Introduction

The Academy of Heaven

What happens in heaven? The question grabs the attention of everyone from ancient theologians to modern *New Yorker* cartoonists. It continues to fascinate because it touches on the timeless matter of truth. What is perfect? What are the secrets of the universe? What explains who we are and why we are here?

In the Bible, the familiar image of heaven is the divine throne. The book of Ezekiel describes the angels and heavenly creatures singing God’s praises amidst chariots, lightning, and fire. The Christian book of Revelation contains some twenty chapters drawing on these themes.

For their part, the rabbis of the Talmud frequently describe heaven with images of God’s throne and the sovereignty over all that is created. In one text, however, the Talmud presents a view of heaven without any precedent in the Bible, an image that is unthinkable, if not blasphemous, outside the rabbinic context. It opens as follows: (b.Bava Metzia 86a).

They were arguing in the Academy of Heaven:

Sit with these words for a moment. First, focus on the noun. In this talmudic passage, heaven consists not of angels, halos, lyres, pearly gates, or fluffy clouds, nor of chariots, smoke, lightning, or thunder. Heaven entails an academy—a yeshiva—a place of Torah study. Now the verb, “arguing.” This heaven is not a place of peace and tranquility, but of intellectual debate and argument.
What is being argued about in this academy? The mysteries of the cosmos? The answers to life’s true meaning? The secrets that emerge when theology meets physics? Is this where God’s ultimate purpose is revealed from the divine throne itself?

Not at all. The Talmud continues:

If the blotch on the skin preceded the white hair, he is impure.
If the white hair preceded the blotch on the skin, he is pure.

Skin? Hair? Blotches! Not only does the Academy of Heaven forgo any discussion of the cosmos, but it studies halakhah, which is nearly always translated as Jewish law (more on this term below). And not just any of Judaism’s laws, but some of the most obscure and technical issues found in the entire rabbinic canon. The question debated at this ultimate institution of higher learning relates to the laws of tzaraat, the skin malady outlined in Leviticus 13, and commonly translated as leprosy.

Here is the background: if the skin develops a white blotch and then the hairs inside the blotch turn white, the affected individual is diagnosed with tzaraat and deemed impure. But if the hair turns white first, and then the skin blotch appears, the infection is benign and the individual is pure.

But now a complication arises:

If there was doubt as to which came first . . .

Apparently, there is not only law and arguments in heaven but doubt as well. Yet surely any doubt must be fleeting. After all, we are studying law from the mouth of the Almighty. What doubts could possibly emerge?

The Holy One, blessed is He, says he is pure,
While the rest of the Academy of Heaven says he is impure.

What’s this? One might think that in a well-functioning heavenly academy, God would be sitting on a throne teaching authoritatively, while the angels sit in rapt attention below. But the Talmud’s Academy
of Heaven is different, for when it comes to debating the nuances of Jewish law, the angels have the audacity to challenge God, and God treats them as equals.

The Talmud then goes one step further. God is not even the final authority. That role is instead assigned to a talmudic rabbi who must be called up to the Academy to adjudicate.

They asked: “Who will judge this issue?”
It was decided that it would be Rabba b. Nachmani
As Rabba b. Nachmani said:
“For I have singular knowledge in the laws of leprosy . . .”
They sent a messenger to get him.

What we have seen here is surely not the only view of heaven in the Talmud, but it is a view of heaven that only the Talmud could fathom. And in a few short lines, the Talmud has told us quite a bit about how it understands both heaven and halakhah.

First, note how the natural state of halakhah is an argument about rules that have meaning regardless of whether they are used to decide a case. We can only presume that there are no mortals and certainly no lepers in heaven—and even if there were, God certainly knows whether blotch or hair came first. But the legal rule reflects something important beyond its applicability to a given case or controversy. That is why God and the angels debate these incredibly specific details.

The second point follows: law is something intrinsically worthy of study—so worthy and important that it is the central activity that takes place in heaven. To the Talmud, ultimate perfection is God and the angels arguing over the intricacies of halakhah.

What exactly is halakhah, then? It is almost universally translated as Jewish law, but in its literal sense, the word means something akin to “the path.” The common translation prevails because halakhah presents itself as a regulatory system that governs virtually every aspect of the life practiced by observant Jews for centuries. Take for example the influential sixteenth-century work known as the Shulhan Arukh, usually dubbed the Code of Jewish Law (literally a “set [or ready] table”). This compilation begins with the “Laws of Arising in the Morning” and
carries on right through to the “Laws of Retiring to Bed,” followed by the “Laws of Modesty” (sexual intimacy) and covers everything from the laws of childbirth to the laws of mourning. Elsewhere, this work instructs not only to eat matzah on Passover, but legislates when one should eat it (after nightfall but before midnight) how much one must eat (one, or maybe two, olive's worth), in what position one should be while eating it (reclining—but to the left) and the length of time one has in which to eat it (about ten minutes). The same is true for what to wear and when to wear it, how to do business and with whom—not to mention the laws of Shabbat (the Sabbath), Jewish holidays, prayers, blessings, marriage, divorce, inheritance, and thousands of other familiar and lesser known Jewish practices.

Committed Jews observe these laws by (among other activities) ceasing all travel and work-related activity before sundown on Friday evening, eating only kosher food, and maintaining separate sets of dishes for meat and milk-based foods. Each spring, Jews restock their kitchens with food that is especially kosher for Passover, and haul out two additional sets of milk and meat dishes reserved for the holiday. Whether measured in time, energy, or money, many of these practices come at great expense, yet Jews adhere to them because halakhah so demands. And though less common today, Jewish communities were once empowered to punish those who flagrantly violated halakhah's rules.

These are just some of the compelling reasons to translate halakhah as Jewish law. But the problem with this translation is that it both overestimates and underestimates the role of halakhah and how it functions.

On the overestimating side, the modern ear hears the term “law” and assumes halakhah is the Jewish version of American law, German law, or Uruguayan law: that is, a legal system established by an independent state with the authority to make and enforce its rules within the relevant territory. Halakhah, however, has not generally functioned in a specific country; it is the law of a people, not of a place, which operates outside of (and at cross-purposes with) the power structures of the state or principality where Jews have resided.

Furthermore, halakhah has rarely maintained the autonomy needed to enforce the full range of its regulatory regime or, putting it more
bluntly, to be solely “in charge” of Jewish life. Throughout their history, Jews have been subject to political and legal systems that compete with halakhah, and to which halakhah has often accommodated itself. This point will be explored in later chapters; for now, the key idea is that both halakhah’s authority to govern and its method of governance are quite different from how American, German, or Uruguayan law regulates those respective countries.

On the underestimating side, translating halakhah as Jewish law does not begin to grasp the role it plays in Jewish life. This point is best illustrated by another tale about the study of halakhah, this one very much on earth.

A few years ago, on Shabbat, a flyer was posted on the synagogue of an upper-middle-class Orthodox community outside New York City whose congregants tend to be doctors, lawyers, real-estate developers, businesspeople, and white-collar professionals. The flyer publicized a lecture to be delivered that afternoon by a guest rabbi visiting from another community. Most of the information provided was routine: the rabbi’s name, the time and place of the lecture, and the names of the sponsors who made it possible.

On any given weekend, similar announcements can be found in thousands of churches and community centers across the country. Two things however set this flyer apart. One was the topic of the lecture: “Bidding Competitively on Goods or Properties when Others are Previously Involved”—an issue vaguely related to what lawyer’s call tortious interference with contract. The other was the rabbi’s title: dean of an advanced institute of talmudic study specializing in business and commercial law. It is as if, say, the chair of Harvard Law School’s forum on corporate and financial regulation had been invited to share his recon-
titioners or clients. Further, while these particular congregants saw themselves as bound by halakhah, neither the topic nor the style of presentation was designed to set forth the rules directly relevant to common scenarios of religious observance. Yet on that Shabbat afternoon, nearly 150 laymen—none of whom was an academic specialist and few of whom would ever draft an agreement under Jewish law—came out to hear the rabbi guide them through the byways of the talmudic discussion.

Why? For the 150 people involved the answer is clear. They did not see this as a lecture on law, but rather as an opportunity to participate in a quintessentially spiritual act: the study of Torah. For as the Talmud sees it, the study of Torah, a study often centered on picayune particulars of halakhah, is one of the most pristine forms of divine worship. This activity of talmud Torah competes not only with other spiritual pursuits such as prayer and good works, and not only with other intellectual interests like studying philosophy, art, or science, but with virtually every other human activity—up to and including the basic human need of earning a living!

The content of that lecture on Shabbat afternoon dealt with the talmudic rules of contract and property law—many of them indeed similar to what is taught in American law schools. But to those present, the deeper meaning of the discussion could not have been farther from the concerns of business or commercial life. Following the example of God and the angels in the Academy of Heaven, they were engaged in a devotional act of religious worship, connecting to God through debating and analyzing the multifarious legal details contained within the divine Torah.

Nor is studying or sweating over the minutiae of halakhic discussion unique to one New York City suburb. Every day, thousands of men, and increasingly women, around the globe gather in synagogues and office parks, sit in trains or buses, or log in online, to study a double-sided page of Talmud. The program, known as daf yomi (a page a day), takes seven-and-a-half years to complete the entire Talmud. In August, 2012, more than 90,000 people crammed into MetLife Stadium—home to the National Football League’s two New York City-based teams—to mark the completion of another cycle. (By way of comparison, the stadium held
82,500 people for Superbowl XLIII.) The gathering, however, was neither a sports game, a rock concert, a political rally, or anything remotely akin to what usually draws 90,000 Americans to an event space. Improbable as it sounds, the occasion was the joyous celebration of an enormous and enormously technical legal work of more than 5,400 pages studied each day as a religiously prescribed “hobby.”

Roughly 1,600 years ago, a Talmudic sage predicted that “in the future, the stadiums of the Gentiles will be used by Jewish leaders to teach Torah in public” (b.Megillah 6a). For the vast majority of intervening epochs, this declaration could only have been understood as a messianic hope—or a tone-deaf display of delusional hubris. But by 2012, the commitment to Torah study—the very opposite of popular entertainment—could fill one of America’s massive colosseums to celebrate the Torah in public.

Though packed stadiums catch our attention, the unique status of Jewish law is even more evident in life’s quieter moments. When a parent is critically ill and the child wants to beseech God for a cure, Torah study is an appropriate response. Should the parent pass on, Torah study is a time-honored way to commemorate the departed. The same is true of joyous occasions—weddings, bar mitzvahs, newborn celebrations, graduations, and birthdays—are all commonly punctuated with words of Torah.

It should be clear now why the term “Jewish law” fails to do justice to halakhah. Imagine substituting American law for Jewish law in any of the descriptions above. I have spent a decade and a half among accomplished legal scholars, and am fortunate to know very successful lawyers. Yet I have never been to a stadium full of people celebrating the Constitution, much less the Tax Code; have never heard a law professor address a church group on the details of contract law; and have never seen a parent faced with the joy of new life, or a child with the tragedy of a parent’s death, whip out the Uniform Commercial Code in search of inspiration or insight. By contrast, it is hard to imagine any private, public, social, religious, or institutional setting where it would not be appropriate to pull out a book and expound on some finer point of Jewish law.

As for the heavens, the typical American view was summed up by Grant Gilmore, one of the twentieth century’s best-known law
professors (and incidentally, co-author of the Uniform Commercial Code). Gilmore ends his classic book on American legal history as follows:

The better the society, the less law there will be. In heaven there will be no law. . . . The worse the society, the more law there will be. In hell there will be nothing but law, and due process will be meticulously observed.1

What for the Talmud is heaven, for Gilmore is hell. The difference could not be starker.

So while halakhah is undoubtedly law, it is also something else. What makes identifying that additional quality difficult is that it is not well-theorized in Jewish sources; nor are there many useful parallels in Western systems. This book will argue that halakhah is not only a body of regulations, but a way, a path of thinking, being, and knowing. Over the course of several chapters, we will see how the rabbis use concepts forged in the regulatory framework to do the work other societies assign to philosophy, political theory, theology, and ethics, and even to art, drama, and literature. While halakhah's regulatory ideals are realized through observance of its laws, access to the broader social and religious aims is gained through its study, through talmud Torah.

But what happens to law when it is also a foundation for social and theological thought? And what does it mean for speculative reason to be carried out in legal categories? How are legal texts transformed when recited as prayers or read for religious inspiration? How are spiritual teachings transformed when encoded into law? What results when the study of law may take precedence over its practice? And what does it mean for legal analysis to connect man to God? The ensuing chapters constitute an attempt to answer these questions.

Conceptual Introduction to Halakhah

As an introduction, this book is aimed at readers who might not know much about either Jewish law or the state of academic scholarship on the subject. As such, I have considerably simplified halakhic discussions
and attempted to provide the necessary background to follow the argument. Similarly, I have kept overt references to academic scholarship and notations rather sparse, even on the many occasions that I have profited from the thinking of other scholars or when the matter is more nuanced than space allows. The same goes for the relatively modest number of endnotes. Instead, I have included a topically organized selection of Further Readings at the end of the book designed to point the interested reader to additional resources on the relevant topics.

This book offers a conceptual introduction to halakhah. First, it is conceptual in that it is not doctrinal: that is, it is not an effort to present and explain correct halakhic practice. It does not catalogue or clarify the laws of Shabbat or kashrut (kosher laws), or weigh in on current controversies regarding their contemporary application. It is not so much a book of halakhah as a book about how to think of halakhah.

Second, it is conceptual in that it aims to define the basic parameters of the concept of halakhah. The core argument is that halakhah exists on a spectrum or continuum. At one pole, it functions similarly to how law is classically understood—a system of rules designed to govern human behavior. I refer to this as the conventional, or halakhah-as-regulation view. But the book’s central concern is the opposing pole, which is far more difficult to describe. Here, halakhah functions as Torah, as an object of Torah study, and even as literature—with “Torah” used as a catchall phrase to refer to religious teachings and instruction that are broader than what is usually conveyed through the term “law.”

The metaphor of opposing poles also suggests that each side exerts a magnetic pull on the range of halakhah as a whole. While there is an undeniable appeal to casting halakhah as law-like rules of regulatory conduct, the countervailing pressures of Torah study pull in the opposite direction and transform concrete rules of behavior into wellsprings of philosophical and religious thought. In a sense, we can think of the two poles as establishing the goalposts, while the “game” of halakhah, and indeed its lived history, plays out on the field between them.

Halakhah-as-Torah is surely the less intuitive approach, and I place more emphasis upon it precisely because it is in greater need of
explaining. For while there is often disagreement as to how to apply rules in a given scenario, from a conceptual perspective the idea of halakhah-as-regulation easily corresponds to common understandings of law and its purpose. By contrast, when legal ideas are pursued in the service of broader social and cultural goals, the paradigm of “law” becomes decreasingly useful, and more elaboration is required.

Still, to be clear, I do not argue that every individual mishnah, or every line in the Talmud, or subsequent work of halakhah adheres to the thesis of “halakhah as Torah,” in its pure form. There is little doubt that this approach is more dominant in later layers of the Talmud than earlier ones, and that in the medieval period it is more characteristic of northern Europe than North Africa, or that as modernity approaches it is more typical of the Lithuanian school than of either hasidic masters or the worldview of Sephardic halakhists. Rather, the claim is that halakhic discourse moves dialectically between its two poles, and that even when halakhah does tend toward the conventional view, the force of the opposing pole can be detected in the background. The opening chapters elaborate on the idea of halakhah-as-Torah as manifested in the Talmud. Later chapters show how even as the thrust of halakhic analysis moves towards the halakhah-as-law pole, the pull of halakhah-as-Torah continues to register.

Conceptual and Historical Methodology

Lastly, this book is conceptual in the sense that it is neither a historical survey nor a work of history. At the basic level, it does not document the central times, personalities, or places of Jewish law; the degree to which legal doctrines change over time; what were the causes or who were agents of such change; how communities differed from each other or interacted with non-Jewish society; or (with the exception of the final chapter and the Conclusion), even the degree to which Jews have observed the laws of the Talmud and its interpreters.

The purpose of this book is not to document how Jewish law was lived.
Likewise, I have made scant reference to such central figures as the eleventh-century commentator Rashi, arguably the most important commentator on the Talmud, nor devoted much discussion to Sephardic halakhists who came to prominence after the sixteenth century, or to classic works of the nineteenth century, such as R. Israel Meir Kagan's Mishnah Berurah or R. Yechiel M. Epstein's Arukh ha-Shulhan. To state the obvious, these omissions are not a comment on the centrality of these works or figures to the halakhic tradition as a whole. The specific persons or historical examples discussed were chosen with one central criteria in mind: to show, in a relatively concise book, how the concepts of halakhah-as-Torah and halakhah-as-regulation played out at critical junctures in the development of halakhic thought.

More significantly, this book approaches halakhah and its history from a legal and phenomenological perspective, rather than the historical one that dominates academic treatment of the subject. The difference between these perspectives was best expressed by the great English legal historian, Frederic W. Maitland (1850–1906), who asked why the English—who had been teaching the history of Roman law in their universities since the High Middle Ages, and who were enthusiastic historians of other legal systems—had not written the history of their own law.

In an essay titled, “Why the History of the English Law Is Not Written,” Maitland answers this question by noting that lawyers and historians have different views on what counts as evidence or argument. Historians want to understand the past qua past, whereas lawyers always read the past as continuous with the precedents and principles of the present. Maitland cites the example of the thirteenth-century Statute of Merton. To the historian, the meaning of that statute is determined by examining the prevailing political and economic factors and considerations that caused the law to be enacted. For the lawyer, the meaning of the statute depends less on events of the thirteenth century and more about how eminent later judges read and applied it. Where the historian finds records, personal correspondence, and other evidence from the thirteenth century highly probative, these are of limited
use to a lawyer who must craft legal arguments. In Maitland’s memorable phrasing:

But is it really the statute of 1236 that [the lawyer] wants to know? No, it is the ultimate result of the interpretations set on the statute by the judges of twenty generations. . . . That process by which old principles and old phrases are charged with new content is from the lawyer’s point of view an evolution of the true intent and meaning of the old law; from the historian’s point of view it is almost of necessity a process of perversion and misunderstanding. Thus we are tempted to mix up two different logics, the logic of authority and the logic of evidence.

In the latter half of the twentieth century, legal theorists pointed to a similar distinction by contrasting “internal” versus “external” viewpoints of the law. H.L.A. Hart and Ronald Dworkin, two influential scholars who conducted a decades-long debate regarding the central issues of legal theory, nevertheless agreed that the goal of jurisprudence was to make sense of the legal and interpretive practices native to the law itself, commonly called the internal point of view. This perspective is, at the very least, committed to taking the law’s categories seriously and offers an account that lives within the normative boundaries established by the legal system. The internal perspective is generally contrasted with approaches that view legal practice from the vantage point of an observer standing outside of it. In Maitland’s case the example was history; for both Hart and Dworkin, the eschewed disciplines were sociology, economics, and political science.3

The issue identified by Maitland is central to the study of Talmud and halakhah, which like most legal systems consciously reads the texts of different generations and geographies together. In academic circles, however, the study of halakhah and rabbinic texts has been pursued overwhelmingly from the historical or external perspective. The central concerns have revolved around questions such as how the texts came about, who wrote them, and under what social and political conditions, how the texts were influenced by the surrounding culture,
what they meant when written, and how their interpretation changed over time.

This external perspective leans towards what, to borrow a phrase from movie-making, we might call the “still-shot” approach to the study of halakhah. The assumption is that to understand any phrase in the Talmud, we must identify when it was written and interpret it in light of who wrote it and what was going on in the world at that time. Each moment, or camera shot, is frozen so as to fix the historical setting and to draw comparisons and contrasts to what came before and after. For a historian, one of the greatest sins is to read the texts of one era through the ideas and assumptions of another. In its more extreme forms, the external perspective insists on such a tight separation between each frame so as to deny that one can say anything meaningful about the concept of halakhah at all. At most, one can study what successive generations of halakhists (along with their supporters and detractors) understood as halakhah.

By contrast, lawyers and theorists working from the internal point of view assume that the texts of halakhah add up to system that can be engaged as a self-standing entity. This form of theorizing tends to view the tradition as a whole or, to extend the metaphor, analyzes the movie as a unit rather than as an aggregate of stills. This does not mean that the entirety of the law is an undifferentiated mass. Just as movies are divisible into acts and scenes, each with its own with mood, lighting, and score, so the legal corpus, or in this case the halakhah, can be divided into periods and movements governed by different assumptions. Still, where the historian aims to uncover in each period what they meant, “they” being the individual halakhist under consideration, the legal theorist aims to uncover what it means, “it” being the halakhah and the interpretive practices that construct it.4

My goal here is not so much to defend my method as to state it clearly. This book is largely an attempt to explain halakhah as experienced from within (or at least the view from within one room) the halakhic castle to an audience standing outside it. Thus, while knowledge of the historical and cultural background is at times central to the thesis, the goal is not to unearth the history of halakhah but to offer a constructive
account of the interpretive and conceptual practices presented within it. In this way, this book departs from the dominant paradigm of academic writing on Talmud and halakhah, and follows the examples of works on general legal theory like Hart’s *The Concept of Law* and Dworkin’s *Law’s Empire*, as well as Alasdair MacIntyre’s investigation of competing philosophical traditions in *Whose Justice? Which Rationality?* Halakhah, no less than Western jurisprudence, deserves an informed articulation of its ambient theory.