

## Introduction

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This volume marks the 30<sup>th</sup> anniversary of the appearance of Yohanan Silman's pioneering article, "Halakhic Determinations Between Nominalism and Realism – Studies in the Philosophy of Halakha," in the pages of this Journal. Silman turned to two philosophic concepts, realism and nominalism, and sought to show that these concepts corresponded to two different stances within halakhic thought: for the realist, commandments are rooted in reality and have ontological rationales; for the nominalist, commandments are solely a product of divine will. The thesis was original, bold, sweeping, and immediately taken up in new directions, giving rise to a lively academic conversation that has persisted to this date.

This volume of *Diné Israel* is the latest fruit of Silman's 1985 article. We present here eight articles, each dedicated to exploring, refining, or challenging the distinction Silman first drew, and highlighting its importance for understanding rabbinic legal thought. The articles ask such questions as whether "ownership" and "marriage" were understood as legal states (denominated by law) or, rather, as real and concrete entities? And, if ownership is a concrete aspect of the object owned, how does it affect the object? Is marriage a metaphysical connection between husband and wife and, if so, of what sort? These questions radiate out and inevitably draw within their compass some of the most central issues in the study of halakhah from the reasons for the commandments (*ta'amei hamišvot*) to the role of biblical exegesis, on the one hand, and logical deduction, on the other, in determining post-biblical law.

A brief summary of Silman's argument, and the responses it evoked over the years, will be useful to the reader.<sup>1</sup> "Halakhic realism," according

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

to Silman, identifies the halakhic terms or concepts used to define positive or negative obligations as qualities or attributes of entities. Such terms as “forbidden,” “impurity,” “holiness” and “ownership” are, in the eyes of realists—“forms” (*šurot*). These “forms” apply to “sub-strata” (*maša'im*). Thus, for example, a vessel constitutes a sub-stratum for receiving the form (*šurah*) known as ‘impurity.’ A “configuration,” wrote Silman, is a combination of “sub-stratum” and “form”—e.g., an impure vessel. The same holds true, for example, for the form “ownership”: like impurity, ownership, according to the halakhic realist, is a property of the object. Thus, my ownership of a particular object (my right of acquisition) is a “concrete” property, or quality, thereof.

“Halakhic nominalism,” Silman argued, reflects a 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.<sup>2</sup>

The distinction between “halakhic realism” and “halakhic nominalism” is thus between those commandments whose foundations lie in a “reality in its own right” and those commandments that are “imperatives that are the product of the freely chosen Divine will.” Whereas according to the halakhic

Comp. 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,” *Da'at* 31 (1993): v–xx (Hebrew); idem, “The Source of the Validity of Halakhic Instructions: A Meta-Halakhic Inquiry” (Hebrew), in *New Studies in the Philosophy of Halakhah* (Hebrew), ed. A. Ravitzky and A. Rosenak (Jerusalem: Magnes, 2008), 3–25.

- 2 Silman, “Halakhic Determinations,” 251. 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. Devorah Dimant and Uriel Rappaport (Leiden: Brill, 1992), 231 n. 8.

realist the commandments have “real”—ontological—reasons or rationales, according to the halakhic nominalist they have no intrinsic rationale, as they are exclusively the result of God’s will.

One of the most influential uses of Silman’s theory appeared in a brief article by Daniel Schwartz, published in 1992, “Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law.”<sup>3</sup> Schwartz proposed that the fundamental distinction between Qumranic-Sadducean and Pharisaic-Rabbinic law could be understood in terms of realism and nominalism as defined by Silman. The Qumranic-Sadducean legal system was realist, its laws anchored in nature and the result of “independently existing situations,” whereas the Pharisaic-Rabbinic legal system was nominalist and conceived of the commandments as orders emanating from the will of God. Schwartz’s neat and elegant theory had great scholarly appeal, and was soon appropriated and applied by many scholars seeking to explain disputes between these two groups. This view was challenged by Jeffrey L. Rubenstein in an article published in 1999 entitled “Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment.”<sup>4</sup> Subsequently other scholars have weighed in on the debate: some have continued to employ the nominalism/realism rubric in different ways and to disparate areas of law; while others have refined, challenged, or problematized Silman’s categories and Schwartz’s theory. Schwartz himself has continued to develop and nuance his theory in subsequent publications.<sup>5</sup>

Still, there had been no comprehensive assessment of these ideas among scholars. To that end, the editors of this special volume organized an international conference on “Halakhah and Reality.” The conference was

3 Schwartz, *ibid.*, 229–40.

4 See Jeffrey L. Rubenstein, “Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment,” *DSD* 6 (1999): 161–79.

5 “Between Priests and Sages in the Second Temple Period,” in *Variety of Opinions and Views in Jewish Culture II*, ed. Dror Kerem (Tel Aviv: Israeli Ministry of Education and Culture, 1992), 63–79 (Hebrew); “*Qal vahomer* Arguments as Sadducean Realism,” *Massekhet* 5 (2006): 145–56 (Hebrew); “On Pharisees and Sadducees in the Mishnah: From Composition Criticism to History,” in *Judaistik und neutestamentliche Wissenschaft: Standorte, Grenzen, Beziehungen*, ed. L. Doering et al. (Göttingen: Vandenhoeck & Ruprecht, 2008), 133–45; “Priestly Judaism vs. Rabbinic Judaism: On Natural Religion and Religion of Choice,” chapter 2 of *Judeans and Jews: Four Faces of Dichotomy in Ancient Jewish History* (Toronto: University of Toronto Press, 2014).

held on April 29–May 1, 2012 at New York University, sponsored jointly by the Edelman Fund of the Skirball Department of Hebrew and Judaic Studies of New York University, Bar Ilan University Law School, the Tikvah Center for Law & Jewish Civilization of the New York University Law School, and the Yeshiva University Center for Jewish Law and Contemporary Civilization at Benjamin N. Cardozo School of Law. The following six issues were identified for sustained consideration: (1) What are the precise definitions and understandings of the terms “realism” and “nominalism,” terms used both in philosophical and legal theory, not always consistently. Should “realism”, for example, be used equally for legal prohibitions directed to metaphysical as well as physical danger? (2) Does the nominalism/realism dichotomy apply to all realms of ancient Jewish law equally, or only to specific sub-areas, such as purities and sacrifices, or perhaps only to a handful of isolated cases? (3) Granted that realism understands law to be grounded in nature, what exactly is the ontological status of the connection? (4) Are other explanations for legal disputes equally compelling, such as the impact of law in furthering social and moral values? If so, do such explanations compete with the nominalism/realism theory, or are they mutually compatible? (5) Is the question of “the reasons for the commandments” (*ta'amei hamishvot*), relevant to this debate, and how might views on the reasons for commandments affect the understanding of law as either nominalist or realist? (6) What is the role of biblical exegesis, on the one hand, and logical deduction, on the other, in determining post-biblical law, and how should such considerations be brought into the discussion of nominalism and realism?

The conference engendered lively debate, productive argument, and passionate dialogue, which is fully reflected in the final versions of the articles included in this volume. The conference proceedings have been supplemented by several additional articles to provide more comprehensive treatment of the subject.

**Yair Lorberbaum's** “Halakhic Realism”<sup>6</sup> offers a conceptual, phenomenological, and methodological framework for the analysis and discussion of “halakhic realism.” He notes the profound differences between halakhic realism, on the one hand, and ethical realism and natural law, on the other. This comparative discussion helps to identify the salient characteristics of halakhic realism in its varied appearances throughout the history of halakhah.

6 A Hebrew version of this article appeared in *Shenaton Ha-Mishpat Ha-Ivri* 27 (2012): 61–130.

Lorberbaum suggests that the understanding prevalent in scholarship of the opposition “halakhic realism”/“halakhic nominalism” should be revised, and he offers a broader definition that encompasses a wide range of aspects of ontology within halakhah. As against the common definition that halakhic nominalism denotes *halakhot* whose source lies in God’s will, a more useful and productive definition of halakhic non-realism is the perception of halakhic rules as based upon values and moral, social, educational, and spiritual goals. He also cautions that there must be careful attention paid to the distinction between realistic-descriptive *language* and a realistic-ontological *approach*.

In “Nominalism and Realism Again,” **Jeffrey L. Rubenstein** continues to problematize the nominalism vs. realism dichotomy, and responds to some of Schwartz’s efforts in recent publications to refine and develop his ideas. Rubenstein discusses the difficulties inherent in considering ancient Jewish law in terms of a coherent “system” given its protean sources and character. He argues that the characterization of *a fortiori* arguments as “natural,” as Schwartz claims, involves a misuse and misunderstanding of this term, and that such arguments characterize Pharisaic and rabbinic law, too. Similarly, priestly Judaism cannot be considered more “natural” than rabbinic or diaspora Judaism. Rubenstein also investigates at length the debates found in 4QMMT, the issues that the authors considered to be the most significant points of conflict between their group and their opponents. He argues that most of these debates cannot be mapped profitably onto the nominalist/realist divide and rather devolve from different exegetical considerations. Biblical exegesis should therefore not be minimized as a factor in these disputes, nor viewed in a reductionist way as driven by realist or nominalist tendencies.

**Vered Noam’s** “Essentialism, Freedom of Choice, and the Calendar: Contradictory Trends in Rabbinic Halakhah,” discusses the rabbinic calendar, the time-bound nature of festivals and related commandments, and the laws regulating calendrical matters. Noam argues that we find a tension between the conception of specific times as inherently holy, such as those of the seasonal festivals, and the recognition of human authority to regulate time. Some Jewish observances devolve from, and point to, an underlying temporal reality, while other laws, including those that provide for the calculation and determination of the months of the calendar, create temporal reality and infuse it with meaning. Rabbinic sources themselves grapple with this tension and aim to harmonize the competing conceptions with various strategies. Noam also discusses the theological implications of

the two trends of thought. She concludes that we find both nominalist and realist perspectives among the rabbinic conceptions of time.

**Adiel Schremer**, in “‘What God Has Joined Together’: The Ontology of the Marital Bond in Early Rabbinic Thought,” argues that the rabbis employ a great deal of “ontological imagery” in aggadic sources that describe marriage, creating the impression of a real, metaphysical bond between husband and wife. Ultimately, however, rabbinic halakhic sources do not support the notion that marriage creates a real, ontological bond, but rather that God played a role in the realization of the marriage through a kind of divine matchmaking in a time prior to the actualization of the union. Moreover, the rabbis did not rule out human intervention in the marital realm—allowing for divorce and remarriage for example, and even granting the sages a measure of authority to annul marriages. Schremer accordingly concludes: “It seems, therefore, that the rabbis adopted a middle stance: marriage is neither ontological, nor is it a mere social construct. Rather, it is God’s Law, because the Torah, for the rabbis, emanates with God. For this reason, humans cannot change it.”

**Yair Furstenberg**, in “Controlling Impurity: The Natures of Impurity in Second Temple Debates,” challenges the widespread tendency to attribute to the tannaim a non-realistic view of impurity, as a mere abstract legal conception, and to claim that the tannaim disputed its reality with other halakhic systems, such as that of Qumran. These views are largely based on the famous teaching of Rabban Yoḥanan b. Zakkai, “The corpse does not defile, nor does the water purify. It is a decree of the Holy One.” Furstenberg offers a new reading of this teaching and argues that it is not concerned with the reality of impurity, but rather its independence and power over people. The article also analyzes a set of explicit disputes between the Pharisees and their counterparts and demonstrates the Pharisaic tendency to remove any sort of power from impurity, as was widely held by contemporaries, and to subject impurity to human control. Through a careful definition of the human sphere, the Pharisees offer a means to manage impurity and to prevent generating it through contact.

A reprint of Silman’s “Halakhic Determinations Between Nominalism and Realism – Studies in the Philosophy of Halakha” commences the Hebrew section of this volume.

**Haim Shapira’s** “Noahide Marriages in Talmudic Law—Between Realism and Nominalism” continues the analysis of rabbinic conceptions of the nature of marriage, responding in part to Schremer’s claims. While

the rabbis understand marriages between non-Jews to be effected by sexual union, this understanding does not necessarily reflect the realist view of marriage found in Sadducean law and in the sayings of Jesus. Shapira argues that intention (*kavvanah*) is the key issue for determining whether the rabbinic view of such marriages is realist or nominalist, and we find rabbinic sources divided on this question. Similarly, the rabbis dispute whether non-Jews can divorce (reflecting a nominalist view) or can never be divorced (reflecting a realist view). These and other considerations lead Shapira to conclude that rabbinic legal rulings on marriage between non-Jews evince a tension between nominalism and realism.

In “The Metaphysics of Divorce: A Halakhic-Philosophical Analysis of the Rules and Procedures of the Jewish *Get*,” **Michael Baris** explores the development of the *get*'s metamorphosis from legal instrument to metaphysical sacrament, tracking developments in key procedural issues of style and lettering. Of scriptural origin, the *get*—the Jewish bill of divorce—is prescribed by Jewish law as the unique and sole method for dissolving marriage between man and wife. Halakhah reinterpreted certain stylistic demands to conform to sacred scribal writing, thus undermining their original legal purport. By the same token, the adoption of a unique phonetic spelling system replaces the communicative value of the *get* as a legal deed with rigid designation of the divorcing couple, at the expense of legibility. The perception of the *get* as a metaphysical device suggests a grass-roots conception of marriage as a spiritual, metaphysical bond—to be undone only by sacrament, and not by legal convention alone.

In “Ontological Aspects of Prohibition in Talmudic Law,” **Shai Wozner** argues that prohibition, besides its normative function as a rule of conduct, has another meaning as a malicious feature of the forbidden objects, which are compared to a dangerous poison. The article also analyzes in detail the ambiguous talmudic distinction between ‘*issur gavra*’ (a prohibition relating to the agent) and ‘*issur hefṣa*’ (a prohibition relating to the object), which might reflect these two aspects of the prohibition (the normative and the ontological).

In “From *Qal vaHomer* to *Gezerah Shavah*: On Realism and Nominalism, Nature and Exile,” **Daniel Schwartz** continues to refine his thesis that halakhic realism was most compatible with the priestly religion and halakhic

nominalism with the religion of the Pharisees and their rabbinic successors.<sup>7</sup> In this essay, Schwartz explores two interpretive strategies in law: *qal vahomer* and *gezerah shavah*, arguing that the first emphasizes the nature of things and is thus more compatible with a “realist” sensibility while the latter relies on conventions and social constructions. Schwartz maintains that debates between the Sadducees and Pharisees are also debates about the preferable interpretive strategy, with the Sadducees favoring an interpretive strategy compatible with a view of law as natural and the Pharisees an interpretive strategy that emphasizes the constructed character of law.

Two other articles are included in the Hebrew section.

**Dov Schwartz**, “A Reexamination of Rabbi Joseph Dov Soloveitchik’s Halakhic Thought: Between the Conceptual and the Phenomenological Models.” Schwartz assesses two halakhic models that emerge from the writings of Rabbi Joseph Dov Soloveitchik. The first model is “halakhic conceptualism,” according to which halakhah creates its objects by means of a process governed by independent and internal laws. The second model is “halakhic consciousness,” according to which halakhah balances and regulates the religious consciousness. The article also investigates the relationship between these models and those proposed by Yohanan Silman.

**Benjamin Porat**, “The Philosophy of Jewish Law: A Methodological Reflection.” Porat argues that in the past three decades scholarship on halakhah has been blessed by the flowering of a new field of inquiry: philosophy of halakhah. His article focuses on methodological questions that pertain to the philosophy of halakhah. Porat explains why a philosophical-legal perspective has unique value in this context, and how philosophy of law in particular can enrich scholarship on the philosophy of halakhah. To this end Porat proposes the integrated use of three disciplines that have the potential to promote and advance scholarship on the philosophy of halakhah: philosophy of law, comparative-conceptual law, and rationalist reconstruction.

7 This article was a late addition to the volume and, accordingly, could not be directly engaged by the other contributors.