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Philosophy in Halakhah: The Case of Intentional Action

For many readers of this journal it is commonplace that the halakhic system is more than a set of rules, more even than a way of life; it is, after all, a *Weltanschauung*, forming, and informed by, a coherent worldview. Yet one who inquires about the history of Jewish philosophy is seldom directed towards the Talmud or its scores of commentaries. More frequently, such an individual is guided to the work of either medieval Jewish philosophers (e.g. Maimonides and Sa'adyah) or modern German and French philosophers (e.g. Franz Rosenzweig and Emmanuel Levinas). This is peculiar insofar as talmudic texts dominate the traditional Jewish curriculum—both in terms of time allocated for study, and the prestige bestowed upon the masters of the texts—and would therefore seem a most natural place from which to cull an authentic Jewish philosophy.

Why, then, do we consistently ignore halakhic texts as primary sources for Jewish philosophy? One reason is the lingering prejudice that the philosophically relevant themes are treated by the Aggadah and not the Halakhah. Halakhah, the story goes, is concerned with pots and pans, not big ideas. As for the Aggadah, the hyperbolic playfulness and open-ended suggestiveness that make it so charming undermine its philosophic utility. In this paper I do not wish to examine the claim that Aggadah is not a sturdy enough ground to support rigorous philosophical reflection. Instead, I wish to challenge the assumption that the Aggadah is the only part of the Talmud that might be philosophically interesting.¹

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The second reason that halakhic texts are frequently bypassed as sources for Jewish philosophy is that such texts do not engage in a serious or sustained way with the Western philosophical tradition. If such engagement is a necessary condition of philosophic reflection, then halakhic texts are, indeed, hardly philosophical. However, I can think of no good reason for insisting on such a strong condition. Although providing a definition of philosophy is notoriously difficult (and fruitless), it seems fair to say that a sustained grappling with a certain set of fundamental concepts fits the bill.² And, as we shall see, the halakhic corpus is rife with such grapplings.

Accordingly, this paper will try to demonstrate different ways halakhic texts can be read philosophically. The basic idea is that when certain *halakhot* mention or implicate a philosophical concept, we should not be surprised to find the Rabbis struggling to pin down the concept or taking a stand (or several stands) on a controversial aspect. To be sure, what motivates the Rabbis is not the sense of wonder which is purported to have initiated the philosophical careers of Plato and Aristotle, but an attempt to rigorously explicate a particular law. Nonetheless, the product is oftentimes decidedly philosophical.

Specifically, I will demonstrate three different ways that philosophy and Halakhah can interact. First, I will show how the Halakhah can serve as a prod for philosophical thinking. In this vein, I will be more concerned with modern talmudic commentators than the Talmud itself. Second, I will show how certain talmudic *sugyot* commit to particular philosophical positions. I will provide an instance of this by teasing a particular view directly from the reasoning of a *sugya*. Last, and most significantly, I will show how the distinctions and arguments familiar from philosophical debate can enrich the world of talmudic learning. In particular, I will examine a technical legal debate in the Talmud and show how it can be grounded in a larger theoretical dispute familiar to philosophers. In an appendix, I will provide an additional example. Even if a reader objects to a particular interpretation offered in this paper, I hope that the viability of the general project will remain evident.

Although it will become obvious, my bias towards the analytic school of philosophy might as well be revealed at the outset. While such a bias requires no apology at the start of the 21st century, the relative dearth of interactions between analytic philosophy and talmudic learning suggests widespread unawareness of the similarity between the two subjects. Subtle distinctions, charitable interpretations, and unrelenting dialectical acrobatics are the hallmarks of both disciplines. Accordingly, the prospect of fruitful exchanges between the two fields should come as

no great surprise. That said, it should also be stated as a disclaimer that analytic philosophers have always prized the rigorous and precise explanation of foundational concepts over the attempt to provide spiritual or existential nourishment. If such nourishment is what the reader seeks from a Jewish philosophy, he may often have to apply different conceptual tools to the same body of Jewish sources.

Intentional Action

To simplify matters, all the topics treated in this paper will have something to do with intentional action. Accordingly, a brief introduction, first philosophical then halakhic, is in order.

The first question usually posed by philosophers of action is how to distinguish an action from a mere happening of which a person is the subject. Classically formulated by Ludwig Wittgenstein, “what is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?”³ In the same vein, Carl Ginet asks:

What is it for a person to act? It is easy to give examples. I act when I voluntarily move my limbs, when I open a door, when I speak or write, press keys on the keyboard, slice a melon, or throw a ball. . . . But not all events or states of which a person is the subject are actions. There are, for instance, perceptions, sensations, desires, beliefs, feelings, unbidden thoughts, faintings, sneezings, tremblings, reflex actions, and states of passivity. What distinguishes actions from these other sorts of things? What is the mark of action? Answering this question is not so easy.⁴

Although this is usually the query which initiates discussion of philosophy of action, investigation spawns further questions. For example, action theorists attempt to provide the mark not merely of action, but of intentional action as well. That is, within the category of actions room is left to distinguish intentional actions from unintentional ones.

Turning to the halakhic corpus, it quickly emerges that certain polemicists (both Jewish and Gentile) who enjoy characterizing Judaism as a religion concerned solely with behavior and not intention significantly misrepresent the Jewish tradition.⁵ At present, we shall focus solely on the halakhic significance of the distinction between intentional and unintentional actions in the realm of ritual transgressions. Since the example will appear elsewhere, let us consider one who detaches a vegetable from the ground on Shabbat (thereby violating the prohibition of harvesting on Shabbat). If one intentionally detaches the vegetable from the ground and is aware that such behavior is prohibited, then (barring abnormal circumstances) one has violated the transgression intention-

ally (*be-mezid*). With due warning from eligible witnesses, such a transgressor is liable to the death penalty. Next, consider the transgressor who intentionally detaches the vegetable, but unintentionally transgresses. This may transpire if the transgressor is either unaware of the prohibition to detach vegetables on Shabbat or unaware that it is Shabbat. In either case, she has transgressed inadvertently (*be-shogeg*). Although such a transgressor is not liable to the death penalty, she nevertheless must bring a sin offering (*korban ḥattat*) to the Temple.

There are at least two ways to make sense of the requirement to bring a sin offering, both articulated by Nahmanides in his *Sha'ar ha-Gemul*.⁶ First, one may conceive of the requirement as a form of punishment for negligence. Although an unintentional transgressor is not *as* culpable as an intentional one, he is culpable nonetheless. Strictly speaking, one should not act until one is sure that one's action is permissible. On this model, the cost of time and money required by the *korban* constitute the tangible punishment, while the fate of the animal perhaps represents the transgressor's guilt on a symbolic plane. Second, one may conceive of the offering not as a type of punishment, but as a method of expiation. In this conception, the unintentional transgressor is not deserving of punishment. Nonetheless, by dint of the sin he has become contaminated and is in need of cleansing. The analogy for this model is the patient who unintentionally swallows a poisonous pill. Although the patient is not deserving of punishment, he must receive an antidote if he is to be restored to health. Since sins leave a stain on the sinner, the *korban* is needed to remove the taint. This model is most appealing in tandem with the "ontological conception of commandments" (popular in kabbalistic traditions), according to which commandments are not merely legal constructs or normative guides, but are part of the innermost layers of reality with powers of their own.⁷

It is worth noting that while Nahmanides discusses both models, only the second model is explicitly presented as an explanation of the sin offering. The first model is employed only as a way of justifying the suffering of the righteous (*yissurin shel ahavah*). Moreover, in Nahmanides' *Commentary on the Torah* his explanation of the sin offering focuses exclusively on the second model (Lev. 4:2). While it is possible that he views both models as appropriate for the explanation of the sin offering, it is also possible that he is precise in limiting his explanation of the sin offering to the second model. After all, certain facts about the sin offering do not square with the first model. Most prominently, if a Jewish baby is kidnapped from its Jewish environs and reared by gentiles (i.e. a *tinnok she-*

nishbah), and later in life returns to the path of observance, she nonetheless has to bring a sacrifice for the transgressions she unintentionally committed during her years of unawareness (*Shabbat* 68b).⁸ Now, if there is anyone undeserving of punishment for unintentional transgressions it is the *tinnok she-nishbah*, who is not even aware that she is a Jew. Nonetheless, Halakhah mandates a sacrifice in her case. Nor can one sweep away this unusual case by appealing to the requirement that law fashion itself with only the normal case in mind. Such a line of defense is inadmissible, since the Halakhah does, in fact, refashion itself to fit the contours of this particular case. After all, the *tinnok she-nishbah* (the focus of her very own talmudic debate) is required to bring only one sin offering, and not one for each of her transgressions.⁹ Accordingly, there is good evidence favoring the second model as an explanation of the sin offering.

In any case, a transgression *be-shogeg* is not the only type of unintentional transgression. Returning to our example, one may unintentionally transgress not only by being unaware that it is prohibited to detach the vegetable on Shabbat or that today is Shabbat. In addition, one may unintentionally transgress if one unintentionally detaches the vegetable.¹⁰ For instance, one may merely intend to *lift* the vegetable from the ground, mistakenly believing that the vegetable is already detached from the ground. Since the vegetable is in fact still attached, the intended movement causes the agent to detach it from the ground. In such a case, the act is called a *mit'asek*, and the agent is not required to bring a sin offering.¹¹

To summarize, the case of *shogeg* (in the context of ritual transgression) occurs when the agent intentionally performs the forbidden act, but does not know that the act is forbidden (either because he does not know the law or does not know that the conditions for the application of the law obtain in this case). An action is *mit'asek*, by contrast, if the agent unintentionally performs the forbidden act.

Although the general rule is that one is exempt from bringing a sacrifice for a *mit'asek* transgression, there is a notable exception to the rule. Specifically, R. Naḥman (and all later authorities) rules (in the name of Shemuel) that *mit'asek* behavior involving the consumption of *helev* (suet, i.e. prohibited visceral fat) or illicit sexual relations nonetheless requires a sacrifice (*Kereitot* 19b). The Talmud explicitly grounds this exception in the pleasure associated with these acts ("*she-ken neheneh*"). Most authorities extend this principle to apply to all phenomenal pleasures, such as the consumption of all forbidden food.¹²

I. Halakhah as a Prod for Philosophical Thinking

As mentioned, philosophers of action wonder how to distinguish actions from mere happenings and, within the class of actions, how to distinguish intentional actions from unintentional ones. There are several competing ways to answer these questions. According to the influential accounts of Elizabeth Anscombe and Donald Davidson, one acts intentionally so long as one acts for a reason.¹³ Different views tell different stories about what “acting for a reason” amounts to. According to Davidson’s early view, one acts for a reason if and only if one’s action is caused (in the right way) by a belief-desire set. If I desire to study Tanakh, and believe that the book in front of me is a Tanakh, and this belief-desire set causes me (in the right way) to study the book in front of me, I have acted for a reason (and thus intentionally).

A certain behavior, on the Davidson-Anscombe view, is an action (as opposed to a mere happening) if it is intentional under at least one of its descriptions. According to this theory—and we will have the opportunity to see others—a given behavior might have several different descriptions. For example, when “I flip the switch, turn on the light, illuminate the room, [and] unbeknownst to me . . . alert a prowler to the fact that I am home,” I have performed one action under several different descriptions.¹⁴ On this view, the object of an intention is not an action, but an action *under a description*. Accordingly, the same behavior can (and will) be intentional under some of its descriptions and unintentional under others. If the behavior is to qualify as an action, however, it must be intentional under at least one of its descriptions. Thus, although I alert the burglar unintentionally, the fact that “alerting the burglar” describes the same behavior as “illuminating the room” renders it a description of an action, and not a mere happening. That is, it enables us to attribute the behavior to the agent as his doing. This account has the virtue of relating the criterion of action to intentionality without barring the possibility of unintentional actions.

With this background, we will now turn to a fascinating debate between R. Ya’akov Kanievsky (“the Steipler”) and R. Elhanan Wasserman (amongst others). The point of departure is the need to explain both the Halakhah’s exemption for *mit’assek* transgressions and the exception in the case of pleasurable *mit’assek* behavior. Although this debate may seem to be merely a matter of rationalizing the commandments (*ta’amei ha-mizvot*), both sides are aware that their respective positions carry halakhic consequences. While R. Wasserman’s position is

accessible in his *Kovez Shiurim*, we will avail ourselves of R. Kanievsky's pithy formulation of his opponents' views.

The principle of the matter regarding the exemption of the *mit'ashek* is that any behavior performed without intention or volition is considered as if it happened on its own accord, and is not considered an action (*ma'aseh adam*). . . . Accordingly, one [who behaves unintentionally, i.e. in a *mit'ashek* manner] is exempt . . . but with regard to the consumption of forbidden fats and illicit sexual relationships, wherein there is pleasure, the essence of the transgression is the pleasure, and it makes no difference that the agent's fornication or eating is not considered an action, since [the agent] nevertheless derives pleasure, which is what is forbidden in the first place. . . .¹⁵

According to R. Wasserman, there are only intentional actions and non-actions. That is, there is no class of actions which are unintentional yet nonetheless attributable to the agent as his doing. Our initial threefold distinction—between intentional actions, unintentional actions, and mere happenings—now collapses into a twofold one, since all unintentional behaviors are necessarily mere happenings. One is exempt from bringing a sacrifice on account of *mit'ashek* behavior for the simple reason that unintentional behavior is not attributable to the agent. Why is there an exception for pleasurable sins? Not because such behaviors are any more attributable to the agent, but because in such cases what is forbidden is not the behavior, but the associated pleasure, which the agent does in fact experience.¹⁶

R. Wasserman's view is well motivated, particularly if we keep in mind the second model for understanding the sin offering. The purpose of the offering is to expunge the contamination caused by the sin. If the sin is not attributable to the agent, however, there is good reason to think that it does not contaminate him. And if he is not contaminated, he will not require a sacrifice. This view is so well motivated that several other rabbinic authorities, such as Sefat Emet and R. Moshe Feinstein, seem to have reached similar conclusions.¹⁷

Although the view is well motivated within the halakhic context, it does not have (to my knowledge) any votaries amongst philosophers. This is because it violates the intuition that there is a difference between your serving alcohol to a minor and sneezing uncontrollably. While both behaviors are unintentional (so you say), the first is usually thought to be an action, while the second is not.

After dismissing R. Wasserman's view solely because it conflicts with Tosafot in *Sanhedrin*, R. Kanievsky proceeds to reveal his own view.

In truth, it seems that *mit'assek* behavior is also considered an action, albeit an unintentional one; the Torah does not obligate [a sacrifice] on account of an unintentional action. Wherever there is pleasure, the pleasure that is sensed by the body is considered like intention. This is because the function of intention is to link the soul with the action of the body, and the sensation of pleasure transpires in the vital soul and is considered like intention.¹⁸

R. Kanievsky restores the threefold distinction between intentional action, unintentional action, and mere happenings by denying that intentionality is a necessary condition of action. In a previous paragraph, he discusses the case of a knife that falls from a person's hand and happens to slaughter an animal in the manner prescribed by Jewish law. R. Kanievsky acknowledges that such a slaughtering is not considered an action, but only on the grounds that the slaughtering is not achieved through the force of the individual (*koah gavra*). If the force of the individual contributes to the slaughtering, then the slaughtering, while still unintentional, achieves the status of action.¹⁹ Moreover, with this non-cognitive criterion of action, R. Kanievsky has created the wiggle room needed to account for the *mit'assek* exemption. Although an action is attributable to an agent if it results from her bodily force, intention is generally required for the act to be attributed to the agent's soul (*nefesh*). Since the sin offering is only needed to treat the sin's effect on the soul, one is generally exempt from a *korban* for unintentional actions (i.e. *mit'assek* behavior). The exception to this rule (in the cases of forbidden fats and sexual relations) is explained by the special feature of phenomenal pleasure. Although intention is usually required to link the body and the soul, pleasure can also activate the same partnership (albeit with the more biological "vital soul"), even absent any relevant intention.²⁰

Although R. Kanievsky's view restores the intuitive three-fold distinction and fits the halakhic data, it is not particularly attractive to those situated outside the halakhic framework. Even if the reference to a "vital soul" does not commit R. Kanievsky to a medieval form of body/soul dualism—perhaps the references to *nefesh* in R. Kanievsky's view can be replaced by terms which stand for certain mental properties—his non-cognitive criterion for action nonetheless clashes with a common intuition, according to which mental states are clearly relevant for determining whether a particular behavior is an action. If a sneeze or an epileptic seizure causes an individual to knock his glass off the table, it is a stretch to attribute the behavior to the individual as his doing.²¹ Yet insofar as the contractions of the individual's muscles are responsible for the accident, R. Kanievsky's theory seems to dictate that we call it an action.²²

When philosophers develop theories to explain certain fundamental concepts, they are guided primarily by their intuitions, which serve as the data for the theory. For example, if someone suggests that knowledge amounts to true belief, a critic may point out that this account allows lucky guesses to count as knowledge, which does not seem intuitively correct. Such considerations count as evidence against the proposed account.²³ Rabbinic authorities also have intuitions about fundamental concepts. Indeed, if a particular account of a concept carries *no* extra-halakhic intuitive appeal, it would be difficult to conjure its endorsement by a rabbinic authority. Nonetheless, rabbinic authorities do not *only* have ordinary intuitions. Their reasoning is also shaped by the halakhic data of a given case. In the case at hand, we have seen how the halakhic data concerning the *mit'assek* exemption as well as the exception to this exemption serve as philosophical prods, leading the rabbis to fashion their respective theories of actions.

It is possible to view the halakhic data as *constraining* the reasoning of the rabbis. On this view, the constraints might foster creative reasoning, but usually result in thoroughly contrived positions, which have no appeal to impartial observers. Alternatively, one may conceive of the halakhic data as serving as a basis for theorizing that is more reliable than mere intuitions. On this model, there is something significant to learn from such rabbinic theorizing, and we ignore the results at our own peril.

II. Philosophical Views in the Talmud²⁴

As adumbrated, there is an interesting philosophical question about how actions are individuated, that is, distinguished one from another. There are several available positions in this rather contained debate. The debate concerns how to distinguish the different action descriptions that are part of the same action tree. An “action tree” can be formally defined, but for the purposes of this paper will be intuitively grasped with the help of two examples.²⁵

Action Tree A

1. S's moving her hand
2. S's flipping the light switch
3. S's turning on the light
4. S's waking her husband (by doing 3.)
5. S's waking the only man in the room

Action Tree B

1. S's raising her hand
2. S's slowly raising her hand
3. S's raising her right hand just after she has heard the chair of the meeting say “all those opposed?”
4. S's voting against a proposal
5. S's offending R (by doing 4.)

The question is how many different actions are in a given action tree, and the three most popular views are:

A. Each action tree contains different descriptions of a single action. All the different descriptions in a given action tree depict the bodily movement—the “basic action”—that lies at the root of the tree. This basic action is, in a sense, all that the agent really does.²⁶ As Davidson put it, “We must conclude, perhaps with a shock of surprise, that our primitive [i.e. basic] actions, the ones we do not do by doing something else, mere movements of the body—these are all the actions there are. We never do more than move our bodies: the rest is up to nature.”²⁷ Following Ginet, we will call this view the Extreme Minimizing View (EMiV).

B. According to Alvin Goldman’s Extreme Maximizing View (EMaV), each column lists five separate actions. Anytime two action descriptions pick out different properties, they do not pick out the same action. Thus, since even B1 and B2 describe different properties, they also depict different actions.²⁸

C. In column A, only A4 and A5 depict the same action. In column B, only B1 and B2 depict the same action. The general rule is that if one action description adds a new circumstance to, or a result (i.e. effect) of, what is depicted by another action description, then the two descriptions depict different actions. In such a case, one action contains the other action as one of its parts, but also includes the new result or circumstance. By contrast, if one action description merely adds more specific details to another action description, then the two depict the same action. This is the Intermediate View (IV).²⁹

A talmudic discussion of the following *baraita* *Kereitot* 20a seems to take a stand on this question:

Baraita: If [on Shabbat] there were before a person two candles [one kindled, the other extinguished] . . . if he intended first to kindle the one and then to extinguish the other, and he first extinguished and then kindled, if with one breath he is liable [for kindling and extinguishing on Shabbat].

To summarize, Smith has before him two candles, one lit (candle A), the other unlit (candle B). Smith intends to blow (a single breath) on the candles in such a way that the flame moves from candle A to candle B; moreover, the intention is that candle A will be extinguished *after* candle B is lit. As it turns out, Smith blows in such a way that candle A is extinguished *before* candle B is lit (to visualize, imagine the flame leaping entirely off

candle A into the air and landing finally onto candle B). Regarding such a case, the *baraita* rules that although Smith's design is foiled, his action is not *mit'asek*, and he is consequently liable. For our purposes, it is important to note that we are dealing with the following action tree:

Action Tree C

1. Smith blows a single breath
2. Smith extinguishes Candle A
3. Smith kindles Candle B

This is a single action tree since both C3 and C2 are done *by* C1.

Commenting on the above *baraita*, the Talmud asks,

But is this not obvious [that he is liable in such a case]? [No, for] I might have thought that since his design is not realized—seeing that he wanted first to kindle and then to extinguish, but in his act the extinguishing was done first and then the kindling—he should accordingly be exempt; therefore we are told [that this is not so]; for although [the kindling of candle B] did not precede [the extinguishing of candle A], neither did it follow.

At first blush, the explanation at the end of this passage is incomprehensible. How can anybody claim that the kindling of candle B does not follow the extinguishing of candle A? Was that not the very description of the case?! On reflection, the following emerges as the most cogent explanation of the end of the passage:³⁰ although it is true that candle B becomes lit after candle A becomes extinguished, Smith's *act* of kindling candle B occurs at the same time as Smith's *act* of extinguishing candle A. This is, of course, only plausible if "Smith kindles candle B" and "Smith extinguishes candle A" are different descriptions of the very same action, each of which denote the willful blowing at the root of the action tree. For if the actions depicted by two descriptions are identical, it follows that the actions depicted by the two descriptions occur at the same time (in this case, the time of the breath, which rests at the root of the action tree).³¹ Since the kindling and extinguishing occur at the same time, the Talmud teaches, Smith is not granted an exemption on the grounds of *mit'asek*, even though his act is not performed precisely in accordance with his design.

As stated, this passage assumes EMiV. That is, the Talmud resorts to EMiV in order to explain the Tannaitic ruling. For according to EMaV, the mere fact that C2 and C3 pick out different properties ensures that they describe different actions. And according to IV, the fact that C2 and C3 describe different results of C1 is enough to render them descriptions of

different actions. Once C2 and C3 pick out two distinct actions it is not plausible to claim, as the Talmud does, that they occur at the same time. Accordingly, the conclusion, seemingly inescapable, is that this *sugya* subscribes to EMiV. Indeed, I do not think this *sugya* is alone in embracing EMiV. As I will show in the appendix, at least two other *rishonim* seem to hold this view. I may also note that I am aware of no *sugya* or *rishon* which clearly holds differently (though my knowledge is admittedly partial).³²

It is interesting that the Talmud is unfazed by what is sometimes considered the most damning objection to EMiV. It is an awkward consequence of this view—and only this view—that it is possible for S to offend R (B5), for example, before R becomes offended (imagine R does not hear about S’s vote in B4 until the following day). This odd consequence of the extreme minimizing view has led some—but by no means all—philosophers to resist the otherwise intuitive appeal of the position. Other philosophers stick to EMiV and reasonably claim that so long as actions are construed as nothing more than willful bodily movements, this consequence is wholly comprehensible. Indeed, far from remaining oblivious to this consequence of the theory, the Talmud openly acknowledges that Smith’s act of kindling candle B occurs before candle B is lit. In this way, the Rabbis unabashedly embrace EMiV, and provide yet another reasonable voice to the chorus of those untroubled by the consequence we have noted.

It is worth returning to R. Wasserman’s view to consider whether it is compatible with EMiV.³³ Recall that according to R. Wasserman *mit’assek* behavior is not an action. Consequently, my unintentional detachment of the vegetable (due to the mistaken belief that the vegetable is already detached) does not constitute an action. Yet “my detaching the vegetable” is only one description in an action tree. I also intentionally lift my arm, and in so doing undoubtedly perform an action. Now, according to EMiV, “my detaching the vegetable” describes the same behavior as “my lifting my arm.” Accordingly, if the behavior described by “my detaching the vegetable” is an action, then the behavior described by “my lifting my arm” must be an action as well. Since R. Wasserman denies that “my detaching the vegetable” describes an action, he must also deny the same regarding “my lifting my arm” if he is to subscribe to EMiV. Since it is not plausible to deny that my intentionally lifting my arm is an action, it follows that R. Wasserman’s view depends on one of the other views about action individuation, and not on EMiV.

This observation has serious consequences for the viability of R. Wasserman’s interpretation. For if the relevant talmudic *sugyot* are

based on EMiV, any interpretation of those *sugyot* which veers from EMiV must be called into question. Moreover, as I show in the appendix, EMiV is affirmed by several *rishonim*, and is not, to my knowledge, denied by any of them. Interestingly, then, a philosophically sensitive analysis of halakhic material has allowed us to raise serious doubts about one of the *sugya*'s interpretations.³⁴

The observation that certain *sugyot* commit to certain philosophical positions raises the following theological question: what happens if an observant Jew, call him Shimon, disagrees with a certain philosophical view, and then learns that this view underlies a particular Halakhah? How does Shimon stand in relation to the previously rejected philosophical position? Is he in any sense bound by the view underlying the Halakhah? Does this drastically expand the category of Jewish dogma?

In confronting these questions, let us not be coy. If the query concerns conditions for personal salvation or delineations of the Jewish community we may categorically assert that our study has no implications at all. Neither textual evidence nor historical precedent suggests that one should stop purchasing meat from a butcher who rejects the Extreme Minimizing View of action individuation. Nonetheless, an interesting question persists about what the scrupulously observant Jew *should* believe. If Shimon previously rejected EMiV on philosophical grounds, and subsequently discovers that a particular Halakhah presupposes EMiV, should this make him, on epistemological grounds, think twice about his philosophical commitments? It is worth distinguishing between two different approaches Shimon might take, which mirror the two approaches to halakhic reasoning distinguished at the end of the previous section.

On the first model, Shimon's discovery gives him no special reason to doubt his initial view. After all, the mere fact that *amoraim* appealed to EMiV to explain a tannaitic ruling does not count as evidence in EMiV's favor. Rabbinic consensus is capable of generating binding norms, not metaphysical truths. The *amoraim* may not have considered all the pitfalls associated with EMiV, or may even have endorsed EMiV solely because it managed to rationalize the tannaitic ruling, and not on independent grounds. In general, although tradition might provide rationalizations for various commandments, there is no reason for one to endorse the rationalizations on each and every instance. As long as one tells some story capable of generating a commitment to the norm, there is no reason to go any further and revise one's considered views.

One might agree that the *amoraim* only endorsed EMiV because it rationalizes the tannaitic ruling and nevertheless resist the first model. As

mentioned earlier, philosophical debates usually involve sorting out our various intuitions regarding fundamental concepts. Yet such intuitions sometimes seem like unstable ground on which to build grand philosophical structures. Moreover, we must wonder how we come to have these intuitions. If they are merely the products of evolution or social conditioning, we must question their reliability in imbuing us with true beliefs. Without overstating these difficulties, I simply mean to suggest that they can be exploited by a second model that looks to halakhic rulings as a sturdier ground on which to fashion philosophical theories.

But the relative sturdiness of a legal system does not alone guarantee that its philosophical underpinnings are correct. After all, if American law presumes a certain philosophical view, we would not, for that reason alone, assume that the view is correct, no matter how patriotic we are. The most likely explanation for the second model, then, points to the divine nature of Halakhah as a means of guaranteeing its philosophical accuracy. For if one believes that the particular Halakhah is designed by God—who, one may suppose, is well positioned to have access to the metaphysical truth—then a philosophical position teased out of the Halakhah should be taken very seriously indeed.

III. Interlude: Methodological Reflections

At this point we may pause to consider a possible objection to the methodology employed in the previous two sections. In the first section, I revealed how halakhic data can spawn philosophical reflection. We saw that R. Wasserman and R. Kanievsky each developed the rudiments of a theory of action in an effort to rationalize the *din* of *mit'assek* and the exception in the case of pleasurable transgressions. In the second section we saw that the talmudic effort to rationalize an earlier law relied implicitly on the Extreme Minimizing View of action individuation. Now, the objection we must consider is that the theories of action developed by R. Kanievsky and R. Wasserman are not meant to be views about action *simpliciter*, but only actions in a particular legal framework, namely that of the laws concerning *mit'assek*. In the same vein, the talmudic commitment to EMiV is not a general commitment to this philosophical position, but only applies to the specific legal framework of the discussion. The Rabbis, the objection goes, are engaged in legal reasoning, not metaphysics. The claims are only made with reference to the *daf*, not to the world.³⁵

Dissolving this objection is critical in order to clarify our methodology and correct mistakes. Recall that R. Wasserman and R. Kanievsky

are attempting to rationalize, that is to make sense of, the laws of a particular *sugya* by appealing to facts about action (*ma'aseh adam*), intentionality (*kavvanah*), pleasure (*hana'ah*), and the relation between them. Appealing to these facts will, they claim, explain the relevant laws. It should be clear that this methodology can only be effective if the facts that are appealed to obtain even when considered in abstraction from the reasoning of the *sugya*. After all, the whole project is to make sense of the localized *sugya* by appealing to the generally obtaining facts. Similarly, the *amoraim* use EMIv in order to explain a particular *din*. If EMIv is not believed to be true, then it does not make sense to appeal to it as a means of explaining the *din*. This would be like pulling on our own bootstraps in an effort to hold ourselves in midair.

Once we realize that the Rabbis are really making claims about action (the real thing), another question quickly arises. Don't the standards of action differ in different *sugyot*? If they do, wouldn't this be deeply problematic? Let us begin answering this question by distinguishing between two different senses of "standards of action." In the first sense, "action" is used imprecisely, and the challenge, relatively benign, is that different *sugyot* designate different degrees of attending intention for prescribed (or proscribed) behavior. In some cases, the Rabbis may be demanding a level of intention that goes beyond what is needed, on a given account, to make the behavior an action. In other cases, the Rabbis may hold people responsible for behaviors that do not, on a given account, qualify as actions. In response to this challenge, we must insist that none of these considerations implies that there are conflicting accounts of action at play. In many normative systems, people are held responsible for non-actions. The primary example of this phenomenon is wrongful omissions of action, like failure to pay taxes, which are not even behaviors. Moreover, there is no reason that Halakhah cannot demand, in circumstances that it deems fit, a higher level intention than that which is needed for the behavior to constitute an action.

In the more literal sense of "standards of action," the worry is that different *sugyot* hold different accounts of action (*ma'aseh adam*). I do, in fact, claim that if one can tease from a *sugya* that a behavior can be a *ma'aseh adam* without any attending intention, then one can raise a *kushyah* against R. Wasserman's position. Due to the possibility of such a challenge, I in no place endorsed R. Wasserman's (or the Steipler's) theory, or claimed that it is consistent across all of *Shas*. I simply highlighted his position and revealed his commitments. All that said, such *kushyot* are not easily launched. Before offering any, one would have to

make sure that the *sugya* upon which one bases one's challenge discusses the concept of *ma'aseh adam* and not some similar concept. As the discussion in the previous paragraph indicates, it is easy to mistakenly assume that two *sugyot* invoke the same concept when they do not. Just because a *sugya* discusses intention and a specific behavior, for example, does not mean it invokes the concept of *ma'aseh adam*.³⁶

Before progressing to more general claims—and readers uninterested in these claims will lose nothing by jumping to the next section—let us take careful notice of the distinction between a concept and a word. Words are signs, and are generally comprised of lines on a page or sounds in the air; concepts, by contrast, infuse the word with meaning. Some words (e.g. “bank”) can be used to invoke multiple concepts, and many concepts can be expressed by multiple words (synonyms, like “student” and “pupil,” or perfect translations, like “tree” and “*ez*”). Regrettably, one can only write about concepts by using words; nonetheless, it is critical to keep the difference in mind. (I will aid the reader by using quotation marks when discussing a word.)

Armed with this distinction, we may, with caution, generalize, and claim that whenever halakhic sources rely on a particular analysis of a concept, they commit themselves to this analysis in any halakhic context. Indeed, one can detect a strong impulse in halakhic discourse to assume that a concept invoked in multiple halakhic spheres will have the same standards of application throughout (*universalizing principle*). In more technical terms, talmudists assume that an analysis of a concept cannot take the irreducibly contextual form: *p1 in context A or p2 in context B*, where the different contexts are different halakhic contexts (e.g. *hilkhot Shabbat* or *nezikin*).³⁷

This universalizing principle is particularly salient given the Talmud's further assumption—an assumption, it should be noted, not merely about concepts but also about words—that when the same word is used in different halakhic contexts it invokes the same concept, *unless there is independent reason to think otherwise* (*strong universalizing principle*). An interesting yet by no means exceptional example will, I hope, illuminate these principles.

Resh Lakish inquired of R. Yoḥanan: If witnesses are unable to sign their names, is it permissible to write the names for them in red paint and let them go over in ink? Does the upper writing count as writing or not? He replied: It does not count as writing. But, said [Resh Lakish], has not your honor taught us that in respect of Sabbath observance the upper writing is counted as writing? (*Gittin* 19a)

Before examining R. Yoḥanan's interesting answer and its reception in halakhic discourse, let us merely point out that Resh Lakish's question presumes, in line with the strong universalizing principle, that the word "*ketivah*" expresses the same concept in different halakhic spheres. Moreover, in line with the universalizing principle, Resh Lakish assumes that a concept—in this case *ketivah*—which is singled out in two spheres of Halakhah—in this case *hilkhot Shabbat* and *hilkhot Gittin*—ought to have the same standard of application in each sphere. Were these not the assumptions, his question would not get off the ground.

R. Yoḥanan replies: "Because we have a certain idea, shall we base our practice on it? (*ve-khi she-anu medammin na'aseh ma'aseh?*)." The Yerushalmi records a different formulation of R. Yoḥanan's answer: "Because we are involved in *hilkhot Shabbat* we should permit a married woman [to commit adultery]? (*mippenei she-anu osekin be-hilkhot Shabbat anu mattirin et eshet ish?*)." It is not quite clear how to parse R. Yoḥanan's elliptical response. Is he rejecting either of the universalizing principles, or is he simply claiming that in a case of uncertainty—it is not sufficiently clear whether such outlining counts as *ketivah*—he prefers to err on the safe side in each practical ruling? While the Yerushalmi's account is pliable enough to support either interpretative possibility, R. Yoḥanan's emphasis of the chasm between theory and practice, in the Bavli's formulation, would seem to support only the latter option, as such a response would be out of place if he simply means to reject either of the universalizing principles. In any event, the reception of this debate in the history of Halakhah will illuminate how widespread the universalizing principles are in halakhic discourse.

Rashi's gloss on R. Yoḥanan's response reads: "'Shall we base our practice on it' to act leniently? Even with regard to Shabbat, if a case came before us in the era of the Temple I would not have relied on my ruling [i.e. that outlining is considered writing in this context] to bring *ḥullin* in the courtyard [*azarah*]" (s.v. *na'aseh ma'aseh*). According to Rashi, even in the single sphere of *hilkhot Shabbat*, R. Yoḥanan would change his ruling in each case in order to ensure that his ruling, in this uncertain case, inflicts minimal halakhic damage. Clearly, then, according to Rashi, R. Yoḥanan's response does not involve challenging the universalizing principles.

Rambam, however, seems to rule that such outlining is considered *ketivah* in *hilkhot Shabbat* but not in *hilkhot Gittin*.³⁸ Perhaps, then, Rambam understands R. Yoḥanan's response to be a straightforward dis-

missal of at least one of the universalizing principles. The mere fact that the two rulings occur in separate halakhic spheres provides sufficient reason to be untroubled by conflicting standards of *ketivah* (or, in line with a rejection of the strong universalizing principle, to assume that there are two concepts at play: *ketivah in hilkhot Shabbat* and *ketivah in hilkhot Gittin*). If rejecting either of the universalizing principles were a live option in halakhic discourse, this is how Rambam's position would be understood. Instead, we are left with a record of *aḥaronim* who labor to show that although the word "*ketivah*" is used in both spheres of Halakhah, there is independent reason, in this case, to expect that the word invokes distinct concepts in the two contexts. We can infer from this methodological approach that without this special reason there would be no grounds to apply different standards in the different halakhic contexts. In other words, the mere fact that the contexts are different would not be sufficient ground to warrant different standards of application.

To take but one creative example, Ḥatam Sofer, in commenting on this discussion, explains that while "*ketivah*" simply means *writing* in the context of *hilkhot Gittin*, its closest meaning, in *hilkhot Shabbat*, is *writing-as-it-was-conceived-in-the-mishkan*. That is, in defining Shabbat's prohibited activities the Halakhah is not concerned with the Halakhah's own definition of the particular activity, but rather with the way the activity was perceived in the *mishkan*. Since outlining played an important role in the construction of the *mishkan*, it is considered *ketivah* in *hilkhot Shabbat*, even when it is not considered *ketivah* on the Halakhah's own account. Although the word "*ketivah*" is used in both spheres, there is independent reason to expect it to invoke different concepts in each case.

So far, I have claimed that the Talmud, as a matter of fact, adheres to the two universalizing assumptions. I have not, however, attempted to explain this adherence by suggesting a rationale for either of the two assumptions. Accordingly, before closing this section, I will briefly initiate this project of justification. Readers uninterested in this project are invited to skip to the next section.

The first universalizing principle admits, I think, of a compelling justification. Concepts, we must remember, are tools used to divide, or map, reality at various levels of abstraction. Although some philosophers have reasonably claimed that certain concepts have (and ought to have) a contextual analysis, such claims are always issued alongside reasons which motivate the contextual shape of the concept in question. After all, one would have to make a case for why there should be one concept with a contextual shape instead of multiple non-contextual concepts (one with the analysis *p1*, a second with *p2*, etc.) or a single non-contextual concept

applied across the board. Now, it seems as though the mere difference between halakhic contexts will not succeed in justifying the unusual contextual shape. After all, why not simply conclude, in a case of seemingly conflicting standards, that the two halakhic spheres simply invoke different concepts? Moreover, we have already seen how talmudists sometimes appeal to certain concepts (e.g. *ma'aseh adam*), which, crucially, have sense and relevance beyond the halakhic framework (after all, they are used to explain a particular halakhah). With regard to these concepts in particular, it would be more than odd for the Halakhah to about-face, and maintain that such concepts have different standards of application depending on the halakhic context.

While I have offered a justification for the first universalizing principle, I cannot think of a satisfying explanation in favor of the stronger universalizing principle. Make no mistake, I do not know of any good reason to reject this principle either. I simply do not know why the Rabbis chose to embrace this principle instead of assuming that each word in question invokes a concept that is restricted to the halakhic context in which the word is used (e.g. *ketivah-in-hilkhoh-Shabbat*). I suspect that the Rabbis' choice to embrace the stronger universalizing principle stems from certain general exegetical assumptions, and not strictly philosophical ones, but more than this I cannot say.

IV. Philosophy as a Tool in *Lomdus*: Buridan's Ass and *Masekhet Kereitot*

One of the primary tasks of traditional Talmud study ("*lomdus*") is the grounding of local legal disputes in larger theoretical structures. What at first resembles an arbitrary debate concerning a halakhic detail—or worse, a debate about empirically verifiable facts (*maḥaloket be-miziyut*)—is revealed to be a single manifestation of a much broader conceptual disagreement. Once this conceptual disagreement is unmasked, the original debate is invested with new meaning. In this section, I will show how philosophical analysis can be harnessed in the effort to theoretically ground *maḥalokot*.

Although the topic of *mit'assek* appears at various points in the Talmud, the principal discussion is a knotty passage in the tractate *Kereitot* (19a-20b). In that passage, several "problem cases" are discussed, and different positions are proffered as to whether the case is a genuine instance of *mit'assek* behavior. Now, since these cases are problematic—insofar as they press our concept of *intentional action* in order

to pin down its elusive boundaries—one might conclude that the various positions simply reflect different gut reactions to the case at hand. That said, it would certainly be preferable to show of a particular disagreement that it is not simply a record of opposing gut reactions, but is the predictable expression of a more fundamental disagreement regarding the nature of intentional action.

As stated in the introduction, the Halakhah exempts someone who unintentionally transgresses from bringing a sin offering. By “unintentional transgression” I do not refer to a case where the agent acts intentionally but does not know that his action is forbidden; such a case is deemed *shogeg* and requires a *korban*. Rather, the *mit'asek* exemption is reserved for cases where the agent unintentionally performs the forbidden action. In the language of EMiV, an illicit action qualifies as *mit'asek* if and only if it is *not* the case that the agent intends to perform the action under a description which both applies to the performed action and makes the action illicit. According to R. Yehoshua, the authoritative voice in the passage, the *mit'asek* exemption even applies to certain cases where the agent intends to perform an illicit behavior—indeed, even to certain cases where the agent intends to violate the very law she ends up violating. Imagine that Dina, for instance, stands in an orchard on Shabbat before an apple and an orange, and intends to pick the apple, thereby violating the prohibition of harvesting on Shabbat. In her attempt to fulfill this intention, Dina, for whatever reason, ends up picking the orange (perhaps a gust of wind altered the position of the fruits at the last moment). Although Dina intended to perform an action which is prohibited by the very law she in fact violated (harvesting), she is nevertheless exempt.³⁹ After all, Dina will always be in a position to claim—whether or not she is telling the truth—that she intended the action under the description of “picking an apple” and not under “picking an orange” or even “picking a fruit.”⁴⁰

An amoraic debate arises concerning a case in which Dina intends to pick one red apple, but ends up picking another one just like it.⁴¹ Given that Dina intends to pick a red apple and ends up picking a red apple, perhaps her transgression should be considered intentional and she should suffer the legal consequences. Alternatively, since Dina picked a different apple than she set out to pick, perhaps her action should be considered unintentional—no different from the case in which she set out for an apple and ended up with an orange—in which case she would qualify for the *mit'asek* exemption. R. Naḥman (and later Ravad) adopts the former view and exonerates Dina, while Rava

and Abbaye (and later Rambam) settle on the latter, letting Dina confront the legal consequences of her action.⁴²

One might stop here and simply claim that the two views reflect two intuitive responses to the specific case at hand. Alternatively, one may try to ground this particular dispute in a larger philosophical disagreement. Before we attempt the latter course, let us bring the case into sharper relief. What exactly is the difference between the first case, in which all post-tannaitic rabbis agree that Dina is exempt for picking an orange if she intended to pick an apple, and the second case, in which there is disagreement as to whether Dina is exempt for picking one red apple if she intended to pick another?⁴³ In the first case, the intended action and the performed action are qualitatively distinct actions, since the apple and the orange are qualitatively distinct objects. Objects are qualitatively distinct if they do not share all the same intrinsic properties (e.g. apples and oranges differ in taste, color, nutrients, etc). Moreover, the qualitative difference between the intended action and the performed action need not be as great as the difference between apples and oranges in order to indisputably qualify for the *mit'assek* exemption. Indeed, the Talmud equates the apple/orange case and another in which Dina intends to pick a red apple and winds up with a green one. That is, even a minor difference is sufficient to render the two objects qualitatively distinct.⁴⁴

In the second case, by contrast, the object Dina intends to pick is qualitatively identical with the object she ends up picking. Although the two objects are quantitatively distinct—we are, after all, dealing with two objects, not one—they share, for all intents and purposes, the same properties. I add “for all intents and purposes” since the two objects undoubtedly differ on the microscopic plane (or even under close macroscopic inspection). Nonetheless, the crucial point is that Dina cannot point to any property as a reason to pick one apple over the other.

This connection between qualitative identity and reasons for action is critically important for our purposes. It is an interesting feature of such reasons that they can only appeal to properties, as opposed to particular instantiations of those properties. If two objects happen to share all the same properties—in technical terms, if they are individual *tokens* of all the same *types*—then one cannot have any reason for choosing one of the objects over the other.⁴⁵ Accordingly, we can reformulate the difference between the two cases in terms of reasons for action: In the first case, where Dina is exempt, she *could have* had a reason for intending to pick one object, which did not apply to the object she ended up picking. This reason might not have been a particularly good one—

indeed, it might have amounted to no more than her preference for the color red—but that is beside the point. In the second case, by contrast, Dina could not have had a reason to pick the object she intended that did not also apply to the object she ended up picking. After all, the two objects share all the same features.⁴⁶

With this background, we are ready to show how opposing conceptions of intentional actions will lead to the opposing claims in the disputed second case. As mentioned above, different theories are offered to try to account for intentional action. According to one influential theory, advanced by Anscombe and Davidson, an action is intentional if and only if it is done for a reason. In the words of Anscombe,

What distinguishes actions which are intentional from those which are not? The answer that I shall suggest is that they are the actions to which a certain sense of the question ‘Why?’ is given application; the sense is of course that in which the answer, if positive, gives a reason for acting.⁴⁷

Armed with this characterization, we will reexamine our two cases. In the first case, the Halakhah assumes that Dina’s reasons for picking the apple do not also apply to picking the orange. (The Halakhah assumes this since Dina would always be in a position to make this claim to the court even if it is, in fact, not true.) If this is so, can we possibly claim that when she nevertheless picks the orange, Dina acts for a reason? Given our assumption that her guiding reason does not motivate picking the orange, it seems that we cannot. And since acting intentionally is acting for a reason, we must also conclude that Dina does not act intentionally. This squares nicely with the unanimous view that in such a case Dina is exempt.

The second case, unlike the first, presupposes our ability to settle on a single course of action even in the face of qualitatively identical alternatives. Indeed, it is difficult to deny that we have this ability. If I am in the supermarket, I will settle on a particular box of Cheerios fully aware that there are three other boxes just like it in arm’s reach. Yet what is it that guides us to a particular course of action in such a case? Whatever the answer, it cannot be the agent’s reasons for acting. After all, such reasons can only distinguish between actions with different properties, not qualitatively identical ones. Now, when Dina plans on picking one red apple and winds up taking another, one of her guides to action clearly malfunctions; her plan, after all, is foiled. Yet whatever the nature of this faulty guide, it cannot be related to Dina’s reasons for acting, whose function was never to steer between qualitatively identical alternatives. Accordingly, if acting intentionally is simply acting for (i.e.,

being guided by) a reason, the malfunctioning of this *other* guide will not be sufficient ground to deem the ensuing action unintentional. As long as one's practical reasons serve *their* guiding function—that is, as long as one performs an action qualitatively identical to the one settled on at the outset—one's action will remain intentional. Thus, according to this theory of intentional action, Dina's action in the second case is intentional, and she is not exempt.

Although this theory of intentional action is popular, it is not the only one. Interestingly, it is precisely our ability to choose a single course of action in the face of equally desirable alternatives (“equidesirability scenarios”) which leads Michael Bratman to abandon the aforementioned theory of intentional action and propose a competing theory in its place.⁴⁸ Imagine a young rabbi who has to choose between what he judges to be two equally desirable rabbinical posts, A and B. Now, if intentionally acting is simply acting for a reason, then it is plausible to suppose that intending to accept post A's offer amounts to believing that one has an all-things-considered reason to accept post A's offer.⁴⁹ Depending on the version, this might be a belief that one has *more reason* to accept post A's offer than any available alternative or simply a belief that one has *as much reason* to accept post A's offer as any available alternative. On the former version, the young rabbi cannot intend to accept either of the offers, since he believes he has no reason to choose one over the other. On the latter version, the rabbi cannot intend to accept one offer without also intending to accept the other, since he believes he has as much reason to choose one as the other. Yet Bratman finds both versions of the account inadequate, given his reasonable conjecture that the rabbi *does* have the ability to intend to accept only one of the offers even without a discriminating reason.⁵⁰ After all, I am not merely able to choose between the qualitatively identical boxes of Cheerios, but am able to make this choice in advance by forming an intention about which box I will take (e.g. the one on the left).⁵¹ Thus, according to Bratman, there seems to be something wrong with accounting for intentions in terms of (belief in) reasons for acting.

Accordingly, Bratman presents his own account, according to which “intention is inextricably tied to the phenomenon of plans and planning.”⁵² The basic idea is that as rational creatures with limited resources we are equipped with the ability for advanced planning, which ensures that “deliberation and rational reflection [can] influence action beyond the present.”⁵³ If we were not able to form plans about our future behavior, we would be forced to deliberate entirely at the moment of action, which would lead to shoddy decision making. Moreover, our need for

coordinating behavior—both the intrapersonal need of coordinating one’s present and future actions and the interpersonal need of coordinating one’s own activities with those of others—demands that we form (and communicate) plans about our future behavior. Interestingly, the possibility of “equidesirability scenarios” merely heightens our need for planning.⁵⁴ After all, in such cases even full knowledge of the agent’s beliefs and preferences will not enable us to predict which course of action the agent will take. Only knowledge of the agent’s avowed plans will allow us to coordinate our actions with his. Having demonstrated the importance of plans, Bratman reveals their significance for a theory of intention:

We form future-directed intentions as parts of larger plans, plans which play characteristic roles in coordination and ongoing practical reasoning; plans which allow us to extend the influence of present deliberation to the future. Intentions are, so to speak, the building blocks of such plans; and plans are intentions writ large.⁵⁵

Far from being reducible to reasons for action (or beliefs about such reasons), an agent’s intentions are the raw material which comprise full-blown plans. And since the reality of equidesirability scenarios forces us to plan particular courses of action in such events, we have the ability to form intentions even devoid of reasons that recommend one particular course of action.

Returning to our talmudic examples, it is clear how Bratman would rule in both cases. In the first case, when Dina intends to pick an apple but picks an orange, her intention is not related to her action in any way. Accordingly, her action is unintentional and she is exempt. As for the second case, the fact that she has no reason to choose one red apple over another does not impede her ability to intend a particular course of action. Intentions and reasons for acting are, excuse the pun, apples and oranges. Thus, her failure to act in accordance with her intention is sufficient ground to render her ensuing act unintentional. Dina, then, would be exempt in the second case as well. Attributing to each side of the talmudic *maḥaloket* one side of the philosophical debate has effectively allowed us to account for the *maḥaloket* in conceptual terms. In halakhic terminology, the legal *maḥaloket* is simply the *nafka minah* of a philosophical debate.

By trying to ground a legal *maḥaloket* in a philosophical debate I do not mean to imply that a *posek*’s ruling should be guided by his philosophical predilections. Established systemic principles as well as consequentialist considerations surely take pride of place over conceptual affinities in deciding how to rule. Nonetheless, as a tool of *lomdus*, such an approach

surely has the capacity to enrich the learning experience by expanding the conceptual vocabulary of the *beit midrash* beyond the relatively small stock of distinctions familiar from the world of Brisker *lomdus*.

Having presented a case in which contemporary philosophical analysis has aided us in analyzing the *sugya*—and I will present another in the appendix—it is worth reflecting for a brief moment on the implications for a *Torah u-Madda hashkafah*. One often hears that *Torah u-Madda* does not merely advocate a dual curriculum, but, at its best, fosters meaningful exchanges between *Torah* and *Madda*. With regard to the light the latter may shed on the former, the examples of academic Bible and Talmud Studies—reliant as they are on historical analysis and modern philological techniques—are often adduced (with all the usual precautions). The method of *lomdus* I have proposed serves as yet another example of this phenomenon. In this case, however, secular wisdom is employed in the service of the paramount activity of the *beit midrash*, the conceptualization of the *sugya*, and not merely for the sake of preparatory activity, such as ensuring that we use the most uncorrupted texts available.⁵⁶ Far from worrying about the charge of secularizing the Talmud, such a methodology should therefore be heralded as a way that commitment to secular learning can be harnessed for the sake of Talmud Torah.

Conclusion

It should come as no surprise to find philosophical ideas embedded in halakhic texts. As Montesquieu wrote, laws are tailored “to the people for whom they are framed . . . to their inclinations, riches, numbers, commerce, manners, and customs.” Consequently, legal systems have often been charged, for better or worse, with reflecting the true spirit of a nation. Is there any sense, however, in seeking the spirit of the nation in something as technical as the equal minimizing view of action individuation?

Famously, there is a tension in Jewish thought, rooted in the Bible, regarding the stature of human beings. Constantly oscillating between diametrically opposed poles, humans are, at once, insignificant specks—in relation to the vast cosmos, and especially in relation to God—and ennobled beings—enjoying a relationship with the Divine, and endowed with qualities which make such a relationship possible. This tension between effacement and aggrandizement is, I believe, expressed in the halakhic treatment of human behavior. The Halakhah’s treatment of behavior is, of course, where we would expect to find the manifestation of this tension, since it is in behavior where the individual’s impingement on his surroundings (or lack thereof) is most easily felt.

A central principle in halakhic tort law is *adam muad le-olam* (*Bava Kamma* 26b). By embracing this principle, the Halakhah proclaims that, from a normative point of view, people are maximally responsible for their behavior, in that they are liable to pay for all the damages their behavior has wrought. Indeed, this principle even extends to behaviors which that were performed unintentionally or under (partial) duress.⁵⁷ By adhering to EMiV, however, the Halakhah declares that, from a certain metaphysical point of view, people are minimally responsible for their behavior. Recall that the fundamental question in philosophy of action is which behaviors are attributable to the *subject*, as opposed merely to movements of his various body parts. According to EMiV, all the subject *really* does is the basic bodily movement which lies at the root of the action tree, as opposed to the reverberations and effects of that movement in the natural order. As Davidson put it, the “rest is up to nature.” If this is plausible for Davidson, it is all the more plausible for those who affirm that nature is in some meaningful way under the control of an intelligent all-powerful being.

Nor should one think that there is anything illicit about this combination of views. It is certainly interesting that individuals are, normatively speaking, maximally responsible for their behavior, while, metaphysically speaking, only minimally responsible. However, this interesting contrast is only contradictory if one mistakenly conflates metaphysical responsibility with moral responsibility. Indeed, it is reasonable to argue that metaphysical responsibility is neither a necessary nor sufficient condition of moral responsibility.⁵⁸

Returning to the original formulation of the tension, we may posit that, metaphysically, human weakness is the dominant pole on the dialectic. Consideration of the immense size and power of the cosmos—and the all-powerful force behind it—leaves one little choice but to concede vast limitations. Nonetheless, by virtue of humanity’s moral and intellectual potential, it is infused with dignity that far surpasses its might. While this dialectical tension remains awe-inspiring, it is in no way contradictory.

APPENDIX

I. EMiV in the *Rishonim*: Nimmukei Yosef and Riva

In a well known passage in his commentary to *Bava Kamma* (10a *dappei ha-Rif*), Nimmukei Yosef cites the position that equates a person's relationship to a fire that she ignites with her relationship to an arrow that she throws (*eisho me-shum hizav*); both the fire and the arrow are conceived as being propelled by the force of the individual so long as they are alight or in flight. Given this view, Nimmukei Yosef wonders why individuals are allowed to light candles just before the Shabbat begins; after all, so long as the candles are still lit, it will be as if the individual is burning the candles on Shabbat. He answers by claiming that in the case of the arrow "the moment the arrow leaves his hand is the moment that he does everything; we do not consider it a protracted action." The action of throwing the arrow is not extended through time. Indeed, even if the arrow destroys your property in mid-flight at T2, I still destroy your property at T1, the moment I throw the arrow. Were this not the case, Nimmukei Yosef argues, then if I were to die between the time I launch the arrow and the time the arrow destroys your property, my estate would not be liable. Since we know the estate is liable in such a case, we must perforce assume that I destroy your property at T1.⁵⁹

Now, unless "destroying your property" describes the same action as "throwing the arrow," as EMiV holds, it would be difficult to claim that I can destroy your property before your property is destroyed. Once we hold that all action descriptions denote movements of the body, however, we can rest comfortably with this position. Additionally, Nimmukei Yosef's usage of the singular "*ma'aseh*" indicates that there is only one action at play. Finally, I may note that I am not aware of any other *rishon* who takes issue with the Nimmukei Yosef's commitment to EMiV.⁶⁰

Along with the *sugya* in *Kereitot* and Nimmukei Yosef, Riva, cited by Tosafot in *Shabbat* 4a, seems to adhere to EMiV (s.v. *ve-khi omerim; kodem she-yavo*). The Talmud in *Shabbat* 4a rules that an individual ought not to commit a transgression in order to prevent another individual from committing a greater transgression. It applies this principle to a case in which Reuven places dough in a hot oven on Shabbat, and Shimon wants to remove the dough before it bakes to prevent Reuven from incurring capital liability (for the prohibited act of baking on Shabbat). Even though Shimon's removal of the dough from the oven, a rabbinical prohibition, is less severe than Reuven's baking bread on

Shabbat, a biblical prohibition, Shimon is not allowed to help Reuven in this fashion. In *Eruvin* 32b, by contrast, an individual is permitted to commit a minor transgression in order to prevent another individual from committing the Biblical transgression of eating untithed fruits. Riva reconciles this apparent contradiction by claiming that since, in the baking case, “the prohibited action is already done,” Shimon must not transgress to prevent Reuven from suffering the legal consequences of his action. In the *Eruvin* case, conversely, the individual has not yet performed the prohibited action of eating the untithed fruits, and we may therefore commit a minor transgression for his benefit. Now, assuming that the prohibited action in the Shabbat case is baking bread and not simply placing dough in a hot oven,⁶¹ we must ask why Riva claims that “the action is already done”? After all, if Shimon removes the dough before it bakes, surely the prohibited action can be terminated before its completion? The answer, of course, is that Riva claims that the action of baking the bread is coterminous with the action of placing the bread in the oven, even though the dough does not bake until later. As we have seen, it only makes sense to claim that the baking of the bread happens before the bread is baked if one holds, with EMiV, that “baking the bread” and “placing the bread in the oven” are descriptions of the same action. All that we *really do* is move our bodies.

II. What’s Bothering Rashi?

In the same *gemara* in *Kereitot* (and elsewhere), Rashi offers a consistently puzzling interpretation of the *mit’assek* scenario. I believe that attributing EMiV to Rashi can help explain his view. So far, we have been content characterizing *mit’assek* as simply unintentional behavior. Indeed, this definition flows from the Talmud’s own examples as well as from the considered view of nearly every major commentator. Yet Rashi offers an interpretation of *mit’assek* behavior that excludes a particular type of unintentional action. Specifically, Rashi excludes the case in which a false belief about the identity of the object (or action) is the only factor which renders the behavior unintentional.⁶² For example, imagine that Reuven unintentionally eats *ḥelev* because he mistakenly believes that the fat which lies before him is *shuman*. According to our definition, this behavior is a classic instance of *mit’asek*. Indeed, the Talmud itself uses the case of *savur she-shuman hu* (mistakenly believing that the fat is *shuman*) as a paradigmatic instance of *mit’assek* behavior (*Shabbat* 73a). Nonetheless, according to Rashi such unintentional behavior is not *mit’asek*, but

shogeg. Accordingly, Rashi offers the following surprising interpretation of the *savur she-shuman hu mit'asek* scenario:

Such a case occurs, for instance, when both *helev* and *shuman* lie before him, and he knows that this piece is *helev* and that one is *shuman*, and he intends to eat the *shuman*, yet he turns his gaze to another place, and his hand drifts to the *helev*, which he eats; alternatively, if there are two pieces of *helev* before him, and he believes that they are *shuman*, and he intends to eat this piece, but eats that piece. This is unlike the *shogeg* case, when he intends for this piece itself (*zo azmah*), but simply believes that it is *shuman*. (*Kereitot* 19b, s.v. *mit'asek ba-halavim*)

In this *mit'asek* case, according to Rashi, the agent does not merely mistakenly believe that the piece he eats is *shuman*; instead, the crucial fact is that he eats an entirely different piece from that which he intended.

Before turning to another example, we must recall that although circumcision is allowed on Shabbat, it is permitted only if the baby is exactly eight days old. Thus, a nine-day old uncircumcised baby is not permitted to be circumcised on Shabbat. Assuming this background knowledge, the Talmud asks us to consider the *mit'asek* case of “he who has two babies, one to be circumcised on Shabbat, the other after Shabbat. He forgets, and circumcises the baby which is to be circumcised after Shabbat on Shabbat.” Prima facie, this case simply involves, or at the very least applies to, a *mohel* who circumcises the nine-day old baby, mistakenly believing him to be the eight-day old one. Yet given Rashi’s commitments, he interprets the case as follows: “[the *mohel*] intends to circumcise this one and circumcises that one. A *shogeg* occurs when the *mohel* intends to circumcise this one itself, but believes that he was born on Shabbat [i.e. is eight days old].” Once again, it is not sufficient for *mit'asek* that the agent believe he is performing an action that is, in fact, permitted (e.g., circumcising an eight-day old on Shabbat). If the circumcision is to be *mit'asek*, according to Rashi, the *mohel* must have intended to circumcise the other baby, only to be misdirected (perhaps by turning his head away?) at the last instance. Generalizing, we may state that, according to Rashi, one’s action only qualifies as *mit'asek* if one’s bodily movements diverge from their intended path.

Although I think this is an accurate generalization of the position of Rashi, it is worth noting that there is room for an alternate interpretation. According to this second version, Rashi is simply taking advantage of the British philosopher J.L. Austin’s distinction between doing something “by accident” and “by mistake,” and relegating *mit'asek* to the former category. In Austin’s words,

‘It was a mistake’, ‘It was an accident’—how readily these can *appear* indif-ferent, and even be used together. Yet, a story or two, and everybody will not merely agree that they are completely different, but even discover for himself what the difference is and what each means. You have a donkey, so have I, and they graze in the same field. The day comes when I conceive a dislike for mine. I go to shoot it, draw a bead on it, fire: the brute falls in its tracks. I inspect the victim, and find to my horror that it is your donkey. I appear on your doorstep with the remains and say—what? ‘I say, old sport, I’m awfully sorry, &c., I’ve shot your donkey *by accident*? Or *by mistake*? Then again, I go to shoot my donkey as before, draw a bead on it, fire—but as I do so the beasts move, and to my horror yours falls. Again the scene on the doorstep—what do I say? ‘By mistake’? Or ‘by accident?’⁶³

Evidently, the latter behavior is an “accident,” while the former is a “mistake.” One would also behave “accidentally” if one’s body moves in an unintended direction. In other words, as opposed to the objects of your intention alternating positions, your hand, say, deviates from its intended path. The reason that I don’t think that Rashi is simply limiting *mit’assek* to “by accident” scenarios is two-fold. First, in his examples of *mit’assek* cases he only refers to situations in which one’s bodily movements diverge from their intended path. Never does he refer to cases in which the movement of the objects is the cause of the “accident.” Second, although the distinction between “by accident” and “by mistake” is neat enough, there does not seem to be a reason to limit *mit’assek* to the former and not the latter. Accordingly, I believe that Rashi limits *mit’assek* to a particular type of “by accident” case—namely where the movements are, in some sense, unintended.

Several commentators wrestle with Rashi’s view and wonder if it survives scrutiny in light of the various *sugyot* on the topic.⁶⁴ Even if it remains a viable option, however, it is clear that Rashi significantly narrows the plain meaning of the text. Accordingly, it befits us to ask what motivates Rashi to interpret *mit’assek* behavior as he does. One possible motivation—indeed, just about the only I can conjure—is that Rashi is driven by his commitment to the Extreme Minimizing View of action individuation surveyed above. According to this view, itself adopted by the *sugya*, all the agent ever really *does* is the basic action that is depicted at the root of the action tree. In order to pinpoint an agent’s action we must simply (drastically!) abstract the agent entirely from his context—even from the food that it is in his mouth, the baby that is in his arms, or the vegetable that lies before him—and confront the willful flexing of the muscles and bending of the joints which, strictly speaking, is all the given action really consists in. As Davidson put it, “the rest is up to nature.”

Now, the Extreme Minimizing View can lead to Rashi's interpretation if it is coupled with the following plausible assumption: An action is *mit'asek* only if the action that the agent performs differs from the action that the agent intended to perform. Note that on this view of *mit'asek* it is not enough that a *description* of the act that the agent performs fails to correspond with the agent's intentions. After all, the appropriateness of a description usually depends on contextual factors, such as the effects of one's movements, which are distinct from what the agent really does. To illustrate, let us return to our example regarding an agent who unintentionally eats the single piece of *ḥelev* before him, solely because he mistakenly believes it to be *shuman*. In such a case, it is true that the agent unintentionally eats *ḥelev*, since he intended to eat *shuman*. After all, on EMiV the objects of one's intentions are not actions, but actions under a description. Nonetheless, it is crucial to remember that "Smith eats *ḥelev*" is simply a description of the action which at bottom consists of certain movements of the hand, mouth, jaw, etc. Accordingly, given that Smith performs the movements she intended, her *act* remains the same as the act she intended, even though the relevant *description* of her act—"Smith eats *ḥelev*"—had no place amongst her intentions. By contrast, when Smith has two pieces of fat before her, and her hand drifts to the wrong one, her bodily movements are (in a sense) unintended, and her actual behavior deviates from its original path. Thus, EMiV and the aforementioned assumption together lead to Rashi's interpretation, according to which only the second case is *mit'asek*.

There is, moreover, evidence that Rashi indeed holds this assumption. In several places where Rashi introduces his interpretation of *mit'asek*, he takes pain to mention the law's exegetical origins: "As it is written: '*asher ḥata bah*,' which is expounded in *Masekhet Kereitot* as excluding he who is preoccupied (*mit'asek*) with something else (*davar aḥer*) yet does this thing (*davar zeh*)" (*Shabbat* 72b, s.v. *ve-ḥatakh et ha-mehubar*; cf. *Sanhedrin* 62b, s.v. *she-bishe'ar miḥvot shagag be-lo mitkavven*). Careful readers will note that nowhere in *Kereitot* is the derivation as extensive as Rashi presents it. Rather, in *Kereitot* (and in *Sifra*) we simply learn "'*asher ḥata bah*'—excluding the *mit'asek*" (*Kereitot* 19a). In Rashi's formulation, however, stress is placed on the difference between the actual action and the intended ("preoccupied") action, as we would expect from an adherent of the aforementioned assumption. Given the proximity of the reformulation of the exegesis and the reinterpretation of the case, it is plausible to argue that the aforementioned assumption (together with EMiV) fuels his reinterpretation.

Since the *sugya* itself presumes EMiV, the only way to avoid Rashi's interpretation is by disputing his assumption. One may do this by claiming that a case of *mit'assek* occurs as long as the agent does not intend the illicit action under a description that both applies to the performed action and renders the action illicit.⁶⁵

We have, therefore, found that a puzzling interpretation can be motivated by attributing to the commentator a certain philosophical position. Students of the Talmud are accustomed to drastic reinterpretations of talmudic material. Tosafot, for instance, frequently narrow the application of a given law, and in so doing simply follow the example of the *amoraim*, who similarly reinterpret tannaitic materials. Such reinterpretations, however, are usually motivated by explicitly contradictory rulings. In the case at hand, by contrast, we have an instance of reinterpretation which is not driven by the exigencies of textual harmony. Far from being motivated by contradictory texts, the plain meaning of the different *sugyot* threaten to rule out Rashi's interpretation. Instead, Rashi is motivated, I believe, by the sheer desire for conceptual harmony.

Notes

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1. For considerations in favor of the philosophical superiority of the Halakhah over both the Aggadah and apocryphal-apocalyptic writings, as well as a rudimentary presentation of philosophical theses drawn from the Halakhah, see Louis Ginzberg, "Jewish Thought as Reflected in the Halakhah," in Ginzberg, *Students, Scholars, and Saints* (Philadelphia, 1958), 115-118. Without making an explicit contrast with the Aggadah, R. Joseph Soloveitchik has stressed, on multiple occasions, that a Jewish philosophy can and ought to be derived from halakhic sources. In *The Halakhic Mind* (New York, 1986), for example, he writes that "there is only a single source from which a Jewish philosophical *Weltanschauung* could emerge: the objective order—the Halakhah. . . . Problems of freedom, causality, God-man relationship, creation, and nihilism would be illuminated by halakhic principles" (p. 101). Mark Steiner, in an introduction to an article about the philosophical insights of R. Israel Salanter, also affirms the philosophical richness of halakhic literature, and

remarks *en passant* that the Talmud philosophically engages issues such as identity, causality, time, and intention. See Steiner, “Rabbi Israel Salanter as a Jewish Philosopher,” *Torah U-Madda Journal* 9 (2000) 42-57.

2. Even if the Western philosophical tradition is responsible for deciding which fundamental concepts and puzzles are genuinely philosophical, this does not mean that one need be entrenched in the tradition in order to philosophically engage the particular problem. Indeed, if intellectual traditions relatively isolated from the western philosophical one nevertheless treat the same problems as the latter tradition, this only supports the philosophers’ claim that the particular concept or puzzle is in some way fundamental.
3. Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe, §621 (Oxford 1953).
4. Carl Ginet, *On Action* (New York, NY, 1990), 1.
5. Aside from the important distinction between intentional and unintentional action—which will be the main study of this paper—it is worth bringing to the fore the two other primary usages of the concept of intention and demonstrating their halakhic significance. (The idea that these three subtly different concepts invoke intentionality originates from G.E.M. Anscombe’s *Intention* [Oxford, 1957], §1; the specific labels come from H.L.A. Hart’s “Intention and Punishment,” in Hart, *Punishment and Responsibility* [Oxford, 1968], 117.)

First, there is the notion of a *further intention*. That is, an agent may perform an action with the further intention of achieving some particular goal. I may open the door, for example, with the further intention of injuring the person eavesdropping on the other side. The halakhic relevance of further intentions can be easily demonstrated. If I slaughter a kosher animal in the prescribed fashion, but do so with the further intention of using the animal’s blood for idol worship, then the animal is not kosher for me to eat (*Sanhedrin* 60b; the Halakhah follows R. Yoḥanan’s view). Interestingly, the animal remains non-kosher even if I do not end up using the blood for idolatry. The mere further intention is sufficient to render the animal unfit for consumption. We may also note that the well-known discussion about whether ritual obligations require a specific intention is a debate concerning further intention. According to the position that holds *mizvot zerikhot kavvanah* (commandments require intention), it is not enough to intentionally perform a certain *mizvah*. Rather, one must perform the prescribed behavior with the further intention of fulfilling one’s obligation.

In addition to further intentions, there is also a notion of *bare intention*. A bare intention need not be connected with any action, as it is a purely mental event. I may form the sincere intention today (Sunday) of going to shul on Shabbat. I may perish (or, less dramatically, have a change of heart) before Shabbat, in which case my bare intention will remain unrealized. This does not, however, render the original intention any less real. It might be thought that a bare intention has no place in a legal system, given that it is conceptually distinct from behavior. Nonetheless, bare intentions are in fact halakhically significant. For instance, while a dry nut is not considered a material artifact that is susceptible to impurity, the bare intention to carve an artifact (e.g. a toy) out of the nut is sufficient to render the nut capable of becoming ritually impure (*Hullin* 12b-13a). There is also the familiar notion that at the moment of repentance a bare intention to sin in the future is enough to de-legitimize the repentance.

6. In *Kitvei Ramban*, ed. Charles Chavel, volume 2 (Jerusalem, 1963), 270.
7. The phrase comes from Moshe Halbertal, *People of the Book* (Cambridge, 1997), 69.
8. Although this is not the only view in the Talmudic passage, it is the authoritative one. According to another opinion, the *tinnok she-nishbah* need not offer any sacrifices. It might be possible to attribute the debate in the *sugya* to the two conflicting models. If this is the case, both models will be represented in the Talmud.
9. One might object that the fact that the *tinnok she-nishbah* is only required to bring one *korban* also counts against the expiation explanation. After all, if sin is a contaminating factor, shouldn't the individual require many sacrifices for her many sins? I do not think this argument is particularly forceful, both because it relies on an unnecessarily crude "quantitative" notion of contamination and because it does not take into account the pragmatic limitations of halakhic rulings. Were this individual required to bring a sacrifice for each transgression, she would be bringing sacrifices her whole life (and would never be certain how many she really owes).
10. Although I speak of a "third way of *transgressing*" I am by no means committed to the view of R. Akiva Eiger, according to whom this type of unintentional action is still a sin, albeit an unpunished one (see *Responsa*, Vol. 1, #8). I simply mean that this is another way of performing the type of behavior which is prohibited, whether or not it is a sin.
11. It is worth noting that this case qualifies as a *mit'assek* according to all the major post-talmudic commentators with the exception of Rashi. For detailed discussion of Rashi's view, see the appendix.
12. That said, there is debate as to precisely how far to extend the line, and whether, for example, the warmth one derives from *sha'atnez* clothing is considered the appropriate type of pleasure to trigger the exception to the exemption. See, for example, R. Akiva Eiger, *Responsa*, Vol. 1, #8.
13. See especially Anscombe's *Intention* and Davidson's *Essays on Actions and Events* (Oxford 1980), Chapters 1-5. There is, of course, much disagreement between Anscombe and Davidson, most famously about whether reasons are the *causes* of action. Nonetheless, both thinkers characterize intentional actions in terms of acting for a reason.
14. Davidson, *ibid.*, 4.
15. *Kehillot Ya'akov*, §29. R. Kanievsky identifies his opponents as both R. Wasserman and R. Yosef Engel. See *Kovez Shiurim* 23:6 and *Atvan de-Oraita, Kelal* 24.
16. This view, that unintentional behavior is necessarily a mere happening (and not an action), is also developed by certain rabbinic authorities in a different (yet closely related) halakhic discussion. With regard to the case of *davar she-eino mitkavven* (forbidden behavior that one did not intend, but foresaw *might* occur in virtue of the intended behavior) some explain R. Shimon's leniency by claiming that unintended behavior (even when it is foreseen as a possible outcome of one's intended behavior) is not attributable to the individual as an action. See *Ḥazon Ish* 50:1. Although this view is sometimes attributed to the Arukh (for example, by *Ḥazon Ish*), close analysis reveals that the Arukh is not committed to this view. See Arukh, *p-s-k, s-v-r*. See note 39 for more discussion about the relation between *mit'assek* and *eino mitkavven*.

17. See *Sefat Emet*, commentary to *Rosh Hashanah* 28a and R. Moshe Feinstein, *Dibberot Mosheh*: commentary to Tractate *Shabbat*, volume 2, 60:3, 468.
18. *Kehillot Ya'akov*, §29.
19. It is possible that R. Kanievsky thinks that *koah gavra* is simply a necessary condition for action and not (as I have supposed) a necessary and sufficient condition. However, since he does not explain why *koah gavra* might be a necessary (but insufficient) condition of action, it is reasonable to suppose that he is simply providing a definition of action and not relying on another (unspecified) definition.
20. As a matter of interest, one of the practical differences between the two positions concerns one who eats *mazzah* on Pesah in a *mit'asek* manner. According to R. Kanievsky, it follows from his own view that if a person unintentionally eats *mazzah* on Pesah, he has fulfilled the commandment, given that the pleasure of the act links the action to the agent's soul; on the other hand, it follows from R. Wasserman's view that the agent in such a case has not fulfilled his obligation, since in the case of positive commandments the act, and not the resulting pleasure, is mandated, and pleasure without intention does not link the agent and action. See *Kehillot Ya'akov*, §29 and *Sefat Emet*, commentary on *Rosh Hashanah* 28a. As a matter of fact, I think one can adopt R. Kanievsky's theory and still hold that the unintentional consumption of *mazzah* is not sufficient for fulfilling one's obligation. After all, one might believe that the fulfillment of positive commandments require a level of intention analogous to the *mezid* category in transgressions. That is, one can believe that it is not enough that the action be attributable to the agent (or the agent's soul); if he is to fulfill his obligation he must intentionally eat the *mazzah*.
21. This does not mean that an individual cannot be morally responsible for the accident. If an epileptic individual takes to the wheel of an automobile without sufficiently mitigating the risk of a seizure, he would surely be responsible in the event of an accident.
22. It is worth noting that no rabbinic authority has (to my knowledge) exploited the first model of explaining the *korban hattat* in the present discussion. One might do this by claiming that *mit'asek* behavior is simply less deserving of punishment than *shogeg* behavior (despite the fact that *mit'asek* behavior is still attributable to the agent, body and soul). That such a line has not been explored is most likely because *mit'asek* behavior does not, in fact, seem less deserving of punishment than *shogeg* behavior; we can envisage *mit'asek* behaviors in which the agent's negligence is responsible for the unintentional action, as well as cases where the agent bears no share of the responsibility for his acting unintentionally, and the same holds true for *shogeg* behavior. An additional reason this approach has not been explored is that the exception of *helev* and *arayot* would appear to be inexplicable, and thus pose a major challenge, to such an account. These considerations provide additional support for the second model of explaining the *korban hattat*.
23. I do not mean to imply that such evidence is non-defeasible. For a discussion of the appropriate relation between theory and data in conceptual analysis see Brian Weatherston, "What Good are Counterexamples?" *Philosophical Studies* 115 (2003): 1-31.
24. For simplicity's sake, I picked an example where the Talmud adopts a well

- known solution to a philosophical problem. That said, it should come as no surprise to find instances where the Talmud or its commentators take unique stands on philosophical issues. In this respect, the Talmud and its commentators may be of special interest to philosophers. In two fascinating papers, philosopher Eli Hirsch undertakes precisely such a task when he develops the Talmudic view about the identity of material artifacts (in the *sugya* of *panim hadashot*) and Rashi's view about the indeterminacy of the open future (in the *sugya* of *bereirah*) and presents these positions to the broader philosophical community. See Hirsch, "Identity in the Talmud," *Midwest Studies in Philosophy* 23 (1999): 166-180; "Rashi's View of the Open Future: Determinateness and Bivalence," in *Oxford Studies in Metaphysics: Volume 2*, ed. Dean Zimmerman (Oxford, 2006), chapter 5.
25. The examples are based on those presented by Carl Ginet in *On Action*, 47. Throughout this section I will draw heavily from Ginet's masterful account of the debate regarding action individuation, which is the subject of chapter 3 of *On Action*.
 26. Ginet, *ibid*, 49.
 27. Davidson, *Essays on Actions and Events*, 59.
 28. See Alvin Goldman, *A Theory of Human Action* (Englewood Cliffs, NJ, 1970), 10, quoted in Ginet, *On Action*, 48.
 29. This view is espoused by Ginet himself. See Ginet, *On Action*, 49-52. It is worth noting that Ginet admits that adherents of his view may part company when it comes to B3.
 30. There are two other unpublished explanations that I know of, but I do not think that either is convincing. On the first account, the Talmud is employing the concept of *tokh kedei dibbur*. Aside from the difficulties of applying this principle as a standard for simultaneity in this halakhic context, this explanation does not account for the details of the *sugya*. After all, the *baraita* distinguishes between the case of one breath and the case of two breaths, ruling the subject of the first case liable and of the second case exempt. Yet clearly two breaths can be blown within *tokh kedei dibbur*. On the second account, the Talmud is reinterpreting the *baraita* (via an *ukimta*) so that it is discussing a case where candle B is lit at the same time as candle A is extinguished. While it is true that the Talmud often draws *ukimtot*, there is no textual indication (e.g., *hakha be-mai askinan*, *ba-meh devarim amurim*) that one is being drawn in the present case. Without such textual indication, one cannot assume that an *ukimta* is being drawn. Moreover, the *mahu de-teima . . . ka mashma lan* formulation does not, to my knowledge, ever single an *ukimta*. Indeed, it undermines the *peshita* challenge rather than conceding it.
 31. This follows from Leibniz's Law, according to which identical objects share all the same properties.
 32. In determining whether a *sugya* or *rishon* rejects or accepts EMiV, I have decided not to take into account mere gleanings from the language of the source. Only if the source's argument or position—and not merely its language—commit it to a particular view do I credit it with that view. This is a crucial *modus operandi*; for when the sources are not expressly addressing, or relying on, the question of action individuation, it is all too easy to be imprecise in one's language. Accordingly, I have not counted *Moed Katan* 2a as a source which holds EMiV, or Rashi in *Shabbat* 4a, s.v. *tehilatah ve-sofah* as a source which rejects EMiV.

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33. I am indebted to Eli Hirsch for his insightful observation that R. Wasserman cannot hold EMiV.
34. See note 16 regarding others who share R. Wasserman's view. Additionally, it is worth noting that R. Kanievsky's account is compatible with EMiV (although there is no evidence that he really considered the matter). On an EMiV version of R. Kanievsky's account, the role of intention is to link the action *under the intended description* to the soul. Pleasure might then link the action under all its descriptions (including the illicit ones) to the vital soul. Moreover, R. Kanievsky would be able to hold the standard EMiV account of action (i.e. a behavior is an action if and only if it is intentional under at least one of its descriptions). His claim regarding *koah gavra* would then be either eliminated or interpreted as follows: *koah gavra* is a necessary (but insufficient) condition of action. If there is no *koah gavra*, the story might go, then the action cannot be intentional under any of its descriptions. Furthermore, R. Wasserman (and those who hold like him in this case) may not be the only *aḥaron* who commits to not-EMiV. With regard to the question of placing dough in a hot oven towards the end of Shabbat, *Eglei Tal* (Zorea, #8) holds that the individual is *patur* in such a case, since the dough does not bake until Shabbat is over. See *Helkat Yoav* ("Shabbat"), however, who disagrees with *Eglei Tal* and seems to employ the logic of EMiV.
35. Both Josh Weinstein and an anonymous referee voiced challenges which resemble the one recorded in this paragraph.
36. Along these lines one must make sure that one is not dealing with homonyms (words which have the same spelling and pronunciation but different etymologies and meanings) or polysemes (words which have the same spelling and pronunciation, related etymologies, but different meanings). Either of these linguistic phenomena can confuse the reader into thinking that the same concept is invoked in two different places.
37. It is an interesting question whether the Halakhah relies on any contextualist analyses, where the contexts appealed to are non-halakhic contexts. Although I do not know of any such analyses, I am not ready to rule out the possibility of such a phenomenon.
38. *Hilkhot Shabbat* 11:16; *Hilkhot Gerushin* 3:4
39. There is a potential problem with the definition of *mit'asek* proposed in this paragraph. Specifically, as Eli Hirsch reminded me in discussion, the definition does not sharply distinguish *mit'asek* from the case of *davar sh-eino mitkavven*, which occurs when the agent foresees that his behavior *might* result in a forbidden action, but does not intend the action under the forbidden description. Accordingly, to accommodate the distinction between *mit'asek* and *eino mitkavven*, one might be tempted to change the definition of *mit'asek* to: illicit action A qualifies as *mit'asek* if and only if it is *not* the case that A satisfies a description D such that: i) D makes the action illicit, and ii) the agent intended A under some description, and iii) the agent believed that D describes A, but performed the action nonetheless. The problem with this definition, however, is that it does not explain why the apple/orange case should be *mit'asek*. After all, even if Dina thinks that the orange is an apple, she will have still performed an action describable by the illicit description "detaching vegetation," and would have undoubtedly believed that the action she intended fit this description (even if she did not intend it under this description). Accordingly, it is advisable to accept the definition of *mit'asek* in

the text and simply claim that *eino mitkavven* is a species of *mit'asek*. Indeed, R. Wasserman says just this when he claims that “the two laws are for the same reason.” See Kovez *Shiurim* volume 2, *siman* 23.

One then has to face the question of why one is liable in the case of *pesik reisha de-niḥa leh* but not in the case of *pesik reisha de-lo niḥa leh*. One may do this by noting that, according to both Tosafot and the Arukh, *pesik reisha de-niḥa leh* is actually to be considered a case in which the agent intends the forbidden action (for various possible reasons). Accordingly, this case is not to be considered a *mit'asek* scenario according to our definition and the problem disappears. As for *pesik reisha de-lo niḥa leh*, the Arukh claims that the Halakhah cannot consider this to be a case in which the individual intends the forbidden action. According to this approach, the exemption derives from the fact that it is a species of *mit'asek*. On Tosafot's picture, the individual is still considered to have performed the action intentionally, but is not liable only on the grounds of *melakhah she-einah zerikhah le-gufah*, which applies exclusively to the laws of Shabbat. See Arukh, *p-s-k*, *s-v-r*, and Tosafot, *Shabbat* 75a s.v. *tfei*.

40. Certainly, there is a sense in which Dina's intention to pick the apple, coupled with her belief that an apple is a fruit, implies an intention to pick a fruit (indeed, there is even a sense in which her intention to pick the apple implies an intention to pick a fruit, even if she does not believe that an apple is a fruit). Nonetheless, we may claim that if her intention to pick a fruit is entirely derivative of her belief that the apple is a fruit (or our belief that the apple is a fruit), then, to invoke a distinction of Howard Wettstein's, the intention is merely subsidiary, and not primary. One may then reasonably claim that the Halakhah is only concerned with primary intentions. See Wettstein, “The Gap Between Meaning and Reference,” in Wettstein, *Has Semantics Rested on a Mistake?* (Stanford, 1991), 75–76.
41. It is not entirely clear whether this dispute is only with regard to *hilkhot Shabbat* or, like most of the laws of *mit'asek*, applicable to all ritual transgressions. Rashi's and Tosafot's reading of the *sugya* seem to suggest the former view, while Rambam, who does not distinguish between the two spheres, can be read either way. Since Ravad argues with Rambam ad loc. it seems reasonable to credit him with Rambam's view regarding the context of the discussion., viz. *kol ha-Torah kulah*. In any event, given that all these positions agree that the rulings occur within the context of *mit'asek*, the difference in views should not affect my discussion.
42. See Rambam *Hilkhot Shabbat* 1:10, and Ravad's expanded gloss quoted in the *Kesef Mishneh*, ad loc.
43. In the Talmud's actual example, the first case is one in which he intended to pick figs but picked grapes, or even one in which he intended to pick black figs but picked white ones.
44. The difference in color is simply an example of a minor property difference. If, for example, there are two red apples, only one of which is unspoiled, the Halakhah would treat both as qualitatively distinct.
45. To be sure, one can have a reason to choose either of the two qualitatively identical objects. For example, if one does not choose one of the boxes of Cheerios, one will not have breakfast. Nonetheless, if the two boxes are qualitatively identical, one can have no reason that picks out one box over the other.
46. This second case is the subject of the well-known puzzle of Buridan's Ass, purportedly formulated by the medieval philosopher Jean Buridan. Buridan imag-

ines a donkey poised precisely between two equally desirable stacks of hay. If the donkey cannot act intentionally without having a reason that picks out its specific action, then the donkey will starve to death. For excellent analysis of this case, see Edna Ullman-Margalit and Sydney Morgenbesser, "Picking and Choosing," *Social Research*, 44 (1977): 757-85. One might object that such a reformulation of the second case already builds too much into the premises and does not allow the sources to speak for themselves. In an effort to show that the reformulation is the most natural way of explaining the text, I will turn to the explanation of R. Kapaḥ, a modern rabbinic commentator, who explains that in the second case Dina is not exempt. "In the case of two candles, one no bigger than the other, if a person intends to light or extinguish one but acts on the other, he is liable For [in such a case] *one cannot ask him why he took this and not that . . . since this is not a question whatsoever*. By contrast, when one of the candles is large and especially luminous, if a person intends to extinguish the smaller candle (since the larger suffices) and [unintentionally extinguishes the larger], then he is certainly exempt, since he did not perform his intention" (emphasis added). Like us, R. Kapaḥ reformulates the second case (where Dina intends to pick one red apple but picks another just like it) in terms of reasons for action. In such a case, one cannot provide a reason for acting ("one cannot ask him why") which applies to one object and not the other. R. Kapaḥ, *Commentary on Mishneh Torah, Hilkhot Shabbat 1:10*.

47. Anscombe, *Intention*, §5.
48. Michael Bratman, *Intentions, Plans, and Practical Reason* (Cambridge, MA, 1987).
49. At the very least, this is what many votaries of the reasons theory of intentional action themselves claim. See especially Davidson, "Intending" in Davidson, *Essays on Actions and Events*.
50. Note that this is different from the conjecture that one can, in fact, pick between the offers in such a case. Bratman's claim is about what we can intend, not what we can do.
51. Bratman launches these criticisms against Davidson's account in "Davidson's Theory of Intention," in *Actions and Events: Perspectives on the Philosophy of Donald Davidson*, eds. Ernest LePore and Brian McLaughlin (Oxford: 1985).
52. In Bratman, *Intentions, Plans, and Practical Reason*.
53. *Ibid.*, 3
54. *Ibid.*, 11.
55. *Ibid.*, 8
56. I do not, of course, mean to imply that this is all that academic talmudists attempt to accomplish. Rather, I simply mean that this is what traditional talmudists claim to be able to safely appropriate from academic Talmud study. Much of the rest involves a *competing* approach regarding the best way to study the text.
57. See the debate between Tosafot (*Bava Kamma 27b, s.v. u-Shemuel*) and Ramban (*Bava Mezi'a 82b, s.v. ve-atta Rabbi Yehudah*) as to whether humans are liable for behavior which is performed under full duress (*ones gamur*).
58. As we have already noted, metaphysical responsibility is not a necessary condition of moral responsibility; one is morally responsible, after all, for negligent omissions. Moreover, metaphysical responsibility may not even be a sufficient condition of moral responsibility. Even if the subject is metaphysically responsible for his action, this does not settle the question of whether

- his action was causally determined. Consequently, if one thinks causal determinism and moral responsibility are incompatible, then one will deny that metaphysical responsibility is a sufficient condition of moral responsibility.
59. It is worth noting that this argument applies to all cases where a bodily movement causes damages at a later time.
 60. *Kezot ha-Hoshen* (390) does claim that *Nimmukei Yosef*'s position is disputed by Tosafot in *Bava Kamma* 17b, s.v. *zarak*, who rule that if I shoot an arrow at your property, but a third person destroys your property before my arrow hits it, then the third party is liable even though my arrow would have destroyed the property in his absence (interestingly, *Kezot* prefers the view of *Nimmukei Yosef*). *Kezot*'s reasoning, however, for assuming that *Nimmukei Yosef* and Tosafot disagree is not necessarily compelling, as R. Shimon Shkop, Ahiezer, and Birkat Shemuel all point out (cited in *Miluei Hoshen*, ad loc.). Moreover, even if one is able to infer from *Nimmukei Yosef* that he disagrees with Tosafot, this disagreement would not flow from the former's commitment to EMiV, but rather from a further view (which he may have held) that the liability's incurrence, and not merely the commencement of the action, occurs when the agent throws the arrow. To put the same point differently, Tosafot's position is entirely compatible with EMiV. After all, Tosafot might hold that *were* my arrow to have destroyed your property, then my action would have occurred at the moment I threw the arrow, even while I would not have incurred liability until your property is destroyed (when the prohibited action description becomes true). Since, however, a third party got to your property before the arrow, the action description "I destroy your property" is never realized, and I never incur liability.
 61. There is good reason to think that Riva holds this assumption. Riva's statement in s.v. *kodem* includes the clause: "*de-vaddai lo haya be-da'ato lirdot kodem afiyah*." Now, R. Akiva Eiger in *Gilyon ha-Shas*, ad loc., asks why Riva requires one to have in mind not to remove the dough before it bakes (if one is to be *hayyav*). R. Yehezkel Abramsky (*Hazon Yehezkel*, ad loc.) answers that it is precisely because Riva holds that the prohibited action is baking bread, and not merely placing dough in a hot oven, that he holds that a condition of liability is the intention not to remove the dough prior to its baking. Thanks to R. Hillel Ruvel for alerting me to *Hazon Yehezkel*.
 62. See Rashi, *Kereitot* 19b, s.v. *mit'assek ba-halavim*, s.v. *mit'assek ba-arayot*, s.v. *tinnokot haynu mit'assek*, s.v. *ve-ta batrai*; Rashi, *Shabbat* 72b, s.v. *nitkavven le-hagbiah et ha-talush*; Rashi, *Sanhedrin* 62b, s.v. *she-bi-she'ar mizvot shagag be-lo mitkavven*, s.v. *ha-mit'assek be-halavim u-ba-arayot*.
 63. Austin, "A Plea for Excuses," in Austin, *Philosophical Papers* (London, 1970), 184-185.
 64. See Tosafot, *Kereitot* 19b, s.v. *lashon*; *Sanhedrin* 62b, s.v. *le-hagbiah*; *Shabbat* 72b, s.v. *nitkavven*. See also *Maginei Shlomoh*, *Shabbat* 72a, s.v. *nitkavven*; *Penei Yehoshua*, *Shabbat* 72b; *Dibberot Mosheh*: commentary on tractate *Shabbat*, volume 2, 60:1, p. 464.
 65. I will leave it to the curious reader to hypothesize why Rashi rejects this account of *mit'asek*.