

Introduction

Jewish law is a puzzlingly contested category. On first impression, it seems like a plausible gloss—if not translation—for halakhah. In medieval Jewish philosophical texts, the Torah's commandments and their implementation are located as part of the genus "*Dat*," and then specified as divine in contrast to conventional and natural law (Melamed, 2014). Likewise, modern Jewish thinkers often identified halakhah with "*Gesetz*," even if only then to distinguish it from Christian faith, on the one hand, and state law, on the other (See, e.g., Mendelssohn, 1983; and Rosenzweig, 2005). And yet, the problem persists because it does not concern the simple application of a given concept (law) to an equally given object (halakhah). Both terms are at play. Before we can determine whether some phenomenon is an instance of law, it seems we must define the concept "law." But is law the commands of a sovereign backed up by force (Austin, 1998) or only those that are consistent with morality (Aquinas, 2000)? Is it a specific, multi-leveled social practice of a community (Hart, 1994) or the result of the constructive interpretation of jurists (Dworkin, 1998)? Is law within a territory unitary or plural? And before we consider whether halakhah falls under any concept, it seems we must determine what is included within it. Is halakhah coextensive with classical rabbinical literature as well as its medieval and modern interpretations, or only those portions that concern practical norms? If so, how should the abstract analysis of these norms, without regard for their application, be classified? Contrariwise, should the lay-enacted regulations of Jewish communities or even popular practices be included? And can these ostensibly scholarly, descriptive questions be settled without taking a position on what halakhah, normatively, ought to be?

Scholarship on halakhah has been conducted in the shadow of the modern state and the positivist conception of law that it ideologically projects: law is unitary and hierarchically organized with legal validity rooted in some ultimate foundation, whether the command of a sovereign, a basic norm, or a constitution. But this conception of law can operate in opposite ways in scholarship on halakhah: As in the *Mishpat Ivri* (Hebrew Law) movement as well as in some religious theories (see, e.g., Roth, 1986), it can be a procrustean bed into which halakhah is forced. Since law is defined in this manner and halakhah is law, it is argued, only that which conforms to this particular conception of law is halakhah (see, e.g., Elon, 1994). Alternatively, this conception of halakhah can be used to argue that halakhah is not really law. Since law is defined in this manner and many aspects of halakhah do not fit this definition, halakhah is not law (Braiterman, 2018, 2020; Neis, 2019). As Ayelet Hoffmann Libson surveys in her lead off-contribution to

this volume, because many of the Talmud's discussions are merely theoretical and rabbinic sages lacked the power to impose their authority, scholars of rabbinic literature in the past few decades have described it as philosophical, scholastic, dialogical, and even humorous rather than legal. What is seldom noted, however, is that this conception of law is not descriptively adequate even for its paradigmatic case: state law. Insisting on enforcement as a criterion for law cannot account for the behavior of citizens whose every action is not disciplined by the threat of punishment, nor can it make sense of the arguments of lawyers and rulings of judges which both presume and construct law (Dworkin, 1998). This descriptive inadequacy motivates more sophisticated positivist conceptions of law that focus on the social practice of the community (Hart, 1994), as well as the recognition of the entanglement of morality and law by both post-positivists and new natural lawyers (Dworkin, 1998; Fuller, 1964; Finnis, 2011) and the mutual dependence of juristic reasoning and communal acceptance among theorists of the common law (Postema, 2004).

The growing sophistication of both legal theory and scholarship on halakhah over the past few decades has created the perfect conditions for a reassessment of their relationship. We do not doubt, however, that there is *some* relationship between law and halakhah. For on any construal of "law" and "halakhah," they both concern institutionalized norms, though the nature of their institutionalization and the content of their norms may be debated by scholars and practitioners alike (Raz, 1999). And they both clearly include distinctively legal reasoning, that is, both law and halakhah concern decisions about these norms by appealing to authoritative sources and by taking account burdens of proof and questions of jurisdiction (Schauer, 2009). This is why we accept the gloss of halakhah as Jewish law even as we maintain that law is not exhaustive of halakhic texts and that halakhah has the capacity to expand our conception of law. We have thus self-consciously titled this volume *Jewish Law: New Perspectives*, in the plural, because it expresses the proliferation of novel approaches to halakhah found in its chapters. The contributors agree that a single methodology is overly reductive. The study of halakhah cannot be limited to the description of its legal doctrines or the narrative of their historical development. Nor should a settled theory of law be applied mechanically to Jewish texts and practices, predermining which are legal and how they should be interpreted. The contributors do not agree, however, on what should replace it.

Indeed, this volume may be read as a record of debates about *what* Jewish law is, *how* it should be studied, and *why* it should be studied. We have thus organized the volume into three units, though, as we note below, there are additional connections among chapters. These units are distinguished by thematic questions that their constituent chapters can be taken to answer, in addition to their other contributions.

The first unit is entitled "What is Jewish law?" It responds directly to the question posed at the beginning of this Introduction concerning the concept of

“law” and halakhah. Hoffmann Libson focuses on the Talmud and, as noted above, surveys the trajectories in recent scholarship that deny its legal status. While she acknowledges the value of those non-legal ways of reading the Talmud, she draws our attention back to those characteristics of the Talmud that reflect its legal nature. In her view, the Talmud is a fusion of non-legal and legal materials and must be studied accordingly. Jonathan Jacobs approaches the question from the perspective of philosophy of law and takes a wider scope. He argues that halakhah, which in his view includes classical and medieval texts as well as philosophical reflection, should be understood as a ‘non-evident’ rational tradition. This is, in his view, a rival theory of law, not reducible to positivist, natural law, or even common law theories. Michael Baris joins the interests of Hoffmann Libson and Jacobs, offering close readings of talmudic and later halakhic texts in view of philosophical questions about skepticism. Yet Baris does not cast these texts as simply doing epistemology in an alternate mode. Because he focuses on legal presumption (*hezakah*), the analysis concerns how legal decision-making confronts the limits of knowledge.

The second unit is entitled “How to Study Jewish Law” and so moves from ontology to methodology. Alexander Kaye argues that scholarly debates about legal pluralism and Jewish law have suffered from theoretical abstraction. Whether halakhah recognizes the independent legitimacy of other types of law cannot be determined based on its native theories. Instead, we should turn to social history, which demonstrates, according to his synthesis of recent historical scholarship, that Jews have inhabited a plurality of legal orders. Tamara Morsel-Eisenberg also reflects on the relation between jurists and their communities; yet she marshals the tools of the history and sociology of the book and social network theory to reconstruct what she calls the Rabbinic Republic of Letters. Turning to responsa as a distinctive genre of Jewish law, she shows how the exchange of letters among early modern rabbis as well as these letters’ structure projects two imagined communities: scholarly peers to whom their reasoning appealed and the broader Jewish legal community before which they asserted their authority. The next two chapters turn back from history to text and demonstrate the benefits of non-legal readings of legal works. Mira Balberg reviews why classifying Jewish practices as either ritual or law has historically been so contentious and suggests that a more flexible deployment of both legal and ritual theories is needed to illuminate rabbinic literature. She then reviews recent rabbinic scholarship that uses ritual theory to offer new insights on classical Jewish legal texts. Likewise, Alyssa M. Gray argues for the richness of literary theory for reading classical and medieval Jewish legal texts, including the Talmud, *Mishneh Torah*, and *Arba‘ah Turim*. She cautions that reading legal texts literarily must not obfuscate their normative intent; on the contrary, she maintains that properly reading them

will reveal how their rhetoric constructs their authority and renders their arguments persuasive.

The third unit turns from the study of classical, medieval, and early modern Jewish law to the modern period. It also raises a very contemporary question: Why Jewish law?, or better, how does the study of Jewish law interact with present-day philosophical concerns? In his contribution, Levi Cooper recovers the legal career of the Hasidic Rabbi Levi Yitzḥak of Berdyczów. He shows how previous scholarship had ideologically overemphasized the antinomianism of early Hasidic leaders like Levi Yitzḥak and then charts his activities as a local halakhic authority who issued rulings and wrote responsa, a talmudic scholar who trained students and published theoretical works, and a communal leader. In view of this Hasidic master's engagement in Jewish law, Cooper concludes by asking whether *Hasidic halakhah*, or any other modifier, is a useful category for scholarship. Shifting from the world of Hasidism to their opponents (Mitnagdim), Paul E. Nahme explores the affective cultural politics of 19th century Lithuanian talmudic scholarship (*Lomdus*). Through a careful reading of one of its major figures, Yosef Dovber ha-Levi Soloveitchik, along with several later figures, Nahme argues that their halakhic writings should not be reduced to the category of law in the manner that is widespread among canonical modern Jewish thinkers; rather, *Lomdus* should be understood as an effort to build an affective world of enchantment for Eastern European Jews in the midst of their subjection to the colonizing power of non-Jewish states. In her contribution, Nechama Juni also examines the fashioning of subjects; however, she focuses on the subjectivity of Jewish women as they perform commandments that are traditionally gendered male. Doing so allows Juni to orchestrate a dialogue between Judith Plaskow and Judith Butler and then interject into it by showing how the gender of Jewish women may be formed by their practice of halakhah. Lastly, Randi Rashkover reveals the hidden vilification of Jewish law in the recent writings of Alain Badiou and then offers an immanent critique of his own theory of truth and politics. In contrast to both the totalizing caricature of Jewish law that Badiou finds in his reading of the writings of St. Paul and the gnostic revolutionary politics that he advocates, Rashkover discovers a model of cultural discourse that is anti-ideological and self-correcting in Jewish law.

Several themes cut across the units of the volume. Many of them explore halakhic reasoning either through the juridification of concepts and practices (Balberg, Hoffmann Libson, and Baris) or the type of rationality manifest in its discourse (Jacobs, Morsel-Eisenberg, and Rashkover). This is not to say that there is agreement; Jacobs and Morsel-Eisenberg, for example, disagree over whether the common law tradition is an appropriate analogy for Jewish law. Another theme for productive disagreement is whether halakhah is best studied through the texts produced by elites (Gray, Morsel-Eisenberg, and Hoffmann Libson) or lay practice (Kaye and

Juni). Several chapters take issue with the invidious distinction between law and spirit that scholarship inherited from Christian theology. Whereas Cooper shows how a “spiritual” thinker like Levi Yitzhak engaged with law, Nahme demonstrates how the “legal” writings of Lithuanian talmudists aim to work on the spirit. Rashkover, for her part, exposes the anti-Judaism implicit in recent continental philosophy and criticizes it out of the sources of halakhah.

Finally, a crucial question that cuts across the units of the volume is the connection between the ontology and the methodology—between the what and the how—of law, and so of halakhah. As Shai Lavi (2011) has argued, the past few decades of legal scholarship has seen the proliferation of projects that can be described as “law and x,” where x involves the reclassification of law (as literature or politics, for example) or the subjection of it to methods of a particular discipline (history or economics, for instance). In the former case, the ontological substitution is clear. (Law is literature or politics by other means.) But it is no less evident in the latter case. When non-legal disciplines and their methodologies are foregrounded, law is reduced to other domains of human activity. (Law is economic activity, for example) Both neglect the study of law on its own terms, for instance by analyzing legal reasoning or describing its basic phenomenology.

This neglect is particularly acute for halakhah due to the history of its scholarship. Halakhah has arguably been the central expression of Jewish intellectual creativity. For both its proponents and detractors, facility with its texts was the aim of the curriculum for (male) education and mastery of its concepts, rules, and arguments was the cultural ideal (Saiman, 2018). For this reason, Jewish studies has a vexed relation to halakhah. On the one hand, because it accounts for much of the Jewish textual tradition, it is an obvious *object* of study. On the other hand, because its discourse serves to legitimize religious norms and traditional authority, its own *mode* of study is suspect and must be replaced by methods understood to be properly academic. An etic, objective perspective must displace the emic, normative perspective as the condition of entry to the university. And so, though rabbinic literature was among the earliest areas of research, the focus was on its classic texts (Mishnah, Midrash, and Talmud) and philology and history were the dominant methodologies for their study. And even when later halakhic doctrine was studied, its historical context was emphasized at the expense of its own self-understanding. Several chapters in this volume, including those of Hoffmann Libson, Balberg, Gray, and Nahme, take care to preserve the legality of halakhah even as they recognize other features of it and champion alternate methodologies. Nahme, in particular, even as he criticizes the reduction of halakhah to law in modern Jewish thought, invites an exploration of the affective and imaginative world-making capacities of halakhic study. Accepting this invitation would revo-

lutionize Jewish legal scholarship in the university by breaking down the boundaries between it and the yeshiva.

Bibliography

- Aquinas, T. (2000). *Treatise on Law* (R. J. R. S. J., Trans.). Hackett.
- Austin, J. (1998). *The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence*. Hackett.
- Braiterman, Z. (2018, July 17). Law Not Law (The Cambridge Companion to Judaism and Law). *Jewish Philosophy Place*. <https://jewishphilosophyplace.com/2018/07/17/law-not-law-the-cambridge-companion-to-judaism-and-law/>
- Braiterman, Z. (2020, December 27). (Jewish Law) The Tikvah Fund = Conservative U.S. Group Trying to Transform Israel's Justice System. *Jewish Philosophy Place*. <https://jewishphilosophyplace.com/2020/12/27/jewish-law-the-tikvah-fund-the-conservative-u-s-group-trying-to-transform-israels-justice-system/>
- Dworkin, R. (1998). *Law's Empire*. Hart.
- Elon, M. (1994). *Jewish Law: History, Sources, Principles* (Vols. 1–4). Jewish Publication Society.
- Finnis, J. (2011). *Natural law and natural rights* (2nd ed). Oxford University Press.
- Fuller, L. L. (1964). *The Morality of Law* (Revised Edition). Yale University Press.
- Hart, H. L. A. (1994). *The Concept of Law* (2nd ed.). Oxford University Press.
- Lavi, S. (2011). Turning the Tables on Law and: A Jurisprudential Inquiry into Contemporary Legal Theory. *Cornell Law Review*, 96(4), 811.
- Melamed, A. (2014). *Dat: Me-Hok le-Emunah*. Ha-Kibbutz ha-M'uhad.
- Mendelssohn, M. (with Altmann, A.). (1983). *Jerusalem, or on Religious Power and Judaism* (A. Arkush, Trans.). Published for Brandeis University Press by University Press of New England.
- Neis, R. R. (2019). The Seduction of Law: Rethinking Legal Studies in Jewish Studies. *Jewish Quarterly Review*, 109(1), 119–138.
- Postema, G. J. (2004). Philosophy of the Common Law. In J. Coleman, S. Shapiro, & K. E. Himma (Eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (pp. 588–622). Oxford University Press.
- Raz, J. (1999). *Practical Reason and Norms*. Oxford University Press.
- Rosenzweig, F. (2005). *The Star of Redemption* (B. E. Galli, Trans.). University of Wisconsin Press.
- Roth, J. (1986). *The Halakhic Process: A Systemic Analysis*. Jewish Theological Seminary.
- Saiman, C. N. (2018). *Halakhah: The Rabbinic Idea of Law*. Princeton University Press.
- Schauer, F. (2009). *Thinking Like a Lawyer: A New Introduction to Legal Reasoning*. Harvard University Press.