, halakhah as a system of rules whose basis is not realistic-ontological. In the wake of the pioneering study of Yohanan Silman, the term “halakhic nominalism” has taken root in the research literature as a synonym for halakhic non-realism.² In Section IV, I propose a critical discussion of the definition offered by Silman—and the multitude of scholars who followed in his wake—of the contrasting pair, “halakhic realism/halakhic nominalism.” Rather than the narrow and reductionist definition proposed by Silman, according to which halakhic realism is restricted to properties of objects or to entities, I propose here a broader definition, encompassing a wide range of aspects of ontology within halakhah, whose aspects are as numerous as ontology (or: the history of ontology) itself. The importance of this discussion is, among other things, that it more precisely characterizes the “realities” or “concrete entities” that fall under the definition of halakhic realism, and eliminates those entities and “states of things” adopted by halakhic non-realists (=nominalists) as well.

No less important than this is the critical discussion in Section IV regarding Silman’s definition of the opposite, complementary term, “halakhic nominalism.” As against his definition, adopted by many scholars, that halakhic nominalism denoted commandments and halakhot whose source lies, in the eyes of the halakhist, in God’s will, a more useful and productive definition of halakhic non-realism would be the perception of halakhic rules as being based upon values and social, educational, and spiritual aims. In other words, rather than the opposition proposed by Silman between “reality-based halakhot” (i.e., realism) and “will-based halakhot” (i.e., nominalism), which led to dubious interpretations of halakhic sources on the part of those scholars who followed in his wake, I wish to propose a distinction between “reality-based halakhot” and “value-based halakhot.” This distinction is more suitable to the difference (and at times to the dispute) in the various realms of halakhah between realistic halakhists and non-realistic (nominalistic) halakhists.

In Section V, I propose a distinction essential to any discussion of halakhic realism—namely, that between realistic-descriptive *language* and a realistic-ontological *approach*. The basic insight underlying this distinction is that descriptive-realistic language regarding matters of ethics and halakhah

2 See Yohanan Silman, “Halakhic Determinations Between Nominalism and Realism—Studies in the Philosophy of Halakhah,” *Diné Israel* 12 (1984–85): 249–66 (Hebrew).

does not necessarily indicate an ontological approach regarding these matters. Central aspects of this basic distinction and its application are entailed in the conceptual distinctions to be discussed in Sections II and III, and in the definitions of halakhic realism and non-realism in Section IV.

In Section VI, I suggest a distinction between what I refer to as “extra-halakhic realism” and “intra-halakhic realism.” Extra-halakhic realism refers to “concrete entities” which, according to halakhic realism, have an effect upon reality (i.e., “the outside world”), such as, for example, “demonic impurity.” The rules of halakhah take these realities and effects into consideration and wish to prevent them causing harm or to exploit their benefits. Against that, intra-halakhic realism is based upon entities that have no effect whatsoever outside of the boundaries of halakhah, such as “neutralized (‘innocent’) impurity” or marriage perceived as an entity. The application of these entities is purely intra-halakhic, that is, they determine the contents of halakhah’s rules alone. Among other reasons, this conceptual and phenomenological distinction is of importance due to its relation to the distinction, discussed in the previous section, between realistic language and a realistic approach. Remarkably, scholarly literature has not to date displayed any awareness of this distinction, and certainly not of the conclusions that follow therefrom. Most of the halakhot which researchers claim to be based upon concrete entities embody intra-halakhic realism. In light of the distinction between realistic language and a realistic (ontological) approach, the suspicion arises that halakhic realism limited to the boundaries of halakhah is not concrete. Thus the distinction between extra-halakhic realism and intra-halakhic realism is of importance both in terms of subject matter and methodology, as well as due to the proximity between intra-halakhic realism and halakhic formalism, to be discussed in Section VII.

Regarding the issue of halakhic realism, the element of “intention” (*kavvanah*), that is to say the *mens rea* involved in the performance of the commandments or transgressions, enjoys a special status. A general, conceptual, phenomenological, and methodological discussion of halakhic realism cannot ignore this matter. Hence, in Section VIII I have devoted a discussion to what I have referred to as “the realism of intentions” (i.e., the effectiveness of intentions “outside of the boundaries of personalities”). Those few studies which relate to the status of intentions (i.e., *mens rea*) in halakhic realism have assumed—either explicitly or by implication, possibly in the wake of Maimonides—that even realistic halakhists throughout the generations have rejected “realism of intentions.” In this section I shall clarify the meaning of

this term, and demonstrate that realism of intentions is a central cornerstone of nearly every version of halakhic realism.

In Section IX I shall present a brief discussion of the sources of inspiration of halakhic realism. I will argue that the sources of inspiration of halakhic realism throughout the generations are numerous and rich. Awareness of the variety of sources of influence is important, among other reasons, because it allows us to discover new aspects of halakhic realism which have thus far not been discussed in the scholarly literature. Moreover, uncovering the sources of their inspiration and influence provides an appropriate context for their discussion.

Discussion of the research literature is, as I have said, a central axis of the present inquiry. Many of the comments to be proposed below took shape during the course of a critical reading of studies involving halakhic realism, a great number of which have been written in recent decades. In order to explain and concretize my remarks, I shall use examples from halakhic literature over the generations, some of which have been discussed in the research and others of which are original. It is my hope that the conceptual, phenomenological, and methodological notes to be proposed will assist in studying matters of halakhic realism, whatever the particular branch of halakhah and historical context may be.³

II. Descriptive Laws and Prescriptive Laws: Halakhic Realism and Ethical Realism

Before addressing general aspects of halakhic realism and non-realism, I wish to propose a basic distinction taught in every introductory course in the philosophy of ethics and law. The term “law” is used in numerous contexts—we speak of “ethical law” and “legal law,” and we speak of “laws of nature” (as well as of laws of mathematics and laws of logic). What is the difference between the meaning of the word “law” in the terms “ethical law” and “legal law” as against its meaning in the “law of nature” (as used in physics and in other exact sciences). The answer is well-known and simple: the laws of nature are descriptive laws, while the laws of ethics and jurisprudence

3 For a general discussion of halakhic realism, albeit from a different direction, see Shai A. Wozner, “Ontological and Naturalist Thought in Talmudic Law and in Lithuanian Yeshivot,” *Diné Israel* 25 (2008): 41–98, esp. 42–52 (Hebrew).

are prescriptive laws. Natural laws are concerned with describing, and by extension predicting, various phenomena which, given the existence of certain conditions, will always *occur*. If the laws are mistaken in their description or prediction, their very validity is challenged. By contrast, laws of ethics and jurisprudence do not describe the behavior of human beings, but rather prescribe—again, given the existence of certain conditions—that they always *behave* in a given manner. Hence, violation of these laws does not constitute a refutation thereof and does not raise the issue of their correctness. While ethics and jurisprudence do take into consideration reality—the state of things in the world, including the laws of nature—they are not concerned with nature as such (“that which is”), but rather with that which is desirable (“that which ought to be”).⁴

This distinction is of interest to us because halakhic realism implies a certain blurring of the distinction between descriptive law and prescriptive law. Realistic approaches in the realm of halakhah strive (albeit not always explicitly or with full consciousness) to bring the legal-halakhic law (*mišvaḥ*) closer to the “descriptive” laws of nature or to “nature” (that is: to that which appears in their eyes to be the state of things in nature), and at times even conflates them. A mood of realistic-ontological thought within the realm of law and halakhah often errs in committing a certain version of what philosophers call “the naturalistic fallacy”—by implication, and at times explicitly, these approaches attempt to “derive the ‘ought’ from the ‘is.’” There is nothing wrong with this from the historical-hermeneutical viewpoint (after all, my task is not to evaluate the sources); however, as I shall demonstrate below, this fact is of great importance for understanding the phenomenon, and in certain contexts even for its very identification.⁵

4 See for example: H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994), 182–84; and cf. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision Making in Law and in Life* (Oxford: Clarendon Press, 1991), 2.

5 One of the motivations of a realistic approach (albeit not necessarily the most important one) would seem to be the wish to give law an “objective”-“realistic”-“solid” character. According to this approach, discussion of values and social goals (and certainly ethical-realism) is seen as unscientific. However, from a philosophical viewpoint this intellectual “effort” entails various logical errors and a non-rational approach to reality. In this context I should comment that certain halakhists prefer to distance themselves from abstract propositions. For them, value-based laws (commandments/imperatives) are seen as insufficiently “concrete”; hence, they are interested in rooting halakhah in the realm of the

Ethical Realism and Halakhic Realism

Legal realism would seem to be close to the classical (and even to some modern) approaches of ethical realism and natural law, which have a seemingly similar tendency—namely, to bring the “ought” closer to the “is.” Moreover, several schools therein are guilty of the naturalistic fallacy or, at the very least, confuse “must” in the causal-descriptive sense and “must” in the normative sense.⁶ As I shall demonstrate below, “halakhic realism” (or naturalism) may be used in different ways. Several of its manifestations may bear a certain resemblance to ethical realism or natural law. However, upon examining typical examples of halakhic realism-naturalism, on the one hand, and common theories of ethical realism and natural law, on the other, it is easy to discern the fundamental differences between the two.⁷

I shall mention briefly several of them. According to widespread theories of ethical-realism and natural law, true rules of ethics and of law are not only identified by means of reason (i.e., they are not up to us), but this is also the basis of their reality (existence). For example, the prohibition against

concrete or, more specifically, what appears to them to be so. In order to lend to the commandments a “concrete” nature they need to be “physical” or connected to real (“tangible”) things. This is similar to the argument attributed by Maimonides in *Guide of the Perplexed* 1:1 to the manner of thinking of the “multitude” (including “the multitude of the rabbis”) regarding abstract matters, in this case with regard to God: “People have thought that in the Hebrew language the word ‘image’ [*šelem*] denotes the shape and configuration of a thing. This supposition led them to the pure doctrine of the corporeality of God ... For they thought that God has a man’s form. ... They accordingly believed in it and deemed that if they abandoned this belief ... they would even make the deity to be nothing at all [i.e., think of him as non-existent—יֵל] unless they thought that God was a body...” (Pines, 21). This is only one aspect of halakhic realism, which is not all of a piece, and its sources are varied; see below.

6 See Hart, *Concept of Law*, 182–85. “Ethical realism” and “natural law” (in their various versions) are not all the same. Thus, it is possible to advocate ethical realism and simultaneously to adhere to a positive doctrine of law. In this context I will draw a distinction between natural law as an approach of legal doctrine, required simply in order to draw a connection between legal validity and ethical contents (but not to cognitivism and to ethical realism) and natural law as a philosophical doctrine, committed to one or another version of ethical realism (and of ethical cognitivism). The following notes concerning “natural law” deal with the philosophical version thereof.

7 On ethical realism, see David Enoch, *Taking Morality Seriously: A Defense of Robust Realism* (New York: Oxford University Press, 2011).

murdering is rationally based, and it exists as a “normative fact.” Modern realists do not elaborate upon the ontological nature of “normative facts.” However, they will acknowledge that, like Platonic ideas, these “entities” do not exist in space and time, they do not come into existence or cease to exist (nor does any change take place therein), they are fixed (“frozen”), and mundane realities, including human actions, do not affect them in any way.

Halakhic-“religious” entities, such as impurity (*tum'ah*), the sanctity of the Sabbath, blessings and curses, the defiling and the purging quality of blood, the Day of Atonement, and so forth, differ from them in this respect. First, according to conventional versions of halakhic realism, these entities are not recognized by the intellect; there are no rational arguments to support their existence. Secondly, while halakhic realism speaks about entities which are not concrete and not measurable, these generally behave as natural, physical entities: they exist in space and time, they come into existence and cease to exist, and the earthly reality including human actions—for example, the performance of commandments or of transgressions—exert an influence upon them. Thus, for example, death creates concrete impurity, located in the dead body and emanating from it. It is contagious, e.g., through contact or being underneath the same “tent” as it, and it is purified through immersion in water; holiness comes into being (“descends”) upon the entry of the Shabbat and departs upon its end. The act of *qiddushin*, of marriage, creates a concrete connection (“bond”) between a man and his wife, which is concretely nullified through a divorce writ (*get*) or death.

Another difference between ethical realism and natural law as against typical halakhic realism is that the approaches regarding ethical realism do not generally carry any implications regarding the contents of the appropriate ethical and legal norms but are only concerned with their ontological status. In other words, there is no necessity (nor is it typical) for there to be a distinction between the normative contents of the ethical rules in the eyes of an ethical non-realist and their contents in the eyes of an ethical realist or advocate of natural law.⁸ The meta-ethical debate concerning the issue of ethical realism does not bring in its wake a debate in the area of normative

8 This argument is correct regarding those positivists whose ethical outlook (including their outlook regarding the suitable kind of law) is cognitivistic but not regarding those who base their legal positivism upon ethical relativism, such as Hans Kelsen; see his *Pure Theory of Law*, trans. M. Knight (Clark, N.J.: The Law Book Exchange Ltd., 2005), 59–69.

ethics.⁹ Such is not the case regarding halakhic realism. The debate between the realistic and non-realistic approach to matters of halakhah generally bears halakhic implications. The halakhic realist may arrive at a different halakhic result than the halakhic non-realist regarding a particular halakhic matter. This difference is rooted in the fact that, whereas the ethical realist argues for the existence of ethical facts which are (typically) tautological to “that which one ought to do,” the halakhic realist argues the existence of halakhic “entities” which are a-ethical, which in his opinion one needs to take into consideration, on occasion at the expense of ethical, spiritual, or social considerations and their like. Indeed, it is possible that, for the halakhic realist, a concrete halakhic entity may conflict with what seems to him to be an ethical value, or even a “normative fact.”¹⁰ Thus for example, a halakhist who thinks that bastardy is a concrete quality of a person born from incest or adultery may nevertheless think that the halakhic limitations imposed upon the bastard (*mamzer*) as a result of this characteristic, such as the prohibition against marrying within the community, are unjust but that, as in the case of a disease which befalls a person, he is unable to help.¹¹ As I said, such a situation would not exist in the case of an ethical realist, according to whom there is typically no distinction between a “normative fact” and “that which one ought to do.”

- 9 On this matter, see J. L. Mackie, *Ethics: Inventing Right and Wrong* (Harmondsworth, UK: Penguin, 1990). I wish to thank Dan Braz for calling my attention to this reference.
- 10 Such a debate could appear among secular lawyers; see Felix S. Cohen, “Transcendental Nonsense and the Functional Approach,” *Columbia Law Review* 35 (1935): 809–49. Cohen is critical of the arguments that fill the legal discourse in his day (and in the past), arguing that they are based on “transcendental nonsense”: “[...] we may summarize the assumptions of traditional legal theory in the following terms: *Legal Concept* (for example, *corporation* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eye of faith. *Rules of law* which refer to these legal concepts are not descriptions of legal social facts [...] nor yet statements of moral ideals but are rather theorems in an independent system [...] *Jurisprudence*, then, as an autonomous system of legal concepts, rules and arguments, must be independent both of ethics and of such positive sciences as economics and psychology. In effect it is a special branch of the science of transcendental nonsense” (820–21).
- 11 See Wozner, “Ontological and Naturalist Thought,” 90–91. This is, however, not the position of all halakhists. See, for example, *Teshuvot Shi'ei Eli'ezer*, 14, § 98 (in light of his words in vol. 13, §97); for more on this subject, see below, Section X.

III. “Halakhic Realism”—Three Levels of Discussion

Halakhic realism may exist, in various degrees, on three levels of discussion, among which it is vital to distinguish. The first level of discussion is halakhah *itself*—that is, of halakhic discourse, which creates, explains, explicates, and applies the halakhic rules. This level encompasses, for example, the legal chapters of the Torah, the Mishnah, the halakhic midrashim, the halakhic *sugyot* in the Talmuds, and subsequent halakhic literature, such as Geonic literature, Maimonides’ *Mishneh Torah*, the *Shulhan Arukh*, responsa literature, and so on. It is mostly this level which has been discussed in scholarly literature on halakhic realism to date—and for good reason, since it would appear to be the most interesting level of discussion. However, there are two additional levels of the discussion of halakhic realism and non-realism which it is important to note.

The second level of discussion of “realism” and “non-realism” in halakhah is that of meta-halakhah—an area sometimes referred to as the theory or philosophy of halakhah. This term alludes to those axioms or approaches that form the underpinnings of the system of *mišvot* and halakhah. These meta-halakhic approaches are parallel to the meta-ethical and meta-legal jurisprudential approaches which underlie a given system of law or every legal system. These meta-halakhic approaches, which underlie the halakhic system as a whole, include, for example, the view that the Torah originated in divine revelation (“Torah from Heaven” or “the Revelation at Sinai”). This view incorporates claims regarding the existence of God and His attributes,¹² the manner of His revelation—both of revelation in general and of revelation in relation to law in particular. Various claims are made within the framework of this discussion regarding the “eternity of the Torah,”¹³ reward and punishment (i.e., divine providence), and various eschatological matters.¹⁴

12 For a discussion of the connection between these issues and halakhah—that is to say, to the first (and second) level of discussion, see Yair Lorberbaum, *Image of God: Halakhah and Aggadah* (Tel Aviv-Jerusalem: Schocken, 2004) (Hebrew) [=Y. Lorberbaum, *In God’s Image: Myth, Theology, and Law in Classical Judaism* (Cambridge: Cambridge University Press, 2015)] and see below, Section X.

13 See for example Yohanan Silman, *A Great Voice Which Does Not Cease: Israel’s Torah, Between Completeness and Ever-Becoming-Completed* (Jerusalem: Magnes, 1999) (Hebrew).

14 See, e.g., Maimonides, *Hil. Teshuvah*, ch. 3, and the talmudic sources upon which that chapter is based.

It is likewise discussed within this framework whether the commandments originate in divine wisdom or divine will.¹⁵ On this level, the assertion that the commandments of the Torah “are based upon (divine) will”—which, according to a widespread view within scholarship is seen as the basis for “halakhic nominalism”—is a metaphysical, i.e., realistic claim! All those assertions—which according to many halakhic authorities serve as the foundation of halakhah, and are in their eyes its constitution—are “realistic,” ontological claims regarding the “metaphysical,” physical, and/or historical reality (in the past, present, and even future).¹⁶ But within the framework of this meta-halakhic discussion there may also exist non-realistic views, or at least less realistic ones. Such approaches will ground halakhah on a limited number of ontological-metaphysical claims, if at all: for example, upon social conventions (e.g., “the agreement of all Israel”).¹⁷ This social agreement is, of course, a real fact, but it does not belong to that sort of metaphysical fact whose reality the non-realist would contest.

In this context, it is important to note that the debate between realism and non-realism is also present in general theories of law. Thus, for example, ancient theories of “royal theology,” which provide the basis for the authority of the king-sovereign, and by extension the validity of his laws and decrees, and of the status of the divine and the sacral, are strongly realistic (i.e., metaphysical) approaches.¹⁸ So too, in another sense, are certain versions of natural law.¹⁹ By contrast, other, more modern jurisprudential theories, such

15 See, e.g., *Guide of the Perplexed* 3:26 (Pines, 506–7).

16 On this matter it is important to note that meta-halakhic arguments of the type that “God revealed himself at Sinai, and gave the Torah” or “the Torah has not changed throughout the generations” are both historical claims and issues upon which halakhic realism focuses in establishing its theological-ontological basis.

17 See, e.g., Maimonides’ introduction to the *Mishneh Torah*, although there this principle has only limited applicability. I cannot elaborate on this point here.

18 See Yair Lorberbaum, *Disempowered King: Monarchy in Classical Jewish Literature* (London: Continuum, 2011), 19–38. Various versions of political theology of this type were widespread in Europe until the 17th and 18th centuries. See, for example, the dispute conducted by John Locke with Robert Filmer in the first of the *Two Treatises of Government* (1689).

19 See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 23–50; cf. the survey of views in B. H. Bix, “Natural Law: The Modern Tradition,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. J. Coleman and S. Shapiro (Oxford: Oxford University Press, 2002), 61–103. Compare in particular Bix’s discussion of the articles of M. Moore, who combines natural

as the “command theory” of Austin or the “rule of recognition” of Hart, as well as other conventionalist approaches towards law, are explicitly non-realistic (non-metaphysical). Hart’s “rule of recognition” is of course a social fact; however, this is again not the kind of fact which a non-realist would nullify or reject.²⁰ Parallel debates exist within the jurisprudential framework of halakhah; many of the metaphysical (“realistic”) claims in the realm of meta-halakhah are, as I have said, non-metaphysical/ontological alternatives. These alternatives were already proposed in meta-halakhic discussions in the Middle Ages, and more strongly during the early modern period and the twentieth century. Similarly, that realm of discussion concerned with meta-halakhah or the philosophy of halakhah may be divided into realistic and non-realistic approaches, both on various levels.²¹

The third level of our discussion of “halakhic realism” is that of *ta’amei ha-miṣvot*: that is, the “rationale” for the commandments. I refer by this to the extensive philosophical, ethical, and kabbalistic literature concerned with explanations and reasons for the commandments. This literature begins within the Bible itself, continues through the literature of the Second Temple period, the writings of Philo and Josephus, and talmudic literature, reaches its height in medieval philosophy and Kabbalah, and continues down to our own day. The literature of *ta’amei ha-miṣvot*, in all of its various trends and schools, proposes reasons for the commandments and halakhah in general (in this respect sometimes encroaching upon the second area of discussion), but its main concern is with specific halakhic institutions and, even more so, with the details of the commandments and halakhah. For various reasons,

law with ethical realism; *ibid.*, 89–93. For Moore’s articles on this subject, see the references there, 89 n. 163. These approaches to natural law, as opposed to royal theology, are generally speaking “intra-legal”; compare Moore, *ibid.* On the distinction between extra-halakhic/legal realism and intra-halakhic/legal realism, see below, Section VI.

- 20 Hart adhered to a non-realistic position regarding ethics; see Hart, *Concept of Law*, 182–83. However, this viewpoint is not related to his claim in terms of legal theory, that legal validity is not dependent upon ethical contents.
- 21 It may be that the totality of realistic (i.e., metaphysical) approaches found in the second level of discussion, the meta-halakhic, are not all of a piece. Some of them may be of the “mythic” type, close to halakhic realism of the first level, such as royal theology, or certain kinds of interpretations of “Torah from Heaven.” Others are more likely to be of a philosophical nature, closer to Platonic ontology, such as the argument that the commandments follow divine wisdom—but I cannot elaborate upon this point here.

this literature was perceived, both in the eyes of its authors and in those of halakhic authorities throughout the generations, as external to halakhic discourse, offering as it does “external” justification for the commandments of the Torah and for halakhah. Hence this area of discussion differs from the former realm of discussion whose concern is, as I have mentioned, halakhah itself.

In this area as well—i.e., that of rationales for the *mišvot*—one may distinguish between realistic and non-realistic approaches. Among the realistic approaches one might include, for example, the approaches of R. Judah Halevi (the *mišvot* as a kind of remedy and the “divine element”), R. Abraham Ibn Ezra (the *mišvot* as related to astral magic), the Kabbalah of R. Moses Nahmanides, and the entire Kabbalistic theosophic-theurgic tradition. As against these, non-realistic approaches to *ṭaʿamei ha-mišvot* include the approaches of Philo, who proposes allegorical-spiritual exegeses of the commandments; R. Saadya Gaon, whose utilitarian-educational approach is articulated in *Sefer Emunot ve-Deʿot*; and Maimonides, who developed a socio-historical approach to the commandments in his *Guide of the Perplexed* and an allegorical one in the *Mishneh Torah*.²² In this area of discussion as well, normative halakhic realism is a matter of degree.

These three levels of discussion are not always distinct from one another; at times, the boundaries between them are obscured or blurred. At certain historical junctures one may observe one level of discussion penetrating into the other or at least influencing it: meta-halakhah is explicitly related to matters of halakhah, while the external rationales for the commandments, whose sources lie in philosophy, ethical literature, or mystical-kabbalistic literature, at times “spill over” into halakhic discourse proper. Nevertheless, from the conceptual viewpoint, and generally speaking also in practice among halakhic authorities and thinkers over the generations, these three areas are generally distinct from one another.²³ But even when such is the case there is no obstacle to drawing analogies from one realm (for example, that of *ṭaʿamei*

22 For a survey of these various approaches to the rationales of the commandments, see Yizhak Heinemann, *Rationales for the Mitzvot in Jewish Literature* (Jerusalem, 1954) (Hebrew). On Maimonides’ approach to this subject, see Yair Lorberbaum, “Parables and Commandments” (in preparation).

23 An interesting example of this separation, on the one hand, and of “flowing together,” on the other hand, is found in R. David Ben Zimra, an explicit halakhist and kabbalist. See *Teshuvot Radbaz*, Part 4, §80; and see below, Section IX.

ha-miṣvot) to another (e.g., that of halakhah). This is particularly so when the halakhist is also a thinker engaged in the rationales for the commandments and/or the philosophy of halakhah. It is true that an analogy of this type is liable at times to be misleading, but it is more often enlightening. For that reason it is important to preserve awareness of the difference among the various levels of discussion.

As I have said, the first level—that of halakhah per se, that is, the halakhic discourse as it appears in the halakhic sources—has thus far been the focus of most research literature. On this level of discussion there is a clear difference between halakhic realism and ethical realism (and natural law). I emphasized earlier that ethical and legal realism are not present in normative ethics and legal discussions; they are a matter for meta-ethics, in whose framework the epistemological and ontological status of ethical and legal norms are discussed.²⁴ By contrast, halakhic realism is not only a matter for meta-halakhah (the second level of discussion): it is also present in matters of practical halakhah (i.e., the first level of discussion). The influence of “halakhic entities” upon the rules of “normative” halakhah is at times decisive. So much so, because the “entities” of which the halakhic realist takes account are not only “objectifications” of the suitable halakhic rules; they are also, as I explained above, entities of a different kind.

IV. [Halakhic] Realism and Nominalism: Definitions

We now turn to a critical discussion of the concepts of [halakhic] realism and nominalism as they are defined and used in the scholarly literature of recent decades. This discussion will help to clarify some of the arguments and distinctions suggested above and, hence, offer some others.

The terms realism and nominalism and the distinction between them were first proposed by the late Yohanan Silman in his pioneering article published in 1985 in this journal.²⁵ In the following, I shall offer a critical discussion

24 See Mackie, *Ethics*.

25 Silman, “Halakhic Determinations.” It would seem that in later papers Silman changed his terminology. See idem, “Commandments and Transgressions in Halakhah—Obedience and Rebellion or Correction and Damage?” *Diné Israel* 16 (1991–92): 183–201 (Hebrew); idem, “Introduction to the Philosophical Analysis of the Normative-Ontological Tension in Halakhah,” *Daʿat* 31 (1993): v–xx (Hebrew); idem, “The Source of the Validity of Halakhic Instructions: A Meta-Halakhic

of the distinction proposed by Silman and the terms that he chose, and comment on the research direction that followed in the wake of his article.²⁶

I shall begin with two preliminary comments. First: the terms “realism” and “nominalism” may be defined in different ways. Different definitions do not necessarily reflect dispute or disagreement but may equally reflect different research interests. It is important to remember that these terms are not the subject of interpretation *per se*. But while they may be only research tools, due to their heuristic and explanatory powers the differences among their various definitions are of decisive importance. The meanings attributed to these terms color the subject of our inquiry, will determine the manner of organizing the material, the choice of texts, and the manner of their interpretation, i.e., the “hermeneutic circle” within which the researcher acts. The definitions I will attribute to these key concepts will to a large extent determine our method of inquiry and shape its conclusions.

Secondly: I am not certain that realism and nominalism are the most useful working terms for studying our subject, i.e., “halakhic ontology” (or: halakhic naturalism) in all its varieties. These terms are too loaded: throughout the history of philosophy (and of the sciences), with all its various and complex branches and ramifications, they have been given numerous and even contradictory meanings. Thus, for example, since the 1930s the term “legal realism” has denoted contrary jurisprudential outlooks.²⁷ Likewise its meaning as an enlightened, realistic approach (closer to its earlier meaning) does not add to the clarity of the discussion—not to mention the abundance of philosophical meanings of the term “realism” in the Platonic tradition, in late antiquity, in the Middle Ages, in Christian scholasticism, and in modern philosophy, including that of the twentieth and twenty-first

Inquiry,” in *New Studies in the Philosophy of Halakhah* (Hebrew), ed. A. Ravitzky and A. Rosenak (Jerusalem: Magnes, 2008), 3–25. I relate to the terms used in the first paper, because they are the ones which took root in the research literature. In addition, for purposes of the critical analysis below, there is no substantive difference between the terms.

- 26 Silman notes that Moshe Silberg preceded him, even though he used different terminology, for example, “halakhic naturalism,” “laws of nature,” “physical causality,” etc. See Moshe Silberg, *They Come Together—Collected Papers in Thought, Halakhah and Law*, 2nd ed. (Jerusalem: Magnes, 1986), 162–65 (Hebrew).
- 27 For a brief survey and bibliography on legal realism, see Brian Leiter, “Legal Realism,” in *A Companion to Philosophy of Law and Legal Theory*, ed. D. Patterson (Oxford: Blackwell, 1999), 241–60.

centuries. The same holds true for the term “nominalism,” whose meaning in our context is even more obscure. It would therefore be preferable, in my opinion, to use the term “halakhic ontology” or “halakhic naturalism.” If the term “realism” has become so deeply rooted in research literature that it is impossible to uproot it, it would be worthwhile, at least, to free ourselves of the term “nominalism”—which is, as I shall argue below, particularly problematic—and to remain with the opposition: “halakhic realism” vs. “halakhic non-realism.”

Realism

“Halakhic realism,” according to Silman’s definition, identifies halakhic terms or concepts used to define positive or negative obligations as qualities or attributes of entities (or objects). Such terms as “forbidden,” “impurity,” “holiness,” and “ownership” are, in the eyes of realists—to use Silman’s terminology—“forms” (*šurot*). These “forms” apply to sub-strata (*maša'im*). In his words: “The sub-strata are able to receive [these] forms. Thus, for example, a vessel constitutes a sub-stratum for receiving that configuration (*šurah*) known as ‘impurity.’”²⁸ A “configuration,” in Silman’s terminology, is a combination of “sub-stratum” and “form”—e.g., an impure vessel. The same holds true for the form known as “ownership”: like impurity, it is a property of the object. Thus, for example, my ownership of a particular book (my right of acquisition) is a “concrete” property, or quality, thereof.²⁹

There are several difficulties in Silman’s manner of defining halakhic realism. First of all, it is difficult to assume that, according to the typical realist, such halakhic concepts as *ṭum'ah* (impurity), “ownership,” and “prohibition” (*issur*) are restricted to “forms”—that is, to qualities of objects. “Ownership,” for example, even in the eyes of a halakhic realist, is a bundle of powers and rights of the owner, and positive and negative duties on the part of others. The same holds true for the concept of “prohibition” and its various applications. It does not seem reasonable that, in the eyes of the ordinary halakhic realist, the duties and imperatives related to a concrete prohibition are identical or reducible to a quality of the object. Rather, it would appear that, according to the typical realist outlook, these positive and

28 Silman, “Halakhic Determinations,” 250.

29 See *ibid.*, 250–51.

negative obligations are derived from this concrete quality.³⁰ In other words, even in the view of the realist there is a certain distinction drawn between qualities of objects and obligations and imperatives related thereto (even if these are interconnected). In the final analysis, the distinction between them is immanent to his language.³¹ The importance of this claim for the issue of halakhic realism will be discussed below.

Second, Silman's definition of halakhic realism is excessively narrow. According to his definition, halakhic concepts are "forms"—that is, qualities ("attributes") of objects. However, matters of ontology in halakhah are far broader. They pertain to the objects themselves, to causality of different "types" (including sympathetic magic), to movement, to the "concrete" nature of time, to the power of language, to subjects of contamination and purification, to issues of the substance of objects, to iconic relations between an object and its image, and more. In other words, issues related to halakhic realism encompass a broad range of rationalist, speculative, or mythic categories or structures of thought that have been developed over many generations with regard to reality—i.e., the "chain of being" in all its variety of components and aspects. Several of these have been mentioned above and several others will be discussed below.³²

It is superfluous to note that the "concreteness" referred to by halakhic realism is not tangible. It is hidden from the senses and from the intellect. It is

- 30 Compare Wozner, "Ontological and Naturalist Thought," 44–45, where he distinguishes, within the framework of a realistic approach, between "rules of definition" and "rules of behavior."
- 31 Compare Arye Edrei, "'When a Person Sins Unknowingly': Responsibility Without Guilt? On the Responsibility of One who Sins by Error in the Bible and in Rabbinic Literature," *Shenaton ha-Mishpat ha-^eIvri* 24 (2007): 1–62, at 24 (Hebrew).
- 32 Within the framework of the definition or limits of halakhic realism, it is also important to note what does not fall under its rubric. The issue of halakhic realism—which is concerned, as mentioned, with the ontological status of halakhic concepts, statements, rules, and arguments—is distinct from those questions pertaining to the relation between halakhah and historical, social, and economic reality, and so forth. In other words, those questions pertaining to ontology and halakhah (halakhic naturalism) are distinct from those which engage historians of halakhah regarding the influence of social, cultural, economic, and such realities, at different places and times, upon the nature and contents of the halakhic rules and principles in their various branches. Regarding the limits of halakhic realism, see also the notes below.

impossible to measure it or to infer its existence, even in an indirect fashion. This is likewise the case regarding such entities, powers, or qualities as impurity, holiness, the Sabbath, the Day of Atonement, blessings and curses, the defiling and atoning power of blood (of the sacrifice), the presence of God in his image (i.e., in humanity), natural ownership, the power of the *get* to divorce man and wife, and many others. Those entities that can be felt in a concrete manner, which may be measured or formulated by scientific methods, are recognized by the non-realist as well.³³ Moreover, the halakhic non-realist might recognize the existence of ethical entities (i.e., “normative facts”), whose existence is argued, on the basis of philosophical argumentation, by the ethical realist and some advocates of natural law.³⁴ None of these are the “entities” to which the opposition between halakhic realism and halakhic non-realism ordinarily pertains.³⁵

Silman has rightly commented that the halakhic realist is unable by his own powers to recognize those entities which pertain to halakhic realism, but only through “the kindness of God, who teaches knowledge, is man

- 33 In this context I would like to comment that one ought not to confuse halakhic realism and halakhic fiction. Halakhic or legal fictions (such as the *eruv*) are by definition not concrete. Disputes concerning legal-halakhic fictions are therefore not generally a subject for debate between the halakhic realist and the halakhic nominalist.
- 34 There are ethical realists who think that normative facts are naturalistic, and therefore reducible to facts of the type with which one deals in natural science. See <http://plato.stanford.edu/entries/naturalism-moral>, and compare Enoch, *Taking Morality Seriously*, 100–9.
- 35 Thus regarding “natural” reasons that are attributed to certain commandments, such as the argument that the prohibition against eating the flesh of swine is because it is unhealthy (“a contemptible food”), see, e.g., *b. Ber.* 25a (“the mouth of a pig is comparable to excrement passing by”), and *Guide of the Perplexed* 3:48 (Pines, 598), or that the biblical prohibition against eating the flesh of a sacrifice outside of its proper time is because the flesh tends to become spoiled during that time and eating spoiled meat is an affront to God. These arguments (as opposed to symbolic arguments) connect the commandment to “nature.” However, this “concreteness” (i.e., whether there is reality to it or not), with which the non-realist is also likely to agree, is not related to the debate between the realist and the nominalist—that is to say, to that which is interesting in the realist approach. Compare Eliezer Hadad, *Torah and Nature in Maimonides’ Writing* (Jerusalem: Magnes, 2011), 290 (Hebrew), according to whom halakhic realism indicates facts in nature, which the halakhic non-realism would also not deny.

able to take them into account, by taking upon himself the yoke of the commandments (*col mišvot*).³⁶

Nominalism

If nominalism is the opposite of realism, it signifies an approach according to which such halakhic concepts as “ownership,” “prohibition,” “holiness,” and “impurity” do not reflect an actual reality. But if not reality, what then lies at their basis? The answer is seemingly simple: values, ethical considerations, social, educational, spiritual and political goals, and the like. But, according to Silman, “halakhic nominalism” reflects a somewhat different approach. He writes as follows:

From a systematic point of view, the contrast between the nominalist and the realist trends is bound up with the contrast in principle concerning the actual nature of the link between God and the laws of the Torah—the contrast between a view of the commandments as orders resultant from the will of the commanding God, on the one hand, and, on the other hand, a view of the commandments as guidelines based in independently existing situations, which man, due to the grace of the wisdom-giving God, may introduce among his considerations by accepting the yoke of the commandments.³⁷

The distinction between “halakhic realism” and “halakhic nominalism,” according to Silman, is thus between those commandments whose foundations lie in a “reality in its own right” (albeit a reality which the halakhist is unable to know by himself) and those commandments that are “imperatives that are the product of the freely chosen divine will.” The opposition here is thus between “directives”-“reality” (=“realism”) and “commandments”-“will” (= nominalism). It follows from this that, whereas according to the halakhic realist the commandments have “real,” ontological reasons or rationales, according to the halakhic nominalist they have no intrinsic rationale, being as they are the result of the (absolute) free will of God. Silman’s definition

36 Silman, “Halakhic Determinations,” 251. However, we shall see below (Section X) that, according to halakhic realists, there may be additional sources of knowledge regarding halakhic entities.

37 Ibid.; English translation in 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), 231 n. 8

of nominalism is close to the Kalaam approach, ascribed in the *Guide of the Perplexed* to a number of the “philosophers and Torah scholars,” according to which “commandments come in the wake of the [divine] will alone,” and are “scriptural decrees” without reason.³⁸ It may be that Silman did not intend to argue that, according to the nominalist, the commandments (which are not reality-based) have no rationale, but merely that according to his outlook the obligatory element therein is the divine decree (i.e., will), and not their underlying reasons (if there are such). In either event, the opposition between “halakhic realism” and “halakhic nominalism,” according to Silman, is one between reality-based reason vs. decree (*gezerah*). This definition of “halakhic nominalism” exerted a decisive influence upon research. I will cite here two examples, and then explain why I find it problematic.

In a pioneering article, Daniel Schwartz adopted Silman’s above terms and definitions.³⁹ Schwartz analyzes a text from the Qumran *Damascus Document* (CD) which prohibits a man from marrying his niece. The sectarian author derives this conclusion from the Torah’s prohibition against a man marrying his aunt.⁴⁰ Schwartz asks: Why is the Qumran legislator so certain about this matter? Why does he not, as a legalist, suffice with that which the Torah explicitly prohibits—namely, the prohibition against marrying one’s aunt (Lev 18:13)? From whence does he conclude that the application of this principle in the opposite direction—i.e., to prohibit a man against marrying his niece—is justified? Schwartz answers: the author of CD clearly assumes that the union between a man and his aunt is prohibited because there is “something wrong about union between people separated by only one generation and one lateral relationship; hence, all such unions [from both directions—YL] are forbidden.” Schwartz concludes from this, paraphrasing Silman: “The union [between a man and his aunt—YL] is not wrong because God forbade it, as a nominalist might say. Rather, God forbade it because it is wrong [i.e., in itself].”⁴¹ Under the inspiration of Silman’s definition, Schwartz

38 *Guide*, 3:26 (Pines, 506 ff.) and see further, *ibid.*, 3:31 (Pines, 523–24) and 3:38 (Pines, 550).

39 Schwartz, “Law and Truth,” 229–40. Schwartz quotes the above-mentioned words of Silman, “Halakhic Determinations,” 231 n. 8. Schwartz was the first to propose a theoretical-conceptual discussion of early halakhah, and of classical rabbinic halakhah—i.e., that of the classic sages.

40 *The Damascus Document Reconsidered*, ed. M. Broshi (Jerusalem: Magnes, 1992), iv–v.

41 Schwartz, “Law and Truth,” 231 (emphasis in the original).

distinguishes between realism and nominalism in terms of the Platonic dilemma articulated in *Euthyphro*. According to the realist, the commandments are reality-based: they are good or evil by their very nature, that is (according to Schwartz), they have an intrinsic, “real” rationale; hence God commanded them. On the other hand, for the nominalist the commandments are not based upon reality: that is, they have no intrinsic or any other reason; rather, they are obligatory because God willed/commanded thus. In other words, Schwartz thinks that, according to the nominalist, halakhah is not rooted in non-realistic reasons but in the (absolute) free will of God—a kind of “I have made a statute, I have decreed an edict” (*gezerah gazarti, huqqah haqaqti*).

But Schwartz’s move is not necessary, and does not stand up to criticism. First of all, does the sectarian prohibition against marriage with one’s niece—as derived from the prohibition against marriage with one’s aunt—prove that these prohibitions are based upon a realistic view? One could easily suggest a social-ethical explanation.⁴² Second, and for our purposes this is the main point: can one not justify the rabbinic, nominalist position—namely, that the prohibition is specifically against marriage with one’s aunt, and not with one’s niece—without relating to the issue of divine fiat (“will”)? The argument attributing a certain “arbitrariness” to rabbinic halakhah—which, according to Schwartz, reflects a nominalist approach by which the source

42 The sectarian prohibition on marrying one’s niece could be understood as a fence (*seyag*) to distance one from marrying his aunt. Another explanation (contrary to Schwartz) is that the sectarian halakhah subscribes here to legal-halakhic formalism (or conceptualism), which “infers” the prohibition to marry a niece from the prohibition to marry an aunt. Such jurisprudential approaches are anchored in structural, institutional considerations which have nothing to do with halakhic realism, see below Section VII. Moreover, it seems that the explanation to the halakhah in CD appears in its very language: “But Moses said: *To your mother’s sister you may not draw near, for she is your mother’s near relation*. Now the precept of incest is written from the point of view of males, but the same (law) applies to women, so if a brother’s daughter uncovers the nakedness of a brother of her father, she is a (forbidden) close relationship” (*The Dead Sea Scrolls*, ed. J. H. Charlesworth [Tübingen: J. C. B. Mohr, 1997], 2:21). According to this formulation, biblical verses that use masculine forms also encompass feminine forms. Hence, a woman is also forbidden to marry her father’s (and mother’s) brother. It may be that this exegetical move is related to the non-realistic considerations mentioned above. Needless to say that the “basic” biblical prohibition on marrying one’s aunt is not necessarily reality-based. These are much more plausible rationales than the realistic one proposed by Schwartz, which is out of a real context and, hence, lacks explanatory power.

of the commandments lies in the divine decree, in isolation from their rationale—is in my view particularly problematic.⁴³

How so? The conflict between halakhic realism and halakhic nominalism is of a different order. As I suggested earlier, realism connects the halakhic rules to a certain reality, whereas nominalism denies this reality. Must we say, in light of the negation of this particular reality, that the only remaining possibility is that of “divine will”? This does not seem to me to be necessary. These commandments and instructions may be related, as I noted earlier, to various different kinds of reasons—social aims and policies, ethics, values, spiritual goals, and so on, that is to say, all those things which the philosophers refer to as “rational” considerations. The case discussed by Schwartz—namely, the distinction between the prohibition against marriage with one’s aunt and the permissibility of marrying one’s niece—may be easily explained on the basis of “nominalist” (i.e., non-realist) considerations of this type. Indeed, none of the sages or interpreters of halakhah argue that this law is a *hoq*—that is, an arbitrary “scriptural decree” without rationale. It would appear that the category “reality-based halakhah” is replaced by Silman, and in his wake by Schwartz and others, by “reason-based halakhah,” which was in turn replaced by the category of “divine-will/decree-based halakhah (i.e., scriptural edict).”⁴⁴

There is, of course, no obstacle to deciding (that is, to defining in a stipulatory manner) that the opposition between realism and nominalism is one between “reality-ontology” and “will” (i.e., scriptural edict without reason or separate from it). However, such an opposition will hardly be

43 It would appear that Schwartz is interested in Qumranic realism. His claim that classic rabbinic halakhah is nominalistic is merely a kind of offshoot of his main argument. At the same time, he repeatedly characterizes “halakhic nominalism” (in this case that of early rabbinic halakhah)—but without noticing it, and only in the wake of Silman—as a divine edict. At the same time, this characterization of halakhic nominalism has become, as noted, a formative factor in his studies and in the research which came after him and, as we shall see below, even among his critics.

44 Moreover, it would appear that realists, both those of Qumran and others, would agree that commandments based upon reality are simultaneously also divine edicts, as there is no contradiction between these two views. The element of command or edict in the commandments does not replace its underlying rationale, whether “concrete” or “value-based.” See Yair Lorberbaum, *Gezerat Hakatuv: Decree of Scripture – Theology, Legal Theory and Halakhah (or: Rules and Reasons in Halakhic Discourse)* (Hebrew) (forthcoming, 2015), ch. 2.

relevant to halakhic texts, and particularly not to non-realistic approaches found therein. Not only will such a distinction not be useful to research, but it is likely to lead to erroneous conclusions. A far more fruitful distinction between realism and nominalism is that between commandments based on reality-ontology and those based upon values—social, ethical, spiritual goals, etc. Both from the conceptual viewpoint and the methodological perspective, the more adequate and interesting contrast between realism and nominalism is that between laws rooted in entities (as the central, if not the exclusive, factor in the contents of the *mišvaḥ* / *halakhah*), and those whose rationale lies in the realm of social/moral/utilitarian/educational/spiritual considerations, which do not require postulating the existence of mysterious entities. I have referred to this distinction above, and will do so below, as “reality-based halakhah” as against “value-based halakhah.”

Indeed, in the decisive majority of those cases in which we consider the distinction between halakhic realism and halakhic non-realism, we have vacillated between reality-based halakhah and value-based halakhah. Thus, for example, regarding Shabbat, the significant question is whether its laws are based upon the view that Shabbat is a “different entity” in time (i.e., that its holiness “breaks” linear time) or in the realm of the heavenly spheres (which in turn influence the mundane realm), or whether Shabbat does not constitute a unique ontological reality, its laws being based upon social, educational, and spiritual goals and the like (i.e., non-realism).⁴⁵ Or, to take the case of Yom Kippur: does the day itself “atone” (i.e., realism), or is its entire purpose to serve as a framework for *teshuvah*—for repentance and soul-searching (i.e., non-realism)?⁴⁶ Regarding the atoning power of blood—does it have a “real,” concrete atoning and purging quality, or is it merely symbolic?⁴⁷ Or, are the Court and the Sanhedrin institutions whose

45 See, for example, the discussions of A. J. Heschel, *The Sabbath: Its Meaning for Modern Man* (New York, 1963). On the real or “concrete” Sabbath in Kabbalah, see, for example, E. K. Ginsburg, *The Sabbath in the Classical Kabbalah* (Albany, N.Y.: SUNY Press, 1989). The naturalist concreteness of the Sabbath is connected, among other things, with the concrete nature of holiness; it was first sanctified in the Bible (see Gen 2:3).

46 See Vered Noam’s contribution in this volume, “Essentialism, Freedom of Choice, and the Calendar: Contradictory Trends in Rabbinic Halakhah.”

47 See Yair Lorberbaum, “Blood, Man and Image: On Execution in Tannaitic Literature,” *Mehqerei Mishpat* 15 (2000): 429–56 (Hebrew); cf. Cana Werman, “The Law of Covering the Blood and its Eating in Priestly Halakhah and in Rabbinic

purpose is to resolve disputes and rule on matters of halakhah considered infallible due to social-institutional considerations (i.e., the social value of its rulings being final)? Or is the Court considered infallible because God dwells therein?⁴⁸ In the case of marriage: is the husband's *qinyan* (acquisition) of his wife something ontologically real, or is it merely a bundle of duties and privileges (i.e., a social convention)? Regarding blessings and curses: do they have some kind of magical effectiveness, positive or negative (realism), or is their concern political-ethical-educational alone (non-realism)?⁴⁹ In none of these examples is the alternative to a realistic approach that of a nominalism of divine will—that is, none of these halakhic institutions is understood by nominalist halakhists as an arbitrary “scriptural decree.”⁵⁰

It is important to note that the nominalist position is not necessarily a non-cognitivist position, nor is it necessarily a non-realist one in relation to the social, ethical, educational, or spiritual rationales by whose means it justifies the halakhic rules. The halakhic nominalist might think that these reasons are rational (in the sense that they are imposed upon us by reason, i.e., they are not up to us). He might also take a realistic position regarding them and believe that the reasons are normative facts.⁵¹ The halakhic nominalist is a non-realist in the sense that he negates those entities in which the halakhic realist believes.⁵² In other words, the non-realist approach regarding value-based halakhah does not necessarily negate the rationalism of those values, nor does it necessarily deny that these are normative facts which

Halakhah,” *Tarbiz* 63 (1994): 173–83 (Hebrew); Noam Zohar, “The Sin Offering in Tannaitic Teaching” (master’s thesis, Hebrew University of Jerusalem, 1988) (Hebrew).

48 See Haim Shapira, “For Judgment is God’s: On the Relationship between God and the Judicial Process in the Bible and in the Halakhic Tradition,” *Mehqerei Mishpat* 26 (2010): 51–89 (Hebrew).

49 On realism regarding the effectiveness of cursing God’s Name and cursing one’s father and mother, see Lorberbaum, *Image of God*, 260–69.

50 Silman’s definition of the opposition realism-nominalism was also adopted by Christine Hayes, “Legal Realism and the Fashioning of Sectarians in Jewish Antiquity,” in *Sects and Sectarianism in Jewish History*, ed. Sacha Stern (Leiden: Brill, 2011), 119–46, who suggested a more “sophisticated” version thereof.

51 See Enoch, *Taking Morality Seriously*.

52 On the profound differences between halakhic realism and ethical realism, see above, Section II.

reason reveals. It only refutes or negates the mythic realism which is unique to the realistic approaches regarding reality-based halakhot.⁵³

To return to Silman's article: the source of confusion in the definition of halakhic nominalism is rooted in a well-known midrashic passage in *Pesiqta de-Rav Kahana (Parah Adummah 4:7)*.⁵⁴ This midrash is cited by Silman as evidence in support of his proposed definition of halakhic nominalism. This is the most striking (and evidently the only) midrashic source for what appears to be the opposition between the realistic view, which was rejected by the sages (in this case by Rabban Yoḥanan b. Zakkai), and the nominalistic one, which they adopted.⁵⁵ In this midrash, which concerns the rules of purification from the impurity caused by contact with a dead body, a contrast is drawn between realism and an understanding of impurity based upon the idea that "I have made a statute, I have declared an edict" (i.e., divine will, without any rationale). This late midrash is the source for the rejection of the realistic position regarding purity and impurity in rabbinic literature.

But this case of explicit nominalism is an exceptional one in midrashic literature, and it would be a mistake to draw any conclusion from it regarding the nature of nominalism in talmudic literature generally, or the history of halakhah. Silman, and in his wake many other scholars, defined nominalism in light of this midrash, as if nominalism (i.e., non-realism) generally speaking expresses the view that the commandments are without rationale.⁵⁶ It would

53 I noted earlier that ethical realism is a meta-ethical issue, distinct from discussions of normative ethics. Because of this separation, normative ethics is not interested in the ontological status of ethical values which it adopts, and it would appear that, generally speaking, it is not even aware of them. Like a normative ethicist (or a modern judge), the halakhic non-realist also relies upon ethical, social, and similar reasons without thinking about their ontological status. It may be that, were he to do so, he would be an ethical realist; however, perhaps not. In this context it is important to note that one ought not to confuse arguments (explicit or implicit) of halakhists or jurists concerning the existence of legal or halakhic principles with halakhic or ethical realism; that is to say, with the argument that these principles are "normative facts."

54 Mandelbaum ed., 74; cf. *ibid.*, 4:1 (p. 54).

55 See E. E. Urbach, *The Sages: Their Concepts and Beliefs* (Jerusalem: Magnes, 1976), 83–84 (Hebrew); and cf. Vered Noam, "Is It True that 'The Dead Body does not Cause Impurity'? On the Nature of Impurity in Tannaitic Literature," *Tarbiz* 78 (2009): 162–63 (Hebrew), and see her notes for additional bibliography.

56 Thus also Vered Noam, *From Qumran to the Tannaitic Revolution: Aspects of the Perception of Impurity* (Jerusalem: Yad Ben-Zvi, 2010), 222–23 (Hebrew).

be superfluous to point out that this midrash makes no claim to engage in generalization: it is concerned with the subject of impurity or, more precisely, the impurity of dead bodies, alone.⁵⁷

It is noteworthy in this context that, from a philosophical viewpoint (medieval and certainly modern), both halakhic realism, which is based upon imaginary entities, and halakhic nominalism, based purely upon divine will (i.e., the perception of the commandments as scriptural decrees without rationale), are a-rational approaches to the commandments. Both approaches negate the provision of rationales to the *mišvot*. In the final analysis, halakhic realism is based upon entities whose existence a person cannot perceive or know by himself. From a phenomenological viewpoint, even when God reveals the fact of their existence, these entities remain hidden and mysterious, and are themselves essentially a kind of “scriptural decree” without any (known) rationale. In other words, from a philosophical and phenomenological viewpoint, both realism and nominalism (according to Silman’s definition) embody an arbitrary disposition in relation to the commandments. As against them, value-based (=reason-based) non-realism embodies a rational approach to the commandments and to halakhah.⁵⁸

- 57 It would appear that this midrash, and its underlying approach, also led Silman to choose the rather awkward term “nominalism.” In the philosophical tradition, this term is opposed to realism and implies an element of arbitrariness. Realism is thus associated with the rational background or underpinnings of linguistic concepts. By contrast, nominalism is derived from the Latin *nomen*, meaning “name.”
- 58 In this context, I will comment on Vered Noam’s suggestion that the tannaim identified impurity as something real, on the one hand, but, on the other hand, completely neutralized it from any demonic element, such that its effectiveness, in their view, was limited to the intra-halakhic realm (see below, Section VI). This thesis undermines her claim as to the opposition between a realistic understanding of *ṭumʿah* and the view that it is a statute (*hoq*) or decree (*gezerah*) without any rationale (as, for example, in the approach of Rabban Yohanan b. Zakkai in *Pesiqta de-Rav Kahana*). If impurity is an entity completely neutralized from any external effect—it cannot cause any damage, either physical or spiritual—the very fact of its being an “entity” is insufficient as an explanation for a system of halakhic rules derived thereof. In the final analysis, if one is speaking of a “closed” system of halakhic rules, without any external effect, then the entities upon which these rules are based do not explain anything. After all, one could ask: if the *ṭumʿah* is real though it causes no physical or spiritual harm, why should we avoid it? Why should we bother to remove it (i.e., purify ourselves from it)?

Maimonides is the outstanding example of a halakhist who advocated a non-realistic approach. Nevertheless, he thought that all of the commandments (including the *ḥuqqim*) have reasons. His nonrealistic (=nominalistic) approach is based, as is well-known, upon a rationalistic (or naturalistic) approach. In his opinion, Aristotle described reality in an adequate manner; in practice, there is nothing to be added to the physics and metaphysics found in the works of science and philosophy of the ancient Greeks and the Arabs.⁵⁹ At the same time, Maimonides sharply rejected the view that the commandments stem from God's will (i.e., that they are decrees without any reason). In his view, there are reasons for all of the commandments and halakhot, based upon values and social ends—i.e., the perfection of the body (i.e., the acquisition of good character traits and the imposition of social order),⁶⁰ or the perfection of the soul (i.e., the attainment of intellectual perfection).⁶¹

Another problem with Silman's definition of halakhic nominalism is to be found in Jeffrey Rubenstein's critique of Schwartz's position. In the final section of his article, in an attempt to somewhat soften his criticism, Rubenstein

59 Maimonides even adhered to a certain version of the distinction between value statements and descriptive statements. See the distinction in *Guide of the Perplexed* 1:2 between the opposition good-evil and the opposition truth-falsehood; and cf. Zev Harvey, "Maimonides and Spinoza on the Knowledge of Good and Evil," *Iyyun* 28 (1978): 167–85 (Hebrew); Shlomo Pines, "Truth and Falsehood Versus Good and Evil: A Study in Jewish and General Philosophy in Connection with the Guide of the Perplexed 1,2," in *Studies in Maimonides*, ed. I. Twersky (Cambridge, MA: Harvard University Press, 1990), 95–145. I have commented elsewhere that, in Maimonides' view, the opposition between philosophy and tradition is not merely that between (Aristotelian) physics and metaphysics and the Account of Creation and the Account of the Chariot. A dramatic opposition also exists, in his opinion, between rational law and talmudic law, particularly in relation to the differences between their underlying rationales. The irrationality of the approaches of talmudic halakhah, according to Maimonides, pertain among other things to the realism attributed to them. See Yair Lorberbaum, "Maimonides on Aggadah, Halakhah and Divine Law," *Diné Israel* 26 (2010): 356–83 (Hebrew), and see below in the Afterword.

60 At times Maimonides "adopts" naturalistic halakhic approaches as "a necessary belief" (or "noble lie"; see *Guide* 3:8); cf. below, in the Afterword.

61 Compare Hayes, "Legal Realism." Following Daniel Schwartz, whose above-mentioned words she quotes in agreement (Schwartz, "Law and Truth," 120), Hayes adopts Silman's definition of the realism-nominalism opposition, and proposes an "improved" version thereof. For a critique of this approach, see the Hebrew version, n. 67.

suggests a “softer” version of Schwartz’s thesis.⁶² To this end, Rubenstein develops a historical or developmental model based upon Silman’s (and Schwartz’s) definition of halakhic nominalism—namely, as commandments whose source lies, not in reality, but in the (arbitrary) divine will.⁶³

According to Rubenstein (following Schwartz), talmudic halakhah is indeed more nominalistic than that of the Sadducees or of the Qumran sect.⁶⁴ In order to provide a basis for this claim, Rubenstein develops the following model: the basis of every law, he argues, lies in a realistic outlook (if it is a human creation it cannot be based upon an arbitrary command or will). According to his approach, in a society in which the law is dynamic—i.e., in which there is no obstacle to it changing over the course of time due to changes in circumstances or worldview—it will remain realistic. This is not the case in a society in which the laws are fixed (i.e., divine) and not subject to change. In a society in which the law is canonic—that is, in which its institutions are barred from changing them (in order to adjust them to new beliefs, ideas, and/or circumstances)—there gradually occurs a transition from a realistic approach to the law (which is the basis of its creation) to a nominalist approach in which the law is perceived as a decree without rationale (i.e., its source is the divine will).⁶⁵ In such a situation, argues Rubenstein, members of the society will think that certain actions are prohibited by the laws because they are part of their sanctified tradition; they will be unable to explain why they are prohibited, but only note the fact that they are prohibited. Such a disposition is appropriate, in his opinion, to the nominalistic viewpoint regarding the nature of the law. In brief, a law enjoying canonic status, combined with the fact that the underlying worldview has changed, invites a transition from realism (which lay at the basis of the original promulgation of the law) to nominalism (which reflects the law’s break from its original roots). The more time passes, argues Rubenstein, the greater the

62 J. L. Rubenstein, “Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment,” *DSD* 6 (1999): 157–83, at 179–83.

63 Silman’s words concerning halakhic nominalism are quoted by Rubenstein in agreement; Rubenstein, “Nominalism,” 158.

64 As opposed to the strong version of Schwartz, according to which Qumranic halakhah is realistic and talmudic law is nominalistic.

65 Or at least there is no need for a rationale. In other words, for purposes of this critique, it does not matter whether nominalism thinks that the validity of the commandments is based upon God’s arbitrary will or His “edict” detached from their rationales, whatever these may be.

tendency of the interpreters of canonic law (for our purposes: halakhah) to turn from a realistic to a nominalistic approach. The basis of this suggested interpretation is that the term nominalism denotes an approach according to which the *mišvah-halakhah* is a sanctified decree without any rationale (and one which stems from the divine will).⁶⁶

By means of this model, Rubenstein explains his attenuated version of Schwartz's thesis. Rabbinic halakhah is a "canonic law." Biblical law, however, from which rabbinic halakhah originates, is realistic (like any original law).⁶⁷ The underlying views of Qumranic law are closer to the worldview of the Bible, and therefore tend more toward the original biblical realism. The sages are further removed from the biblical worldview but are unable to change that law in order to adapt it to their worldview because in their eyes it is canonic. Their solution, according to Rubenstein, is to adopt a nominalistic approach in relation to (biblical) law, according to which its basis lies in the divine will (hence, without any reason). Echoes of Rubenstein's interesting model are to be found elsewhere in the research literature.⁶⁸

However, this model for the study of halakhic realism-nominalism, and its use for understanding talmudic law, raises difficulties. First of all, do the sages really consider the commandments of the Torah and the rules of halakhah to be arbitrary "decrees" lacking in all rationale? To the best of my knowledge, this category hardly exists in tannaitic literature, and, insofar as it does, is applied (in one isolated aphorism) to a very limited number of commandments.⁶⁹

66 Alternatively, that its reason is hidden from the eyes of those subject to it (that is, it is a "scriptural edict" in the theological sense).

67 Rubenstein qualifies this argument, as it may be that the laws of the Bible (at least part of them) are already "nominalistic"—that is to say, they are a kind of inheritance from the non-Jewish environment but without the original worldview that lay in their basis. This subject is not important for the model that he proposes.

68 See, e.g., Noam, *From Qumran to the Tannaitic Revolution*, 246–47, which accepts, albeit with certain reservations and "corrections," Rubenstein's developmental model.

69 See Yair Lorberbaum, "*Gezerat ha-Katuv*, Philosophy, Legal Theory and Halakhah" (Hebrew) (in preparation, to be published by Shalom Hartman Institute Press), Chapter 1 and Appendix A. See for the present Yair Lorberbaum, "Two Concepts of *Gezerat ha-Katuv*: A Chapter in Maimonides' Legal and Halakhic Thought—Part I," *Diné Israel* 28 (2012): 123*–61*.

Secondly, Rubenstein's model confuses the distinction between realism and nominalism with that between commandments-with-rationale and commandments-without-rationale. Rubenstein's model deals, as I have said, with a situation in which the rules of the law became sanctified (i.e., canonic) while their original reasons have become obsolete. The solution to this tension lies, in his opinion, in a theology of scriptural decree (i.e., of the divine will that transcends all rationales). But such a situation applies not only to laws whose reasons are based upon reality but also to rules based upon values: when values-based justifications for canonic laws are no longer applicable, a theology of scriptural decree may develop as well. Indeed, rabbinic law is often removed from scriptural law in cases involving value-based laws, such as, for example, that of "an eye for an eye" or the rebellious son; indeed, in these examples rabbinic law did not, in practice, ratify the sanctified biblical law.⁷⁰ It would therefore seem that, unintentionally and unknowingly, in Rubenstein's model, too, "commandments-which-have-a-rationale" are replaced by "commandments-which-have-a-**realistic**-rationale." In other words, his model has no substantive connection to the distinction between halakhic realism and halakhic non-realism (=nominalism).⁷¹

70 In this respect as well Rubenstein's thesis entails a certain difficulty, for if the sages did not refrain from departing from biblical law (even though the Torah was sacred to them), is it correct to describe it in their eyes as canonic?

71 The change from "naturalistic ontological rationales" to "rationales" (which are also ethical, social, and the like), is particularly striking in the analogy which Rubenstein proposes to modern laws. He argues that laws against homosexuality in the United States (and in the West) are gradually being altered or abolished in recent decades because people have changed their view of the nature [or: "naturalness"] of this behavior, which is no longer perceived by them as "really" wrong (in Rubenstein's words). The confusion implicit in this claim is rooted in the ambiguity of the term "really." Its ordinary meaning is not that opposition to homosexuality is necessarily based upon "legal ontology," but only upon the value recognition that this behavior is improper and contemptible. The change in the attitude towards homosexuality is not necessarily connected to a change in realistic-ontological outlooks. It may well be connected to non-realistic ethical views. Moreover, even if we assume that the legal prohibition against homosexuality in the past was based upon a realistic outlook (for example, the idea that homosexual relations violate the cosmic order, whatever may be meant by this term), the change in the law—that is to say, the abolition of the prohibition—is not necessarily based upon a competing realistic-ontological approach, as Rubenstein argues, but upon a not necessarily "realistic"-value approach.

The third critique of Rubenstein's model is intertwined with the second one. Overall reflection upon the history of halakhah reveals that there were historical transitions, not only from halakhic realism to halakhic nominalism, but also in the opposite direction—from nominalism to realism. Thus, for example, the development of theurgic approaches in relation to the commandments began with the ascent of Kabbalah at the beginning of the thirteenth century, in both kabbalistic and rabbinic circles (such as that of Naḥmanides)—a tendency which grew stronger over the generations, and at times even spilled over from the realm of "rationales for the commandments" to that of halakhah per se! Researchers have argued that the theosophic-theurgic model in Kabbalah was a reaction to the (non-realistic) rationales for the commandments presented in the school of Maimonides.⁷² Such a process, and other similar ones, contradicts the model proposed by Rubenstein.⁷³ These difficulties do not present themselves regarding the distinction I have suggested between realism and nominalism. If realism refers to a reality-based rationale, whereas non-realism, or nominalism, is based upon values and social ends, historical transformations may occur in every direction.⁷⁴

72 Moshe Idel, "Maimonides and Kabbalah," in *Studies in Maimonides*, ed. Isadore Twersky (Cambridge, MA: Harvard University Press, 1990), 31–81.

73 Rubenstein's model also cannot explain how in a particular period and in a particular area of halakhah the transition from realism to nominalism occurred, whereas in another area the transition was from nominalism to realism. There are more than a few examples of such a situation as well in the history of halakhah, and it would seem more widespread than revolutions. See below, Section X.

74 Moreover, the power of canonization to "freeze" the law—that is, to prevent its adaptation and adjustment to new situations—applies not only to transitions from realistic understandings of the law to nominalist ones. Its power to preserve the law as is also holds true in situations of transition from nominalist approaches (of various types) to realistic ones. The force of conservatism may overcome "strong" realistic approaches. Even in a situation where one might anticipate that a new and powerful realistic outlook, which had replaced a nominalistic one, would bring about a change in the rules of halakhah, the conservative force of canonization of halakhah is often stronger. Thus, for example, when the realism of kabbalistic theurgy became stronger (from the 13th century on; thus at least according to Scholem, see below, n. 149), including among central halakhic figures, it did not bring about dramatic changes in the rules of halakhah, but instead gave them new meaning. The potential for influence of the theosophic-theurgic Kabbalah was enormous, but its practical influence on halakhah was limited (among other factors, due to the canonic status of the latter). This claim

Are Generalizations of the Type “Halakhic System X is Realistic/Nominalistic” Possible?

Is it possible, given the present state of research of halakhic realism, and in light of the manner in which I have drawn the contrast between it and halakhic nominalism, to establish rules of the type commonly found in the research literature, stating that: “Such-and-such a halakhah (e.g., Bible, Qumran, Mishnah, and Talmud, etc.)—as opposed to a specific halakhah or body of halakhah—is realistic/nominalistic”?⁷⁵

Halakhah, in all of its varied areas, offshoots, and details is an enormously complex and multi-layered subject. Parts of it, according to certain halakhists, may be explained in a nominalistic manner—that is, on the basis of social, utilitarian, educational, or other considerations, or may be explained as “scriptural decree” without any rationale—whereas other parts may be explained in a realistic-ontological manner. It is difficult to see how, on the basis of a non-exhaustive and not particularly sophisticated discussion of five, ten, or even twenty examples, it is possible to draw generalizations regarding an overall body of halakhah, even within a particular generation or tradition. This evaluation is strengthened by my claim regarding the nature of the opposition between realism and non-realism (=nominalism), which does not necessarily require a transition specifically from realism to nominalism, but in which, as noted, every direction of change is possible.⁷⁶

To this, one must add the knowledge that realism in halakhic matters is not uniform. One may imagine transitions from one kind of realism to another kind (on all three of the levels discussed above). In other words, there may be a dispute among several different realistic approaches (and transition among them), just as there may be a dispute and transition between

also holds true regarding the opposite direction: the transition from talmudic realism to Maimonidean nominalism. Because of his conservative approach to halakhic matters, Maimonides’ innovative nominalistic interpretation of halakhah did not bring about any real changes therein.

75 See Schwartz, “Law and Truth”; and cf. idem, “Arguments *A Minori ad Majus* as Sadducean Realism,” *Masekhet* 5 (2006): 145–56 (Hebrew); Rubenstein, “Nominalism and Realism”; Hayes, “Legal Realism.”

76 This argument is also correct regarding Schwartz’s suggestion (“amended” in light of the criticism of Rubenstein and others) that it is possible to base a general thesis regarding a systematic dispute, e.g., between Sadducean-Qumranic halakhah and rabbinic halakhah; see his “Law and Truth.”

various nominalistic approaches regarding the values and social, spiritual, and educational goals of a particular halakhah or body of halakhah.

Moreover, nominalism and realism are not necessarily mutually exclusive. Realistic-ontological approaches may be intertwined with value, goal-oriented, and educational-spiritual approaches within a particular body of halakhah or among certain specific halakhists.⁷⁷ As I noted above, from a conceptual viewpoint, alongside the realistic-ontological determination (or on its basis) there is generally also a value-normative decision. Thus, for example, one may believe *tum'ah* (ritual impurity) to be real and even harmful or demonic, yet nevertheless, due to certain value, social, and educational considerations, consider it permissible, and even incumbent upon a *kohen* to “contaminate” himself for a close relative (or for a *met mišvah*, an anonymous dead body with nobody to bury it).

The underlying assumption of these studies is that, if a particular halakhic tradition (for example, that of the Sadducees or of Qumran) is realistic in certain matters, it will be so in every halakhic matter, whereas if a particular tradition is non-realistic in certain areas (as is argued, for example, regarding the sages), then it will be so, or at least tend to be so, in every halakhic matter. Why? Because: “Such is its nature,” or “This tradition adheres to a realistic/nominalistic legal doctrine.” Such an approach attributes to every form of realism the view that various concepts—such as “prohibited,” “holiness,” “ownership,” “impurity,” etc.—which are widespread in every area of halakhah, express a concrete reality in all their manifestations.

This conclusion is not necessarily true. The factors which fashion ontological approaches in various halakhic matters are varied and numerous. Realistic approaches are not dictated exclusively—and in my opinion not even primarily—by a jurisprudential-realistic outlook, just as nominalistic approaches are not dictated exclusively (nor even primarily) by a jurisprudential-nominalistic position. It is not necessary for the realist to attribute to such concepts as holiness, impurity, and prohibition (*issur*) a natural meaning in all of their appearances. The decisive reason for the realist may be theological, mythic, pseudo-scientific, or otherwise.⁷⁸ It may be subject

77 It may happen that a non-realistic explanation may appear, on the part of a given halakhist or thinker, alongside a realistic explanation. At times, the one may be esoteric and the other exoteric; see below, Section X.

78 See below, Section X. Here too the distinction between halakhic realism and ethical realism is noticeable. Whereas halakhic realism is likely to be partial

to cultural-environmental influences in the case of a particular ontological matter. These factors may fashion a realistic approach in certain matters, but not in others. Hence one cannot exclude the possibility that a particular halakhist will, for example, be a realist in matters pertaining to Shabbat, but a nominalist in matters of blessings and curses, while another one may be a realist in matters of personal status but a nominalist in matters of forbidden foods; and so on.⁷⁹

The study of halakhic realism in the various areas of halakhah, in different periods and places, is still in its infancy. The same holds true for halakhic nominalism. Due to these considerations, it is impossible to make a sweeping generalization of the type, "Halakhah X is realistic/nominalistic."⁸⁰

V. Realistic Language and Realistic Conception

Another methodological comment: how do we know, upon reading a given halakhic text, whether or not it expresses or embodies a "realistic" approach? The answer is seemingly simple: through its language. If the halakhic text portrays a concrete reality, if its language is factual, if it relates the halakhic subject to certain entities, to nature, or to laws of nature, then it expresses, or at least implies, an ontological-naturalistic viewpoint regarding that subject. But does realistic *language* always signify a realistic *approach*? Is descriptive, factual language an unequivocal indication of ontological approaches? I think not.⁸¹

It seems to me that halakhists, and possibly jurists in general, tend to use factual, descriptive language in order to indicate norms: positive and negative imperatives, obligations, privileges, proscriptions, and so forth.

or fragmentary, ethical realism must of necessity encompass or embrace the entirety of the "normative facts."

79 Cf. Schwartz, "Arguments *A Minori ad Majus*," 147.

80 The area of discussion of the rationales for the commandments (*ta'amei ha-miṣvot*) is somewhat different, in that a thinker or particular school of thought may express a realistic or non-realistic outlook regarding extensive bodies of commandments or all the commandments. Such is the case regarding realism and non-realism within the realm of the theory of halakhah.

81 Compare Wozner, "Ontological and Naturalist Thought," 93–94. The complexity involved in textual interpretation of the issue of halakhic realism emerges from Rubenstein's critique ("Nominalism and Realism," 161–76) of the textual interpretation of Schwartz ("Law and Truth").

At times one is only speaking of well-worn metaphors, whose purpose is to strengthen and to buttress the norm. This tendency may be based upon the awareness that descriptive, factual language is perceived as conveying solidity and certainty. Moreover, the sharp distinction between descriptive language and prescriptive language, between descriptive laws and imperative laws, discussed briefly above (in Section II), is a modern distinction (as is the awareness of the naturalistic fallacy, which was first pointed out by David Hume). The ancients, including the earliest teachers of halakhah, were not aware of this. One should not be surprised that they move easily from imperative language to descriptive language without being aware of it. At the same time, as I have noted above, their language reflects the existence of such a distinction—that is to say, a vague (i.e., unreflective) consciousness thereof. For purposes of our discussion, this fact raises considerable difficulties, as it is not clear whether the descriptive language of the halakhists, in normative contexts, is intended “seriously”—that is to say, as precise and conscious, and therefore as reality oriented.

There are many examples of descriptive language in talmudic literature, and in halakhic literature generally, whose concern is with determining norms. I will begin by suggesting an example unrelated to halakhic realism. In *m. Sanh.* 7:2–3, the following description appears:

2. The commandment of those who are executed by burning: They would immerse him in dirt or excrement up to his knees, and place a hard garment within a soft one and tie it around his neck; one pulls this way and the other pulls that way until they open his mouth, and they lit a wick and threw it into his mouth, and it descends into his innards and consumes his innards...

3. The commandment of those who are killed: They would cut off his head with a sword, in the same manner as the kingdom does. Rabbi Judah said: This is despicable; rather, they placed his head upon the block, and they chopped it off with an axe. ...

The commandment of those who are strangled: They would immerse him in dirt up to his knees, and they placed a hard cloth within a soft one, and tied it around his neck; one pulls this way, and the other pulls that way, until the life goes out of him.

These mishnayot give operative instructions regarding court-decreed executions; they describe how one ought to execute a person by burning, beheading, and strangulation. While the language used by the mishnah is descriptive,

a kind of report concerning the past (“they would immerse him”... “they would cut off...” etc.), it is clear that the interest of the mishnah is first and foremost normative—namely, to instruct how one ought to perform executions. Was its intention to describe how the Court executed people in practice? It seems highly doubtful, even though this language led exegetes and scholars to argue that this was in fact the way in which the Court of Twenty-Three executed people in the days of the Temple.⁸² It does not seem that this wording was intended to describe actual events in the past, and thereby, indirectly, to determine a halakhic norm. Rather, these mishnayot use descriptive language in order to convey a normative decision.⁸³ This technique is not limited to *m. Sanhedrin*, but appears throughout the mishnaic corpus.⁸⁴

While this example is remote from halakhic realism, it indicates the linguistic and stylistic blurring that is widespread in halakhic sources (in this case, tannaitic-talmudic ones) between factual-descriptive language and normative-imperative language. If the reading I have suggested for these mishnayot is correct, it suggests that the sages utilized descriptive language in order to determine norms. This example may also indicate the nature of realistic languages in talmudic and halakhic sources.

I shall now turn to an example from halakhic-realistic language. In his above-mentioned study, Silman describes with some astonishment halakhic statements which, in his opinion, “turn the clock backwards.” One such example that he brings is from *Shullḥan Arukh, Oraḥ Ḥayyim* 55:10 [Laws of *Birkot ha-Shaḥar* and Other Blessings]:

If a certain youth was born on the 29th of I Adar in a leap year, and another was born on the first day of II Adar that same year, and the thirteenth year is not intercalated, then the one

82 See, for example E. E. Urbach, “Courts of Twenty-Three and the Laws of Judicial Execution,” in *The Halakhah: Its Sources and Development* (Jerusalem: Yad la-Talmud, 1984), 47–53 (Hebrew); and cf. Lorberbaum, *Image of God*, 170–277.

83 On this linguistic phenomenon in relation to the ceremonies in the Mishnah, see Yohanan Breuer, “Verb and Participle in Descriptions of Ceremonies in the Mishnah,” *Tarbiz* 56 (1987): 299–320, esp. 319–20 (Hebrew). It is important to emphasize that I do not claim that this was necessarily the case regarding all descriptive language in the Mishnah (also that regarding ceremonies).

84 This may also be the case regarding *m. Sotah* 1:4; see Y. Rosen-Zvi, *The Ceremony that Was Not: Temple, Midrash and Gender in Tractate Sotah* (Jerusalem: Magnes, 2008), 226–41 (Hebrew).

who was born on the 29th of I Adar must wait until the 29th of Adar in his thirteenth year to be considered thirteen years of age [i.e., obligated in *mišvot*), while the one who was born after him, on the 1st of II Adar, becomes 13 years of age immediately upon the 1st of Adar of his thirteenth year.⁸⁵

According to Silman, this is an example in which “the act of the Court has the power to change the past,” and that “this belief assumes that calendrical time and real time, as it is in reality, are the same.”⁸⁶ For another example, also cited in Silman’s article, we may see *y. Sanhedrin* 1:2:

R. Avin said: “*I cry out to God Most High, to God who recompenses me* (Ps 57:3). [A female child] who was three years old and a day, and the Court decided to intercalate the year—her virginity returns [until her now-postponed third birthday]—and if not, her virginity does not return.”

Silman cites with agreement the *Mordekhai*: “... *I cry out to God Most High, to God who recompenses me*—this means that He [God-yl] concludes and agrees with the earthly court’s intercalation. And if the year was intercalated—her virginity returns [i.e., because she is retroactively considered not yet to be three years old] and also her signs [of puberty] come later if the year is intercalated.”⁸⁷ According to Silman’s view, *Mordekhai* correctly interprets the Palestinian Talmud, which expresses “extraordinary” halakhic realism: the decision of the court turns the clock backwards, an act which in turn causes her (actual) virginity to return.

Does Silman’s interpretation of these passages in the *Shulḥan Arukh* and the Palestinian Talmud necessarily follow? These two texts use factual-descriptive (“realistic”) language. That of the *Shulḥan Arukh* is somewhat weaker: “The one who was born after him, on the 1st of II Adar, becomes 13 years of age immediately upon the 1st of Adar of his thirteenth year”; the Palestinian Talmud articulates it in more definitive, outspoken language

85 It continues: “One who was born during Adar and became *bar mišvah* during a leap year, does not become *bar mišvah* until II Adar” (from *Teshuvot Mahar”i Mintz*, §15.9).

86 Silman, “Halakhic Determinations,” 261–62.

87 *Mordekhai*, *Yevamot* §§115–16; Silman, “Halakhic Determinations,” 262. Indeed halakhists read the language of the Palestinian Talmud thus; see, e.g., *Teshuvot Havvot Ya’ir*, §92.

("her virginity returns"). But do these texts in fact express a realistic *approach*, as Silman would have it? It seems to me rather doubtful. One may easily read the *Shulḥan Arukh* in a different manner. Even though its language is factual, it would not occur to the author to argue that the ruling regarding the question of a youth born on 29th I Adar who reached his *bar miṣvah* in a non-leap year has any effect on actual time. The ruling of the *Shulḥan Arukh* is halakhic, not factual or ontological: namely, that from a *halakhic viewpoint* the youth who is chronologically older (i.e., who was born on the 29th of I Adar) is "younger" than the one who was born subsequently (on the first day of II Adar): that is to say, that he arrives at the age of obligation in *miṣvot*, which is a normative category, before him. All that is said here is that, due to the intercalation of the year, the boy who is chronologically younger is considered, from the halakhic viewpoint, older than his fellow (who is older than him in terms of real time). The order of "real" time has not changed at all.

Regarding the Palestinian Talmud, even the factual language, "her virginity returns," does not necessarily express a realistic-ontological assertion or approach. Again, it is possible that our text is only concerned with the statement that the child is considered to be a virgin from the halakhic viewpoint. Thus, the realistic language used here does not reflect a realistic approach. Rather, it expresses a legal reality, unrelated to the reality of time or to the restoration of virginity!⁸⁸ In this case, the realistic metaphor is self-evident, almost necessary. It serves as a means of emphasizing the normative power—not the real ("magical") power—of the court.⁸⁹

88 At the same time, this halakhah is based upon compatibility with nature. It would appear that the underlying approach is that a female child does not even reach initial physical-sexual maturity until the age of three years. Prior to that age she is still seen as a kind of walking, developing fetus, such that penetration of her sexual organ is not considered intercourse. The question then is whether the author of this statement thought that ordinarily the physiological signs of her virginity actually regrow if she is under three years old. In any event, there is no necessity to read the phrase, "her virginity returns" in a realistic manner. The halakhic consequences of this halakhah are whether, for example, such a girl may be allowed to marry the high priest. Even if ordinarily they do "return," her fitness for this status does not depend upon her physiological virginity.

89 R. Avin's "astonishment" in the Palestinian Talmud is evidently regarding the normative daring of the sages, which was accepted in the "upper realms," as in the midrashic interpretation of the verse from Psalms: *I cry out to God Most High, to God who recompenses me* (also regarding other matters). See, e.g., *Gen. Rab., Vayḥi*, §99 (Theodor-Albeck, p. 1250): "I cry out to God – this is our father

Is linguistic “thickening”—i.e., the multiple uses of descriptive language—sufficient, in and of itself, to indicate a realistic view? It seems doubtful to me. Thus, for example, the fact that the talmudic sources frequently use descriptive-naturalistic *language* in matters of impurity of a dead body—creating a dense “ontological picture” of *tum'ah* and the manner of its operation (the directions of its flow, factors which halt it, and so on)—does not, in itself, necessarily indicate a realistic *view*.⁹⁰

I do not claim that there are no uses of realistic language within halakhic literature that clearly indicate realistic approaches. These certainly exist, particularly in the case of “extra-halakhic realism” (see the next section). All I wish to state here is that not all descriptive and realistic formulations are the same; we are frequently called upon to provide subsidiary or auxiliary proofs to substantiate an argument about a realistic view in the realm of halakhah (which cannot be based upon descriptive language alone).⁹¹

Regarding the relationship between naturalistic language and naturalistic views, it is interesting to consider the question as to how to relate to a situation in which descriptive-naturalistic language can be read both metaphorically (as entailing a non-realistic view) and literally (in a way that would seem to imply a realistic view). In a situation in which there is no decisive supporting evidence for either reading, upon whom does the “burden of proof” fall? In other words, given descriptive-realistic language, is it the natural tendency of halakhists (in general, or those of a particular generation/place/circle) to lean toward a non-realistic approach or toward a realistic one? My own tendency in such cases is to apply the methodological “principle of charity”

Jacob. *to God who recompenses me*—that the Holy One blessed be He agreed with him to give to each one according to what he is—*And Jacob called to his sons* (Gen 49:1).”

- 90 Compare Noam, “Dead Body,” and see Appendix A in the Hebrew version. Most of the examples cited by Silberg, and in his wake by Wozner, of halakhic realism within the realm of talmudic law, may be read in a non-realistic way, either because their naturalistic language is far from being unequivocal or because it is easy to give them social-practical-legal explanations; see Wozner, “Ontological and Naturalist Thought,” 93–94.
- 91 Thus, for example, regarding talmudic material, it is possible to make use of aggadic sources, whether realistic or non-realistic. Regarding later sources, one may utilize *ta'amei ha-mišvot* (the rationales for the commandments), if the halakhist in question—such as Maimonides, Saadya Gaon, Naḥmanides, Rav Kook, and the like—comments on this in their non-halakhic writings.

of Quine and Davidson, according to which, when interpreting a text, one ought to refrain as much as possible from attributing to it irrationality.⁹² This approach seems preferable in an ambiguous situation. To be sure, this methodological-hermeneutic principle is not a-historic. On the contrary, it takes into account the totality of factors (“all things considered”), including the historical context. Ambiguous situations—in particular commonplace situations regarding which we are lacking in information—are not unusual in cases of halakhic realism.

In concluding this section, I wish to observe that there are cases in which halakhists of a particular generation read the descriptive-factual language of those of previous generations in a literal manner. These later halakhists thus attribute “realistic seriousness” to an earlier wording, which was originally metaphoric. It would seem that this phenomenon is widespread in the history of halakhah, and is deserving of a separate study.

VI. Extra-Halakhic Realism and Intra-Halakhic Realism

In any discussion of halakhic realism, one needs to consider the distinction between what might be called “extra-halakhic realism” and “intra-halakhic realism.” Extra-halakhic realism is an approach according to which the “entities” upon which the halakhic rules are based (or from which they are derived) are effective—that is, they can cause physical and/or spiritual harm in the world. Generally speaking, the rules of halakhah are intended to prevent these harmful consequences and/or to utilize their beneficial powers. Thus, for example, if *ṭumʿah* is perceived as “demonic”—that is, as harmful, whether in the physical or spiritual sense, immediately or in the long run—then the laws of purity and impurity are concerned with preventing the harm they are likely to cause. If blessings and curses are effective (i.e., beyond the positive feeling or feeling of insult on the part of the objects of said blessings or curses), then their laws are intended to exploit their power or to prevent their causing harm, respectively.⁹³

92 Donald Davidson, “On the Very Idea of a Conceptual Scheme,” *Proceedings and Addresses of the American Philosophical Association* 47 (1974): 5–20; reprinted in D. Davidson, *Inquiries into Truth and Interpretation*, 2nd ed. (Oxford: Clarendon Press, 2001).

93 Realistic approaches within the realm of *ṭaʿamei ha-miṣvot* are typically extra-halakhic; for example, the idea of the “divine element” in R. Judah Halevi, astral

Unlike the case in extra-halakhic realism, in intra-halakhic realism there are no consequences outside of the halakhic realm itself. Their effectiveness is intra-halakhic—that is, confined to the limits of the law itself: their consequences are purely normative. It is possible that a certain intra-halakhic entity may have a dramatic normative effect (in comparison with its non-realistic parallel); however, from a conceptual and phenomenological viewpoint, one must not confuse influence within the realm of halakhah, even revolutionary, with naturalistic effectiveness outside the law, in the “real” world.

One example of intra-halakhic realism is a certain understanding of marriage as something real and concrete. According to this approach, marriage between a man and woman is not only a collection of mutual rights and obligations (which also impact upon other parties as well), but is a real, natural, or “metaphysical” connection between husband and wife.⁹⁴ However, this ontological aspect of the nature of marriage has no actual impact. Violation of this “real” connection, such as unfaithfulness to a marriage partner, does not cause any concrete damage, beyond those damages which a non-realist would also recognize. Even if we interpret the argument of the *Damascus Document*—namely, that “male and female He created them” (Gen 1:28) is the “foundation of creation”—as an ontological understanding of marriage, its consequences are purely normative: for example, a prohibition of polygamy and even of second marriage.⁹⁵ Again, even if these halakhic derivatives of this ontological view are dramatic, they are only intra-halakhic. To the best of my knowledge, nowhere in CD, or in any other Qumran scroll, is there a statement that violation of the “real” prohibition against having many wives carries any sort of harmful or destructive effect—whether physical or spiritual, immediate or future of any sort.⁹⁶ The only thing that this realistic approach does is to provide a basis for prohibitions or obligations, dramatic as they may be. The sectarian prohibition against polygamy is no exception to this. Almost all the examples brought by Daniel Schwartz to provide a basis for his claim that the Sadducean-sectarian halakhah is realistic are

magic in Abraham Ibn Ezra, and theurgy in Kabbalah.

94 Which is, at times, a particular case of the perception of acquisition as a concrete reality.

95 See above note 40.

96 See Aharon Shemesh, “Comparison of Prohibited Unions to *Kil’ayim* and *Sha’atnez* in the Literature of the Dead Sea Sect,” in *Fifty Years of Dead Sea Scrolls Research*, ed. G. Brin and B. Nitzan (Jerusalem: Yad Ben Zvi, 2001), 200 (Hebrew).

intra-halakhic: the manner of cooking grasshoppers (by water or by fire, “because such is the law of their creation”; CD 12:14–15); the prohibition against marrying one’s niece (CD 7:4); the impurity of the bones of animals (*Temple Scroll*; *m. Yadayim* 4:7); the law of *niṣoq* (4QMMT); laws of evidence; matters of the calendar; and conversion to Judaism.⁹⁷ Widespread realistic views of ownership are also intra-halakhic.⁹⁸ The consequences of all these are strictly within the limits of halakhah.

Another example: According to the thesis of Vered Noam, the realism involved in the ritual impurity of a dead body, according to tannaitic literature, is intra-halakhic. Noam argues that the impurity of a dead body is considered by the early rabbis to be real, yet “free of even the faintest hint of threat, darkness or malice.” Thus, among the tannaim, *tumʿah* (according to Noam) has no extra-halakhic effect. According to her suggestion, the ontological nature of the impurity of a dead body was limited, in their view, to the parameters of halakhah alone—that is, to those rules of behavior derived from this concrete entity.⁹⁹

The distinction between extra-halakhic realism and intra-halakhic realism is important, *inter alia*, because it arouses the suspicion that intra-halakhic realism is not really real; it is only seemingly “real.” In the final analysis, if its realism is completely neutral, and all of its effects or consequences are within the realm of the law—that is to say, its “concreteness” is purely normative—it seems incorrect to speak of it as being “natural” or “ontological.”¹⁰⁰ Moreover, it is possible that one is using here realistic language which is not based upon

97 Schwartz, “Law and Truth,” 231–36. The only extra-halakhic example mentioned there, in n. 19, is the matter of change in the “appearance of the hair,” which indicates a subcutaneous “event.”

98 On such naturalism regarding matters of acquisition, see the sources and discussion in Wozner, “Ontological and Naturalist Thought,” 85–87. Even if Wozner is not aware of this distinction, all of the “legal” examples that he brings in this article are intra-halakhic.

99 See Noam, *From Qumran to the Tannaitic Revolution*, 254.

100 It is important to note that, typically, halakhic realism is extra-halakhic—that is, it generally has in the eyes of the halakhic realist some sort of effect. The realist may not explicitly note the results—physical or spiritual, immediate or long-term—of violation of halakhah because these are not known to him; for him, although they are concrete, they are hidden and mysterious; in his eyes, their violation arouses an unfocused fear, and therefore its danger is even greater. For this reason the results of such violation do not find expression in his texts. However, amorphous fear of violation of halakhah is what exemplifies extra-

a realistic view; we may have here a “comprehensive” metaphor, a kind of allegory or fiction concerned entirely with strengthening certain normative statements or obligations (duties and prohibitions).¹⁰¹

At the same time, from those examples of intra-halakhic realism mentioned above, and from other similar ones, it follows that for many halakhists the lack of extra-halakhic effectiveness does not add or detract anything. These halakhists are interested in the suitability of the halakhic rules to reality, even if that reality does not “punish” one for following inappropriate rules, or for violation of “adequate” rules. They are even willing to pay an ethical and social price for this “suitability.”¹⁰²

The distinction I have proposed in this section is of content and methodological importance also because of the similarity between intra-halakhic realism and halakhic formalism, which will be discussed below (Section IX).

Halakhic Realism and Taboo

The comparison to prohibitions of “taboo” may help clarify further characteristics of halakhic realism. I will comment on this subject briefly. Among anthropologists, sociologists, and scholars of religion, the term “taboo” signifies prohibitions (and rituals) that originate in “super-natural” powers or entities—divine or animistic.¹⁰³ In primitive societies, taboo is a crossroads at which everyday human reality encounters cosmic powers in the broad sense—the natural and the supernatural, the holy and the mundane, the

halakhic realism. This may be the kind of halakhic realism that was prevalent among the people of Qumran (as it is among Haredi Jews in our own day).

- 101 In relation to the previous section, I should remark that, even though it is possible that, generally speaking, realistic-affective *language* is also a sign of a realistic *approach*, it may also be no more than a metaphor. Thus, for example, in Lev 18:26–28; see, e.g., *Sifra, Aḥarei Mot*, §9. Others read it in a metaphorical, non-realistic manner.
- 102 Concerning this matter, it is sufficient to cite the Qumranic example of the prohibition against marrying another wife after the death of the first; see above, n. 40. An interesting example of this tendency may be found in the discussion of Rabbi Shimon Shkop in his work *Sha'arei Yosher* (New York, 1959–60), at least according to Wozner's interpretation, “Ontological and Naturalist Thought,” 82–83.
- 103 R. Wagner, “Taboo,” in *Encyclopedia of Religion*, ed. M. Eliade, 14:233–36; cf. M. B. Hamilton, *The Sociology of Religion, Theoretical and Comparative Perspectives* (London: Routledge, 1995), 122–36.

impure and the pure, with all the dangers embodied therein. "In that place where primitive man applied the taboo," wrote Freud, "he feels danger."¹⁰⁴ Taboo prohibitions are also to be found in modern societies, and not only as pale remnants of the "primitive" past.¹⁰⁵ In them, too, taboo prohibitions differ from ordinary social and legal norms. They arouse powerful feelings, such as disgust, revulsion, and nausea, including a feeling, often unfocused, of terror and danger. Regarding disgust as a constitutive element of the consciousness involved in taboo prohibitions, even in modern societies, William Miller has written: "Disgust is a feeling *about* something and in response to something, not just a raw unattached feeling ... Part of disgust is the very awareness of being disgusted, the consciousness of itself ... disgust must be accompanied by ideas of a particular kind of danger, the danger inherent in pollution and contamination, the danger of defilement."¹⁰⁶

The similarity between taboo prohibitions (both primitive and modern) and halakhic realism is self-evident. Both normative categories are based upon "primal," "unnatural" entities—powers against which the various prohibitions and rituals are intended to protect. At the same time, the phenomenological overlap between these two categories is partial, limited. According to the halakhic realist, numerous halakhot, even though they are derived from entities (or properties thereof), are not considered taboo. The subjects of the prohibition do not necessarily (or even in the majority of cases) elicit revulsion, disgust, and fear. This claim is true not only regarding intra-halakhic realism, which typically does not arouse feelings, reactions, or sensations of this type, but even in relation to many of the concrete "results-effects" of extra-halakhic realism. Does the impurity of a "real" dead body arouse disgust and repulsion? It would appear that, according to extra-halakhic realism, many of the prohibitions of the Shabbat, even those of forbidden

104 S. Freud, "The Taboo of Virginity," in *The Psychology of Love* (Harmondsworth: Penguin, 2007). On the source of the taboo and its significance, see Sigmund Freud, *Totem and Taboo: Resemblances Between the Psychic Lives of Savages and Neurotics*, trans. A. A. Brill (New York: Vintage Books, 1918).

105 See, for example, Mary Douglas, *Purity and Danger* (London: Routledge, 1966); M. Mead, "Taboo," *Encyclopedia of Social Sciences* 14 (1934): 181–82.

106 W. I. Miller, *The Anatomy of Disgust* (Cambridge, MA: Harvard University Press, 1997), 8. For our purposes, there is no need to discuss the question as to whether, in modern society, every object of taboo prohibition is one that elicits disgust and thus is perceived as dangerous. In my brief comments on this matter here, I have assumed (together with Miller) that this is generally so.

foods (at least some of them), agricultural laws relating to the Land of Israel, blessings and curses (at least in part), and many other prohibitions are not considered as taboo. Rather, they are considered as regular obligatory norms. It would appear that the category of taboo prohibitions within halakhah is limited, in contrast to reality-based halakhot (according to the extra-halakhic realist).¹⁰⁷ The realist is unable, perhaps not even interested, in transforming them into taboo prohibitions.

VII. Halakhic Realism and Halakhic Formalism

In any discussion of halakhic realism, it is worthwhile to take note of its similarity to halakhic formalism. The proximity between them concerns two interrelated subjects: rulism and conceptualism.¹⁰⁸ It is particularly noticeable in intra-halakhic realism, in which halakhic reality has no consequences outside of the limits of halakhah itself. The following discussion will focus upon the resemblance between halakhic realism and rulism.

One of the ways to distinguish between a realistic understanding of an halakhic rule and a non-realistic approach thereto is by examining the manner in which considerations of various types may nullify the applicability of the rule. If one is not speaking of a concrete “violation”—that is, of a conflict with reality (i.e., an act that “goes against” reality)—and everything is a matter of nominalism, i.e., relating to considerations of values and purposes—then in certain exceptional cases opposing values and goals may overcome the rule and obviate its applicability. Let us turn once more to the realistic under-

107 Paul Rozin and others have argued that the feeling of disgust and revulsion involved in fear of real “contamination” and “soiling” (which lie at the base of taboo, whether primitive or modern) are connected to matters of eating and rejection of food, as well as to matters of sex, hygiene, death, injury to the surface of the body, and certain socio-ethical sins. Miller expanded these matters somewhat; see the discussion and bibliography in Miller, *Anatomy of Disgust*, 6–23. Even if Miller is correct in stating that taboo pertains to far broader areas of life than seems at first glance, those areas are still narrow in comparison to the extent of those with which halakhah is concerned (including its “concrete” elements, according to the realist).

108 On legal formalism as rulism, see Frederick Schauer, “Formalism,” *Yale Law Journal* 97 (1988): 509–45. On legal formalism as conceptualism, see E. J. Weinrib, “Legal Formalism: On the Immanent Rationality of Law,” *Yale Law Journal* 97 (1988): 949–1016. Compare Wozner, “Ontological and Naturalist Thought,” 51 n. 20.

standing of marriage in the *Damascus Document* (CD 4:21), which states that “a foundation of creation” is that “male and female He created them” (Gen 1:27). According to several exegetes, this verse is interpreted by the scroll as a “law of nature”—that is, the halakhic rule must correspond to nature; hence, polygamy and possibly even remarriage are forbidden.¹⁰⁹ According to Qumran halakhah, one may not under any circumstance take a second wife during the life of the first. As one is speaking here of “reality,” just as there are no exceptions to the laws of nature, so too in this matter there is no consideration (or group of considerations) which would allow polygamy, even in an exceptional case. Qumranic law would prohibit, for example, second marriage even in a hard case in which a man is living with a partner who has become insane. The reason for this is a kind of “There is no wisdom, no understanding, and no counsel that can avail against” nature.¹¹⁰

As against Qumranic halakhah, let us imagine a certain halakhist who thinks that polygamy ought to be prohibited, albeit not on “realistic” grounds, but rather due to social-value considerations, such as the equality of women, control of the sexual urge, modesty, and so forth. Such considerations might presumably be overruled by opposing considerations in exceptional cases, such as the partner’s insanity, in which case we might give priority to preventing suffering on the part of the sane partner and give preference to the value of pleasant marital life. But let us imagine that this halakhist were to adopt a strict formalistic approach based upon such considerations as the integrity and stability of the law, fear of the “slippery slope,” and so on.¹¹¹ He might adopt an extreme rulism and decide that he will never depart from the rules, including the rule prohibiting polygamy. That is, it would be extremely rare, or maybe even impossible, for a situation to exist in which other reasons or principles would override the general rule.

The Qumran intra-halakhic realist and our hypothetical nominalist-formalist halakhist would thus arrive, in the end, at the identical halakhic

109 This example is taken from Schwartz’s discussion, “Law and Truth,” 231–32.

110 An ironic paraphrase of Prov 21:30; cf. *b. Ber.* 19b.

111 These considerations are interwoven with the “religious” consciousness that the reasons for the halakhic rules transcend human understanding. The halakhist does not really know the reasons for the halakhic rule, and therefore is unable to weigh them against opposing values and considerations.

result.¹¹² The identity between the conclusions of the (intra-halakhic) realist and the formalist non-realist might recur in many halakhic issues, perhaps even in all of them. In other words, social considerations, combined with strict formalism—an approach characteristic of many areas of halakhah and of many halakhists—lead to the identical halakhic-legal results. If this analysis is correct, then in many cases the distinction between realism and nominalism is bereft of any practical-halakhic consequences.¹¹³

This does not mean that the distinction between them ceases to be interesting. To my mind, the explanations which halakhists offer for their decisions (that is to say, the world of consciousness or spirituality underlying the rules) are interesting in themselves. Nevertheless, one must admit that, in the absence of practical consequences, the distinction between halakhic realism and halakhic non-realism loses its vitality. Moreover, given the problem of language—that is, that realistic language does not necessarily indicate a realistic view—the distinction between the two is obscured to the point of confusion. Here too, the resemblance between halakhic realism and strict halakhic formalism invites a “spilling over” from one approach to the other—generally speaking, from halakhic formalism to halakhic realism.

112 In this context it is worth noting that, from a conceptual viewpoint, even a realistic approach (with extra-halakhic consequences) can tolerate an exception to the rule, as there too it is possible that the results (positive, all things considered) of a violation of the rule is preferable to the (negative) consequences of obedience thereto.

113 A subject deserving of separate research in its own right is the relationship between the preventive edicts of halakhah and halakhic realism. As is well known, halakhah in all its branches is filled with *seyagim* (preventive edicts) concerned with extending the prohibitions of the Torah out of fear that a person might come to violate a Torah prohibition. On edicts and restrictive rules in halakhah, see the notes in Ephraim E. Urbach, *Halakhah*, 11; and cf. Abraham Goldberg, “On the Development of the *Sugya* in the Babylonian Talmud (Use of the Terms *gezerah shema*, *gezerah dilma*, *gezerah mi-shum*),” in *Hanoch Albeck Jubilee Volume* (Jerusalem: Mossad ha-Rav Kook, 1963), 101–13, at 102 (Hebrew). For our purposes, the interesting question is: Is the fear of transgression that motivates the enactment of an edict typically based upon realistic approaches, or is there no necessary connection between halakhic restrictions and halakhic realism?

VIII. Realism of Intentions

Intention (*kaovvanah*)—that is to say, the mental component (*mens rea*) of the halakhic act—enjoys a special position in the issue of halakhic realism, constituting a realm unto itself. The relation between “intention” in the halakhic act and its reality or concrete nature (which is sometimes the result of the act) is multifaceted.¹¹⁴ In what follows, I shall propose a number of conceptual and methodological comments relating, among other things, to halakhic texts and research literature concerning the realism and non-realism of intentions.

At first glance, it would appear that the shift in emphasis from the physical component and/or the results of a given action to its underlying intention signifies a transition from realism to non-realism. Such is the case in ethics and law regarding the transition from “ethics of consequences” (or: results) to an “ethic of intentions,” and it may also be the case in matters of halakhah.¹¹⁵

An example of such a line of thought in halakhic matters was already suggested by Maimonides in his *Mishneh Torah*. His words may serve as a point of departure for the comments offered below. In the final halakhah in *Hilkhot Miqva'ot* (11:12), which is also the closing halakhah in the *Book of Purity*, Maimonides writes:

It is a clear and well-known thing that impurity and purity are scriptural decrees and are not the sort of thing that can be determined by a person's mind, for they are among the *ḥuqqim* (i.e., statutes). Similarly, immersion in water from impurity is among the *ḥuqqim*, for impurity is not like dirt or excrement which can be washed away by water, but rather is a scriptural decree, so that the matter depends upon the intention of the

114 For our purposes, there is no need to distinguish among different kinds of intentions, but it is sufficient that all of them fall under the category of the “mental component” of the act. In what follows, the meaning of the term *kaovvanah* (intention) is thus not in any sense a psychological one.

115 On this tendency in ethical thinking, see Paul Ricoeur, *The Symbolism of Evil* (Boston: Beacon Press, 1967); in the context of the Jewish tradition, see, e.g., Yochanan Muffs, “Between Judgment and Mercy: The Prayer of the Prophets,” in *Love and Joy: Law, Language and Religion in the Bible and in Rabbinic Literature* (Jerusalem: Magnes, 2002), 15–16 (Hebrew).

heart. Therefore our sages said that one who immersed but did not have intention is as if he did not immerse at all.

The categories of “impure” and “pure” (*ṭameʿ* and *ṭahor*) and the laws derived therefrom are, according to Maimonides, without any rationale (i.e., they are scriptural decrees),¹¹⁶ as is also the category of “purification” (i.e., immersion from impurity) and the laws which follow from it—“they are among the *ḥuqqim*” (within the context of this halakhah, this refers to commandments which have no rationale). Why? “Because impurity is not like dirt or excrement which can be washed away by water.” The various types of impurity (e.g., contact with a dead body, a menstruant woman, certain kinds of creeping insects or reptiles, etc.) are, according to Maimonides, not real states of things in the world; hence the act of purification therefrom (by means of immersion in water) is not intended to bring about any actual change therein so as to remove them. This final halakhah of the *Book of Purity* thus negates the realistic-naturalistic understanding of impurity and purity and of those laws which pertain thereto.¹¹⁷ This claim is based upon the Aristotelian worldview in which Maimonides was steeped. According to Aristotelian physics and metaphysics, impurity and purity are neither ontological categories, nor concrete entities, nor accidents which occur to bodies.¹¹⁸

But Maimonides attempts to argue his claim that *ṭumʿah* is not real from halakhah itself. This view is implied, in his opinion, by the law according to which purification depends upon the intention of the heart. That is, if a person immersed himself without the intention of purifying himself from a specific impurity (*lo huḥzaq*, in halakhic language; i.e., he did not have intention), he does not become pure (i.e., “it is as if he had not immersed himself”).¹¹⁹ In other words, according to halakhah, one is rendered pure not

116 What I have referred to elsewhere as “the scriptural decrees” in the theological sense; see Lorberbaum, “Scriptural Decree,” 127–33, 139–49.

117 On the rhetoric of this claim, see Lorberbaum, “Scriptural Decree,” Chapter 4, Section 2. 1.

118 The assertion that “impurity is like dirt or excrement which can be washed away by water” (which Maimonides rejects) should be understood as a general argument regarding the reality of *ṭumʿah*, which also includes a spiritual reality, not necessarily as a claim concerning its concrete physical-material quality.

119 See *m. Ḥag.* 2:6; *b. Ḥag.* 18b–19a. Rashi, ad loc., interprets: “*Huḥzaq*—this is language of intention.” However, the word *huḥzaq* in the Mishnah evidently has a different meaning. See Yair Furstenberg, “Eating in the State of Purity during the Tannaitic Period: Tractate *Ṭeharot* in Its Cultural and Social Contexts” (PhD

only by the water of the *miqveh* but also by one's intention at the moment of immersion. If intention at the time of immersion is a precondition of purification, then purity cannot be a bodily change; rather, it is dependent upon one's state of consciousness.¹²⁰ The assumption underlying Maimonides' move in this halakhah is that, for the halakhic realist, "halakhic entities," such as impurity, behave like natural-physical entities; hence, just as states of consciousness do not ordinarily exercise any physical influence on objects, so too is intention lacking in any influence or effect within the framework of halakhic realism. Hence, according to the rabbis, purity and impurity are not real, i.e., physical properties.

This claim prepares the ground for the allegorical explanation of impurity and purity that appears immediately thereafter:

Nevertheless, there is an allusion in this matter: just as one who directs his heart to purify himself is pure once he has immersed himself, even though nothing has been changed [lit., "made new"] in his body, so too one who intends to purify his heart from the impurity of the souls—namely, the thoughts of evil and improper opinions—once he has decided in his heart to remove himself from those thoughts and immersed his soul in the water of knowledge—he becomes pure.

The argument from intention in this halakhah serves a double purpose: first, the requirement for intention in immersion serves as proof that impurity and purity are not "objective" ("nothing changes in his body"), but rather "scriptural decrees without a rationale"; second, the statement further on that the requirement of intention is seen as an "allusion" (i.e., an allegory) paves the way for the statement that impurity is equated with "thoughts of evil" whereas purity is tantamount to perfection of character and intellect.¹²¹ The "rationalist" assumption implied in Maimonides' claim is that the intention of

diss., Hebrew University of Jerusalem, 2011), 236–40 (Hebrew). The meaning of the mishnah is irrelevant to my purposes here.

120 And indeed, in *Guide of the Perplexed* 3:47 Maimonides proposes functional explanations for the entire complex of matters of impurity and purity—i.e., keeping people at a certain distance from the Temple in order to establish a feeling of awe regarding it.

121 Moreover, the argument that matters of impurity and purity are scriptural decrees without any rationale serves two purposes in this halakhah: first, to confute the view that they are real ("like dirt or excrement"); second, to prevent

immersion, and evidently intention in general, has no “real,” causal effect (as opposed to its influence upon the soul—see below). Maimonides’ argument was adopted by scholars in other halakhic contexts.¹²²

Yet it may be that the halakhah, “If he immersed and did not have intention, it is as if he had not immersed at all,” is not a decisive proof of the sages’ non-realistic approach towards impurity. It may be that they attributed power to change reality to intention, or that they understood intention as a necessary condition for purification in the halakhic sense, which also includes purification in the real sense. In order to evaluate the “persuasive power” of Maimonides’ argument and its weight in the history of halakhah, I wish to suggest a distinction among three different meanings of the concept of the effectiveness of *kavvanah* or intention—that is, of the mental component in the halakhic act.

According to one sense, intention is a defining element of the halakhic act, similar to the fundamental role of intention in actions in general and in ethical acts in particular. According to this sense, “commandments require intention” because without deliberate intention (or at the very least with the intention to fulfill the *mišvah* in question), the commandment has not been fulfilled. The mental component is the factor which distinguishes between a physical event in the world and an action (both action in general and halakhic action in particular). Thus, for example, one who heard the sound of the shofar on Rosh Hashanah without intending to fulfill the *mišvah* involved therein did not in fact do so.¹²³ The mental component of the *mišvah* act may in fact be a concrete entity or quality. However, the ontological status of intention as such is not concerned with this sense. Moreover—and for our purposes this is the main point—the non-realist will not disagree regarding the fundamental status of this sense of intention (and its “concreteness”).

According to the second sense, that intention which lies at the basis of the *mišvah* act shapes the personality. Like the ethics of virtues, according to this sense, the requirement of intention in fulfilling the commandments is meant to assist in acquiring religious perfection. The impact of the underlying intention on the individual’s ethical and religious perfection is an

antinomian conclusions due to their spiritualization. For a detailed discussion of this halakhah, see Lorberbaum, “Scriptural Decree,” Chapter 5, Section 1.

122 See Edrei, “When a Person Sins Unknowingly.”

123 *M. Roš Haš.* 3:7.

expression of the religious-halakhic act's reality.¹²⁴ This kind of "reality" is not the concern of halakhic realism, for the halakhic non-realist might also agree that the aim or intention of fulfilling the commandments is its effect upon a person's soul or psyche.¹²⁵ Thus, for example, Maimonides, who as mentioned is a halakhic non-realist, constantly emphasizes that the very essence of the commandments is their preparation or directing toward perfection of character, and indirectly intellectual perfection.¹²⁶ An example of this is found at the end of the final halakhah of *Hilkhot Miqva'ot*, discussed above.

According to a third sense, the intention that underlines the halakhic deed has influence "beyond the boundaries of the personality" (whether of the one acting or of the other); it exerts an effect upon the state of things in the world, whether earthly or heavenly. A halakhic realist is likely to think that not only the physical component, but also (and primarily) the mental or "spiritual" component of the *mišvah* act exerts an effect upon the "state of things in the world." By contrast, the halakhic non-realist will argue that "intentions" have no effect of this sort, their influence being limited to the definition of the act in general and of the religious act in particular, as well as to its effect upon the personality. This third sense embodies that "realism of intentions" which—in contrast to the first two meanings—is relevant to the issue of halakhic realism.

Maimonides' rational argument at the end of *Hilkhot Miqva'ot* assumes that "realism of intentions" is denied by the halakhic realist. Is this in fact the case? Examples of realism of intentions are to be found in Kabbalistic literature. According to various Kabbalistic circles, intention in the commandments (generally speaking combined with action) serves to "repair"

124 The underlying intention of acts is likely to have an influence also upon another personality. Thus for example, Reuben's asking forgiveness of Shimon, accompanied by intention, is likely to cause Shimon to forgive Reuben and to alter his relationship to him. Such is not the case if he gets the impression that the request for forgiveness was merely lip service.

125 Compare Joshua Levinson, "From Narrative Practice to Cultural Poetics: Literary Anthropology and the Rabbinic Sense of Self," in *Homer and the Bible in the Eyes of Ancient Interpreters*, ed. M. R. Niehoff (Leiden: Brill, 2012), 345–67.

126 See, e.g., his *Introduction to Tractate Avot (Shemonah Perakim)*, Chapters 3 and 4 (ed. Shilat, 232–41). This may also be the case regarding a number of sources in rabbinic literature. See, for example: "Rav said: 'The commandments were only given to Israel in order to refine thereby human beings'" (*Lev. Rab. 13, Parashat Shemini*).

the divine world. It unites the *sefirot* and creates (or “restores”) harmony in the upper worlds, and thereby in the lower ones as well.¹²⁷ However, realism of intentions is not limited to the approaches of the Kabbalists, who function primarily within the second (the meta-halakhic) and the third (rationales of the commandments) levels of discussion mentioned above in Section III. The view that intentions have a causal effect upon the state of things in the world is evidently found also in the Bible, and possibly also in talmudic halakhah—specifically on the first, halakhic level of discussion. (Its results are of course different from those of Kabbalistic *kavvanot*.)¹²⁸

These three senses of “intention” are not mutually exclusive. It is possible that, with regard to certain halakhot, a given halakhic thinker will adhere to two of them, or even to all three. The mental element may serve as a component in defining the *mišvah* act; it may also serve as an educational means of shaping and directing the personality, while simultaneously (together with the physical act) influencing the world (outside the boundaries of the personality).

Even though there is a conceptual difference between the first sense of intention and the third one, for the halakhic realist the connection between them is stronger than would appear at first glance. This is so for the following reason: if, according to the halakhic realist, the fulfillment of a *mišvah* ordinarily bears a real, concrete result, and intention (*kavvanah*), as a *sine qua non* of the *mišvah* act, is a basic element thereof, then intention is an essential condition for its realization. In other words, if without the mental element the commandment has not been fulfilled at all, then the act per se, i.e., the physical event, is not efficacious. The halakhic realist, who believes that even those commandments which require *kavvanah* (i.e., those for which some mental element is fundamental) have a real effect, will thus reject Maimonides’ argument at the end of *Hilkhot Miqvaot*. A halakhic realist of this type will also be a realist of intentions; he will tend to believe that a

127 See Gershom Scholem, “The Concept of Kavanah in Early Kabbalah,” in *Studies in Jewish Thought*, ed. A. Jospé (Detroit: Wayne State University Press, 1981), 162–80; Moshe Idel, “Some Remarks on Ritual and Mysticism in Geronese Kabbalah,” *Journal of Jewish Thought and Philosophy* 3 (1993): 97–122; Yonatan Garb, *The Appearances of Koah (The Power) in Jewish Mysticism* (Jerusalem: Magnes, 2005), 123–30 (Hebrew).

128 This should not to be surprising, as the effectiveness of intention plays a crucial role in magical and theurgic practices in their various periods. I cannot elaborate on this here.

necessary component for the effectiveness of the halakhic act (or of the act of transgression) is its underlying intention.

A halakhic realist who is not a realist of intentions, such as Maimonides' imaginary realist, is likely to deny realism in the case of those halakhot which involve a mental element. Another path available to him is to distinguish between the efficacy of the halakhic act (which is that of the physical "behavior" alone) and its halakhic validity (which depends upon a mental element). But there are considerable difficulties in both of these approaches. As for the first approach—given the centrality of the mental element in halakhah, this path dramatically limits its real, ontological nature, and clarifies the effectiveness of Maimonides' anti-realist argument at the end of *Hilkhot Miqva'ot*. As for the second path, it seems doubtful to me as to whether such a distinction—i.e., between efficacy and validity—ever occurred to any halakhic realist, i.e., whether it is useful to explain halakhic sources which combine realism with intentionality.

In every discussion concerning realism of intention, it is worthwhile taking into consideration the distinction suggested above between extra-halakhic realism and intra-halakhic realism and to ask: is it within the power of the mental element of the act to change the state of things in the world, or is its influence limited to the confines of halakhah? At the same time, within the framework of a discussion of realism of intentions, one cannot or should not identify the "confines of halakhah" with those of the personalities; in other words, intra-halakhic realism of intentions is different from non-realism of intentions.

In order to clarify the distinction among the three different senses of intention in the halakhic act, and the comments I have suggested in their wake, I shall briefly discuss two examples. The following discussion is not intended to establish final conclusions regarding the meaning of the intentions therein, but only to uncover the assumptions implied in the various exegetical possibilities to be proposed.

In Numbers 35 a distinction is drawn between one who murders another person deliberately and one who does so mistakenly or accidentally. The punishment of the deliberate murderer ("he is a murderer") is to be killed by the blood redeemer ("The murderer shall surely be put to death; the blood avenger shall himself put the murderer to death ... Whoever smites a person, the murderer shall be put to death by the testimony of witnesses"—Num 35:18–19, 30). By contrast, one who kills another person inadvertently or by

accident—referred to in this chapter as “one who smites another by error” (v. 15) or “the manslayer” (v. 24)¹²⁹—is subject to exile in the city of refuge, where he must stay until the death of the high priest (v. 28). The chapter goes on to explain: “You shall not accept ransom for the life of the murderer, who is guilty of death, but he shall surely be put to death; and you shall not accept ransom for he who has fled to the city of refuge, that he may return to dwell in the land before the death of the priest” (ibid., vv. 31–32). The unconditional obligation to execute the deliberate murderer, and possibly also to “imprison” the accidental manslayer in the city of refuge, is explained in the following verses: “And you shall not pollute the land in which you are living, for blood pollutes the land, and the land cannot be expiated for the blood that is shed therein, save by the blood of he who shed it. And you shall not defile the land in which you live, in whose midst I dwell, for I am the Lord, who dwells in the midst of the people of Israel” (ibid., vv. 33–34). Exegetes and scholars think that these verses express a realistic understanding of the blood that has been shed as polluting the land. This pollution is real. The “stain of blood” is real in an extra-halakhic sense, as a critical mass of blood of those who have been murdered will cause the land to spew out its inhabitants.¹³⁰ The putting to death of the deliberate murderer is a means of purifying and expunging the land of blood; unlike ransom or atonement money, this is the only ritual means of cleansing the stain and removing the dangers entailed therein (“for the land cannot be expiated for the blood that is shed therein, save by the blood of he who shed it”).¹³¹ Verses 33–34 relate directly only to the deliberate murderer, as they require the spilling of his blood (“by the blood of he who shed it”). Does the blood of one who was killed by accident or by mistake—whose killer, it is true, is not allowed to pay ransom to “return to dwell in the land”—not require purgation? Or

129 The phrase “he is a murderer,” used to characterize the deliberate murderer, is repeated three times in vv. 16–18. As against that, one who kills inadvertently is called “he who smites a soul in error.”

130 Cf. Ezek 24:6–14.

131 See, e.g., Baruch Schwartz, *The Doctrine of Holiness: Studies in the Priestly Codex in the Torah* (Jerusalem: Magnes, 1999), 116 (Hebrew). He comments there that atonement for the land (“and the land shall not be atoned for the blood which has been spilled thereon”) is the opposite of “for the blood corrupts the land” (35:33), its concern being with purgation and purification (and cf. ibid., 108). Compare also Jacob Milgrom, *Leviticus—A Book of Ritual and Ethics, A Continental Commentary* (Minneapolis: Fortress, 2004), 209.

does his blood perhaps also defile the land, but in this case the removal of that stain is through the death of the high priest (i.e., by his blood)?¹³² One way or another, there is clearly a dramatic difference drawn between the deliberate murderer and one who commits unintentional manslaughter, a difference rooted in the nature of his intention. Whether the difference in these rituals/punishments is rooted in the difference between the realism of the stain of the blood of the one who was been killed and the non-realism of one killed by accident, or whether the distinction between them is only in the degree of “concreteness” (i.e., danger) involved in the stain of their bloods, the mental element is decisive. If Numbers 35 indeed states that there is a real “stain” as the result of bloodshed and an actual pollution that rises from it, it also implies a realism of intentions. The distinction between the blood of one killed deliberately, which requires purgation through the blood of the murderer, and that of one killed accidentally, which does not require such purgation and “suffices” with a different, postponed means of purification (the death of the high priest, which is perhaps only symbolic) is emphatic, in any event, it does not require immediate purgation through the blood of the murderer.¹³³

Another example: the mishnah in *Gittin* 3:1 states the following:

Every *geṭ* that is not written for the sake of (lit., in the name of) that particular woman is unfit (*pasul*). How so?

If he was passing through the market and heard the voice of a scribe reading: “Such-and-such a person divorces such-and-such a woman in such-and-such a place,” and he said: “This is my name and that is the name of my wife,” he cannot use that writ to divorce.

Moreover: if he wrote [a *geṭ*] to divorce his wife, and he went and met someone from his city who said: “My name is the same as your name, and my wife’s name is the same as your wife’s name,” he is not allowed to divorce using it.

132 See Israel Knohl, *The Sanctuary of Silence* (Jerusalem: Magnes, 1994), 169 (Hebrew).

133 Compare Edrei, “When a Person Sins Unknowingly.” The underlying assumption of Edrei’s article is that, according to realistic approaches in the Bible and particularly in rabbinic literature, the effect of the act of transgression (the “stain”), and evidently also of the *mišvah* act, is a consequence of the act alone and not of its intention.

Moreover: If he had two wives whose names are the same, and he wrote [a *geṭ*] so as to divorce the older one, he may not use it to divorce the younger one.

Moreover: If he told the scribe: "Write it, and I will use it to divorce whichever one I wish," it is unfit to divorce with it.¹³⁴

According to this mishnah, the writing in the divorce writ of the names of the woman being divorced and of her husband, who is divorcing her—by the scribe, and not necessarily by the husband—requires special intention: "for the sake/name of that woman and for the sake/name of that man." The mishnah goes to some lengths to specify the precise intention required ("Moreover... moreover... moreover..."), any deviation therefrom disqualifying the *geṭ*.¹³⁵

Why is such intention required on the part of the one writing the divorce document? What is the mental component required in this mishnah? To which of the meanings of intention discussed above does it correspond? The answers to these questions would seem to be interrelated. I will comment as to possible answers in relation to this halakhah only insofar as they pertain to a possible debate between an halakhic realist and an halakhic non-realist—or, better, between a realist of intentions and a non-realist of intentions.

The mental component referred to here is first and foremost according to the first meaning: namely, it constitutes the *geṭ*. Without the fulfillment of this intention, the *geṭ* is lacking in halakhic validity. Why is such intention required in order to create a valid *geṭ*? According to the non-realist, the reason for requiring intention is of a social nature, perhaps of the following type: given that marriage is a social institution of great value ("sanctified," in the view of the sages), the demand for intention of this type, requiring the writing of a unique and special *geṭ* for every act of divorce, helps to assure that the marital connection will not be severed hastily or casually.¹³⁶ As against that, the realist is likely to think that marriage constitutes a reality in the world (see above), which can only be nullified by the giving of a *geṭ*, which thereby

134 According to MS Kaufmann.

135 See the discussion in *b. Giṭ. 24a* and in *MT, Hil. Gerushin 3:3–4*.

136 It may be that such demands for intention indirectly exert an influence over the one divorcing to reconsider well his decision to divorce his wife; if so, the psychological element, whose direct concern is the writing of the *geṭ* for its own sake, also acquires a second meaning.

allows the woman to marry someone else.¹³⁷ According to this latter view, intention “for the sake of the woman” (and the man) at the time of writing is a kind of empowering or charging of the *get* with the power to affect this action so that the divorce itself may be actualized.

For our purposes, it is important to emphasize that even that halakhic realist who would not explain this requirement of intention in terms of “charging the power of the *get*” (or something similar) cannot avoid attributing to it the third meaning mentioned above. If marriage and divorce are real entities, and their establishment and annulment require intention—that is, a mental component—as follows from the above mishnah, then, as I commented above, it is impossible to escape realism of intentions regarding these matters.

Indeed, there were halakhists who wrote of the *get* in precisely such terms. Rabbi David Ben Zimra (Radbaz) was asked the following question: “Concerning those things that need to be done ‘for their sake’ (*lishman*), do they require speech, or is thought sufficient to this effect?” He answered:

Answer: The *rishonim* of blessed memory already spoke of this, and they stated that one requires speech. The reason for this is, in my opinion, for any object involving holiness (*davar she-biqdushah*), such as a Torah scroll, *tefillin*, *mezuzah*, etc., which need to be written for their own sake, they do not acquire holiness by means of thought alone but through speech, for speech makes a great impression (*roshem gadol*). And the sages of the midrash mentioned this in several places. And should you say that this is the case regarding things of holiness, but the writing of a divorce writ, that requires being written for its name—as is stipulated in the verse, “and he shall write for her” (Deut 24:1)—for her name—I might say that thought is sufficient! But in the final analysis one must say that there is an element of holiness in the *get*, for it is called *sefer* (book), and it is written therein “according to the law of Moses and Israel.” Furthermore, if he wrote it without any intention, it does not cut off or separate between him and her, *but by his writing it in his name and her name it separates between them*. Therefore, he

137 Another realistic significance of the *get* is, for example, to prevent any children the woman may have from a subsequent husband from being given the status of *mamzerut*, i.e., bastardy.

must articulate the things verbally, so that *thereby the act will be sustained*, for these things are not sustained by means of thought alone. *Similarly, in the scroll of a soṭah* [a wayward wife, described in Numbers 5], *he must also write it for her sake, and he needs to articulate it verbally so that the waters will bring about their action by virtue of the Holy Name erased in the water*. It is therefore good and upright regarding all those things that require that they be done for their sake that it be articulated in speech, that he is doing it for their own sake. But retroactively I agree that it is not rendered unfit thereby [i.e., by the absence of speech], as he concluded in his heart and thought in his mind to make it for their sake...¹³⁸

Radbaz is concerned in this responsum with the need to strengthen the effectiveness of thought by means of speech (“for speech makes a great impression”). However, his words assume that thought is a necessary condition for speech to be efficacious: “for these things are not sustained by means of thought alone”—that is, that speech without thought is likewise not efficacious. Moreover, in his opinion, even thought by itself is a sufficient condition, for “retroactively ... it is not rendered unfit thereby [i.e., by the absence of speech], as he concluded in his heart and thought in his mind to make it for their sake.” The words of the Radbaz—who was among the outstanding commentators on Maimonides, as well as a noted Kabbalist¹³⁹—express clearly a realism of intention in those (halakhic) matters involving “things of holiness” generally, and matters of divorce and the writing of the *get* “for the sake of the woman,” in particular.¹⁴⁰

138 *Teshuvot Radbaz*, Section I, §154 (my emphasis—YL).

139 The Radbaz was (or is at least considered to have been) one of the teachers of R. Yitzḥaq Luria in Safed. See the references in Melila Hellner, “The Doctrine of Reincarnation in the Kabbalistic Works of Rabbi David ben Zimra,” *Pe'amim* 43 (1990): 20 nn. 28, 30 (Hebrew).

140 It would seem that one ought not to isolate Radbaz’s language in this responsum from his Kabbalistic views in general and from his views of the commandments in particular. See his Kabbalistic work on *ṭamei ha-mišvot*, *Mešudat David* (Zolkiew, 1866), as well as his work *Sefer Migdal David* (Lemberg, 1883), a Kabbalistic interpretation of Song of Songs, fol. 69a.

IX. The Sources of Inspiration for Halakhic Realism

Halakhic realism draws upon numerous sources of inspiration. According to an argument commonly found in research literature, the central, if not the only motivation for realistic approaches to matters of halakhah and law is a certain outlook as to the nature of law. In other words, the motivation for the realistic position is to be found in the realm of jurisprudential thinking. I noted above the drawbacks of this approach and the confusion which it creates.¹⁴¹

The sources of inspiration for halakhic realism are, among other things, religious, theosophic, and theological. Their sources may be found in canonic texts (Bible, Talmud, and Kabbalah) or in other, external influences; in approaches regarding the nature of the human being and of society; in popular views regarding certain entities, powers, and causal connections (including magical approaches); in pseudo-scientific approaches; in pseudo-logical-ontological approaches in the realm of legal reasoning; and elsewhere. Each of these sources may contribute to the shaping of a particular branch of halakhah, but not necessarily to that of halakhah in its entirety. As I have commented above, a particular halakhist may be a realist regarding a particular halakhic matter and a non-realist in another.¹⁴²

It seems worthwhile to distinguish between realism whose source is theological or religious (this may be the source of inspiration for realism in matters of purity and impurity, Shabbat, sacrifices, and prayer), and that realism whose source lies in pseudo-logical legal thinking.¹⁴³ There may also be intermediate cases combining different sources of inspiration, such as those involving marriage, blessings and curses, and the like. It is needless to add that different sources of inspiration may be central or marginal in different periods and in different places. Moreover, some of these sources of inspiration may negate one another, thereby creating contradictory realistic views.

I wish to dwell for a moment on the religious-mythic-philosophic source of inspiration. Scholarship on the subject of halakhic realism speaks extensively about “mysterious” entities as a source for halakhot, but not

141 See above, Section III.

142 It is possible that a halakhist might propose a non-realistic reason for a particular (exoteric) halakhic subject and alongside an (esoteric) realistic reason. Thus, for example, Naḥmanides in his *Commentary on the Torah* at Deut 22:6–7; see below.

143 See Hebrew version, Appendix B.

of God. There would seem to be an implicit distinction among scholars between such entities as impurity, blood, sacrifice, prohibitions, language, time, marriage and acquisition, and God as an “entity.” This non-articulated or non-explicit distinction evidently assumes that God lies at the basis of religion and of halakhah as a whole, and therefore is not an “entity” of the type relevant to the issue of halakhic realism. The widespread definition of halakhic nominalism as “the will of God” likewise follows from this.

In my book, *Image of God: Halakhah and Aggadah*,¹⁴⁴ I reconstructed the sages’ interpretation of the idea of humanity’s creation in the image of God. This reconstruction revealed an anthropomorphic approach and an iconic understanding of the concept of *selem*, according to which God is present in man, who is made in his image. In this work I also showed how this structure of thought serves the *tanna'im* as a halakhic principle, functioning as a tool for fashioning various bodies of halakhah, including court-imposed execution, laws of corporal punishment, laws of procreation, blessings of marriage, laws of marriage and divorce, and more. Many of these halakhot are based, among other things, upon the realistic-ontological approach that “whoever sheds blood” or “one who refrains from being fruitful and multiplying” diminishes the divine image. How so? “Because in the image of God he made man...”¹⁴⁵ This is an acute realism, rooted, as mentioned, in an anthropomorphic theology and an iconic anthropology: the image as presence, which is an ontological approach. The source of inspiration for “realism” in these bodies of halakhot is not legal but rather theological. It draws upon the Bible and perhaps upon other sources. It is easy to see how the iconic approach (image as presence) would fashion laws which pertain to man in a realistic manner, whereas other branches of halakhah, which do not pertain to man (or in any event not in the same manner) would not

144 Above, note 12.

145 *T. Yebam.* 8:7 (Lieberman ed., 26); *Gen. Rab.* 34:6 (Theodor-Albeck, 326); cf. Lorberbaum, *Image*, 358–66, 387–418. Researchers with a Maimonidean tendency refuse to read the talmudic sources, particularly the halakhic ones, as implying anthropomorphism, and by so doing negate (by implication) their relation to halakhic realism. This tendency is particularly widespread in scholarship of the previous generation (see *ibid.*, 27–77), and is not altogether absent even in our own time. For a recent example, see David Henshke, “‘In the Image and Likeness of His Form’—Blessing as Midrash, and Something on the Question of Anthropomorphism in the Talmud,” *Sidra* 24–25 (2011): 123–45 (Hebrew).

be fashioned in this theosophical-ontological approach.¹⁴⁶ This ontological understanding of the “image” is absent in Qumranic literature and in that of the Second Temple, as are the halakhot derived therefrom.¹⁴⁷ This finding further confutes, or at least challenges, the claim that Qumran halakhah is realistic, whereas that of the sages is non-realistic.

Halakhic realism whose source of inspiration is not religious-theological often has an indirect religious catalyst. Halakhists, particularly in recent centuries, tended to distance themselves from teleological (i.e., rationalistic) reasons. Their motivation is usually theological—that is, they hold that the reasons for the commandments and *halakhot* transcend the human intellect. Rational reasoning—values, social, educational, or spiritual considerations—are replaced in their thought by realism of various kinds, particularly of the type which I referred to above as pseudo-logical (“ontological-conceptual”). This also relates to the close relation which I described above between halakhic formalism and halakhic realism. Strict halakhic formalism also involves, generally speaking, the refusal of halakhists to interpret halakhah in terms of pragmatic or purposive rationales. A common “solution” to this problem is “formalism” and “conceptualism”; from such approaches, it is easy in turn to “slide” into realistic approaches.

X. Afterword

In conclusion, I wish to mention two subjects which are interrelated, at least indirectly, with one another. Both belong to the margins of the conceptual-phenomenological discussion of halakhic realism; nevertheless, their interest is obvious. Both are deserving of extensive discussion, beyond the framework of the present work. Hence, I will suffice here with only a few brief comments concerning them.

The first subject pertains to halakhic realism as a “noble lie” or an

146 In its Kabbalistic dress, in various Kabbalistic traditions and in other forms, the “theosophy of the image” has come to dominate the realm of rationales for the commandments (the third level; see above, Section III) in many areas of the halakhic system (if not halakhah as a whole). See, e.g., Yair Lorberbaum “Nahmanides’ Kabbalah on Man Created in God’s Image,” *Kabbalah* 5 (2000): 287–326 (Hebrew); and cf. Moshe Idel, *Kabbalah: New Perspectives* (New Haven: Yale University Press, 1988), 112–55.

147 See Lorberbaum, *Image*, 454–68.

educational device. According to this view, realism is of vital necessity for buttressing obedience to halakhah, lending it a level of “depth” and a “spiritual”-religious character. Halakhic realism seems essential for ritual and cultic matters (such as Shabbat and holidays, prayer, matters of repentance and atonement, purity and impurity, forbidden foods, sexual relations, and personal status), but also pertains to ethical-social-legal commandments. According to this view, rational reasons—based upon values or social, utilitarian, and even spiritual (allegorical, symbolic) reasons—are insufficient to move the ordinary person to accept upon himself the yoke of the commandments. Such rationales do not create a sufficiently “deep” religious experience; they do not create commitment and *devequt* (emotional attachment). Only “mysterious entities” are able to do so;¹⁴⁸ hence, the decisive political, social, and educational importance of halakhic realism.¹⁴⁹

148 In *Guide of the Perplexed* 3:31 (Pines, 523–24) Maimonides describes: “People who consider it a grievous thing that reasons should be given for every law; what would please them most is that the intellect would not find a meaning for the commandments and prohibitions. What compels them to feel thus is a sickness that they find in their souls, a sickness to which they are unable to give utterance and of which they cannot furnish a satisfactory account. According to these people of weak intellects, if there is a thing for which the intellect could not find any meaning at all, and that does not lead to something useful, it indubitably derives from God; for the reflection of man would not lead to such a thing.” In these words Maimonides alludes to thinkers and halakhists who transcend the commandments and attribute to them “irrational reasons.” For a discussion of this chapter in the *Guide*, see Lorberbaum, *Gezerat Ha-Katuv*, the last chapter. A common way to transcend the *mišvot* is halakhic realism; see the next note.

149 A version of this argument has been suggested by Gershom Scholem in order to explain the Kabbalistic reaction to the rationalistic rationales for the commandments given by Maimonides. See G. G. Scholem, *Major Trends in Jewish Mysticism* (New York: Schocken, 1941), 29–30. Scholem writes: “Right from the beginning and with growing determination they (=Kabbalists—YL) sought to master the world of the Halakhah as a whole and in every detail [...] in their interpretation of the religious commandments these are not represented as allegories of more or less profound ideas or as pedagogical measures but rather as a performance of a secret rite [...] the fact remains that it was this transformation which raised the Halakhah to a position of incomparable importance for the mystic, and strengthened its hold over the people. Every *mišvah* became an event of cosmic importance, an act which had a bearing upon the dynamics of the universe [...] By interpreting every religious act as a mystery, even when its meaning was clear for all to see [...] a strong link was forged between Kabbalah and Halakhah, which appears to me to have been, in large part, responsible for the influence of Kabbalistic thought over the minds and hearts of successive generations” (my emphasis—YL). The realistic

Such a line of thought appears in Maimonides' writings—for example, regarding the prohibition against gossip and speaking ill of others. As is well-known, the sages emphasize that evil speech leads to leprosy.¹⁵⁰ In *The Guide of the Perplexed* 3:47, Maimonides writes:

As for the uncleanness of leprosy, we have already explained its meaning. The sages, may their memory be blessed, have also explained it. They have made known to us that the established principle in regard to it is that it is a punishment for slander and that at first this change appears in the walls. If the man repents, the purpose has been achieved. If, however, he continues in his disobedience, the change extends to his bed and his house furniture ... then to his body. This is a miracle that was perpetuated in the religious community like that of the waters of the woman suspected of adultery.¹⁵¹

"The benefit in such a belief," Maimonides comments there, "is clear." This comment is consistent with his well-known approach that, in addition to "true beliefs," the Torah teaches "necessary beliefs." These latter are false, yet "necessary for the sake of political welfare. Such, for instance, is our belief that He, may He be exalted, is violently angry with those who disobey Him and that it is therefore necessary to fear Him and to dread Him and to take care not to disobey."¹⁵² "Necessary (i.e., beneficial) beliefs" are at times realistic vis-à-vis matters of halakhah, such as the highly beneficial belief regarding the causal connection between slander and leprosy of various types.¹⁵³

theurgy proposed by the Kabbalists had, according to Scholem, great persuasive power over the public.

150 See, e.g., *b. Arak*. 15b.

151 *Guide of the Perplexed*, 3:47 (Pines, 596–97); cf. *Hil. Tum'at Šara'at* 16:10. On the sources of this interpretation, see Num 12:1–13; for the talmudic sources, see *b. Arak*. 15b. And cf. Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven: Yale University Press, 1980), 446–47 and n. 220. On the impurity of leprosy according to Maimonides, see James Diamond, "Maimonides on Leprosy: Illness as Contemplative Metaphor," *JQR* 96 (2006): 95–122.

152 *Guide* 3:28 (Pines, 512).

153 This is of course extra-halakhic realism, which "uncovers" the dramatic harm caused by passing on slander. One is not speaking here of realism which gives "deep religious meaning" to the prohibition. Rather, this is a "necessary belief" which is intended simply as a means of deterrence. However, the subject of

In the case of Maimonides, a realistic rationale for a particular commandment may be a revealed (i.e., exoteric) one, such being the nature of “necessary beliefs,” whereas its non-realistic rationale will be hidden (esoteric); such, for example, is the nature of certain philosophical rationales. In contrast to Maimonides, among other halakhists and thinkers the realistic reason for the *mišvah* may be the one seen as “inner,” hidden, and esoteric. R. Moses Naḥmanides (Ramban), for example, offers a non-realistic revealed reason for certain halakhot, alongside a hidden Kabbalistic-realistic reason. Thus, for example, in his *Commentary on the Torah*, he proposes an exoteric, rationalistic, ethical-educational reason for the commandment of sending away the mother bird (Deut 22:6–7; i.e., “to teach us the quality of compassion and so that we not behave cruelly”), followed by a theurgic-ontological, Kabbalistic, esoteric rationale for the same *mišvah* (“and there is in this *mišvah* a secret ... and it alludes to a profound matter”).¹⁵⁴

Are there other halakhists and thinkers, in addition to Maimonides, who adhered, whether explicitly or implicitly, to some form of halakhic realism as a “necessary (exoteric) belief” or as an “educational” tool? And, if so, on which considerations were these outlooks based?¹⁵⁵ These questions are matters for further inquiry.

Our second concern here pertains to ethical issues that arise from halakhic realism. At times, halakhic realism functions as the basis for certain halakhot which may be themselves, or as the result of whose application, problematical from an ethical viewpoint. On the conceptual level, halakhic realism (in its various types) is prone to ethical conflicts, as it tends to take into consideration the “needs” of the entities which it “creates,” at the expense of ethical-social-educational-spiritual needs. From an ethical viewpoint, an

leprosy seems to be an exceptional case in Maimonides’ writings of the use of halakhic realism as a necessary belief. He refrains from this elsewhere, evidently because he perceives it as a lowly form of irrationalism which ought to be avoided, even regarding the masses. See, for example, his language at the end of *Hilkhot Miqva’ot*; and cf. Lorberbaum, “*Gezerat ha-Katuv*,” Chapter 5.1.

154 Regarding the esoteric theurgic significance of the commandments in Naḥmanides, see Y. Lorberbaum, “Naḥmanides’ Kabbalah on Man Created in God’s Image.”

155 Esotericism and exotericism in general, and regarding the rationales for the commandments in particular, appear not only in Maimonides but also in other schools of thought in the Middle Ages from the twelfth century on. See Moshe Halbertal, *Concealment and Revelation: Esotericism in Jewish Thought* (Princeton: Princeton University Press, 2007), 8–10.

approach which gives secondary importance to ethical considerations as opposed to considerations of reality (which often function as “exclusionary reasons”) will almost of necessity lead to injustice. Examples of problematic halakhic results of this kind include the following: marriage as a reality (in Qumranic halakhah) and the severe limitations which this “reality” places upon divorce, and possibly also upon remarriage; the perception of acquisition of property as real, and the halakhic consequences thereof.

Even more problematic are those “entities” whose very existence involves an ethical injustice, such as a realistic understanding of personal status in general, and of bastardy in particular; the perception of the *get* as real, with the halakhic consequences derived therefrom, such as that of women being tied without recourse to a recalcitrant husband who refuses to grant a *get*; the perception of Jewishness and non-Jewishness as a substantive difference, with its implications for matters of conversion; and so on.¹⁵⁶

Shai A. Wozner thinks that the naturalist (i.e., realist) approach limits the power of halakhic sages and “makes it more difficult for them to propose solutions to ethical dilemmas that arise as a result of varied halakhic rules, such as for example the laws of bastardy, the issue of conversion, and the difficult problem of women who are refused their divorce writ.”¹⁵⁷ Wozner continues:

Their main limitation is not their commitment to the normative rules of halakhah, but rather their subjugation to what they perceive to be an ontological reality ... There are also advantages to these limitations on their power: it removes responsibility from the *poskim* and from the halakhists in those cases mentioned

156 There emerges here a profound difference between halakhic realism and ethical realism and the naturalism of natural law. These approaches (in their various forms) only “externalize” the non-realistic ethical values involved. This ontological move has no implications for the contents of the values or their practical results and does not turn the ethical consideration into something secondary or turn evil into a “concrete” entity.

157 Wozner, “Ontological and Naturalist Thought,” 90. It is important to note in this context that halakhic naturalism does not always limit the halakhists, but at times increases their power. Thus, for example, according to a number of commentators (and such scholars as Silman), halakhah gives halakhists the power to change the “movement of time” (e.g., in the intercalation of the year and in determining the date of the new moon), which in turn causes, for example, the “reemergence” of virginity; see above, Section V and n. 88.

above, when it seems that the halakhic rules create ethical dilemmas. According to the naturalist [=realist] approach, the court is not responsible for the fact that the woman refused a *get* suffers, nor is it guilty for the fact that it takes a passive stance. It is simply unable to do anything regarding this matter ... Similarly regarding the ethical problematic created by the laws of *mamzerut* (bastardy) ... The naturalistic approach argues that the status of *mamzerut* reflects an ontological reality, and the proscription against his marrying derives from the fact that the *mamzer* suffers from some sort of ontological defect, independent of any halakhic decision that might be subject to change. The defect of the *mamzer* is a part of reality, analogous to the situation of a child who is born ill because his mother consumed drugs during her pregnancy... halakhah is not guilty of the fact that the *mamzer* suffers, nor are the sages of the Rabbinic court who are unable to offer him any solace. The ethical responsibility for his situation lies upon his parents, who committed unlawful adultery.

The suffering of the *mamzer*, argues Wozner, is part of a more general theological question “regarding the unexplained existence of suffering in the world,” which goes beyond the meta-halakhic discussion of halakhic realism.¹⁵⁸

One may disagree with this charitable and tolerant approach. One of the sources of evil is to be found in naturalistic-essentialist outlooks upon “reality” and regarding “the state of things in the world.” Moreover, naturalistic approaches—not weakness of the will or bourgeois lack of concern—bear the responsibility for the colossal evils in the past and in the present. Thus, for example, the problem of anti-Semites is their naturalistic perception of Jews as spreading disease and so forth (the norms of ghettoization and the plans of extermination were only derived from this); the problem with male chauvinists is their realistic-essential approach that women are light-minded or less intelligent than men (norms that exclude women from public positions are only derivatives thereof); the problem with racists is their ontological theory that people with black skin are “animals in human form” (discrimination being derived from that). Do these naturalistic-ontological-realistic

158 Wozner, “Ontological and Naturalist Thought,” 90–91. It would appear that all this was written not only from the viewpoint of these halakhists but also from that of the author.

outlooks “resolve the ethical problematics” of the norms derived therefrom? And “do they, to a large extent, excuse from responsibility [those who hold these views—YL]”?

It is particularly disturbing in this context that intra-halakhic realism, which is characteristic, for example, of certain realistic approaches in relation to divorce and bastardy, according to which the effectiveness of a *get* or the status of a *mamzer* is purely halakhic, asserting that they do not cause any external damage in the “real world.” This approach is astonishing. Given the ethical injustice that this “non-concrete reality” causes, why do realistic halakhists not take these into account? If, according to Wozner’s claim, they are not limited by “their commitment to the normative rules of halakhah but rather [by] their subjugation to what they perceive to be an ontological reality,¹⁵⁹ why do they try so hard to adjust halakhah to this imagined reality? Why not simply ignore it?¹⁶⁰

The ethical problematics of halakhic realism is a far more complex matter, both in terms of Wozner’s assertion and that of the counter-argument presented here. A fundamental clarification of this issue would, as mentioned, go beyond the framework of the present study. Here I only wish to comment, in the wake of Plato and many other philosophers, that wrongdoing stems not only from wrong values or from weakness of character and will; it is also rooted (at times, even primarily) in erroneous perceptions of reality.

159 Wozner’s distinction between the “normative rules of halakhah” and the “ontological reality,” which in the eyes of these halakhic authorities is not part of halakhah, but is in their eyes (and those of Wozner) quasi-natural laws (like the law of gravity) is astonishing. In the eyes of realistic halakhists, knowledge regarding the “concrete defect” of the *mamzer*, for example, has its roots in halakhah itself.

160 See above, Section VI.