

Metaphysics out of the Sources of the *Halakha* or a *Halakhic* Metaphysic?

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“The lawyer cannot afford to adventure himself with the philosopher on the metaphysics of causation”

—Sir Frederick Pollock, *The Law of Torts*

3.1. METAPHYSICS IN THE TALMUD?

The scene begins with one man demanding payment of a debt from another fellow. To the creditor’s chagrin, the debtor repays him with roughly the following argument: a man, at every time at which he exists, is just the sum of many smaller parts. But a sum can’t lose or gain parts without passing out of existence, in the same way the number nine couldn’t “lose” one and be the number eight. But as it happens, organisms, including human beings, are losing and gaining parts all the time. Thus, the debtor argues, the man who stands before the creditor is not the very same man who contracted the debt, and therefore he is not legally obligated to pay it. The creditor is no fool. He strikes the debtor, and when the debtor protests, the creditor responds that he is not the same man who struck a few moments earlier.

This scene first appears in an early Greek comedy by Epicharmus, and variants of it frequently resurface.¹ It is amusing. But it raises serious questions. Both the philosophical argument and its central premise—that a sum can’t lose or gain parts—have found many adherents throughout the history of philosophy, and both are worthy of discussion.² Abstracting away from the

¹ The reconstruction of the scene from Epicharmus is based on Sedley 1982: 255–75.

² See Rea 1995: 225–52, and the sources cited therein, nt. 8.

particular argument, however, the scene raises a broader set of questions. We have here a *legal* argument—or at least an argument whose conclusion is about legal matters—that has a straightforwardly *metaphysical* premise about the persistence conditions of material objects. We might naturally ask, Does the issue of who is legally obligated to repay debts (in some specified legal system) *really* turn on subtle metaphysical questions about the persistence conditions of material objects? Do legislators and judges need to keep abreast of the state-of-the-art literature in metaphysics?

To students of Talmudic literature, cases such as that of the debtor will surely seem familiar. To be sure, other legal systems also make heavy use of metaphysical notions, like *causal contribution*.³ But the broad range of Jewish law, both in the diversity and ubiquity of its application, coupled with its dogged attempt to base itself on fully general principles and conceptual analyses, makes it an especially fertile ground for the treatment of metaphysical topics.⁴ The employment of metaphysical premises in the course of a Talmudic legal argument, whether explicitly stated or implicitly assumed, is commonplace. Claims that are apparently about, or apparently entail ones that are about, identity and persistence, events, causation, action and intentional action, truth and bivalence, time, potentiality, or composition and parthood, make frequent appearances in *halakhic* (Jewish legal) discussions.⁵ These topics are the woof and warp of traditional metaphysical inquiry. To have a comprehensive theory of all of these concepts would be to approach a full-blown metaphysical theory about the most general features of the world and our place in it.

Of course, no one could reasonably claim that a fully comprehensive theory of *any* of the above concepts is explicit, or can even be extracted from, Talmudic discussions. But it would seem that for many of them, the broad contours of a theory, as well as important details, could indeed be reconstructed. If this were done, it would afford us a unique window into the rabbis' views on metaphysical matters. The world of *aggadah* and liturgy of course provides us with an indispensable resource on such issues, but its mode of expression is often metaphorical and imagistic, and its metaphysical subject matter is almost exclusively theological or religious, so it is difficult to extract from it a rigorous and comprehensive metaphysic. But that is precisely what appears to be possible with respect to the *halakha* in the Talmud. For those interested

³ See Moore 2009: 1–4.

⁴ As Leib Moscovitz (2002) remarks, “Indeed, due to the remarkably broad scope of rabbinic law, which includes both civil and criminal law and various types of ritual issues, rabbinic legal concepts and principles can often be applied to multiple legal domains in a manner which is not possible in other legal systems” (36). See also Hirsch 1999: “One of the main ideas that interests me is that in the Talmud the identity of artifacts seems to take on a kind of importance (and, in a sense, a kind of ‘reality’) not found in any other literature with which I am familiar” (166).

⁵ See Steiner 2000: 44–5 for several examples.

in reconstructing a rabbinic worldview (or worldviews), the Talmudic legal discussions seem to be a veritable treasure trove.

Indeed, in the last decade or two, a number of philosophers have turned their attention to those discussions, with an eye toward extracting a rabbinic metaphysic. They have painstakingly examined certain Talmudic legal passages and have unearthed what seem to be fairly clear views on age-old questions about the metaphysics of action and material objects. They have put R. Yohanan in debate with the Stoics, and the stamaitic redactors of the Babylonian Talmud in dialogue with Wittgenstein and Anscombe.⁶

I have been tempted on more than one occasion to try my hand at this. I have not done so, however, because I have reservations about one of the project's underlying assumptions, reservations that are roughly the same as the questions I raised about the "debt scene." Is R. Yohanan, in claiming that a dish or sandal loses its impure status after undergoing certain changes, *really* committed to a certain controversial view about the metaphysics of material objects? Is his *halakhic* position precariously perched on a metaphysical view that may well be false? The answer to these questions, I believe, is no. Put simply, we have little reason to believe that the rabbis were dealing with the very same issues and questions with which a metaphysician is grappling. Nor were they staking out controversial philosophical views.

But crucially, that does not mean that the rabbis were not developing a distinctive metaphysic. They were, I will argue, *carving reality* using concepts that are different from, and quite possibly indefinable in terms of, the ones an ordinary philosopher employs. Thus, the project we ought to pursue is not the one of putting the rabbis in direct dialogue with the philosophers. What we ought to pursue in its stead is an investigation of the alternative *conceptualizations of the world* that emerge from *halakha*.

3.2. YES, METAPHYSICS IN THE TALMUD

But first it would be good to have a more careful statement of the view which I oppose. I will assume that the notion of a *metaphysical claim*, i.e., a claim whose subject matter is metaphysics, is relatively unproblematic. Now suppose we come across a Talmudic legal statement that expresses a metaphysical claim. The basic idea is that we are not to understand it as expressing a *distinctively halakhic claim*—whatever that might amount to—about some

⁶ See Hirsch 1999, 2006, and 2018, and Lewinsohn 2006–07. Note that Lewinsohn undertakes three different tasks, and my discussion is confined to only one of them, namely investigating "philosophical views in the Talmud." I have no objections to the projects of using "*halakha* as a prod for philosophical thinking" and using "philosophy as a tool in *lomdus*."

metaphysical subject. Rather, we are to understand it as expressing an ordinary, run-of-the-mill metaphysical claim. Indeed, we are to understand it as expressing the *very same* claim it would have expressed if it had not appeared in a *halakhic* context. Or, at least we are to understand it that way unless we have good reason to think it is in some way unusual. So we might state the view as follows:

Presumption of Non-Locality: Consider any Talmudic legal statement that expresses a metaphysical claim—we are *prima facie* justified in presuming that it expresses the very same claim that it *would* express if it were stated in a straightforwardly philosophical context.

But this statement of the view requires some modification, if only because it is not general enough. The view is not meant to be restricted to cases in which there is an explicit Talmudic statement that expresses a metaphysical claim. In many cases, perhaps *most* cases, the metaphysics is lurking beneath the surface of a Talmudic passage, and it is only when taken together with certain contextually supplied interpretive principles—plausible principles about what a Talmudic rabbi means to convey when making certain sorts of statements or inferences, or even asking certain questions—that the Talmudic statement implicates a metaphysical claim.⁷ This presents a difficulty in stating the view, because in such cases it's likely false that the Talmudic statement *would implicate* the very same claim in a straightforwardly philosophical context, since the contextually supplied interpretive principles would likely differ. (For example, here's a maxim that is often assumed in the Babylonian Talmud to be followed by the rabbis, at least in their legal discussions: Don't say anything obvious. If this were to govern our ordinary discourse, I'm afraid my wife and children would need to reinterpret much of what I say. Even in philosophical contexts, although one is often expected to say something non-obvious, it is of course not expected that *everything* one says is non-obvious. Sometimes, one needs to state the obvious in order to explain or argue for the less-than-obvious.) And yet the view under discussion would still have it that the metaphysical claim that is implicated is one philosophers would be debating.

This difficulty in stating the view can be overcome in the following way: in cases in which a metaphysical claim is implicated by a Talmudic legal statement but not expressed by one, there is, I will assume, a sentence that *would have* expressed the claim if the sentence had been stated in a *halakhic* context. The idea here is that there has to be some way the rabbis of the Talmud could have directly expressed the metaphysical claim. We can even imagine the rabbis having drawn out the implication if we wish. Then the view is that the relevant sentence would still express the same metaphysical claim if it were

⁷ See Grice 1989.

stated in a purely philosophical context. If we consider expressing a limiting case of implicating, we can state the view in a unified way as follows:

Presumption of Non-Locality*: Consider any metaphysical claim that is implicated by a Talmudic legal statement—we are *prima facie* justified in presuming that any statement that would exactly express that claim if it were stated in a *halakhic* context, would still express that claim if it were stated in a straightforwardly philosophical context.

I am quite sure that this formulation would have to be tweaked to accommodate the difficulties that frequently beset analyses and views that are put in terms of counterfactual conditionals. But I will spare the reader the details. I will let the above formulation of the view (henceforth ‘the Presumption’) stand and simply promise that any objection I raise will be one which anyone who holds the *substance* of the view in question will recognize as an objection to his or her view.

3.3. METAPHYSICS IN THE TALMUD, EXEMPLIFIED

It will be useful, I think, to consider this view as applied to a specific example. The Babylonian Talmud in *Baba Kamma* 65b is discussing the conditions under which a thief has to return an object which he stole:

R. Ilai said: If a thief misappropriates a lamb and it grows into a ram, or a calf and it grows into an ox, as the article has undergone a change while in his hands he would acquire title to it, so that if he slaughters or sells it, it is his which he slaughters, it is his which he sells. R. Hanina objected to R. Ilai’s statement [from the following teaching]: If he misappropriates a lamb and it grows into a ram, or a calf and it grows into an ox, he will have to make double payment or four-fold and five-fold payments reckoned on the basis of the value at the time of theft. Now, if you assume that he acquires title to it by the change, why should he pay? . . . But all the same does the objection raised against R. Ilai still not hold good?—R. Shesheth thereupon said: The teaching [of the Baraita] is in accordance with the view of Beth Shammai, that a change leaves the article in the previous position and will accordingly not transfer ownership, as taught: If he gave her [the harlot] as her hire wheat of which she made flour, or olives of which she made oil, or grapes of which she made wine, it was taught on one occasion that “the produce is forbidden [to be sacrificed upon the altar],” whereas on another occasion it was taught “it is permitted,” and R. Joseph said: Gorion of Aspurak learnt: “Beth Shammai prohibit [the produce to be used as sacrifices] whereas Beth Hillel permit it.”

In this passage, R. Ilai and R. Hanina have a *halakhic* dispute about a case in which someone steals a lamb and it grows into a ram or a calf and it grows into an ox. R. Ilai maintains that the ram or ox now belongs to the thief and the

thief is under no obligation to return it; instead, he is obligated to compensate the original owner for lost value. R. Hanina, on the other hand, maintains that the thief is still obligated to return the ram or ox, and can incur further monetary obligations by slaughtering or selling the animal.

R. Ilai's ruling is an instance of the general principle that emerges from the *Mishnayot* in the ninth chapter of Tractate *Baba Kamma*, that, in the words of Rabbah, "shinui koneh": a significant change in a stolen object effects a transfer of title. But what is the legal basis of that principle? From Rabbah's derivation of the law (BT *Baba Kamma* 66a), one might get the impression that it is rooted in a local consideration in the laws of thieves and robbers. In other words, the *halakha* is that one is obligated to return a stolen object only if it is "just as it was"—sufficiently qualitatively similar—and that's the entire content of the principle of *shinui koneh*. In that case, the principle would have no application outside the laws of theft and robbery. But from the second half of our passage, it would appear that at least R. Shesheth did not understand things that way.⁸ He assumes that the dispute between Beit Shammai and Beit Hillel about the transformation of a gift to a hired harlot is *generalizable*, and, in particular, that it applies to the case of a stolen object that has undergone change. Beit Shammai, in parallel to their stringent ruling regarding gifts given to hired harlots, would maintain that even someone who stole wheat and ground it into flour would still be required to return the flour (and a fortiori, that someone who stole a lamb would be required to return the ram into which it grew). Clearly, if the principle of *shinui koneh* is a local one, it would not be possible to infer that Beit Shammai would reject the principle of *shinui koneh* from their position regarding gifts to hired harlots. So what permits R. Shesheth to make this inference? Quite plausibly, he is interpreting both Beit Shammai and Beit Hillel as maintaining some general view on the persistence conditions of material objects, a view which will then have implications for disparate areas of *halakha*. As the *Ba'ale ha-Tosafot* (s.v. *Ha Mani*) make explicit,

And if you ask, how does he [R. Shesheth] compare them, as what is the relevance of gifts [to a hired harlot] to *shinui* [*koneh*]? The answer is that he maintains that if he [Beit Shammai] would accept the principle *shinui koneh*, he would have permitted a changed gift [to a hired harlot] since **it is considered another [object] and it is not the one that came into her hands as a gift . . .**

⁸ See *Tosafot* s.v. *Hen ve-Lo Shinuieh* and *Yam Shel Shlomo Baba Kamma Siman 6* for a discussion of the relationship between Rabbah's source and the source cited by Beit Hillel. What emerges from both of them, although in quite different ways, is that even Rabbah agrees with R. Shesheth that there is a very general principle at work that can have ramifications in disparate areas of *halakha*. We should note that even leaving aside R. Shesheth's generalization, the Talmud seems to assume that we can generalize the principle, which is derived from a verse about robbery, to the case of theft. See *Shita Mekubetzet*. Cf. *Tosefta Baba Kamma* 10:4 (ed. Lieberman) and *Tosefta K'fshuta Baba Kamma*, p. 115.

In other words, both the houses of Shammai and Hillel agree that a thief is obligated to return only an object that is numerically identical to one he stole, and a harlot is prohibited from offering an object in the Temple only if that object is numerically identical to one she received in exchange for harlotry, but Beit Hillel maintain that in the circumstances described—say, wheat that was ground into flour—the object at the end is distinct from the object at the beginning, whereas Beit Shammai maintain that “they” are identical.⁹

Or at least that seems clearly right if the context of the above paragraph is a *halakhic* one (as is true of the statement of the *Ba’ale Hatosafot*). But the Presumption goes further. If the Presumption is right, then we are *prima facie* justified in believing that Beit Shammai maintains *the claim that I would express* if I were to make the following speech in the course of a metaphysics seminar: “If I take a stalk of wheat and grind it down to flour, I haven’t annihilated anything in the process. The stalk of wheat still exists, although of course it is no longer a stalk of wheat.” And Beit Hillel maintains that claim is false.

And the metaphysical issues will only get more intricate as the *halakhic* discussion unfolds. Consider the dispute between R. Ilai and R. Hanina, both of whom accept Beit Hillel’s position that a stalk of wheat goes out of existence when it is ground up, but who apparently have an “in-house dispute” about whether a ram is identical to the sheep from which it grew. What is this dispute about? The Talmud says the following:

R. Zera demurred saying: Why should he not indeed acquire title to it through the change in name? Rava, however, said to him: An ox one day old is already called “ox,” and a ram one day old is already called “ram.” An ox one day old is called “ox,” as written: “When an ox or a sheep or a goat is born.” A ram one day old is called “ram,” as written: “And the rams of thy flocks have I not eaten.”

Several commentators assume that R. Zera’s suggestion—that a change in “name” ought to suffice for numerical distinction—is indeed R. Ilai’s own rationale.¹⁰ And this is despite the fact that Rava’s assertion, in defense of R. Hanina, that an ox is called an “ox” from the day it is born, is unanswered. How can this be? One who is familiar with the contemporary literature on the so-called paradoxes of material constitution, would, I think, find the following explanation of R. Ilai quite natural: Indeed, a calf belongs to two kinds, picked out by the so-called sortal terms, “ox” and “calf.” These two kinds are associated with incompatible persistence conditions, the former more relaxed than the latter. Anything belonging to both kinds—i.e. any calf—has the

⁹ How far does Beit Shammai take this? At what point does a material object go out of existence? This is not entirely clear. See *Shita Mekubetzet* s.v. *Ha Mani* (quoting *Talmide Rabbenu Peretz*) who says that according to Beit Shammai, *there is no change* that would effect a transfer of title. Presumably, they mean no change *other than the annihilation of the matter of which the object is made*.

¹⁰ See *Yam Shel Shlomo*.

persistence conditions associated with its *dominant kind*, with being a calf.¹¹ But when it ceases to be a calf, it must therewith go out of existence, since an ox that is *not* a calf has different persistence conditions.¹² Thus, its losing the name “calf,” i.e. *its ceasing to be of that kind*, is sufficient for its going out of existence. What then of R. Hanina? Plausibly, he thinks that being a calf is just a phase that oxen go through, the way that being a teenager is just a phase that human beings go through.¹³ The sortal term “calf,” like the sortal term “teenager,” is a so-called phase sortal. There are no special persistence conditions associated with being a calf that differ from the persistence conditions associated with being an ox, just as there are no special persistence conditions associated with being a teenager that differ from the persistence conditions associated with being a human.

This explanation of their dispute is admittedly speculative. But suppose it’s correct. Then the Presumption says that we are entitled to presume both R. Ilai and R. Hanina are staking out controversial philosophical positions that would be equally well expressed by the previous paragraph even if it were to have been written in a straightforwardly philosophical context.

3.4. METAPHYSICS IN THE TALMUD, PROBLEMATIZED

As I have already indicated, I don’t think we are entitled to presume any such thing. Even absent any argument against the Presumption, it just *seems to me* false. But I also have two arguments, one theological and the other “historical.” These arguments are not knockdown refutations, and for each of the two arguments there surely are available responses on my opponent’s behalf. Each such response, however, comes at a price. In one case, the opponent must deny what I think is an attractive theological view on the nature of *halakhic* disputes, and in the other case, the opponent must hold that the Talmudists themselves accepted a controversial view about the resolution of those disputes. One might be willing to pay these prices, especially if the cost of giving up the Presumption is deemed sufficiently high. But as I go on to argue in the next

¹¹ A kind *K* is the dominant kind of an object *x* just in case *x* has the persistence conditions it has in virtue of belonging to *K*. Of course, this is unhelpful in *determining which* of a thing’s kinds is its dominant one. Burke 1994 attempts to supply a more substantive criterion.

¹² See Burke 1994.

¹³ Many of the medieval commentaries emphasize that the transition from calf to adult ox is a natural change, rather than an artificial one, and that R. Hanina maintains that natural changes are not sufficient to effect a change in title. I don’t think this is inconsistent with the suggestion I make here.

section, there is an interesting and compelling alternative to the Presumption. The cost of denying the Presumption is not so high after all.

Before turning to my arguments, one preliminary point is in order. The objections in this section are targeted not against the Presumption *all by itself*, but against the Presumption in conjunction with a certain package of “realist” views about metaphysics. The package consists of the following family of closely related views: true metaphysical claims are not made true by convention, stipulation, or communal decision; they are “out there” to be discovered; metaphysical questions are meaningful, and disputes about metaphysical claims are, at least for the most part, substantive. It is dialectically appropriate, I believe, to conjoin this package to the Presumption not only because I am strongly inclined to accept the package—which is indeed why I will take it for granted when I look for alternatives to the Presumption—but because my target in this section is a certain *project*, one of whose planks is the Presumption, but which isn’t exhausted by the Presumption. The project is that of putting the Talmudists into debate and dialogue with the philosophers. The project presupposes not only that the Talmudists are expressing straightforwardly philosophical claims (this is captured by the Presumption) but also that there are substantive issues to debate and about which one can have a worthwhile dialogue (this is captured by the “realist” package).

Now for the arguments, which arise rather naturally from elements of the passage I discussed in the previous section. Two elements are noteworthy: (a) the metaphysical claims are apparently subject to dispute, and (b) the usual rules of resolving *halakhic* disputes, such as “The *halakha* is in accordance with Beit Hillel,” apparently apply with equal force to disputed metaphysical claims.

In both instances I say “apparently” because according to the approach(es) I develop later, there is no dispute in the passage about a metaphysical claim—even though each side is in fact making a metaphysical claim—and hence no need to decide the *halakha* in accordance with one metaphysical view. According to those approaches, the appearance of a genuine metaphysical dispute is just that: mere appearance. But according to the Presumption, I don’t see how to pry apart appearances from reality. At the very least we are *entitled to presume* that there is a substantive metaphysical disagreement—at least if disputes between philosophers about the persistence conditions of material objects are substantive—and hence, that the usual rules of resolving *halakhic* disagreements apply to disputed metaphysical claims.

But if that is so, then the proponent of the Presumption is thereby committed to denying any robust interpretation of various Talmudic statements that affirm a plurality of valid views in *halakhic* disputes, such as the well-known statement “These and those are the words of the living God” (BT *Eruvin* 13b).¹⁴ More

¹⁴ See also Babylonian Talmud *Hagiga* 3b, *Sanhedrin* 34a, *Shabbat* 88b, and *Gittin* 6b, Palestinian Talmud *Sanhedrin* 4:2, and *Midrash Tehilim* 12:4. For a synoptic work on the

precisely, they are committed to denying the *truth* of those statements so interpreted. So let us say that they are committed to denying a robust *view* on *halakhic* disputes. Now, by a “robust view” I do not mean “a view according to which there are true contradictions or some such thing.” Rather, I mean a view according to which at least the following is true: in Talmudic legal disputes, each position expresses a viable option, i.e., something that God *might very well have* willed, or at the very least endorsed.

Here is a view, from R. Yom Tov Ishbili (Ritva, thirteenth century), which would certainly count as robust:

When Moses ascended to receive the Torah, it was demonstrated to him that every matter was subject to forty-nine lenient and forty-nine stringent approaches. When he queried about this, God responded that the scholars of each generation were given the authority to decide among these perspectives in order to establish the normative *halakha*.¹⁵

Ritva maintains that in *halakhic* disputes no view is more objectively correct than any other, as God has expressed to Moses a willingness to endorse any one of them. But one need not go as far as Ritva to hold a robust view. One can hold that as a matter of fact, one and only one view in such disputes is objectively correct, and *still* accept what I call a “robust view.” R. Nisim Gerondi (Ran, fourteenth century) offers the following interpretation of the pluralistic principles:

But this matter requires investigation. How can we say that [the views of] two groups of disputants were told to Moses by the Almighty? . . . How can we say that something untrue left the mouth of God? But this is the [correct] account: It is well known that the entire Torah, written and oral, was given to Moses at Sinai, as it says in BT Megila (19b) “R. Hiya bar Abba said in the name of R. Yohanan: What does the verse mean ‘And on them as all the words . . .’? This teaches that the Almighty showed Moses *dikduke Torah* and *dikduke Soferim* . . .” *Dikduke Soferim* are the disputes and differing rationales among the Sages of Israel, and all of them Moses learned from the mouth of the Almighty without a decision [one way or the other] . . . since the [authority to make a] decision was given over to the sages of each generation . . . and we are enjoined to follow their decision, whether they have arrived at the truth or its opposite . . . whatever they decide, that is what God has commanded.¹⁶

principle of *Elu V’elu* and its interpretations, see Sagi 1996. See also the article by R. Michael Rosensweig (1992). There has been some controversy in recent years about whether such a pluralistic attitude indeed characterized the period of the *Tana’im* and *Amora’im* or if it was rather a Stammaitic innovation. I think Fraade 2007 has demonstrated that the latter suggestion is untenable. But in any case, I am not so much interested, in this argument, in the degree to which such a pluralism characterized the Talmudists, as much as what we ought to think.

¹⁵ Babylonian Talmud *Eruvin* 13b. Translation is from Rosensweig 1992.

¹⁶ *Derashot Haran*, *Derush* 7. See also Nachmanides’s commentary on Deuteronomy 17:11 and introduction to *Ketzot ha-Hoshen*. See Rosenberg 1997: 69–79 and Halbertal 1997: 63–72.

Thus, despite saying that there is a single *true* view, R. Nisim maintains that the other views are ones that would be divinely endorsed if human *halakhic* authorities were to conclude that they were correct. This too is a robust view.

But the proponents of the Presumption are committed to denying any such robust view. In metaphysical disputes, at least if the dispute is substantive, at most one view is true. And in most metaphysical disputes, including disputes about persistence conditions of material objects, not only is at most one view true, but any view that's false is one that simply *couldn't have been* true. But then surely it's not a viable option; it's not something God could have willed or even endorsed *ex post facto*.¹⁷ So, to return to our example, either Beit Shammai's rationale or Beit Hillel's rationale is simply not a viable option. I might add that it's difficult to see how even the correct view in such disputes, if one of them is correct, is a viable option, since it's not really an *option* at all. It doesn't seem to reflect God's will (or endorsement) in any meaningful way, since it is necessarily true. Things just had to be that way.

As I said above, the proponents of the Presumption are not without reply. One option, of course, is to simply "bite the bullet" and deny any robust view. Relatedly, they might accept a robust, but severely restricted, interpretation: perhaps these principles are not to apply to the Talmudist's theoretical rationale, but only to his "bottom-line." Thus, even if Beit Shammai's theoretical rationale is not a live option, his case-by-case ruling certainly was. I have nothing further to say about these, other than to point out that they are, what I would consider, costs. All else being equal, an account that does not have this consequence is preferable.

But those who would rather not incur any cost might respond as follows: we spoke of *prima facie* justification. Our presumption can be defeated, and indeed, anytime a Talmudic metaphysical claim is *disputed*, its being disputed serves to defeat the presumption that it expresses a straightforwardly philosophical claim. I won't dwell on the fact that this reply drastically limits the *usefulness* of the Presumption to the larger project of putting the Talmudists in conversation with the philosophers, although I do think that is a serious drawback. The basic problem, as I see it, is this: it would be quite a *lucky coincidence* if all the cases of disputed Talmudic views were ones in which the Talmudists were not making straightforwardly philosophical claims, even though when Talmudists *usually* made a metaphysical claim, it is to be understood in a straightforwardly philosophical way. Did the other Talmudists have some philosophy-meter by which to tell when they could safely get

¹⁷ Unless one agrees here with Descartes (according to some interpreters) and Rabbi Nachman of Braslav that God could have made true what is in fact a necessarily false proposition. Note that I don't deny that God could have sanctioned, or even willed, *that we adopt* a false metaphysical view *for the purposes of halakhic theorizing*. But that is not to accept that God could sanction, or will, a false metaphysical view. Thanks to David Shatz for helpful discussion here.

into an argument and when they couldn't? What was that meter, and why can't we use it? I don't see any promising answers to these questions.

The second element from the passage raises a related argument, one that exacts a price to be paid by the historian, rather than the theologian. As we noted, R. Shesheth assumes that the usual principle of *halakhic* resolution that governs disputes between Beit Shammai and Beit Hillel—that the *halakha* is in accordance with Beit Hillel—is in force with respect to their dispute about *shunui koneh*.¹⁸ After all, R. Shesheth defended R. Ilai by claiming that the Baraita that seemed to contradict his ruling reflected the position of Beit Shammai. The implication is that R. Ilai need not be concerned with that Baraita because the *halakha* was, as usual, in accordance with Beit Hillel. And this is so even though that dispute is a substantive metaphysical one, or at least the proponent of the Presumption tells us we are entitled to presume that.

But how is one to understand the notion of the *halakha* being in accordance with a certain metaphysical view? What would that mean? Here we ought to keep in mind two positions on *halakhic* dispute-resolution in general.¹⁹ In cases in which there is a *halakhic* dispute and the Talmud (or a particular Talmudist) decides that the *halakha* is in accordance with one of them, what is nature of that decision? One position, which we might call the “revelatory position,” is that the decision *reveals* or *uncovers* that that view in question is *true*, that is, true independent of the decision itself. An alternative position, which we might call the “authoritarian position,” is that the decision *makes authoritative* the view in question; one version of this position has it that the decision *makes the view true*, while another version has it that the decision merely bestows legal authority on the view.²⁰ Either way, the decision is not understood to be revealing the view that is true independent of the decision. Now, we can raise this question from a jurisprudential standpoint, but we can also ask the historical question, Did the Talmudists consider this question, and if so, what was their position on the matter? Of course, there might not have been, and it is very unlikely that there was, unanimity on this issue.

But here's what's interesting: the advocate of the Presumption is committed to its being the case that in the main, the Talmudists didn't accept the authoritarian position. The argument is fairly straightforward and invokes considerations similar to ones we have already discussed. As we have seen, the Presumption, taken together with some Talmudic passages (including our passage from *Baba Kamma*), implies that there are Talmudic legal disputes that we are entitled to presume are substantive metaphysical ones and that

¹⁸ For a discussion of when that principle was first formulated and the scope of its application, see Safrai 1994.

¹⁹ See Halbertal 1997: 81–9, and Sagi 1996: 49–73, 198–216.

²⁰ These two versions are what Halbertal (1997: 84) calls the “constitutive version” and “procedural version,” respectively.

are decided by the Talmud in accordance with the ordinary principles of dispute-resolution. But with regard to such metaphysical views, as opposed to normative-*halakhic* claims, no *halakhic* principles or *halakhic* decisions can *make them* true. That's just not the sort of thing that can happen. So the only way to hold on to the authoritarian position is to understand the content, or at least the intended force, of the decision in such cases along the following lines: *halakhically speaking*, the metaphysical view is true, i.e. that we are to proceed *as though* the metaphysical view is true. But assuming that this is how the Talmudists understood such decisions quickly spells trouble for the Presumption. For if that is what is meant by the decision in accordance with Beit Hillel, say, then the same is presumably true of any subsequent *halakhic* discussion that was constrained by the position of Beit Hillel. It would be quite odd if, for example, R. Ilai understood the decision in accordance with Beit Hillel along the above lines, but then proceeded to put forward a refinement of Beit Hillel's position as the sober metaphysical truth. Presumably, he would be expressing a claim that would be most perspicuously expressed, if not for the context, by a statement that begins with a "*halakhically speaking*" operator. But then there are a significant number of metaphysical claims in the *halakhic* discussions in the Talmud for which the Presumption doesn't hold. If one were to take the statement that *in a halakhic context* would express the claim that *halakhically speaking*, a ram is not identical to the sheep from which it grew, and transplant it into a purely philosophical discussion, it would of course not express that claim. It would, instead, express the claim that a ram is not identical to the sheep from which it grew, period.²¹ This is not a good road for the proponent of the Presumption to take.

Conclusion: the proponent of the Presumption is committed to denying a widespread Talmudic adherence to the authoritarian view.²² But this is a bold conjecture, and a problematic one given the fact that there are a fair number of Talmudic passages, from various periods, that seem to endorse an authoritarian approach.²³ I consider that to be a costly commitment. Again, all else being equal, an account that doesn't carry this commitment is preferable.

²¹ I am assuming of course that the statement that would express that claim, in a *halakhic* context, need not contain any explicit prefix to the effect of "*halakhically speaking*."

²² Objection: perhaps the Talmudists (in the main) did not accept a "realist" package about metaphysics. They didn't think that metaphysical "questions" were genuine questions, and they didn't think their metaphysical disputes, or anyone's for that matter, were substantive. So they just went about their reasoning assuming that *halakhic* decisions could make claims, which as a matter of fact are metaphysical, true.

Reply: remember that my target is not the Presumption taken alone. It is the overarching project of which the Presumption is a presupposition. But that project would be severely compromised if the Talmudists did not conceive of themselves as engaging in, say, a substantive dispute about whether a ram is identical to the lamb from which it grew.

²³ Most famous, of course, is the passage in Babylonian Talmud *Baba Metzia* 59b about the "oven of Achnai." See also *Sifre Devarim*, p. 154 and *Mishnah Rosh Hashanah* 3:9. For an

3.5. METAPHYSICS IN THE TALMUD, FICTION, NOT FACT

But whether all else is equal depends on what the alternatives are. What could the metaphysical statements in the *halakhic* discussions of the Talmud mean if they don't express the philosophical claims they would express in a straightforwardly philosophical context? The discussion from the previous section immediately suggests one answer: they are to be understood as occurring within the scope of an implicit "*halakhically speaking*" operator.

Some background about these operators and their role in philosophy might be helpful here. It is not uncommon to find a philosopher denying the existence of things such as Maryland, the number 3, teacups, Abe Lincoln, holes, and a host of other things you might think obviously exist. But even those philosophers can't seem to help themselves from speaking as if there were such things. You might catch them saying something like "There are so many holes in this old shirt" or "There was a time when there were only 48 states in the USA," which *apparently* commit them to the existence of holes and states (and surely if there are states, then Maryland exists). What to do about this double-talk? A number of solutions have been devised to address this problem. One solution that has gained some prominence in the last few decades is to treat the opposing view as a useful *fiction* that we ordinarily employ.²⁴ We are to understand the offending sentences as occurring within the scope of an implicit "fictionalist operator." For instance, when someone, even the hole-denying philosopher, says "There are so many holes in this old shirt," they are really expressing the claim that according to the "fictional story" that there are holes, there are so many holes in this old shirt. This is similar to when someone, after hearing a Sherlock Holmes story, says "The detective who lived at 221b Baker Street sure was brilliant"; no one accuses her of speaking falsely—even though there was no detective who lived at 221b Baker Street—because the person really means, "According to the Sherlock Holmes fiction, the detective who lived at 221b Baker Street sure was brilliant."²⁵ In this way, the hole-denying philosopher can consistently speak with the vulgar.

So perhaps a similar thing can be said regarding *halakha*. Begin by thinking of *halakha* as comprising a theory of sorts. It's a theory that contains mainly norms, but also many non-normative (and some metaphysical) claims which serve as inferential and classificatory links between the general and specific norms. Now, anytime that a Talmudist states that P in a *halakhic* context, the

extensive discussion of the passage from the *Sifre* and its relation to Palestinian Talmud *Horayot* 1:1, see Blidstein 1997.

²⁴ See Rosen 1990 and the essays in Kalderon 1999.

²⁵ This is not the only philosophical approach to dealing with truths apparently about fictional characters. See van Inwagen 1979 for example.

content of his assertion is this: According to *halakha*, P.²⁶ So even when a Talmudist makes a metaphysical claim in a *halakhic* context, he isn't even trying to state the sober philosophical truth. He is making a claim about what is true *according to halakha*. And crucially, what is true according to *halakha*, so long as it's a non-normative claim, need not be true. This could be thought of as a universalization of the *halakhic* legal fiction. The reason why the "*halakhically-speaking*" operator is only sometimes made explicit is because in those cases, the claim that is prefixed by the operator is obviously false.²⁷

This approach nips the problems we raised above in the bud. The dispute between Beit Shammai and Beit Hillel, even if R. Sheshet is right, is not a metaphysically substantive dispute at all. It's a dispute about what the *halakha* is. It's a dispute about which metaphysical view we are to adopt for the purposes of *halakhic* theorizing. Naturally enough, there is no difficulty in assuming that both positions were ones God might very well have willed, since God very well might have willed that we adopt a false (and even necessarily false) metaphysical view for the purposes of *halakhic* theorizing. And as a natural corollary, this approach does not commit one way or another on how *halakhic* dispute resolution was conceived by the Talmudists.

We should note that although this approach is clearly inconsistent with the Presumption, it's not obviously incompatible with the overall project of extracting from Talmudic sources a metaphysic that can be said to treat the very same metaphysical questions that philosophers do, and reasonably calling it "*halakha's* metaphysic." After all, the claim that appears *within* the scope of the "*halakhically speaking*" operator, on this view, is just like any other philosophical claim. That having been said, it would certainly call into question the *value* of such a project so conceived, since for all we know, these philosophical claims are simply false—and were not even thought to be true by the Talmudists—but were adopted for the purposes of *halakhic* discussion, for any number of reasons.

In any case, I don't think this approach can be maintained. The problem is this: it doesn't sit well with the Talmudists' frequent use of rational intuition in generating the raw materials for *halakhic* theorizing. I am not referring to their use of rational intuition in deriving or inferring one *halakha* from another, or in analogizing from a given classification to a related one.²⁸ Rather, I am referring to their seeming use of rational intuition in making such non-inferential classificatory judgments in the first place. As Eli Hirsch (1999) puts it in discussing the topic of persistence and identity in the Talmud, "My impression is that Talmudists struggle with this question in much the way philosophers do, appealing to intuition—or what they would call *svara*—of

²⁶ Replace "P" here throughout with a sentence.

²⁷ For a discussion of legal fiction in *halakha*, see Moscovitz 2002: chapter 4.

²⁸ See Moscovitz 2002: chapter 6.

various sorts to try to roughly demarcate a class of examples in which a functional change seems sufficiently significant to threaten an object's identity." But on the approach we are currently considering, it's far from clear what would license this use of intuition. After all, it's one thing for a claim to be true and another thing for it to be true *according to halakha*. So what would license the inference from a claim's being true to its being *halakhically* true? Given the approach under consideration, what reason would we even have to think there is a strong *correlation* between the two when it comes to metaphysical claims? Perhaps one will suggest that the Talmudist used his faculty of rational intuition to *directly* output a belief about what metaphysical view is true according to *halakha*. But this seems incredible. It's one thing for a Talmudist to just *see*, with his mind's eye, that a certain metaphysical claim is true, and another thing for him to just *see*, with his mind's eye, that a certain metaphysical claim is true *according to halakha*. It's hard enough for rationalists to give an account of the former; just imagine trying to give an account of the latter.²⁹

Note that this problem arises here and not in other applications of the fictionalist strategy: in general, the claim that is (allegedly) literally false but "true according to a fiction" is either (a) *in the neighborhood of some truth* that the speaker is trying to get at—there is some sense in which one "component" of the claim is true and unobjectionable—but which can't be expressed without the help of some fiction, or (b) one that is *useful*, and perhaps indispensable, in deriving truths from truths (it's what philosophers would call "conservative") even if it is false. In the former case, it makes a good deal of sense to use one's rational intuition to deliver such fictionalist judgments, and in the latter case, one is expected to account for why such reasoning about falsity is in fact conservative, or at least give an argument *that* it is. But for the proposed *halakhic* fictionalism, I don't see how any such account or argument would go.

3.6. METAPHYSICS IN THE TALMUD: SEEKING THE HALAKHIC JOINTS

Both approaches we have considered so far share this much in common: they assume that the *concepts* deployed in the claims under discussion are the same

²⁹ Keep in mind that I am talking about one's forming non-inferential beliefs about what's true according to *halakha*. I have no problem with the suggestion that someone could *infer* that something is true according to *halakha* from other *halakhic* claims. Also, keep in mind that we are discussing metaphysical claims, not straightforwardly normative ones; I don't have difficulty understanding how one could imbibe *halakhic* values and overarching norms to the extent that one could non-inferentially form a belief about what is demanded according to *halakha*. But this seems quite implausible to me with regard to metaphysical claims. Thank you to Curtis Franks for discussion here.

as those deployed in ordinary philosophical claims. The difference between the approaches is just that the first one (adopting the Presumption) takes these claims with utmost philosophical seriousness and the second one understands them to come along with an implicit “*halakhically speaking*” operator. The former suffers from making *halakha* too contingent upon the truth of ordinary philosophical claims, and the latter suffers from cutting it too loose from ordinary philosophical claims. The way forward, I suggest, is to reject what these two approaches share in common; the concepts being deployed in metaphysical claims in Talmudic legal contexts are, for all we know, uniquely *halakhic*.³⁰

Part of the argument for that suggestion is constituted by my arguments against the other approaches. However, I have a more direct argument, which serves simultaneously as a fuller development of the suggestion.

But first some background is in order. What follows is a very cursory and necessarily selective overview of a central topic in the philosophy of mind and language. The question is deceptively simple: How do our words and thoughts have the meanings or contents they do? Why do our utterances of “frog” mean frog, and not something else? One might think the answer is obvious: Suppose my ancestor pointed to a frog and said “frog,” and so did his friends and family members. And suppose the same happened for a large number of other words, enough words with which to then define *all* of our words. Wouldn’t that behavior, linguistic and non-linguistic, together with the further definitions, be good enough to settle the meaning of all our words? Unfortunately, not by a long shot. Indeed, the story doesn’t even seem to get off the ground. For what makes it the case that one’s pointing in a certain direction means something like “this,” where what’s picked out by that demonstrative is what lies beyond the tip of one’s finger? Maybe, as Wittgenstein suggested, it picks out what’s behind one’s shoulder. Or maybe it doesn’t serve as a demonstrative at all, but rather a question mark. And as W. V. O. Quine reminded us, whenever one points to a frog, one also points to an undetached frog part (assuming there are such things), so why doesn’t “frog” mean undetached frog part? Adding more use won’t help. The problem is demonstrably generalizable: if one tries to assign meanings to the words in a stretch of discourse solely based on patterns of *use*—say, attempting to maximize the number of true sentences and valid inferences while trying to consistently assign the same meaning to word tokens of the same type—there will be a vast number of radically disparate

³⁰ Others have made a similar claim about the use of such terms as “cause” in discussions of American law (and other legal systems). See Edgerton 1924 and Stapleton 2008. However, their arguments are not very compelling, and I agree with Moore 2009: 1–4, that the claim should be rejected. But I don’t think our verdict regarding *halakha* need be the same. For one thing, in the case of other legal systems there is much more by way of explicit identification by jurists and legal theorists of their concept of causation with the straightforwardly philosophical one.

assignments that are equally satisfactory. In fact, pretty much any theory can be made true in countless ways by pretty much any world.³¹

What to do?³² Several things have been said in response to this problem, but here's one that strikes me as correct: in addition to *use*, we need to take account of *eligibility*. Putting forward a certain objective inegalitarianism among different ways to carve up the world, David Lewis (1984: 65) says, "Among all the countless things and classes that there are, most are miscellaneous, gerrymandered, ill-demarcated. Only an elite minority are carved at the joints, so that their boundaries are established by objective sameness and difference in nature. Only these elite things and classes are eligible to serve as referents." He goes on to say that eligibility, on his view, is a matter of degree: the more elite, or natural, the more eligible. So Nelson Goodman's famous predicate "*grue*" picks out a class that is surely not as elite as the class of green things, but neither of them are as elite as the class of spatiotemporal points, and neither of them are as gruesome as some of the classes that we could never pick out using our linguistic resources.³³ Then the recipe is this: Balance the goal of maximizing overall eligibility of referents with the goal of maximizing the degree to which total theory comes out true. And that's pretty much the whole story.

This account has played a prominent role in recent debates about the substantiveness of metaphysical disputes. Several philosophers have revived the charge that certain metaphysical, and in particular ontological, disputes are merely verbal.³⁴ The idea is that each side in the dispute just means something different by "exists" or "thing" (and probably other terms as well), and so there is no real dispute going on between those who, for example, claim that for any things, there exists something that is composed of those things, and those who deny this. The most promising response to this, to my mind, comes from Theodore Sider and invokes the Lewisian account I just sketched.³⁵ The basic idea is that there are certain privileged candidate semantic values for words like "exists" and "thing." They are privileged in this way because they are "perfectly natural"; they carve nature at the joints. Thus, the substantiveness of ontological disputes can be secured because the single privileged

³¹ See Putnam 1981, Lewis 1984, and Kripke 1984. For an explanation of the first and second "pretty much," see Lewis 1984: 68.

³² Some philosophers think there is nothing to do. Some think we ought to be skeptics (about meaning and rule-following, etc.) while others reject the need for an answer, thinking that there is something defective about the question. (I myself can't quite see what's defective.) For a nice summary of various approaches, see Stern 2002: 353–5. Thanks to Curtis Franks for making me aware of this paper.

³³ See Goodman 1955. An object *is grue* just in case it is green and examined first before 2000 CE or blue and not examined before 2000 CE.

³⁴ For some of the seminal work that played a role, on both sides, in the recent revival, see the papers in Chalmers, Manley, and Wasserman 2009 and Hirsch 2010.

³⁵ Sider 2009, 2011.

candidate semantic value of “exists” is the semantic value of tokens of that word in the mouths (and writings) of both sides in the ontological dispute.

As I said, both the Lewisian view and its usefulness in responding to deflationary criticisms of metaphysical disputes strike me as correct. However, we should note two things. The first is that even if we assume that there are objective joints in nature, there is no guarantee that there is just one, most natural, candidate semantic value for any given linguistic role; there could be more than one, and they might be “very close” to one another, by which I mean they have nearly the same extension across possible worlds (the same “intension”). Indeed, Sider simply assumes that if the world has “quantificational structure,” then there is exactly one privileged candidate semantic value for “exists.” This assumption would be unwarranted if not for the fact that the consequent alone is warranted.

The second thing to note is related, but of more fundamental significance. It is obvious that two things can be “objectively the same (or different)” with respect to one dimension of comparison and not with respect to another. This doesn’t make the sameness (or difference) any less objective as long as those dimensions of comparison are themselves objectively distinguished. For example, assuming materialism about human beings, the class of all conscious humans is miscellaneous in *fundamental physical* respects, but quite unified and distinguished in *mental* respects. An analogous thing could be said about the class of all morally prohibited action-events. Lewis gives the dimension of “fundamental physics” an almost exclusive role in determining the perfectly natural properties.³⁶ But I see no reason to accept this.³⁷

Seeing how this is so, it seems to me that Lewis’s semantic account has to be augmented slightly. The question of what is the most eligible candidate semantic value of a particular linguistic item can depend on the relevant dimension of comparison, which in turn is, I assume, determined by context. For example, suppose we are comparing two global assignments of semantic values to a language L. They agree on all assignments except that (i) one of them assigns a semantic value A to all instances of word C, (ii) the other assigns a semantic value of B to all instances of C, (iii) instances of C always appear in context of moral statements (that is, both assignments assign semantic values to the “surrounding statements” in such a way that they express moral claims), and (iv) A is a *moral joint*—it makes for objective similarity in moral respects—while B is some other non-moral sort of joint. Assume that this difference does not make any difference in the degree to which total theory comes out true. Still, I say, the former assignment is

³⁶ See Lewis 1984: 66.

³⁷ See Hawthorne 2006: 108–9 for a similar objection to Sider’s argument for four-dimensionalism.

preferable, since A is most eligible relative to the moral axis of comparison, and that is what is relevant if the context is a moral one.

Here's a somewhat, although not entirely, fictitious example. Derek Parfit (1971) famously holds that *strict* identity of a person over time is not really what matters (for moral and other related purposes); what matters is *survival*, where that does not entail strict identity. Now, suppose (and here's the fiction) that even if Parfit is right, identity and survival are equally good candidate semantic values for the term "identity," vis-à-vis the goal of maximizing the degree to which our total theory comes out true (imagine our language having been greatly impoverished). It would seem, moreover, that identity is just as much of a joint in nature as the relation of survival. And yet, if Parfit is right that strict identity of persons doesn't *matter* all that much for moral purposes, then I am inclined to say that we were *always referring to survival* rather than identity when we discussed our hopes and fears and dreams about what we would do. Survival is the *morally relevant* joint.

Returning now to the Talmudic legal orbit, I say we ought to believe the following:

Halakhic Realism: (i) there are *halakhic* joints which need not coincide with the logical, mental, physical, or moral joints, and for any such *halakhic* joint, we have no reason to think it *does* coincide, and (ii) for any *halakhic* joint, there are any number of other *halakhic* joints "very close" to it.³⁸

For those who see *halakha* as an expression of God's will (or word) to one degree or other, I don't think this thesis should seem very controversial. The *halakhic* joints are properties and relations that divide up the world in ways that God did, or might very well have done, for *halakhic* purposes. Their sharing makes for objective similarity since "God's will"—both actual and merely possible—is surely an objectively distinguished dimension of comparison.³⁹ Given the range of possible ways that *halakha* might have gone, there is good reason to think that there are any number of *halakhic* joints in the vicinity of any given *halakhic* joint. But then assuming that joints of other distinguished sorts (logical, moral, etc.) don't "cluster" in this way—whether

³⁸ This thesis should not be confused with what Silman 1984–85 calls "realism," and whose accuracy in characterizing rabbinic law is the subject of a debate between Silman 1984–85, Schwartz 1992, and Rubenstein 1999. That thesis is much easier to grasp than it is to characterize precisely. My best attempt is this: *halakhic* properties, such as *being pure* and *being impure*, are possessed in virtue of possessing "real," i.e. non-*halakhic* and causally efficacious, properties. This thesis is both distinct from and logically independent of the thesis I am discussing here.

³⁹ Note that I do not mean that everything God could have willed is relevant to determining objective similarity. I mean only to include those things that God might have willed, within the range of the proverbial "49 prohibiting factors and 49 permitting factors," even if they were not in fact willed.

inter-sort or intra-sort—it is unlikely that a given *halakhic* joint is also a joint of another distinguished sort.

The implications of this thesis for our primary topic are far-reaching. Consider a Talmudic legal statement that expresses a metaphysical claim. For example, take Beit Hillel's metaphysical claim that a stalk of wheat that is ground up is distinct from the resulting flour.⁴⁰ What relation is picked out in this context by “is distinct from”? Given what I argued above, the naturalness of (the logical relations) identity and distinctness won't play much of a role here, since the context of the statement is a *halakhic* one. Instead, the most eligible semantic value candidates will be those relations in the vicinity of distinctness and identity that are *halakhic* joints. And as we argued, there are a number of these that are equally good; one of them might be the distinctness (and identity) relation itself, but that relation is no more *halakhically distinguished* than its fellows. So what narrows the playing field? Well, maximizing the degree to which “theory” comes out true. Some assignments will make Beit Hillel's statement true and others will make it false. On this score, the better assignments are the ones that make their statement true.⁴¹ If identity and distinctness won't make it true, so much the worse for them.⁴² In this way, it's hard for a Talmudist to go metaphysically wrong.⁴³

And for similar reasons, it's hard for Talmudists to have a genuine metaphysical dispute. The charges against the substantiveness of metaphysical disputes are compelling and extremely difficult to answer when the disputes in question are Talmudic-*halakhic*. There simply is no single privileged meaning of the core metaphysical terms to anchor their dispute. Thus, unless

⁴⁰ I am pretending, for the sake of simplicity, that Beit Hillel explicitly stated this, rather than just implicated it.

⁴¹ It still might be the case that reference is underdetermined. But that's good; it's precisely that indeterminacy that R. Ilai and R. Hanina will exploit.

⁴² It's true that attempting to consistently assign the same semantic value to all token instances of the term will pull in the direction of assigning (ordinary) distinctness and identity, since that is presumably the right assignment for their use of the term in ordinary speech. But that seems to be a very weak consideration, given the very different contexts and the concomitant expansion of eligible candidates; I would think that it will usually be outweighed by the goal of maximizing the degree to which one's theory comes out true. I say “usually” because I can conceive of cases in which the consideration of consistency takes on added force. For example, if a Talmudist were to make a metaphysical claim and then add, “And I mean ‘identity’ here in the very same sense that I usually do,” or even be disposed to do so, then the consideration of consistency will, at least de facto, have greater force since it piggybacks here on the goal of maximizing the number of truths. Or, to take a scenario in which the link is not as explicit, if a Talmudist, in a *halakhic* context, asserted something that he had concluded in a non-*halakhic* philosophical context, the consideration of consistency would have great weight.

⁴³ Hard, but not impossible. It is possible that no very *halakhically* eligible candidate will make the statement true, and then considerations of use might be outweighed by considerations of eligibility. And as I said in the previous footnote, in some cases considerations of consistency-in-use might settle the meaning of the term so that the Talmudist's statement comes out false. So it's not as though the Talmudists were metaphysically infallible.

we have good reason to think otherwise, Beit Shammai's metaphysical claim is likely not incompatible with Beit Hillel's, and there is no metaphysical dispute between them. Beit Hillel is making a metaphysical claim about what we might call *Beit-Hillel-identity* and Beit Shammai is making a metaphysical claim about what we might call *Beit-Shammai-identity*. Their dispute is about which of the various candidate relations in the vicinity of identity is the one that's relevant for *halakhic* purposes; purposes such as determining whether a thief has to return the object he stole and whether a harlot can bring a certain animal as a sacrifice. Of course they would not put the question in these terms, but we can: they were disputing where the *actual halakhic joints* lie.⁴⁴

The problems I had with the Presumption don't arise on this approach. There is no genuinely metaphysical dispute, and hence no need to decide the *halakha* in accordance with just one of several incompatible metaphysical views. As I said above, any appearance to the contrary is just that: mere appearance.

The upshot of this is that we cannot presume that the Talmudists were talking about the very same things as an ordinary philosopher. The properties and relations which are expressed by their terms may not even be definable in a finite number of steps in terms of the properties and relations that are the world's ontological and metaphysical joints. If that's so, then putting them in direct dialogue with philosophers cannot be done. But while a conversation between Abaye and Aristotle might not be in the cards, Abaye is developing a metaphysic all his own. What emerges from Talmudic legal discussions are alternative and often alien ways to carve up reality. The project of investigating these differing conceptualizations, it seems to me, has the potential to be philosophically fruitful and is of considerable theological importance. It has the potential to be philosophically fruitful because it demands of us, and allows us, to think about the world in new ways, and it is of considerable theological importance because the alternative conceptualizations represent, after all, the way God's will structures the world.

3.7. OBJECTIONS

The academic scholar of Talmud and the modern-day Talmudist are armed with objections. Let us hear from them in turn.

The scholar objects: "Your account is very peculiar. It is supposed to be an account of what certain Talmudic statements *mean*, and yet it takes no notice

⁴⁴ The "actual *halakhic joints*" are the properties and relations that make for objective similarity with respect to what God *actually* willed. They are no more actual than "merely possible *halakhic joints*."

of historical or philological arguments. As a typical philosopher, you think you can theorize from the armchair about matters, which as a matter of fact, can only be understood by rolling up one's sleeves and doing some real empirical work.⁴⁵ In order to evaluate the Presumption, and the broader question of how best to understand metaphysical claims in the Talmud, we have to explore the extent to which Talmudists—and here we'd need to be careful to distinguish between different locales, different eras and hence strata in the Talmudic text, and even different individuals—were influenced by the prevailing philosophical winds. Anything short of that is hopeless.

To compound matters, you let theology play a role in your account of what Talmudic statements mean; and not the theology of the Talmudists, which might in fact be relevant, but *your* theology. After all, *halakhic* joints, which are a function of God's will, determine in part the meanings of certain Talmudic statements. But this is absurd. A theist and an atheist ought to arrive at the same interpretation of what a Talmudist meant given the same objective data. Your account is thus both ahistorical and objectionably theological."

Reply to the scholar: Let me begin with the first charge. I think I was fairly modest in my claims. I claimed that it was *hard* for a Talmudist to go metaphysically wrong and *hard* for Talmudists to have a substantive metaphysical dispute. But it can happen. As I noted (nt. 43), one way it can happen is if a Talmudist relies in his *halakhic* theorizing on a conclusion he, or someone else, drew in a straightforwardly philosophical context. So if it could be shown that such a thing happened, then that would give us good reason to think that the Talmudist was making a claim that would be expressed by the same statement in a philosophical context. I take it however, that it would be quite difficult to show such a thing. Showing merely that there was some philosophical influence on a Talmudist will not be enough. And barring such an argument, I see no reason to presume that a given Talmudic legal statement that expresses a metaphysical claim is to be understood in a straightforwardly philosophical way. So I see my account not as *precluding* the use of careful historical research, but as raising the standard for a relevant historical argument. And I don't see why a philosophical argument can't accomplish that much.

As to the second charge, I plead guilty to its being theological, although I don't see this as objectionable. I agree that it is a consequence of the account that a theist and an atheist not only won't, but ought not, interpret Talmudic legal statements in the same way. But I just don't see why that would be a problem.

⁴⁵ I put this objection in the mouth of "the scholar," but many philosophers would assert this even more emphatically.

The modern-day Talmudist objects: “I put before you a dilemma. Either general philosophical arguments and discussions are of no help in understanding Talmudic legal *sugyot* (units) or they are. If you take the first horn of the dilemma, then you are both robbing us of a potentially useful tool, and you are endorsing a position that has been demonstrated to be false by the discussions in Hirsch 1999, 2006, and 2018, and Lewinsohn 2006. If, on the other hand, you accept the second horn of the dilemma, then you need to explain how this is so, given that you think that Talmudic passages are not treating straightforwardly philosophical questions. And yet, no explanation seems possible, so your position is untenable.”⁴⁶

Reply to the modern-day Talmudist: I take the second horn of the dilemma. I think philosophical discussion and background can certainly illuminate the workings of Talmudic legal dialectic. And I concede that I need to explain this given my denial of the Presumption and my suggestion of an alternative approach. I think the basic explanation is this. A false philosophical view (and arguments pertaining to it) can often serve as a model for a true philosophical view about a closely related subject (and arguments pertaining to it). Naturally enough, a false theory T about identity will be a true theory about identity^T, which is the relation that the xs instantiate just in case they satisfy the “axioms” of theory T. Seeing how this works will have to be done on a case-by-case basis. I think more can and should be said in response to this objection, but I leave that for another time.⁴⁷

BIBLIOGRAPHY

- Blidstein, Y. (1997) “Even if they Say about what is Right that it is Left’: Really? The Strength and Limits of Institutional Authority in *Halakha*” (Hebrew). In: A. Sagi and Z. Safrai, eds., *On Authority and Autonomy in Jewish Tradition* (Hebrew). Tel Aviv: Hakibbutz Ha-Meuhad.
- Burke, M. (1994) “Preserving the Principle of One Object to a Place: A Novel Account of the Relations among Objects, Sorts, Sortals, and Persistence Conditions.” *Philosophy and Phenomenological Research* 54: 591–624.
- Chalmers, D., Manley, D., and Wasserman, R. (eds.) (2009) *Metametaphysics*. Oxford: Oxford University Press.
- Edgerton, H. (1924) “Legal Cause.” *University of Pennsylvania Law Review* 72:4.

⁴⁶ My formulation of this objection owes much to discussion with David Shatz.

⁴⁷ Thank you very much to Curtis Franks, Eli Hirsch, Sam Lebens, Dani Rabinowitz, and David Shatz for extensive and insightful comments on earlier drafts of this chapter. Thanks also to members of the audience at the 2011 Shalem Center conference on the theme, “Philosophical Investigation of the Hebrew Scriptures, Talmud, and Midrash,” at which I presented an ancestor of this chapter.

- Fraade, S. (2007) "Rabbinic Polysemy and Pluralism Revisited: Between Praxis and Thematization." *AJS Review* 31(1): 1–40.
- Goodman, N. (1955) *Fact, Fiction, and Forecast*. Cambridge, MA: Harvard University Press.
- Grice, H. P. (1989) *Studies in the Way of Words*. Cambridge, MA: Harvard University Press.
- Halbertal, M. (1997) *People of the Book: Canon, Meaning, and Authority*. Cambridge, MA: Harvard University Press.
- Hawthorne, J. (2006) "Three-Dimensionalism." In: J. Hawthorne, *Metaphysical Essays*. Oxford: Oxford University Press.
- Hirsch, E. (1999) "Identity in the Talmud." *Midwest Studies in Philosophy* 23: 166–80.
- Hirsch, E. (2006) "Rashi's View of the Open Future: Indeterminateness and Bivalence." In: *Oxford Studies in Metaphysics* v. 2, Oxford: Oxford University Press.
- Hirsch, E. (2010) *Quantifier Variance and Realism: Essays in Metaontology*. Oxford: Oxford University Press.
- Hirsch, E. (2018) "Talmudic Destiny." *Jewish Philosophy in an Analytic Age* (this volume). Oxford: Oxford University Press.
- Kalderon, M. (ed.) (1999) *Fictionalism in Metaphysics*. Oxford: Oxford University Press.
- Kripke, S. (1984) *Wittgenstein: On Rules and Private Language*. Cambridge, MA: Harvard University Press.
- Lewinsohn, J. (2006–07) "Philosophy in Halacha: The Case of Intentional Action." *The Torah u-Madda Journal* 14: 97–136.
- Lewis, D. (1984) "Putnam's Paradox." *Australasian Journal of Philosophy* 62; reprinted in *Papers in Metaphysics and Epistemology*. Cambridge: Cambridge University Press, 1999, pp. 56–77 [page references are to the reprinted paper].
- Moore, M. (2009) *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics*. Oxford: Oxford University Press.
- Moscovitz, L. (2002) *Talmudic Reasoning: From Casuistics to Conceptualization*. Tübingen: J.C.B. Mohr.
- Parfit, D. (1971) "Personal Identity." *Philosophical Review* 80 (January): 3–27.
- Putnam, H. (1981) *Reason, Truth, and History*. Cambridge: Cambridge University Press.
- Rea, M. (1995) "The Problem of Material Constitution." *Philosophical Review* 104(4): 525–52.
- Rosen, G. (1990) "Modal Fictionalism." *Mind* 99: 327–54.
- Rosenberg, S. (1997) *Lo Bashamayim Hi*. Hotza'at Tevunot.
- Rosensweig, M. (1992) "Elu Va'elu Divre Elokim Chaim: Halachik Pluralism and Theories of Controversy." *Tradition* 26: 4–23.
- Rubenstein, J. (1999) "Nominalism and Realism in Qumranic and Rabbinic Law: A Reassessment." *Dead Sea Discoveries* 6(2): 157–83.
- Safrai, S. (1994) "Ha-Hakhra'ah ke-veit Hillel be-Yavneh." In: *Bimei ha-Bayit u-vime ha-Mishnah*. Jerusalem: Magnes Press, pp. 382–404.
- Sagi, A. (1996) *Elu V'elu—Mashma'uto Shel Ha-siach Ha-hilchati*. Hakibutz Ha-meuchad.
- Schwartz, D. (1992) "Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law." In: D. Dimant and U. Rappaport, eds., *The Dead Sea Scrolls: Forty Years of Research*. Leiden: Brill.

- Sedley, D. (1982) "The Stoic Criterion of Identity." *Phronesis* 27:3.
- Sider, T. (2009) "Ontological Realism." In: Chalmers, Manley, and Wasserman 2009.
- Sider, T. (2011) *Writing the Book of the World*. Oxford: Oxford University Press.
- Silman, Y. (1984–85) "Halakhic Determinations of a Nominalistic and Realistic Nature: Legal and Philosophical Considerations." *Dine Israel* 12: 249–66.
- Stapleton, J. (2008) "Choosing What We Mean by 'Causation' in the Law." *Missouri Law Review* 73.
- Steiner, M. (2000) "Rabbi Israel Salanter as Jewish Philosopher." *The Torah u-Madda Journal* 9.
- Stern, D. (2002) "Sociology of Science, Rule Following and Forms of Life." In: M. Heidelberger and F. Stadler, eds., *Vienna Circle Institute Yearbook 9/2001: History of Philosophy of Science—New Trends and Perspectives*. Dordrecht: Kluwer.
- van Inwagen, P. (1979) "Creatures of Fiction." *American Philosophical Quarterly* 14: 299–308.