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Pragmatism and Jewish Thought: Eliezer Berkovits's Philosophy of Halakhic Fallibility

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Abstract

In classical American pragmatism, fallibilism refers to the conception of truth as an ongoing process of improving human knowledge that is nevertheless susceptible to error. This paper traces appearances of fallibilism in Jewish thought in general, and particularly in the halakhic thought of Eliezer Berkovits. Berkovits recognizes the human condition's persistent mutability, which he sees as characterizing the ongoing effort to interpret and apply halakhah in shifting historical and social contexts as *Torat Hayyim*. In the conclusion of the article, broader questions and observations are raised regarding Jewish tradition, fallibility, and modernity, and the interaction between Judaism and pragmatism in the history of ideas.

Keywords

American pragmatism – fallibilism – Jewish thought – Eliezer Berkovits – halakhah – normative change – *sevarah* – decision-making

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1 Introduction

1.1 *Jewish Thought and American Pragmatism: a Literature Review*

Harry Austryn Wolfson argued as early as 1911 that deep connections obtain between Jewish thought and classical American pragmatism (CAP).¹ After comparing what he considers to be the “Hellenized” thought of Maimonides and the “empirical-pragmatic” thought of Halevi, Wolfson concluded that “contemporary thought, the whole pragmatic movement, may find its visions foreshadowed in Halevi’s discussions.”² For many years, intersections between Jewish thought and CAP received relatively little scholarly attention,³ but recent decades have witnessed scholars acknowledging the profound significance of pragmatic concepts and ideas in Jewish thought.⁴ Notable examinations of philosophical links between Jewish thought and CAP have been presented by Peter Ochs,⁵ Eliezer Schweid,⁶ Mel Scult,⁷ Robert B. Gibbs,⁸ Menachem Fisch,⁹

1 Harry A. Wolfson, “Maimonides and Halevi: A Study in Typical Jewish Attitudes towards Greek Philosophy in the Middle Ages,” *Jewish Quarterly Review* 2 (1911–1912): 297–337.

2 Wolfson, “Maimonides and Halevi,” 337. Although Wolfson later revised his position on Maimonides, his description of Halevi makes much sense. See Warren Zev Harvey, “Hebraism and Western Philosophy in H. A. Wolfson’s Theory of History,” *Immanuel* 14 (1982): 77–85.

3 A plausible reason for this neglect is that for almost half a century, CAP suffered from the misconception that pragmatism is anti-religious, anti-foundationalist and “metaphysics-free,” a misconception perpetuated by the intellectual influence of Richard Rorty. See his *Consequences of Pragmatism (Essays: 1972–1980)* (Minneapolis: University of Minnesota Press, 2001), viii–xlvii.

4 Paul Mendes-Flohr wrote in this manner about Mordecai M. Kaplan’s pragmatic attitude, which characterizes the religious perspective of many (or even most) modern Jews, liberal and orthodox alike. See Mendes-Flohr’s *Progress and Its Discontents* [Hebrew], trans. Debby Ayalon (Tel-Aviv: Am-Oved, 2010), 38.

5 Peter Ochs, *Peirce, Pragmatism, and the Logic of Scripture* (Cambridge: Cambridge University Press, 1998), 290–325. Here and in many other works, some of which I reference later, Ochs articulates the interpretive halakhic process from a Peircian logical perspective.

6 Eliezer Schweid, *A History of Modern Religious Philosophy*, part 4 (Tel Aviv: Am ‘Oved, 2006), 363–386 (on Rabbi Mordecai M. Kaplan) and 109–123 (on Rabbi Ḥayyim Hirschensohn).

7 Mel Scult, *The Radical American Judaism of Mordecai M. Kaplan* (Bloomington: Indiana University Press, 2013), 66–87. Scult investigates various connections between Kaplan and James and Dewey.

8 Robert B. Gibbs, *Why Ethics? Signs of Responsibilities* (New Jersey: Princeton University Press, 2001), 225–257. Gibbs is utilizing Peirce’s semiotic theory of signs as the basis for an ethical theory.

9 See Menachem Fisch, *Rational Rabbis: Science and Talmudic Culture* (Bloomington: Indiana University Press, 1997), and the collection *Menachem Fisch: The Rationality of Religious Dispute*, ed. Hava Tirosh-Samuelsen and Aaron Hughes, Library of Contemporary Living Philosophers 18 (Leiden: Brill 2016).

Hannah E. Hashkes,¹⁰ Elliot Klayman,¹¹ Michael Baris,¹² Shaul Magid,¹³ and others. Here, I aim to suggest a new account of these intersections. As the discussion proceeds, it will become clear that many other scholars of Jewish thought have implicitly contributed to the investigation of the links between Jewish thought and CAP.¹⁴

1.2 What Is “Pragmatism”?

Analysis of the relationship between CAP and Jewish thought requires a working definition of the term “pragmatism.” While the fathers of CAP, C. S. Peirce, William James and John Dewey (hereafter referred to collectively as the CAPS),¹⁵ had various philosophical interests,¹⁶ the nucleus of their pragmatism can be located in a constellation of the following concepts:¹⁷

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- 10 Hannah E. Hashkes, “Studying Torah as a Reality Check: A Close Reading of a *Midrash*,” *Journal of Jewish Thought and Philosophy* 16 (2008): 149–193; idem, *Rabbinic Discourse as a System of Knowledge* (Leiden: Brill, 2015). Hashkes utilizes a Peircian pragmatic perspective (as well as analytic and continental philosophy) to clarify elementary concepts in Jewish tradition that relate to halakhic discourse.
- 11 Elliot Klayman, “Shades of ‘Pragmatism’ in Halakhah: A Model for Legal Reform?,” *Journal of Church and State* 48 (2006): 623–658. Klayman presents some pragmatic aspects of halakhah, suggesting that it may be a vital source of inspiration for the advancement of American civil law.
- 12 Michael Baris, “Vision versus Verity: Doubt and Skepticism in Maimonides’ Jurisprudence” [Hebrew] (PhD diss., Bar-Ilan University, 2008). Baris analyzes Maimonides’s halakhic thought and defends his proto-pragmatic legal approach.
- 13 Shaul Magid, “Pragmatism and Piety: The American Spiritual and Philosophical Roots of Jewish Renewal,” in *Kabbala and Modernity: Interpretations, Transformations, Adaptations*, ed. Boaz Huss, Marco Pasi, and Kocku Von Stukrad (Leiden: Brill, 2010), 357–358. Magid traces connections between Zalman Shachter-Shalomi and William James’s metaphysical and pluralistic approaches.
- 14 I would nevertheless like to emphasize that discerning pragmatic elements in Jewish tradition does not exclude the existence of other tendencies or philosophical schools in it.
- 15 As Horace S. Thayer wrote, “The individual thinkers who contributed most to the formation and articulation of pragmatism, Peirce, James, and Dewey, were the three greatest philosophers America has yet produced.” *Meaning and Action: A Critical History of Pragmatism* (Indianapolis: Bobbs-Merrill, 1968), 3.
- 16 On the plurality of philosophical interests in CAP and neo-pragmatism, see Cornel West, *The American Evasion of Philosophy: A Genealogy of Pragmatism* (Madison: University of Wisconsin Press, 1989).
- 17 This is not to exclude other common denominators of CAP, such as the primacy of praxis, meliorism, oriented pluralism, continuity, centrality of the social, and continuity between mind and body, and between individual and society. See, for instance, Israel Scheffler, *Four Pragmatists: A Critical Introduction to Peirce, James, Mead and Dewey* (London: Humanities Press, 1974), 8; John J. Stuhr, *Classical American Philosophy: Essential Readings and Interpretive Essays* (New York: Oxford University Press, 1987), 3–12; Michal Alberstein,

- (1) A rejection of Cartesian radical foundationalism¹⁸ and radical skepticism in favor of a reasonable middle way, or “critical common sensism.”
- (2) The “Pragmatic Maxim,” or the appreciation of metaphysics according to its earthly ethical consequences.¹⁹
- (3) Fallibilism. In the words of Hilary Putnam: “Pragmatists hold that there is never a metaphysical guarantee ... that such-and-such a belief will never need revision.”²⁰

This paper will focus on the third strand of thought, which was introduced by Peirce,²¹ and its reflection in the work of Eliezer Berkovits (1908–1992), a prominent rabbinic thinker in modern Orthodox Judaism.²² Naturally, works by re-

“Pragmatism,” *Encyclopedia of Law and Society: American and Global Perspectives*, ed. D. Clark (California: Sage, 2007), 1169–1170.

- 18 “Radical foundationalism” is not a tautology, since critiques of foundationalism (e.g., those made by D. Z. Philips) tend to disregard that constructive human knowledge requires at least a certain basis. See Nancy Frankenberry, *Religion and Radical Empiricism* (New York: SUNY Press, 1987), 4–7. Hence the philosophical need for a distinction between moderate and radical foundationalism. See ch. 3 of Nadav Berman Shifman, “20th Century Jewish Thought and Classical American Pragmatism: New Perspectives on Hayyim Hirschensohn, Mordecai M. Kaplan, and Eliezer Berkovits” PhD diss. (Hebrew University, 2018).
- 19 See Christopher Hookway, *Peirce* (London: Routledge & Kegan Paul, 1985), 234–261. For an analysis of the pragmatic maxim in the Jewish religious context, see Berman S., “Jewish Thought and Pragmatism.”
- 20 Hilary Putnam, *Words and Life*, ed. James Conant (Cambridge, MA: Harvard University Press 1995), 152. The following observation by Putnam is instructive: “That one can be both fallibilistic and antiskeptical is perhaps *the* unique insight of American pragmatism” (ibid., italics in original). See also Richard J. Bernstein, *Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983), 16–20, and Sami Pihlström, *Pragmatist Metaphysics: An Essay on the Ethical Grounds of Ontology* (London: Continuum, 2009).
- 21 His collected writings were published by Harvard University Press (thematically arranged), and by Indiana University Press (chronologically arranged). Here I will refer to the former: *Collected Papers of Charles Sanders Peirce*, ed. Charles Hartshorne and Paul Weiss (vols. 1–6) and Arthur W. Burks (vols. 7–8) (Cambridge, MA: Harvard University Press, 1931–1958), henceforth *CP*. Citations indicate volume and paragraph number, for example *CP* 5.264.
- 22 In this paper, I do not presuppose any a priori or monolithic phenomenon behind the signifier “Judaism.” However, I do believe that any religion and culture include voices that are comparatively more essential to its common characterization. In this I follow Daniel Boyarin, who disagreed with those who view “each cultural formation as so heterogeneous that there are no important differences between cultures.” *Carnal Israel: Reading Sex in Talmudic Culture* (Berkeley: University of California Press, 1993), 22.

lated rabbis and thinkers (such as rabbis Moshe Shmuel Glasner and Yaakov Yehi'el Weinberg, whom I reference below) that demonstrate conceptual affinity with CAP, but not necessarily direct knowledge of it, may provide material for similar investigations.

The encounter between Judaism and CAP raises significant questions regarding the place of pragmatism and fallibilism in Jewish tradition, their intersections in intellectual history, and how they inform the more specific comparison of Berkovits' thought and CAP. I will treat these questions here in some detail, since, according to my findings, they have not been extensively considered in existing research. Although the basic aim of the present study is not historical, but conceptual, I will briefly outline the particular biographical acquaintance of Berkovits with CAP. My main interest will be the ways in which pragmatism, and more specifically fallibilism, are reflected in Berkovits' philosophy of halakhah, which was his central field of interest (although his contribution to theology is notable as well²³). Fallibilism will be demonstrated here as a vital feature in halakhic decision-making that enables new deliberations within the tradition to address changes in individual and social circumstances appropriately, which is to say, neither dogmatically nor as baseless or contingent.

I assume that Berkovits, among other modern Jewish thinkers, was acquainted with CAP. At the same time, I assume that pragmatic fallibilism is possibly found in early Jewish thought.²⁴ The analytic trajectory of this paper extends from CAP to modern Jewish tradition, so that Jewish texts are analyzed using philosophical-pragmatic concepts. However, in the broader interdisciplinary perspective, I assume that Berkovits' encounter with CAP led him to reclaim and emphasize the pragmatic strand inherent in rabbinic thought.

Before sketching the origin and nature of fallibilism in CAP, I would like to clarify that pragmatists in general, and Peirce in particular, were less interested in fallibilism as a means for verifying theories or truth claims, than as a concept for describing the elementary human inability to possess perfect knowledge. I will therefore not delve here into the place of fallibilism within epistemological disputes, and in this regard, I do not presume to make a strong claim whether pragmatic fallibilism derives from or establishes a correspondence theory of truth,²⁵ a coherence theory of truth,²⁶ or any other theory of validity.

23 Compare my paper "The Rejection of Radical Foundationalism and Skepticism: Pragmatic Belief in God in Eliezer Berkovits' Thought" [Hebrew] (forthcoming).

24 This assumes that there is (or at least, there may be) a pan-human pragmatic realm of thought, that is reflected in Talmudic writings.

25 The correspondence theory of truth evaluates the validity of arguments, or even their truth status, according to how well they match empiric data and human experience.

26 The coherence theory of truth analyzes arguments according to how well they coalesce and the degree to which they support each other. For further references to philosophical

Such an investigation serves certain epistemological aims, but is less important for the present context. This is mainly because the practice of halakhic discourse, similar to the premises of the CAPS, was based on naïve realism, and thus assumed a basic realist distinction between self and reality on the one hand, and a basic ability to know the world on the other. Ultimately, this distinguishes it from hyperbolic Cartesian doubt. In other words, halakhic fallibility as it will be examined here distinguishes between epistemology and ontology, and at the same time it does not doubt that there is any correspondence between human language and the external world.²⁷ My interest is thus in fallibilism as a broader philosophical tool for understanding halakhic deliberation and supporting institutional change, rather than in fallibilism as a response to theoretical Cartesian doubt.

The body of this paper is divided into four sections. Section 2, “Fallibilism in Classical American Pragmatism,” will clarify the concept of pragmatic fallibilism within its original philosophical context. Section 3, “Fallibilism and Jewish Thought,” will provide a bird-eye’s view of the place of fallibilism in early Jewish tradition. Section 4, “Berkovits and Pragmatic Fallibilism,” will justify our comparative examination of Berkovits and pragmatism and will examine the role of fallibilism in his halakhic thought. Section 5, “Pragmatic Fallibilism and Modern Jewish Thought,” will suggest some conclusions about Berkovits’ thought and offer a critical perspective on the marginalization of pragmatic halakhic thought in modernity.

2 Fallibilism in Classical American Pragmatism

2.1 *Cartesian Radical Foundationalism and Its Pragmatist Critique*

Classical pragmatist fallibilism can be traced back through the history of philosophy. The Platonic idealistic tradition (relying on Plato’s theory of ideas), from which Western philosophy originated, conceived truth as unchanging and eternal. Descartes, the “father of modern (Western) philosophy,” added to

literature on these truth tests (correspondence, coherence) and an analysis of their appearance in Jewish thought, see Avinoam Rosenak, “Truth Tests, Educational Philosophy, and Five Models of the Philosophy of Jewish Law,” *HUCA* 78 (2009): 149–182, esp. 152–164.

²⁷ This is the intuition that brought Susan Haack (among others) to reconstruct a philosophical ground for common sense. She suggests an epistemological *modus vivendi* she terms “foundherentism” (foundationalism plus coherentism), which aims to validate arguments on the aggregate basis of their being elementary and mutually supportive. See *Evidence and Inquiry: Towards Reconstruction in Epistemology* (Oxford: Blackwell, 1993), esp. 73–94, 203–222.

it a radical-foundationalist emphasis in his *Meditations*.²⁸ Foundationalism, in short, is the argument that human knowledge in general, and philosophical propositions in particular, require absolute certainty as a condition or warrant for beliefs.²⁹ Descartes created what Richard J. Bernstein coined “Cartesian anxiety,” or the modern dichotomy between foundationalism and relativism.³⁰ In a more overt religious context,³¹ the idea of Papal Infallibility, announced by the Vatican in 1869–1870, took this approach to the extreme, arguing that Pius IX’s proclamations on dogma are free of errors.³² This radical Catholic-Christian move will be significant for the appreciation of Ultra-Orthodox Jewish attitudes when we compare Berkovits’ fallibilistic stance with more stringent halakhic approaches (see section 5.2 below).

CAPS departed from this path in favor of an evolutionary-dynamic mode of thought anchored, in terms of in Greek philosophy, in Heraclitus, preferring his motto “no person ever steps in the same river twice” to Parmenides’s “for being is, but nothing is not.” In this manner, one of the main arguments offered by the CAPS against Cartesian radical foundationalism, and implicitly

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- 28 René Descartes, *Meditations on First Philosophy*, trans. John Cottingham (Cambridge: Cambridge University Press, 1996); see mainly the first two meditations (1–23). On Cartesianism as constitutive of the dichotomous intellectual framework in modernity, see Hannah Arendt, *The Human Condition* (Chicago: University of Chicago Press, 1958), 273–289, and Bernstein, *Beyond Objectivism*, 115–118. Bernstein highlights some of the complexities in Descartes, a religious philosopher who later became a herald of secular modernism. This ambivalence may explain the great appeal Descartes had for religious and secular successors alike.
- 29 In opposition to Descartes, St. Augustine held that the phenomenon of error (i.e., fallibility) proves the reality of human existence. *The City of God against the Pagans*, vol. 3, trans. D. S. Wiesen, Loeb Classical Library (Cambridge, MA: Harvard University Press, 1968), book 11, at 533.
- 30 See Bernstein, *Beyond Objectivism*, 1–16. This Cartesian skeptical current has wider consequences. On Cartesian anxiety as caused by a loss of interhuman basic trust, and as increasing it, see Peter Ochs, “Scriptural Pragmatism: Jewish Philosophy’s Concept of Truth,” *International Philosophical Quarterly* 26 (1986): 131–135.
- 31 Descartes’s project was inherently religious, but it aimed to prove its validity using philosophical language and tools.
- 32 On the religious scope of papal infallibility, see Patrick J. Toner, “Infallibility,” *The Catholic Encyclopedia*, vol. 7 (New York: Encyclopedia Press, 1910), 790–800. While the current pontiff, Pope Francis, notably embraces fallibility, earlier popes were more loyal to the doctrine of papal infallibility. See, for example, Richard Shusterman’s pragmatist critique of the 2005 papal address by Cardinal Joseph Ratzinger (Benedictus XVI) as a fixed doctrine of faith, which leaves no room for development and change. Shusterman, “Fallibilism and Faith,” *Common Knowledge* 13 (2007): 379–384.

also against the idea of papal infallibility,³³ was the pragmatic conception of truth as a progressive process of doxastic improvement that is nevertheless susceptible to human mistakes.

Fallibilism is a protest against the Cartesian pretension of achieving absolute, fully certain knowledge, including knowledge of whether God and the world exist.³⁴ It was introduced by the pragmatists against the background of the Darwinist evolutionary paradigm, which interpreted the origin and development of biological species as evolving, adapting, and improving.³⁵ However, beyond the biological-physical context, the *Zeitgeist* of spiritual evolution³⁶ advocated by modern German idealism nourished the emergence of the concept of fallibilism.³⁷

Fallibilism pertains to the corrigible process³⁸ of knowing, and to knowledge as the development and accumulation of human thought and experience, which depends upon the changing conditions of life.³⁹ It applies not only to the human knower and the knowing process (epistemological fallibilism), but also to that which is known, i.e., the external world (ontological fallibility/fallibilism).⁴⁰ In this sense, fallibilism is not only an epistemological doctrine

33 On the role of papal infallibility in Peirce's coining of the term "fallibilism," see Jaime Nubiola, "C. S. Peirce and G. M. Searle: The Hoax of Infallibilism," *Cognitio* 9 (2008): 73–84. Peirce suggests a distinction between "practical infallibility" and "absolute infallibility," but the basic reservation about infallibility remains.

34 Descartes, *Meditations*, 12–15, 37–43, 48–49.

35 See Charles Darwin, *The Origin of Species* (New York: D. Appleton, 1910), 102. On evolution theory as constitutive of CAP, see Philip Wiener, *Evolution and the Founders of Pragmatism* (Cambridge, MA: Harvard University Press, 1949).

36 G. W. F. Hegel is viewed as the main contributor to the formulation of the modern dynamist-evolutionist worldview. See his *Phenomenology of Spirit*, trans. A. V. Miller (Oxford: Oxford University Press, 1977), e.g., 65–66.

37 For an argument that Peirce inherited his evolutionist thought indirectly from Lurianic Kabbalah by the mediation of his father, Benjamin Peirce, see Paul W. Franks, "Peirce's 'Schelling-Fashioned Idealism' and 'the Monstrous Mysticism of the East,'" *British Journal for the History of Philosophy* 23 (2015): 732–755.

38 Isaac Levi suggested the adoption of the term "corrigibilism" (rather than fallibilism), which reflects a stronger belief in the generally positive direction of scientific investigation. *Pragmatism and Inquiry: Selected Essays* (Oxford: Oxford University Press, 2012), 4–18.

39 In a wider scientific context, fallibilism is affiliated with the concept of "trial and error."

40 These three elements—the knower, the act of knowing, and the known—are also a source of some ambiguity regarding fallibilism. As we shall see below (sections 4.2.1–4), this trivalence also finds expression in the halakhic case.

concerning currently justified beliefs, but an ontological doctrine concerning the nature of truth and reality as a whole.⁴¹

CAPS held a position of meliorism, or constrained optimism,⁴² regarding the world and humanity, generally believing in the advancement of human knowledge and rejecting pessimistic determinism.⁴³ Nevertheless, they accepted the possibility that human understanding of the world might regress or fail. The fallibilistic conception of truth is paradoxical,⁴⁴ since it comprehends truth as a process of pursuing truth itself. It is thus a philosophical mode of addressing the tension between striving for a trans-subjective truth and acknowledging that human formulations of such issues are by definition partial and imperfect.

2.2 *Pragmatic Fallibilism according to Peirce*

Peirce argued against the Cartesian conception of truth as perfect, static, and eternal,⁴⁵ formulating fallibilism in the context of his unique preoccupation with the philosophy of science.⁴⁶ In what follows, I focus on his conception of human knowledge as dynamic and fallible instead of examining the ways in which he understood science in general, or evolution in particular.⁴⁷ Peirce wrote that there are three things human beings cannot achieve: “absolute certainty, absolute exactitude, and absolute universality.”⁴⁸ Any knowledge we have is by definition fallible and partial, even without taking the dynamism of nature itself into account: “For fallibilism is the doctrine that our knowledge is never absolute but always swims, as it were, in a continuum of uncertainty and of indeterminacy. Now the doctrine of continuity is that *all things* so swim in continua.”⁴⁹

41 William James took this to an extreme in his *A Pluralistic Universe* (London: Longmans, Green, 1909), in which he rejected any search for Archimedean point.

42 James rejected blind optimism in favor of meliorism, which he regarded as a more realistic approach, and as open to the possibility of error (*Pragmatism*, 179–186).

43 See Wiener, *Evolution*, 200–202.

44 See Peter Skagestad, “Fallibilism and Truth: A Reply to Eugene Schlossberger,” *Transactions of the Charles S. Peirce Society* 20 (1984): 50–55; Richard J. Bernstein, *The Pragmatic Turn* (Cambridge: Polity, 2010), 36.

45 And against some “religionists” who objected to the idea of “ongoing growth” (see Peirce’s “Science and Continuity,” *CP* 1.62). Peirce’s opinion on the development of knowledge also opposed that of some logicians who were affiliated with the “religious seminarists” (“Lessons from the History of Philosophy,” *CP* 1.15–141, esp. 1.40).

46 See Peirce, “Some Consequences of Four Incapacities,” *CP* 5.264–265, and the review of Peirce’s stance in Scheffler, *Four Pragmatists*, 42–55.

47 In the theories of Lamarck, Darwin, and Weismann. See Peirce, “Evolution,” *CP* 1.105.

48 Peirce, “Fallibilism, Continuity, and Evolution,” *CP* 1.141–175 (at 1.141).

49 *CP* 1.171 (italics in original). On Peirce’s fallibilism, see Thayer, *Meaning and Action*, 120–132, 349–352.

For Peirce, thus, fallibilism better suits and explains the concepts of evolution and continuity.⁵⁰ Rejecting the Cartesian aim of revealing the eternal foundations of human knowledge, he conceived our understanding as a constant process. This is not to say, however, that fallibilism entails radical skepticism⁵¹ regarding the human ability to know the world, but a gradual, realistic,⁵² and non-pessimistic approach to human knowledge: “Indeed, out of a contrite fallibilism, combined with a high faith in the reality of knowledge, and an intense desire to find things out, all my philosophy has always seemed to me to grow.”⁵³

Peirce thus believed in the reality of knowledge, and in this sense, in our ability to achieve moderate and reasonable foundationality. The inclination towards anti-foundationalism in postmodernism (like that of Richard Rorty), therefore, does not suit Peirce, who instead held a type of moderate foundationalism.⁵⁴ Fallibilism goes hand in hand with Peirce’s understanding of human knowledge as a constant process of improvement: an existing belief humans hold is constantly challenged by a new datum or experience. This is how a new doubt appears in our mind. Confronted with this, we rethink, make

50 Evolution assumes the development and growth of the cosmos, and therefore no reason is needed to search for an eternal and absolute foundation. Continuity implies that there will always be some phenomena beyond our capacity to measure. See also Franks, “Peirce’s Idealism.”

51 Like Descartes, and in proximity to Hume’s skepticism about causality.

52 Peirce tried to avoid a fundamentalist conception of fallibilism itself; see *CP* 8.43. The tendency of “isms” to become overly rigid underlies my decision to use the term “fallibility” in the title of the present paper.

53 *CP* 1.14. See also Nathan Houser, “Peirce’s Contrite Fallibilism,” in *Semiotics and Philosophy in Charles Sanders Peirce*, ed. Rossella Fabbrichesi Leo and Susanna Marietti (New Castle, UK: Cambridge University Press, 2006), 1–14.

54 Cornelius F. Delaney, *Science, Knowledge, and Mind: A Study in the Philosophy of C. S. Peirce* (Notre Dame, IN: University of Notre Dame Press, 1993), 85–102; James Jakób Liszka, “Good and Bad Foundationalism: A Response to Nielsen,” *Transactions of the Charles S. Peirce Society* 29 (1993): 573–580; Charlene Haddock Seigfried, “Pragmatist Metaphysics? Why Terminology Matters,” *Transactions of the Charles S. Peirce Society* 37 (2001): 13–21. For various critiques of Rorty’s arguments in general, and more specifically his self-identification as an authentic successor of CAP, see Susan Haack, *Manifesto of a Passionate Moderate: Unfashionable Essays* (Chicago: University of Chicago Press, 1998), 31–47. For a thorough examination of Rorty’s philosophy in comparison to Peirce, James, and Dewey, see Hannah Hashkes, “Philosophy and the Role of the Philosopher in American Pragmatism” [Hebrew] (PhD diss., Hebrew University, 2004). Hashkes’s research finds that Rorty took a very different (and often nonpragmatic) path than that of Peirce, James, and Dewey regarding central topics in pragmatist philosophy.

sense of,⁵⁵ and improve our previously held beliefs. This is a dialectical process, because the new belief will also be fallible, and will probably raise new doubts that will in turn contribute to the improvement of this belief. This is, in short, the process Peirce termed “The Fixation of Belief” in his famous 1877 article.⁵⁶ Furthermore, as Cornelius Delaney noted, “Fallibilism for Peirce is more than anything a matter of attitude.”⁵⁷ Peirce was not alone: fallibilism is a central concept that typifies the diverse pragmatic tradition.

William James and John Dewey also espoused fallibilism. James rejected idealist-absolute philosophies, which aimed to offer totalistic explanations of reality. According to James, knowledge is not some independent and self-contained corpus, but open to the unknown future, and leaves room for the repair and improvement of the world.⁵⁸ This is why James advocated a “tender minded” attitude, as opposed to a “tough minded” one.⁵⁹ James regarded any sealed world-knowledge as inherently suspicious, because it tries to evade the concreteness of the real universe, which is pluralistic and decentralized in nature.⁶⁰ However, James insisted that pragmatic deliberation is not made in a doxastic vacuum: “No one can live an hour without both facts and principles.”⁶¹ His fallibilism was also psychologically oriented, considering human consciousness as constantly changing, developing, and adapting.⁶²

Dewey utilized fallibilism when articulating his ideas regarding growth and continuity, which are based on faith in, and hope for, the advancement of scientific examination through the idea of “self-corrective inquiry.”⁶³ Dewey wrote explicitly about Darwin’s influence on his thought and the birth of CAP.⁶⁴ Next to Darwin, Hegel was a major source of inspiration for Dewey, who managed

55 Hence Peirce’s emphasis on logic, categories, and rules as necessary to common sense. See Ochs, *Peirce*, passim.

56 “The Fixation of Belief,” *CP* 5.358–387.

57 Delaney, *Science*, 67.

58 William James, *Pragmatism*, in “*Pragmatism*” and *Four Essays from “The Meaning of Truth”* (New York: New American Library, 1974), 46.

59 James, *Pragmatism*, 20–23.

60 See James, *Pluralistic Universe*, passim.

61 See James, *Pragmatism*, 20. This is also why James asserted that one may be a pragmatist regardless of whether one adopts James’ radical empiricism (or radical pluralism). *Ibid.*, 14.

62 William James, *The Principles of Psychology*, vol. 1 (New York: Dover, 1950), 229–248.

63 John Dewey, *Logic: The Theory of Inquiry* (New York: Henry Holt, 1938), 40–41. This idea of self-correction is essential to any serious fallibilist thinker, and in this case Dewey draws heavily on Peirce. On the multilayered concept of corrective reading in Peirce, see Ochs, *Peirce*, 3–11.

64 John Dewey, *The Influence of Darwin on Philosophy and Other Essays in Contemporary Thought* (New York: Henry Holt 1910), 1–19.

to combine Darwin's implicit materialism and Hegel's idealism. Both orientations infused Dewey's holistic thought, positioning knowledge as a graduated and evolving process. In this manner, Dewey reconstructed the educational process as progressive.⁶⁵ However, like James, Dewey emphasized that fallibility is not relativism, granting rather that everyone, in his conception, "must be dogmatic at some point in order to get anywhere with other matters."⁶⁶ We cannot enter here into various currents in neo-pragmatism during the second half of the twentieth century, but I should briefly note that following the publication of Willard V. O. Quine's "Two Dogmas of Empiricism,"⁶⁷ the concept of fallibilism became widespread in neo-pragmatism as well.⁶⁸

3 Fallibilism and Jewish Thought

There is nothing *uniquely* American about pragmatic fallibilism; it has a more universal and global reach.

RICHARD J. BERNSTEIN⁶⁹

3.1 *Pragmatism and Jewish Thought: the Basis for Comparison*

What might justify an examination of pragmatic fallibilism within Jewish thought, and more specifically, within halakhah? Fallibilism is presumably relevant to epistemology and philosophy of science,⁷⁰ while halakhic texts are

65 John Dewey, *Democracy and Education* (New York: Macmillan, 1925); idem, *How we Think* (Boston: D. C. Heath, 1910), 29–44, 135–145.

66 John Dewey, "Half Hearted Naturalism," *Journal of Philosophy* 24, no. 3 (1927): 57–64.

67 Willard V. O. Quine, "Two Dogmas of Empiricism," *Philosophical Review* 60 (1951): 20–43. Quine argued mainly against reductionist empiricism, in favor of a holistic pragmatic approach.

68 On fallibilism as a key concept in the Rorty—Putnam neo-pragmatic dispute, see Joseph Margolis, *Reinventing Pragmatism: American Philosophy at the End of the Twentieth Century* (Ithaca: Cornell University Press, 2002), 131–158. For a comprehensive presentation of fallibilism as a contextualist approach in neo-pragmatism, see Yonatan Y. Brafman, "Critical Philosophy of Halakha: The Justification of Halakhic Norms and Authority" (PhD diss., Columbia University, 2014), 358–374.

69 Richard J. Bernstein, *The Abuse of Evil: The Corruption of Politics and Religion since 9/11* (Malden, MA: Polity, 2005), 42 (*italics in original*).

70 Indeed, it was adapted by prominent philosophers of science in the twentieth century (see Yemima Ben-Menahem, *Conventionalism: From Poincaré to Quine* [New York: Cambridge University Press, 2006]) and by existentialists (see, e.g., Paul Ricoeur's *Fallible Man: Philosophy of the Will* [Chicago: Henry Regnery, 1967]). Here, in any case, we cannot expand on these significant contributions to the concept of fallibilism. For a discussion of how Karl Popper, Imre Lakatos, Richard J. Bernstein, Susan Haack, Hilary Putnam, and

affiliated with normative ethics and law. However, both Jewish thinkers and the CAPS seem to reject the practice of viewing human phenomena through a far too narrow lens. In Jewish thought we find links between jurisprudence and metaphysics, or between *nomos* and narrative, in the form of the traditional Hebrew categories of *halakhah* and *aggadah*.⁷¹ In CAP, fallibilism functions not as strict logic, but as a broad philosophical perspective. The fallibility of human understanding and reasoning thus applies to science as well as to ethics.⁷² No wonder, therefore, that legal pragmatism became a major branch of CAP.⁷³ It was in this context that Michal Alberstein coined the term “Philawsophy,” referring to the broad and dynamic realm extending between law and philosophy.⁷⁴ We should also recall that religion was an essential part of the world of the CAPS, or of their *Weltanschauung*; they were also philosophers of religion.⁷⁵

Having established reasonable grounds for comparing pragmatism and Jewish thought, I now turn to the question of whether one can locate the concept of fallibilism (as defined above) within Jewish tradition. Without lapsing into a conveniently homogenizing and monolithic conception of Jewish tradition,⁷⁶ one can find fallibilist attitudes across the heterogeneous corpus of Jewish intellectual history. It is important to note, however, that the following review does not contend that fallibilism is the *only* attitude we may find in the Jewish tradition.

Jürgen Habermas utilize Peirce's fallibilism, see Joseph Margolis, “Peirce's Fallibilism,” *Transactions of the Charles S. Peirce Society* 34 (1998): 535–569.

71 See Yair Lorberbaum, *In God's Image: Myth, Theology, and Law in Classical Judaism* (New York: Cambridge University Press, 2015), 61–88.

72 For a constructive-ethical approach to fallibilism, or “pragmatic fallibilism,” see Bernstein, *Abuse of Evil*, 39–52.

73 The legal writings of Supreme Court justices Oliver Wendell Holmes Jr. and Benjamin N. Cardozo are considered part of CAP's heritage; see Holmes, “The Path of the Law,” *Harvard Law Review* 10 (1897): 457–478, and Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921). Compare Hanoach Dagan, *Reconstructing American Legal Realism and Rethinking Private Law Theory* (New York: Oxford University Press, 2013), ch. 1. We cannot enter here into the debates in American jurisprudence (e.g., between Richard Posner and Ronald Dworkin) about the relevance of pragmatism to legal deliberation. See the critical analysis by Michael Sullivan, *Legal Pragmatism: Community, Rights, and Democracy* (Bloomington: Indiana University Press, 2007), 48–78.

74 Michal Alberstein, *Pragmatism and Law: From Philosophy to Dispute Resolution* (Aldershot, UK: Ashgate & Dartmouth, 2002), 1–99, and esp. x–xiv.

75 See Michael R. Slater, *Pragmatism and the Philosophy of Religion* (Cambridge: Cambridge University Press, 2014).

76 Some take such intercultural examination of two isms (“Judaism” in relation to CAP, in the present case) to be superfluous or meaningless. I rather follow Daniel Boyarin's observation cited in n. 22 above. Discerning intercultural *proximities*, therefore, is not taken for granted either.

For instance, a fallibilist approach appears in articulations of God's dynamic or perfected character, as well as in inquiries into the nature of belief in God and the question of whether humans may attain any certainty in this matter. My focus here, however, will be the status of halakhic values, principles, and norms, and the question of whether they are conceived as eternal or as evolving within the process of halakhic discourse. For the sake of establishing the context of our main discussion, some preliminary background on the presence of fallibilism in Jewish tradition is important. To be sure, the following investigation is only an outline for a comprehensive analysis of fallibilism in classical Jewish sources. It in no way exhausts the vast material mentioned, and does not imply that there are no "infallibilist" ways of thinking in Jewish tradition. It will nevertheless provide sufficient ground for the examination of fallibilism's role in Berkovits' thought (as well as in the thought of many, or perhaps even most, Jewish thinkers). Additionally, it will provide necessary material for the concluding discussion of this paper, about the tense encounter between Jewish tradition and modern fallible-pragmatic tendencies.

3.2 *Fallibilism in Classical Jewish Sources: a Bird's-Eye View*

The Bible, as a text that emerged in the ancient Near East, generally holds a cyclical-static conception of the natural world, a world of eternal return, the most prominent example of which is the book Ecclesiastes (e.g., 1:1–11).⁷⁷ The paradigm of the world as cyclical-static in classical thought seems related to the conceptualization of religious law as fundamentally unchanging, both stemming from God's presumably fixed nature.⁷⁸ An explicit demonstration of this static conception of the law appears in Deuteronomy 4:2,⁷⁹ which commands Israel not to change, add to, or subtract from the Torah's commandments.

However, the picture is more complex than that. God's image, which is an elementary reference for a religious conception of the world,⁸⁰ is explicitly anthropomorphic throughout the Bible and thus He is portrayed as fallible. For instance, God often changes His mind and instructs different people in

77 The biblical phenomenon of miracles is seemingly opposed to this stable picture, but as a matter of fact, miracles testify that the world normally runs its natural course. In the same way, prophetic apocalypses that describe radical changes in nature (like Isa 2:2, 40:4) are not accounts of normal eras.

78 See Christine E. Hayes, *What's Divine about Divine Law? Early Perspectives* (Princeton: Princeton University Press, 2015), 54–60, and the vast literature and references provided there.

79 "You shall not add anything to what I command you or take anything away from it, but keep the commandments of the Lord your God that I enjoin upon you" (NJPS).

80 See Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books 1973), 87–141, esp. 90–91.

different ways, as in Exodus 13:17–18. The Bible thus gives the reader, or more commonly, the auditor in the text's reception history, good reason to assume that God's utterances may at times be fallible,⁸¹ and that human concerns regarding divine law are legitimate and even blessed, as in the story of the daughters of Zelophehad (Num 27:1–11).⁸²

It is not surprising, therefore, that Talmudic sages like Ḥoni ha-Me'agel (the circle-drawer) are often described as disputing with God or protesting presumed divine injustice.⁸³ Talmudic sages, roughly speaking, adhere to this hermeneutical perspective, declaring themselves loyal heirs of Mosaic law, even as they radically interpret it, modifying both the written law and the oral legal traditions that lie at the center of the rabbinic project. This tendency is manifested in the “halakhic revolutions” that Avraham Aderet, Moshe Halbertal, and numerous other scholars have located in various fields of Talmudic law, including the fundamental subjects of purity, family law, vows, and Shabbat.⁸⁴

81 Hans Jonas came to a similar conclusion based on the phenomenon of human radical evil. See “The Concept of God after Auschwitz: A Jewish Voice,” *Journal of Religion* 67 (1987): 1–13. On Jonas's proximity to William James, see Sami Pihlström, “Jonas and James: The Ethics and Metaphysics of Post-Holocaust Pragmatism,” *Journal of Speculative Philosophy* 28 (2014): 31–51.

82 See Michael Fishbane, *Biblical Interpretation in Ancient Israel* (Oxford: Clarendon, 1985), 543. The divine relationality and care for human needs recalls discussions of femininity as a key element in Jewish tradition. See Leora Batnitzky, “Dependency and Vulnerability: Jewish and Feminist Existential Constructions of the Human,” in *Women and Gender in Jewish Philosophy*, ed. Hava Tirosh Samuelson (Bloomington: Indiana University Press, 2004), 127–152, and in the same volume, Suzanne Last Stone, “Feminism and the Rabbinic Conception of Justice,” 263–288; Mara H. Benjamin, *The Obligated Self: Maternal Subjectivity and Jewish Thought* (Bloomington: Indiana University Press, 2018).

83 m. Ta'anit 3:8. On the motif of rabbinic disputation with God, see Dov Weiss, *Pious Irreverence: Confronting God in Rabbinic Judaism* (Philadelphia: University of Pennsylvania Press, 2017). It seems that the idea of a personal God is necessary for the sustainability of such dialogical religious sensitivities. Thus, in some proclamations of Jewish “process theology,” an attempt is made to provide a dynamic (and in this sense, fallibilistic) account of Judaism. See, e.g., Bradley Shavit Artson, “Ba-Derekh: On The Way—A Presentation of Process Theology,” *Conservative Judaism* 62 (2010): 3–35. However, it seems that without the idea of a personal and caring God, such a trajectory easily dissolves into a pantheistic power-based determinism. See the critique by Steven Kepnes, “God is One, Everything Else is Many: A Critique of Green and Artson,” *Conservative Judaism* 65 (2014): 49–71.

84 Avraham Aderet, *From Destruction to Restoration: The Mode of Yavneh in Re-Establishment of the Jewish People* [Hebrew] (Jerusalem: Magnes, 1990); Moshe Halbertal, *Interpretative Revolutions in the Making: Values as Interpretative Considerations in Midrashei Halakhah* [Hebrew] (Jerusalem: Magnes, 1997). The acknowledgment of halakhic change is emphasized by historians of later Jewish law as well. See, e.g., Haym Soloveitchik, “Religious Law and Change: The Medieval Ashkenazic Example,” *AJS Review* 12 (1987): 205–221.

While this “activist” hermeneutical stance seems to contradict the legal immutability of Deuteronomy 4:2, it mirrors the apparent fallibility of God’s will, as noted above,⁸⁵ and assumes at least a certain amount of textual indeterminacy (for the sake of the present discussion, suffice it to say that pragmatic fallibilism seems to be a middle way between indeterminacy and determinacy).⁸⁶ In fact, the concept of fallibility is a critical basis for Talmudic controversy,⁸⁷ no less than “tolerance,” “pluralism,” and some other important concepts that frequently serve to illuminate rabbinic discourse in modern research.⁸⁸ This hermeneutical approach suggests that something akin to the “tender minded”-ness James advocated was implicitly familiar to sages such as Rabbi Eleazar, son of Rabbi Shimon, who came to understand that “a human being should always be gentle as the reed and not unyielding as the cedar.”⁸⁹

Fallibility manifests itself in Talmudic sources in other contexts as well. It is embedded in the dynamics of scriptural transmission, for example in the

85 Here we find an interesting divergence between rabbinic thought and what appears in the Dead Sea Scrolls. The phenomenon of “rewritten bible” (for example, in the book of Jubilees and the Temple Scroll) typically fills-up narrative gaps and harmonizes legal contradictions in order to produce a determinate and infallible version, while the rabbinic midrashim concentrate their efforts on interpreting the Mosaic text, and not on fixing it (in both meanings of the word “fix”: repairing the Mosaic text and fully stabilizing it). Compare Israel Knohl, *The Divine Symphony: The Bible’s Many Voices* (Philadelphia: Jewish Publication Society, 2003), 134–143; Steven D. Fraade, *Legal Fictions: Studies of Law and Narrative in the Discursive Worlds of Ancient Jewish Sectarians and Sages* (Leiden: Brill, 2011), 381–398.

86 Many works have been dedicated to the subject. See, e.g., Susan Handelman, *The Slayers of Moses: The Emergence of Rabbinic Interpretation in Modern Literary Theory* (Albany: SUNY Press, 1982); David Stern, “Midrash and Indeterminacy,” *Critical Inquiry* 15 (1988): 132–161; Leon Wiener-Dow, “Indeterminate Midrash, Indeterminate Halakhah,” *Jewish Law Association Studies* 27 (2017): 50–72; see also Robert Alter’s observation cited below (n. 102).

87 This fallibility appropriates Shaye J. D. Cohen’s observation on rabbinic inclusivity: “At no point in antiquity did the rabbis develop heresiology and ecclesiology, creeds and dogmas. At no point did they expel anyone from the rabbinic order or from rabbinic synagogues because of doctrinal error or because of membership in some heretical group. Those who held incorrect beliefs were chastised or denied a share in the world to come, not denied a share in the people of Israel in this world.” *“The Significance of Yavneh” and Other Essays in Jewish Hellenism* (Tübingen: Mohr Siebeck, 2010), 58–59.

88 See, e.g., the discussion by Avi Sagi, *The Open Canon: On the Meaning of Halakhic Discourse* (London: Continuum, 2007).

89 b. Ta’anit 20b (English translations are mine unless otherwise noted). It should be noted, however, that the Talmudic meaning of the word *le-’olam* is not identical to the common modern unequivocal sense of “always” or “never,” and is closer to “usually.” Put differently, Talmudic rabbis did acknowledge that it is sometimes necessary to practice tough-mindedness.

claim of the sages that “The Torah was originally written down scroll by scroll,”⁹⁰ which implies that divine revelation was indeed gradual.⁹¹ Another example can be found in the argument that “The Torah was originally given to Israel in the Hebrew script, and it was given to them in the days of Ezra in the Assyrian script and the Aramaic language.”⁹² This acknowledges that the spoken language and the written language of the Torah shifted with historical contexts as the people experienced successive imperial conquests.⁹³

The explicit awareness of human error in ancient Jewish tradition provides an additional example of fallibility. In biblical and classical rabbinic culture, human fallibility, including the phenomena of forgetfulness and error, is a persistent working premise.⁹⁴ In fact, the Bible itself testifies to the shortcomings of transmission. The most famous example is the finding of a “book” of the Torah during the reign of King Josiah (2 Kgs 22:13), from which we may conclude that the oral law that should have accompanied the written law was not transmitted, at least not properly.⁹⁵

90 “*Torah megilah megilah nitenah*” (b. Gittin 60a).

91 Compare Midrash Exodus Rabbah 46:1.

92 “*Ba-tehilah nitenah Torah le-yisra’el bi-khtav ivri, ve-hazerah ve-nitenah lahem bi-yemei Ezra bi-khtav ‘ashuri ve-lashon ‘arami*” (b. Sanhedrin 21b).

93 Another Talmudic example relates to material culture. One of the liquids used for writing Torah scrolls was an ingredient called *kankantom* (copper sulfate), which is not easily erased (see m. Gittin 2:3). However, the sages debate whether such a substance allows the scribes the necessary flexibility to correct errors they make (see b. ‘Eruvin 13a, b. Sotah 20a–b, and Itay Marienberg-Milikowsky, “And he shall write, and he shall blot out: the materials by which the Torah is being made” [Hebrew], *Shabbat Shalom* 974 (2016).

94 An exception is the hagiographic attitude of the book of Chronicles towards King David’s sins as they are described in the book of Samuel. For a more moderate argument, that the book of Chronicles diminishes the personal aspect of King David’s sins and deliberately elaborates on his political organization, see Sarah Japhet, *The Ideology of the Book of Chronicles and Its Place in Biblical Thought*, trans. Anna Barber (Frankfurt: P. Lang, 1997), 364–372. A similar reservation applies to the prophet Balaam’s proclamation that “God is not a man, that He should lie, neither the son of man, that He should repent.... None hath beheld iniquity in Jacob, neither hath one seen perverseness in Israel” (Num 23:19, 21), with respect to whether this claim about divine immutability and human angelic nature really corresponds to the biblical descriptions of changes in God’s opinion, and to biblical narratives about biblical figures.

95 This point was comprehended not only by modern lower Bible criticism, but also by traditional exegetes; see, for instance, the statement in b. Temurah 16a about ‘Otni’el ben Kenaz’s restoration of many details of oral law that had been lost to previous generations. For a broader discussion of the topic, see David Weiss Halivni, *Breaking the Tablets: Jewish Theology after the Shoah*, ed. Peter Ochs (Lanham, MD: Rowman and Littlefield, 2007), 73–101.

Both the Mosaic and the Talmudic corpora anticipated that individuals, both religious leaders and members of the Israelite nation, were susceptible to act or rule wrongly (see Lev 4 and m. Horayot 1–2).⁹⁶ Awareness of fallibility leads to an inclusive attitude towards minority opinions (see m. 'Eduyot 1:5–6). Exceptions to this awareness of fallibility, such as the Talmudic claim ascribed to Rabbi Yonatan that “anyone who says ‘King David has sinned’ is absolutely wrong,”⁹⁷ can be found, but they do not represent the dominant attitude of biblical and rabbinic texts.

The centrality of fallibility may explain the relative lack of hagiography in the Hebrew Bible and motivate the biblical narrators’ frequent critiques of its figures.⁹⁸ This issue is exemplified, maybe better than anywhere else, in the (narrative) fact that Moses, the transmitter of divine law to the people of Israel, was buried by God, and that his burial place is unknown (Deut 34:6). True, there are today various practices (textual, physical) of hagiography in Judaism,⁹⁹ but it seems that a different approach is to be found in the formative ancient Jewish sources. For it is a commonplace that the Hebrew Bible generally reflects an anti-hagiographic stance, distinguishing it from the more hagiographic attitude of Christian early writings¹⁰⁰ and the Qur’an.¹⁰¹ Supersessionist

96 On the tension between authority and the acknowledgment of possible rabbinic mistakes, in the context of tractate Horayot, see Menachem Lorberbaum, “Learning from Mistakes: Resources of Tolerance in the Jewish Tradition,” in *Democratic Education in a Multicultural State*, ed. Yael Tamir (Oxford: Blackwell, 1995), 115–126.

97 b. Shabbat 56a.

98 Such critiques are often expressed by figures within a story. See, for instance, Gen 3:8–19; 12:18; 34:30; Exod 32:7–8; Num 20:12; 2 Sam 12. The phenomenon of biblical ethical prophecy testifies to this as well in the social-collective realm.

99 Important scholars, including Joseph Dan and Yoram Bilu, have examined various aspects of this phenomenon.

100 See Hippolyte Delehaye, “Hagiography,” *The Catholic Encyclopedia*, vol. 7 (New York: Encyclopedia Press, 1910), 106–108. A possible explanation of the links between early Christian hagiography and the doctrine of papal infallibility comes from Peter L. Berger’s observation: “The negative attitude toward laughter continues in the patristic and medieval periods of Christian thought. There is a long line of grim theologians. Repeatedly there are negative comments on laughter, which is understood as expressing worldliness, sinful insouciance, and lack of faith.... One does not have to be a Nietzschean to look upon the history of Christian theology as a depressingly lachrymose affair.” *Redeeming Laughter: The Comic Dimension of Human Experience* (Berlin: De Gruyter, 1997), 198.

101 The fact that biblical prophets like Abraham and Moses are depicted committing sins led Islamic tradition (e.g., the medieval Ibn Ḥazm) to conclude that the Hebrew Bible was falsified or distorted by the Jews. See Hava Lazarus-Yafeh, *Intertwined Worlds: Medieval Islam and Bible Criticism* (Princeton: Princeton University Press, 1992), 19–49. In early modernity, Spinoza pointed to the contradictions in the Bible, but gnostic thinkers preceded him (and Islam) in stating these and other difficulties. See Robert M. Grant,

arguments, nevertheless, brought Jews to declare the immutability of Judaism and the Bible. Therefore, the attempt to “save” the authority of the Bible came at the expense of an awareness of the value of fallibility in the Bible and in halakhah, a fallibility that is ethical in nature.¹⁰² One may plausibly assume that this attitude towards human behavior relates to the attitude towards past halakhic-interpretive mistakes, an issue that I treat below. Furthermore, one can hardly grasp the centrality and importance of the concept of *teshuvah* (repentance) as a mostly human task, and its various manifestations in the Bible and later Jewish tradition,¹⁰³ without considering its complementary concept of human fallibility. In the Bible, it is correlated with a divine fallibility, or evasiveness, as reflected in the burning-but-unconsumed bush. This ontological fallibility is manifested also in God’s self-description as ‘ehyeh ‘asher ‘ehayah, which is an etymology of the Hebrew YHWH (Exod 3:2–3, 13–14).¹⁰⁴ Divine fallibility is at the same time the source of its ineffability. Both are expressed by the claim that God’s essence is located in the future, which is by definition unknown to humans.¹⁰⁵ In this context, the prohibition of idolatry (Exod 20:2–4) in the Decalogue is presumably aimed against human static fixations (visual, conceptual) about what God *is*.

“Historical Criticism in the Ancient Church,” *Journal of Religion* 25 (1945), 187–188, and Yakir Paz, “From Scribes to Scholars: Rabbinic Biblical Exegesis in light of the Homeric Commentaries” [Hebrew] (PhD diss., Hebrew University, 2014), 202.

- 102 Compare Robert Alter’s observation: “Indeed, an essential aim of the innovative technique of fiction worked out by ancient Hebrew writers was to produce a certain indeterminacy of meaning, especially with regard to motive, moral character, and psychology.” *The Art of Biblical Narrative* (New York: Basic Books, 2011), 12.
- 103 The concept of *teshuvah* is portrayed in the Bible a few times as overriding God’s will; see, e.g., Exod 7:3–4; Isa 6:9–10. For a comprehensive discussion of the role and power of repentance in Jewish tradition, see Joseph B. Soloveitchik, *On Repentance*, ed. Pinchas Peli (New York: Paulist, 1984).
- 104 The idea of Judaism as future-laden is thus unsurprisingly dominant in later Jewish thought, e.g., in Franz Rosenzweig’s *The Star of Redemption*, trans. Barbara E. Galli (Madison: University of Wisconsin Press, 2005), esp. part 3, book 1 (317–355). Compare the reference to Hans Jonas in n. 81 above.
- 105 For a philosophical examination of idolatry, see Moshe Halbertal and Avishai Margalit, *Idolatry*, trans. Naomi Goldblum (Cambridge, MA: Harvard University Press 1992). It is noteworthy that in this volume the specific context of the Tetragrammaton, ‘ehyeh ‘asher ‘ehayah (Exod 3:14) is translated into English (*ibid.*, 157) as “I Am He Who Exists,” representing God propositionally as a being in the present and not in the future. This English formulation is based on the Greek translation of the Hebrew text of Exod 3:14 in the Septuagint (ἐγὼ εἰμι ὁ ὢν). I thank Yakir Paz for his help with the Greek text. For elaboration on the topic within the biblical context, see Hillel Ben-Sasson, “The Divine Name YHWH: Its Meaning in Biblical, Rabbinic, and Medieval Jewish Thought” [Hebrew], (PhD diss., Hebrew University, 2012), 42–44, 72–82.

The above paragraphs give us some sense of the prominence of fallibility in early Jewish sources. Let us consider now more thoroughly the relationship between fallibility and halakhic norms. They are often perceived as being in a state of corrigible fallibility. To be sure, some streams of Jewish tradition view halakhah, the world, and humans as essentially unchanging. According to this view, which Yoḥanan Silman terms the “perfection” position (or the “all-inclusive approach”), halakhah is an eternal and inherently infallible corpus, and halakhic norms are essentially static entities.¹⁰⁶ Maimonides and his project of codifying the oral law is a radical example of the all-inclusive conception of halakhah.¹⁰⁷ The all-inclusive approach, in any event, often represents human nature as regressive, a perspective embodied in the phrase “the decline of the generations,”¹⁰⁸ and is thus pessimistic regarding the ability of present halakhic decision-makers to reconstruct the original or “pure” traditional norms revealed in the ancient past.¹⁰⁹ For those who subscribe to this view, the main questions to be addressed are (1) What is our access to the “real” halakhah?¹¹⁰ and (2) How can halakhic decision-makers preserve the unchanging halakhah

106 This approach to halakhic knowledge is expressed, for example, in the rabbinic notion that “the Torah, its halakhic details and interpretation was given to Moses at Sinai” (*Sifra*, Parashat be-Ḥuqotai, 8:13; see also Yoḥanan Silman, *The Voice Heard at Sinai: Once or Ongoing?* [Hebrew] (Jerusalem: Magnes, 1999), 26 (on the “perfection” [*shelemutit*] approach, see 19–86). A static approach may also apply to the external reality to which halakhah is referring, e.g., in the expression “‘olam ke-minhago noheg” (“the world runs its natural course”; b. *Avodah Zarah* 54b, cf. t. *Avodah Zarah* 7:3).

107 Maimonides’ theory of halakhah as eternal anchors its validity in the primacy of Moses’ prophecy. See Maimonides, “Introduction to Mishneh Torah,” in *A Maimonides Reader*, ed. Isadore Twersky (New York: Behrman House, 1972), 35–41. On the question of dogmatism in Maimonides, see Menachem Kellner, *Must a Jew Believe in Anything?* (London: Littman Library, 1999), 52–65. Considering the above discussion of Descartes’ radical foundationalism versus Peirce’s pragmatic fallibilism, Maimonides is seen as a halakhic radical foundationalist. It should be noted, however, that Maimonides’ approach is more complex. Compare Baris, “Skepticism in Maimonides,” which sheds new light on his pragmatic halakhic reasoning.

108 See b. *Shabbat* 112b.

109 A pessimist-regressive notion regarding human incapacity to restore the static-absolute divine truth is reflected in expressions like “*in rishonim benei mal'akhim, 'anu benei 'anashim*” (“if our ancestors were like sons of angels, we are [only] sons of humans”; b. *Shabbat* 112b). On the tension between generations present in the notion of the “decline of the generations,” see Avraham Melamed, *On the Shoulders of Giants: The Debate between Moderns and Ancients in Medieval and Renaissance Jewish Thought* [Hebrew] (Ramat Gan: Bar-Ilan University, 2003).

110 Examples of this approach are found in Ultra-Orthodox thought; see section 5 below.

and clarify human disputes regarding its implementation in reality?¹¹¹ In this vein, as a result of the confrontation with modernity, a Jewish halakhic equivalent of papal infallibility emerged in the Orthodox (or Ultra-Orthodox) concept of *Da'at Torah* (literally, knowledge of Torah), bestowing upon rabbinic leaders a special status and according them unique access to halakhic truth.¹¹² While there are disagreements between scholars of Orthodoxy, it is agreed that the term *Da'at Torah* appears in Talmudic sources with a much weaker authoritative resonance than that with which nineteenth-century Orthodoxy invested it.¹¹³

There are, by contrast, opinions within traditional Judaism that view halakhah as more dynamic. Silman discerns two main variants of this dynamic approach: (1) the *discovery* position, in which there is a perceived separation between the heavenly, stable and all-inclusive Torah on one hand, and its worldly revealed content on the other; and (2) a *continuous process of perfection*, according to which divine truth, and even God Himself, is understood as dynamic.¹¹⁴ This dynamic approach assumes that *peshat*, the plain sense of the text of the Torah, is a potentiality in a process of constant applied renewal.¹¹⁵

111 Moshe Halbertal has referred to this approach as the “retrieval model.” *People of the Book: Canon, Meaning, and Authority* (Cambridge, MA: Harvard University Press, 1997), 54–59.

112 See Jacob Katz, *Halakhah in Straits: Obstacles to Orthodoxy at Its Inception* [Hebrew] (Jerusalem: Magnes, 1992), esp. 18–20; Lawrence Kaplan, “Daas Torah: A Modern Conception of Rabbinic Authority,” in *Rabbinic Authority and Personal Autonomy*, ed. Moshe Sokol (Northvale, NJ: J. Aronson, 1992), 1–60; Gershon Bacon, *The Politics of Tradition: Agudat Israel in Poland, 1916–1939* (Jerusalem: Magnes, 1996), 47–69; Yosef (Yoskeh) Aḥituv, “Tensions and Transformations in Religious Leadership” [Hebrew], in *Between Authority and Autonomy in Jewish Tradition*, ed. Avi Sagi and Zeev Safrai (Tel-Aviv: Ha-Kibbutz ha-Me’uhad, 1997), 56–83.

113 See Benjamin Brown, “The *Daat Torah* Doctrine: Three Stages” [Hebrew], *Jerusalem Studies in Jewish Thought* 19 (2005): 537–600.

114 See Silman, *Voice*. Another distinction could be made between the values anchored in the written law and their implication in the oral law. A dynamic-perfectionist approach may be reflected in the dynamism of the values themselves and in their formulation in the oral law. Silman’s “ever-perfected” position will serve here as a basic model for reference (and not the prophetic branch of the discovery position), because it is more comparable to fallibilism: (1) it assumes that truth itself is somehow dynamic; and (2) most halakhic thinkers do not rely on prophecy to determine halakhah. See Avinoam Rosenak, *A Prophetic Halakhah: Rabbi A. I. H. Kook’s Philosophy of Halakhah* [Hebrew] (Jerusalem: Magnes, 2007), 130–134, 204–213.

115 Rashi’s grandson, Rashbam (R. Shmuel ben Meir), testified that if Rashi had had enough time, he would have provided additional interpretations according to the “*peshatot ha-mithadeshim be-khol yom*” (“the applied meanings that are constantly renewing”; see

The second approach is widespread within progressive Jewish movements in the United States, but its roots can be found in Talmudic texts, as we have seen above.¹¹⁶ It seems, therefore, that the fallible approach is widely rooted in the unfolding halakhic tradition.¹¹⁷ On the “left wing” side of halakhic fallibility, we find progressive views of halakhah, which are generally more optimistic and comprehend the human condition as constantly evolving and improving. Some modern Jewish thinkers, such as Rabbi Abraham Geiger, explicitly criticized papal infallibility itself.¹¹⁸ Other scholars affiliated with the *Wissenschaft des Judentums*, such as Shmuel David Luzzatto and Zechariah Frankel, criticized Jewish attempts (like that of Maimonides) to portray halakhah as an immutable system.¹¹⁹ On the more liberal-progressive side, halakhic fallibility appears frequently in twentieth-century Conservative Jewish thought¹²⁰ and Reform Jewish thought.¹²¹ Whether ancient or modern, fallibilistic attitudes understand human knowledge of the world, including halakhic knowledge of the world, as potentially continuously improving.¹²² To be sure, modern

Rashbam’s commentary on Gen 37:2). To be sure, Rashi was not a progressive thinker in the modern sense, but he indeed reflects an interesting fallibilistic sensitivity.

- 116 Talmudic literature was often a source of inspiration for the crystallization of modern attitudes. See, e.g., Max Kadushin, *The Rabbinic Mind* (New York: Bloch, 1972); Abraham Joshua Heschel, *Heavenly Torah: As Refracted through the Generations*, ed. and trans. Gordon Tucker with Leonard Levin (New York: Continuum, 2005).
- 117 For various examples of halakhic fallibility, see Neria Gutel, *Changes of Nature in Halakhah* [Hebrew] (Jerusalem: Yaḥdav, 1995). On the halakhic “approximative” approach, see Sagi, *The Open Canon*, 37–40, and Benjamin D. Sommer, *Revelation and Authority: Sinai in Jewish Scripture and Tradition* (New Haven: Yale University Press, 2015), 188–208. On the pragmatist truth test in halakhah, see Rosenak, “Truth Tests,” 164–169.
- 118 See Geiger’s essay “Turning Point in Global History” (1872), in *Selected Writings on Religious Reforms* [Hebrew], ed. Michael Meyer, trans. G. Eliasberg (Jerusalem: Zalman Shazar Center and Dinur Center, 1980), 109. On papal infallibility, see nn. 32–33 above.
- 119 Frankel asserted that “Judaism itself affirms many changes,” and SHaDaL rejected Maimonides’s conception of halakhic immutability: “With all his [Maimonides’s] philosophizing, he was disrupting us.” See Rivka Horwitz, *Zacharia Frankel and the Beginnings of Positive-Historical Judaism* [Hebrew] (Jerusalem: Zalman Shazar Center, 1984), respectively 59, 247.
- 120 For a collection of Conservative halakhic thinkers, including those considered to be in the twilight zones to the right and to the left of the Conservative movement, see Elliot N. Dorff, *The Unfolding Tradition: Jewish Law after Sinai* (New York: Aviv, 2006).
- 121 On Reform attitudes towards halakhah, including the question of its role in Progressive Judaism, see Mark Washofsky, “Against Method: Liberal Halakhah between Theory and Practice,” in *Beyond the Letter of the Law: Essays on Diversity in the Halakhah*, ed. Walter Jacob (Pittsburgh: Rodef Shalom, 2004), 17–77.
- 122 Prominent examples of Halakhic progressive thought are found in Jewish-American liberal movements (Reform, Conservative, Reconstructionist). In the Israeli context we may

progressive approaches differ from classical and medieval ones in that they are informed by the evolutionist paradigm and lay much greater emphasis on the idea of progress.¹²³ Progressivism, for its part, overlaps with fallibilism, but is not identical to it. In fact, progressivism, like any other ism, might be dogmatic, even as it contains a sense of fallibilism. Fallibilism, therefore, might inform opposition to strict and dogmatic articulations of progressivism. While a comprehensive philosophical account of the differences between the concepts of change and advancement is beyond the scope of the present discussion,¹²⁴ fallibilism can nevertheless be located somewhere on the spectrum between static and progressive positions.

In this section we have seen that the concept of fallibilism makes significant appearances in traditional Jewish halakhic sources.¹²⁵ I therefore now turn to the question of whether fallibilistic views of halakhah can be located in modern Orthodox texts. Such views are indeed present in Berkovits' writings. By analyzing his halakhic thought through the prism of pragmatic fallibilism, I wish to add to the work that has been conducted by Tamar Ross,¹²⁶

recall Rabbi A. I. H. Kook as a thinker who was inspired in many ways by evolutionist thinking and developed a progressive historiosophy. See his "The Basic Changes in the New Thought" [Hebrew], *The Lights of Holiness*, 2:556–560, in *The Essential Writings of Abraham Isaac Kook*, ed. and trans. Ben-Zion Boxer (New York: Amity House, 1988), 169–172. Kook further developed a conception about the inherent aspect of change in divinity (*Lights of Holiness*, vol. 2, essay 5, sections 14–17). Interestingly, this philosophical progressivism did not fully fit some of his halakhic stringencies. On Rabbi Kook's halakhah, see Rosenak, *Prophetic Halakhah*, 214–364.

123 In general, Darwinism and the evolutionist paradigm deeply influenced many modern Jewish thinkers from a variety of religious (as well as secular) affiliations. See the articles included in *Jewish Tradition and the Challenge of Darwinism*, ed. Marc Swetlitz and Geoffrey N. Cantor (Chicago: University of Chicago Press, 2006). For the use of the evolutionist paradigm as a tool for examining the public reception of halakhic norms, see Moshe Koppel, *Meta-Halakhah: Logic, Intuition and the Unfolding of Jewish Law* (London: J. Aronson, 1997), 88–92. Koppel emphasizes the advantage of ordinary people, as opposed to halakhic professionals, in having authentic intuitions about the quality of the transformations that halakhic norms undergo.

124 For such a discussion with respect to philosophy of science (mainly that of Thomas S. Kuhn and Michael Friedman), see Ariel Furstenberg, *The Language of Talmudic Discourse: A Philosophical Study of the Evolution of Amoraic Halakhah* [Hebrew] (Jerusalem: Magnes and Van Leer Institute, 2017), 42–66.

125 It may be the case that this fallibility is the source of the charge that Jewish liturgical melodies are messy and non-cultivated. See Ruth HaCohen, *The Music Libel against the Jews* (New Haven: Yale University Press, 2011), esp. 1–16, 126–178.

126 Tamar Ross, *Expanding the Palace of Torah* (Waltham, MA: Brandeis University Press, 2004), 64–85.

Shalom Carmy,¹²⁷ Jonathan Cohen,¹²⁸ David Hazony,¹²⁹ Meir Roth,¹³⁰ Avinoam Rosenak,¹³¹ Yonatan Y. Brafman,¹³² Marc B. Shapiro,¹³³ David Shatz,¹³⁴ and others. Before examining Berkovits' philosophy of halakhah, I establish its context by tracing the biographical evidence for Berkovits' acquaintance with the philosophical-pragmatic tradition. I will turn to the question regarding the relationship between Judaism and pragmatism in the history of ideas in section 6.1 below.

4 Berkovits and Pragmatic Fallibilism

In this section, which is the heart of this paper, I will contextualize Berkovits' attitude towards pragmatism as part of his attitude towards philosophy in general. Then we will examine if and how pragmatic fallibilism is manifest in his thought.

4.1 *Berkovits, the Wisdom of the Nations, and Pragmatism*

A review of the main stages of Berkovits's physical and intellectual journey proves necessary for understanding his links to CAP.¹³⁵ In his doctoral

127 Shalom Carmy, "Eliezer Berkovits's Challenge to Contemporary Orthodoxy," *Torah U-Madda Journal* 12 (2004): 192–207.

128 Jonathan Cohen, "Incompatible Parallels: Soloveitchik and Berkovits on Religious Experience, Commandment and the Dimension of History," *Modern Judaism* 28 (2008): 173–203.

129 David Hazony, "Introduction," in Eliezer Berkovits, *Essential Writings on Judaism*, ed. David Hazony (Jerusalem: Shalem, 2002), i–xxxvi; idem, "Human Responsibility in the Thought of Eliezer Berkovits" (PhD diss., Hebrew University, 2011).

130 Meir Roth, *Orthodox Judaism, the Human Dimension: The Halakhic Philosophy of Rabbi Prof. Eliezer Berkovits* [Hebrew] (Tel-Aviv: Ha-Kibbutz ha-Me'uhad, 2013). Roth provides a comprehensive analysis of Berkovits's philosophy of halakhah, mostly from an inner-halakhic perspective.

131 Avinoam Rosenak, "Rabbi Eliezer Berkovits: Halakhah and Modern Orthodoxy," *Ukrainian Orientalistics* 2011 (special issue on Jewish Studies, ed. Vitaly Chernoivanenko): 73–110.

132 Brafman, "Halakhah." Brafman has made a tremendous contribution to the clarification of Berkovits's thought in the context of legal reasoning, and I will refer to him below (as well as to the other scholars mentioned above).

133 Marc B. Shapiro, "Rabbi Eliezer Berkovits's Halakhic Vision for the Modern Age," *Shofar: An Interdisciplinary Journal of Jewish Studies* 31, no. 4 (2013): 16–36.

134 David Shatz, "Berkovits and the Priority of the Ethical," *Shofar* 31, no. 4 (2013): 85–102.

135 See Roth, *Orthodox Judaism*, 11–19.

dissertation,¹³⁶ Berkovits dealt with David Hume and Deism, analyzing some of the fallacies involved in the attempt to outline a form of natural religion. During his doctoral studies in Berlin, Berkovits was ordained as a rabbi by Rabbi Yaakov Yeḥi'el Weinberg, one of the prominent halakhists of the twentieth century.¹³⁷ Another significant, if implicit, influence on Berkovits' halakhic attitude was that of Rabbi Moshe Shmuel Glasner, whose Hebrew book *Dor Revi'i on Tractate Hullin*¹³⁸ presents a dynamic account of halakhic renewal.¹³⁹

In 1939, Berkovits learned that he was about to be deported to a concentration camp and fled to London. After spending most of World War II there, he moved to Sidney, Australia, in 1946 before continuing on to the United States of America in 1950.¹⁴⁰ Twenty-five years later, Berkovits relocated to Israel, dedicating most of his writing after 1975 to major challenges facing modern religious Zionism, with a special interest in the status of women.¹⁴¹ Before examining the halakhic approach of this influential figure in modern Orthodoxy, we will justify our comparative analysis of Berkovits' thought and CAP by considering how Berkovits viewed the "wisdom of the nations" (*hokhmah she-ba-goyim*).¹⁴²

Given Berkovits's Holocaust experience, it is no wonder that some negative proclamations regarding Christian civilization appear in his writings. As a humanist Jew, however, Berkovits made a distinction between the fields of theology and of interpersonal human dialogue. Berkovits did not adhere to the narrow particularistic ethos found in Jewish sources such as the Zohar.¹⁴³

136 Eliezer Berkovits, "Hume und der Deismus" (PhD diss., Friedrich Wilhelms University, Berlin, 1933). I read this work in an English translation by Ruth Morris, provided by David Hazony.

137 Berkovits studied also with the rabbis Akiva Glasner and Eliezer Yehudah Finkel. On Rabbi Weinberg, see Marc B. Shapiro, *Between the Yeshiva World and Modern Orthodoxy: The Life and Works of Rabbi Jehiel Jacob Weinberg, 1884–1966* (London: Littman, 1999).

138 Moshe Shmuel Glasner, *Dor Revi'i on Tractate Hullin* (Jerusalem: Weinstein & Friedman, 1921). See particularly Glasner's introduction (i–xii).

139 See Avi Sagi, "The Renewal of the Torah: Rabbi Moshe Glasner's Halakhic Thought" [Hebrew], *DAAT* 61 (2007): 131–148.

140 In 1950 Berkovits moved with his family to Boston, and in 1958 to Chicago, where he was appointed the head of the Department of Philosophy and Jewish Thought at the Hebrew Theological College. Shortly after arriving in the United States, Berkovits presented his halakhic works to Rabbi Prof. Saul Lieberman. Berkovits hoped to obtain a teaching position at the Jewish Theological Seminary, but ultimately this did not happen. See Roth, *Orthodox Judaism*, 414–417.

141 See Jonathan Sacks, *Crisis and Covenant* (Manchester: Manchester University Press, 1992), 162–172.

142 Compare Midrash Lamentations 2:13, and Marc Hirshman, *Torah for the Entire World* [Hebrew] (Tel-Aviv: Ha-Kibbutz ha-Me'uhad, 1999), 129–149.

143 See *The Zohar*, vol. 2, trans. Daniel C. Matt (Stanford: Stanford University Press, 2004), 252–256, and the critique by Elliot R. Wolfson, *Venturing Beyond: Law and Morality in*

Indeed, he insisted that the universal-humanistic shared realm of thought ought indeed to be discussed:

On the level of philosophical thought, contact and interchange of ideas are certainly to be desired. Jews are familiar with Barth and Tillich ... not less than with Sartre and Radhakrishnan. This, however, is not a specific Jewish-Christian dialogue. *It is the dialogue in the intellectual realm which Judaism has carried on with all cultures and religions at all times.... The realm of thought is universal.*¹⁴⁴

Furthermore, the fact that Berkovits criticized Western thought and Christianity should not be understood as a categorical negation or rejection of their value. In fact, the opposite may be true, as Roth and Shatz maintained, and as I suggest, more specifically, regarding Berkovits' critique of Abraham Joshua Heschel's "theology of pathos."¹⁴⁵ Within the larger expanse of Berkovits' thought, we may therefore trace two different categories with respect to Western culture:

- (1) Opinions Berkovits rejects, mainly early Pauline Christianity and the modern Radical Theology movement.¹⁴⁶
- (2) Opinions Berkovits identifies as having an essential philosophical value, including the work of pragmatic thinkers.

Kabbalistic Mysticism (London: Oxford University Press, 2006), 1–16, 43–46, 142–145. There are, of course, deep humanistic (and in this sense, pragmatic) commitments in the Zohar; compare Melila Hellner-Eshed, *Seekers of the Face: The Secrets of the Idra-Rabba (the Great Assembly) of the Zohar* [Hebrew] (Rishon leZion: Yedioth Aḥaronot, 2017).

144 Eliezer Berkovits, "Judaism in the Post-Christian Era," *Judaism* 15, no. 1 (1966): 80 (italics added). On Berkovits' ethical-humanist stance, particularly with regard to the Holocaust, compare Hazony, "Human Responsibility."

145 In my article "The Challenge of the 'Caring' God: A. J. Heschel's Theology in Light of Eliezer Berkovits' Critique" [Hebrew] (*Zehuyot* 8 [2017]: 43–60), I argue that there is a strong resemblance between Heschel's theology and that of Berkovits. The latter's attempt to distinguish himself from Heschel's thought was caused not by Berkovits' presumable "fundamentalist" protection of orthodoxy (as many critics have thought), but rather resulted from a complex self-reflection and examination. On the hermeneutics of dispute and self-criticism, see Menachem Fisch and Yitzhak Benbaji, *The View from Within: Normativity and the Limits of Self-Criticism* (Notre Dame, IN: University of Notre Dame Press, 2011).

146 Berkovits, *Holocaust*, 50–66. It is important to note, however, that Berkovits not only appreciated the wisdom of the nations, but also saw as praiseworthy the moral behavior of non-Jews. Consider, for example, his description of the brotherhood between Englishmen in the time of World War II, in Eliezer Berkovits, *Between Yesterday and Tomorrow* (Oxford: East and West Library, 1945), 135.

Four moments in Berkovits' intellectual biography reflect contact or engagement with the pragmatic tradition and lay the groundwork for a focused comparative analysis of Berkovits vis-à-vis CAP:

- (1) David Hume, the subject of Berkovits' doctoral dissertation, can be viewed as a forerunner of CAP in his experiential-constructive phenomenology of belief and in his philosophy of religion.¹⁴⁷ Berkovits' account of Hume's philosophy of religion¹⁴⁸ reveals that he saw a certain value and justification for the kind of natural religion Hume advocated.¹⁴⁹ However, it is noteworthy that Berkovits opposed the deistic, dogmatic, fixed-immutable concept of human nature and religion.¹⁵⁰
- (2) William James's books were popular in the German academy¹⁵¹ when Berkovits studied in Berlin, and his teacher, Rabbi Weinberg, participated in Prof. David Koigen's study circle in Berlin.¹⁵² As Martina Urban has shown, Koigen was closely affiliated with Jamesian pragmatism.¹⁵³
- (3) Berkovits' acquaintance with the CAPs deepened during the twenty-five years he lived and taught in the United States.¹⁵⁴ When I asked

147 Hume's radical analytic-skeptical attitude in the *Treatise of Human Nature* is essentially different, of course; compare Thayer, *Meaning and Action*, 24–26.

148 Berkovits, "Hume und der Deismus."

149 To be sure, in Hume's *Dialogues Concerning Natural Religion* there are major differences between the opinions of Demea, Cleanthes, and Philo. Nevertheless, following J. C. E. Gaskin's work we may talk about a basic "thin theistic" (or deistic, in the present case) stance that Hume held.

150 See Berkovits' concluding discussion in "Hume und der Deismus."

151 See Martina Urban, *Theodicy of Culture and the Jewish Ethos: David Koigen's Contribution to the Sociology of Religion* (Berlin: De Gruyter, 2012), 94–95.

152 Prof. Koigen, who was inspired by William James's pragmatism, hosted a circle of scholars in his house (among them Abraham Joshua Heschel). In the protocols documenting the discussions of those meetings (to be found at the Central Archives for the History of the Jewish People, Jerusalem, box 196), the name "Dr. Weinberg" is mentioned often. Marc B. Shapiro, the biographer of Rabbi Y. Y. Weinberg, told me that it is plausible that this "Dr. Weinberg" was Rabbi Weinberg, Berkovits' influential mentor. Compare Edward K. Kaplan and Samuel H. Dresner, *Abraham Joshua Heschel: Prophetic Witness* (New Haven: Yale University Press, 1998), 121–139.

153 Urban, *Theodicy of Culture*, 94–124.

154 Explicit and implicit testimony to Berkovits' philosophical relationship to pragmatism can be found throughout his writings. Consider how he writes favorably about John Dewey's holistic approach, opposing the "greatest dualism which now weighs humanity down, the split between the material, the mechanical, the scientific and the moral and ideal." Eliezer Berkovits, *Crisis and Faith* (New York: Sanhedrin, 1976), 14, citing

Berkovits' sons, Dov Berkovits and Avraham Berkovits, whether their father had read the writings of the CAPs, each independently responded that he had.¹⁵⁵

- (4) Berkovits' book *Major Themes in Modern Philosophies of Judaism*¹⁵⁶ is replete with criticism of European idealistic-metaphysical assumptions, and at the same time displays significant pragmatic argumentation. In fact, like the CAPs (and differently from Rorty and others), Berkovits did not deny the existence of metaphysics, nor its philosophical transcendental necessity.¹⁵⁷ Many scholars saw Berkovits' book as an anti-liberal attack,¹⁵⁸ and this is to some extent true. However, when Berkovits' justifications for his critiques of Hermann Cohen, Franz Rosenzweig, Martin Buber, and Abraham Joshua Heschel are carefully examined, we find that many of these critiques bear the sign of pragmatic thought.¹⁵⁹ In addition, the proximity between Berkovits and the dynamist-fallibilist thought of Rosenzweig and Buber¹⁶⁰ (as in Berkovits' critique of Heschel) may have led Berkovits to feel that he needed to distinguish himself from their non-Orthodox attitudes.¹⁶¹

Dewey from Bernard Murchland, *The Age of Alienation* (New York: Random House, 1971), 186. (Murchland does not mention the source for the quotation, which is found in John Dewey, *Reconstruction in Philosophy* [New York: Henry Holt, 1920], 173.) Berkovits argued that Dewey, as a naturalist, did not manage to *ground* those values normatively and ethically. However, Berkovits' opinion implies that the Deweyan integrative humanist approach is, on its face, a worthy one.

- 155 My conversation with Dov was held at Yakar synagogue, Jerusalem, on November 28, 2011. I spoke by phone with Avraham (Brum) on November 23, 2011.
- 156 Eliezer Berkovits, *Major Themes in Modern Philosophies of Judaism* (New York: Ktav, 1974).
- 157 On the interdependence between ethics and metaphysics, or the "pragmatic maxim," see n. 20 above. On moderate foundationality as an indispensable part of CAP, see n. 54 above.
- 158 See Steven T. Katz, *Post-Holocaust Dialogues: Critical Studies in Modern Jewish Thought* (New York: New York University Press, 1983), 94–133.
- 159 This does not mean that Berkovits did not see any value in their thought, or that he had nothing in common with them. Compare n. 145 above.
- 160 Like Berkovits' position, Rosenzweig's stance in *The Star of Redemption* is at one and the same time moderately foundational and fallible. It is foundational, because the structure of the world seems quite fixed (the three angles, or in fact six, of the Star). It is fallible, because the dialogic-interactive structure of the world is based on eternal dynamism. See Rosenzweig, *Star of Redemption*, for example his discussion of love (172–178, 182–200). Buber's thought, however, seems less foundational and more fallible.
- 161 Attempts to map the Jewish world as if it consisted of an "Orthodox camp" and a "Liberal camp" do not always correspond to reality. Berkovits, for instance, was denounced by some rabbis for his lenient halakhic opinions. See Roth, *Orthodox Judaism*, 414–432, and section 5.2 below.

These four indications of Berkovits' familiarity with pragmatism provide the justification for an analysis of Berkovits' writings against the background of philosophy in general, and more specifically with respect to the concept of fallibilism in CAP.

4.2 *Berkovits: Fallible Halakhic Decision-Making*

Berkovits did not think that the theory of evolution provided sufficient explanation for the origin of humans,¹⁶² and as a post-Holocaust thinker he was justifiably skeptical about the Enlightenment paradigm of human goodness and about modern progressivism.¹⁶³ However, Berkovits did hold a moderate progressive attitude on human advancement in history, in general,¹⁶⁴ and on the status of women. At the same time, Berkovits was aware that "the possibility of improvement ... is also a perpetual reminder of the threat of further degradation," and he therefore described his attitude as one of "critical optimism."¹⁶⁵

Regarding Berkovits' specific attitude towards halakhic fallibility, he had deep faith in the ability of halakhah to improve as it faces new challenges.¹⁶⁶ His philosophy of halakhah includes a few pragmatic aspects, and he explicitly used the term "pragmatic" in his halakhic writing.¹⁶⁷ The most basic pragmatic element in Berkovits' work is his focus on the moral implementation of halakhah in human reality.¹⁶⁸ Here, I focus more specifically on halakhic decision making as an ongoing process of human self-correction that seeks to improve over time.¹⁶⁹

162 See Eliezer Berkovits, *God, Man and History* (Jerusalem: Shalem, 2004), 68–77.

163 For a critique of the tendency to ignore human evil inclinations in Enlightenment thought, see Berkovits, *God*, 96–101. Berkovits was deeply concerned about the dehumanization caused by "scientific" reductionism (e.g., the reductionism of logical positivism), and its aspiration to dominate (or even eliminate) the realm of metaphysics and values. See Berkovits' "Final Solution: Universal?," in *Confronting Omnicide: Jewish Reflections on Weapons of Mass Destruction*, ed. Daniel Landes (New Jersey: J. Aronson, 1991), 259–267, esp. 261.

164 See his *Crisis and Faith*, 77. Berkovits' explicit lens is Judaism; however, his inherent perspective is firmly humane, and as such, universal.

165 Berkovits, *God, Man and History*, 84 (compare n. 42 above, regarding James' meliorism).

166 On the reflection of fallibilism (as well as the other core concepts of CAP) in Berkovits' thought, see Berman S., "Jewish Thought and Pragmatism," ch. 6.

167 Eliezer Berkovits, *Not in Heaven: The Nature and Function of Jewish Law* (Jerusalem: Shalem, 2010), e.g., 11, 28, 120. Compare the parallels between this book and the more halakhically detailed original: *Halakhah: Its Role and Function* [Hebrew] (Jerusalem: Mosad ha-Rav Kook, 1981), 35, 39–40, 79, 217–218, 297, 299, 301.

168 See Berkovits, *Halakhah*, 218.

169 In this context, Berkovits was inherently different from other modern orthodox rabbis—in particular Rabbi Joseph B. Soloveitchik—who seem to adopt (at least de jure) the

Berkovits argues that while the Word of God, and more specifically, the moral and spiritual values of Judaism, are eternal,¹⁷⁰ halakhic norms may be fallible.¹⁷¹ Principles and rules stand somewhere in the middle, for they mediate between values and norms, and are to some extent fallible.¹⁷² Berkovits' stance is thus affiliated with Silman's "being ever-perfected" position but is not identical to it, since in Berkovits' thought the values of the Torah are eternal.

From a formal perspective, fallibilism is manifested in Berkovits' theory of halakhic deliberation in at least two ways: (1) on the personal level of individual halakhic decision-makers who reinterpret Jewish tradition or revise their own rulings; and (2) on the collective level, that of the rabbinical court. Here, too, the *dayanim* confront precedents established by previous courts, as well as their own past rulings.¹⁷³ These two dimensions are interwoven, since each one of the rabbinic judges is an individual, and since every individual decisor is part of an interpretive community, both synchronically as a participant in certain contemporary halakhic activities, and diachronically, as a participant in the ongoing commitment to Jewish halakhic tradition.¹⁷⁴ The present paper will concentrate primarily on the individual halakhist who may understand halakhah differently from previous generations and presumably in a manner more appropriate for the contemporary world.¹⁷⁵

Kantian conception of divine law as fixed and unchanging. See, for instance, Joseph B. Soloveitchik, *Halakhic Morality: Essays on Ethics and Masorah*, ed. J. B. Wolowelsky and R. Ziegler (New Milford, CT: Koren, 2017), 93–108. On the deep philosophical gap between Berkovits and Soloveitchik, see Hazony, "Introduction," xxxii–xxxiii; Cohen, "Incompatible Parallels"; Roth, *Orthodox Judaism*, 423–432; Carmy, "Berkovits's Challenge."

170 See, for instance, Berkovits, *Halakhah*, 290–294; idem, *Jewish Women in Time and Torah* (New Jersey: Ktav, 1990), 31.

171 In this sense, Nathan Barack's claim that "Human beings can be divided into ... the infallibles and fallibles" is simplistic: every human being holds *some* things to be fallible. "Judaism: A Pattern of Faith for Fallibles," in Nathan Barack, *Faith for Fallibles* (New York: Bloch, 1952), 61.

172 For an account of the topic from a juridical perspective, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press 1977), 14–45. For a review of the topic within the philosophy of halakhah, see Brafman, "Halakhah," 231–344.

173 This is related to the question of whether a rabbinic court may rule in opposition to a *taqanah* or *gezerah* of a previous court (in particular, in light of m. 'Eduyot 1:5–6).

174 Both the diachronic and synchronic dimensions of discourse are types of what Stanley Fish termed "interpretive communities," in his *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, MA: Harvard University Press, 1980).

175 On the explicit legitimacy given in Talmudic sources to juridical interpretive intuitions, see Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law: Governed by Men, Not by Rules* (New York: Harwood, 1991).

4.2.1 Halakhah and Reality

It has been argued that the idea of judicial discretion in Jewish law has been internalized over time through, roughly speaking, a shift from focusing on the social context of a decision to focusing on the inner consciousness of the deliberating sage.¹⁷⁶ For pragmatic halakhic authorities, however, concrete human-societal consequences (or ontological fallibilism, philosophically speaking) play a key role in halakhic deliberation. Accordingly, Peter Ochs described Berkovits' pragmatic halakhic orientation as one in which he "offers a lively defense of halakhic Judaism as the appropriate consequence of an action-oriented epistemology."¹⁷⁷ Berkovits himself implies that this action-oriented epistemology is constantly pointed towards reality: "Among the various theories of truth which occupy epistemological inquiry, the one closest to common-sense is the theory of correspondence. According to it, a judgment is true if it corresponds to the fact to which it refers."¹⁷⁸ The very meaning and validity of halakhah is hence determined by its relation to reality.

Berkovits' basic assumption is that the Torah is interested in humans and in improving them, or "humanizing" them. Halakhah is derived from, and at the same time interprets the Written Law, namely the revelation at Sinai. However, it is often difficult to apply the content of the written Torah to changing human realities, and one always risks misapplication.¹⁷⁹ For this reason, Berkovits argues, the Oral Law is needed. Divine in its origin, it serves to mediate the severity of the Written Law. Considering the status of women in modern society, for instance, Berkovits first observes that "conditions of life, reality, social

176 See Joseph E. David, *Jurisprudence and Theology in Late Ancient and Medieval Jewish Thought* (Switzerland: Springer, 2014), 54–57.

177 Peter Ochs, "Pragmatism in American Jewish Theology," paper presented at the thirty-fifth annual conference of the Association for Jewish Studies (Boston, 2003), http://www.academia.edu/4921620/Pragmatism_inAmerican_Jewish_Theology_a_conference_paper, 7.

178 Eliezer Berkovits, *Man and God: Studies in Biblical Theology* (Detroit: Wayne State University Press, 1969), 253.

179 Berkovits used the phrase "the exile of Halakhah" to refer to the condition where halakhah is not responsive to reality. *Not in Heaven*, 131. According to Berkovits, another reason for this exile is that "too much text may blind us to the realities awaiting the life-giving word of the Torah" (ibid., 139). On the inferiority of the written text in the early rabbinic world, see n. 212 below. Rorty has offered a similar critique of hyper-textuality: "In our century [i.e., the twentieth] there are people who write as if there were nothing but texts." *Consequences*, 139.

order, aspirations, and goals have changed fundamentally.¹⁸⁰ Therefore, halakhah ought to address new realities and be applied thoughtfully.¹⁸¹

This, indeed, is the essential nature of Halakhah: it recognizes the continually changing human condition.... Halakhah affirms the law, but—recognizing the ultimate authority of the word of God as revealed in the Torah—applies it in a manner that enables the meaning and purpose of the law to guide man and society in the context of the aimed-at integration of Torah and life. Judaism commits the Jew to the ever-enduring vital partnership with God. The result is *Torat Hayyim*, a living Torah.¹⁸²

Furthermore, Berkovits emphasizes that the attentiveness of halakhah to reality is not a random feature, but intentional and purposeful:

The application of the Torah to life throughout the history of the Jewish people had to be entrusted to man.¹⁸³ ... Once the Torah was revealed to the children of Israel, its realization on earth became their responsibility, to be shouldered by human ability and human insight.¹⁸⁴

The belief that the Torah was handed down with such an intention surely influences the way in which it is interpreted.¹⁸⁵ This leads to the question: What is

180 *Jewish Women*, 1. Berkovits' statement is indeed ambivalent: on the one hand, human nature is *not* arbitrary. In this sense Berkovits was a kind of "essentialist," and this explains his search for fundamentals; see his book entitled *In Search of Fundamentals: Five Addresses* (Sydney: Central Synagogue, 1947). On the other hand, life circumstances do create fundamental changes. In other words, changes are an inherent part of the picture, and they may be radical.

181 Berkovits, *Not in Heaven*, 142. On Berkovits's attitude to the status of women in halakhah, see Rachel Berkovits, "Torat Hayyim: The Status of Women in the Thought of Eliezer Berkovits," *Shofar* 31, no. 4 (2013): 4–15.

182 Berkovits, *Jewish Women*, 33 (see also 27–28, 31). On the attentiveness halakhic decisors display to the surrounding social reality, see Menachem Elon, *Jewish Law: History, Sources, Principles*, vol. 2, trans. Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), 538–541.

183 I believe that if Berkovits were alive today, he would prefer the word "humans."

184 *Not in Heaven*, 110 (compare Berkovits, *Halakhah*, 69). Hashkes defined this kind of halakhic tendency, in light of Peirce's semiotic theory of signs, in the following way: "a procedure that enabled the continuous process of interpreting these signs in order to adjust them to their changing environment." "Studying Torah," 166–167.

185 Compare n. 80 above on Geertz.

the main vehicle by which humans should conceive the constantly changing relationship between halakhah and reality?

4.2.2 Common Sense and the Centrality of *sevarah*

For Berkovits, the basis for enhancing halakhic knowledge and instruction is the use of *sevarah*, or human intuitive reasoning, to elucidate the connection between halakhic norms and specific circumstances. From Berkovits' point of view, *sevarah* is a proper (but not exclusive) way to engage the values of the Torah and comprehend halakhic norms in light of their underlying values and principles. Following Talmudic sources, Berkovits further equates the status of *sevarah* to that of the Written Law: "Principles deriving from *s'vara*, that is, from common sense or logic, have the validity of biblical statements."¹⁸⁶ Berkovits views *sevarah* as part of the pragmatic aspect of halakhah,¹⁸⁷ which considers human constraints and deliberates how to apply halakhah in light of them.¹⁸⁸ A pragmatic consideration of *sevarah* in light of reality thus stands in contrast to a "pure" logical-hypothetical way of thinking, even if such a scholastic endeavor might be seen as technically more accurate.

In contrast to hyper-rationalistic or idealistic conceptions of reason, Berkovits believed that reason should not be detached from the world it refers to and aims to repair; he deemed the effort to shape halakhah to be in accordance with presumed universal-absolute philosophical truth to be misconceived. This is how Berkovits explains Rabbi Yehoshua's use of the verse "not in heaven" (Deut 30:12) in the famous Talmudic discussion of the oven of 'Akhnai:¹⁸⁹

186 *Not in Heaven*, 9. Berkovits demonstrates the concept of *sevarah* using the Talmudic principle "ha-moši' me-ḥavero, 'alav ha-re'ayah" ("the burden of proof falls on the claimant"; b. Bava Kama 46b; see Berkovits, *Halakhah*, 15, 293). Compare David Weiss Halivni, "The Meaning of S'vara," *S'vara* 1, no. 1 (1990): 3–5; Avi Sagi, "A Philosophical Analysis of S'vara," *S'vara* 2, no. 1 (1991): 3–7; David Ellenson, "The Other side of S'vara," *S'vara* 2, no. 2 (1991): 8–10; Elon, *Jewish Law*, 987–1014.

187 Berkovits presented many illustrations of the "pragmatic and moral feasibility" of halakhah. See, for example, Berkovits, *Not in Heaven*, 18; idem, *Halakhah*, 297; Roth, *Orthodox Judaism*, 30–45.

188 See Berkovits, *Halakhah*, 301. In this sense, Berkovits is affiliated with what Thomas Sowell called "constrained" (as opposed to "unconstrained") thinkers. See Sowell's *A Conflict of Visions: Ideological Origins of Political Struggles* (New York: Basic Books, 2007).

189 In b. Bava Meši'a 59b. Much has been written on this formative Talmudic story; see, e.g., Izḥak England, "The Oven of Akhnai: The Interpretations of an Aggadah" [Hebrew], *Shnaton ha-Mishpat ha-'Ivri* 1 (1974): 45–56.

Halakhah, as the human way of life in accordance with the Torah, does not aim at absolute truth, nor does it run after the *fata morgana* of universal truth. Neither of them is accessible to human beings. Its aim is “earthly truth,” that the human intellect can grasp and for whose pursuance in life man must accept personal responsibility.¹⁹⁰

Berkovits’ rejection of the formalist-idealist conception of halakhah paves the way for its attentiveness to reality.¹⁹¹ Berkovits’ statement regarding the “*fata morgana* of universal truth” displays close proximity to James’ denunciation of the absolutist-idealist conception of truth.¹⁹² Similar to James and to pragmatism more generally,¹⁹³ Berkovits moved the center of gravity to the moral-ethical realm, rather than the epistemological one, holding that

the *sevarah* in halakhah, namely the human rational decision, does not function according to pure and theoretical logic rules of philosophic intellectualism, and you have no better proof for that than the talmudic inclination towards the Hillelites.¹⁹⁴

The application of the Torah according to the halakhic school of Hillel considers “human nature, biological-instinctive needs, psychological traits, financial-social problems, and changes in economic, psychological and moral life conditions.”¹⁹⁵ While biological needs have not changed radically, the other pa-

190 *Not in Heaven*, 84 (italics in original). For a comprehensive analysis of Berkovits’s opinion from the standpoint of legal theory, see Brafman, “Halakhah,” 231–473.

191 There is an interesting correlation between Berkovits’ objection to “universal principles” and the ethical school known as “moral particularism,” e.g., that of Jonathan Dancy in his *Ethics without Principles* (Oxford: Clarendon Press, 2004). It is nevertheless important to note that for Berkovits, principles did play an important, although not exclusive role.

192 See James, *Pluralistic Universe*, 11, 40, 126, 311.

193 According to Albert Schnitz, CAP is a pioneering attempt to re-establish philosophy as moral philosophy. “Jean Jacques Rousseau: A Forerunner of Pragmatism,” *The Monist* 19 (1909): 482. An argument about the entanglement of facts and values appears in various CAPs, and later in Hilary Putnam’s *The Collapse of the Fact/Value Dichotomy and Other Essays* (Cambridge, MA: Harvard University Press, 2002). In the context of Jewish thought, see Randi L. Rashkover, “Jewish Philosophy, the Academy, and the Fact-Value Divide,” in *The Future of Jewish Philosophy*, ed. Hava Tirosh-Samuels and Aaron W. Hughes (Leiden: Brill, 2018), 247–270.

194 Berkovits, *Halakhah*, 296. For a brilliant account of the pragmatic inclination of the Hillelites (however, without direct use of the concepts of CAP), see David Brezis, *Between Zealotry and Grace: Anti-Zealot Trends in Rabbinic Thought* [Hebrew] (Ramat-Gan: Bar-Ilan University Press, 2015).

195 Berkovits, *Halakhah*, 296.

rameters Berkovits mentions are indeed subject to many changes of time and place.¹⁹⁶ Given the dominant Maimonidean concept of halakhic diachronic immutability,¹⁹⁷ however, Berkovits' argument is far from taken for granted.

4.2.3 The Improvement of Halakhic Knowledge

The assumption that human *sevarah* has a fundamental status in halakhah provides the principal justification for considering changes in human understanding that unfold as the era, society, and customs change.¹⁹⁸ The notion that we understand the world differently than before, or that we now have better technological tools for dealing with nature, affects the treatment of halakhic norms. The need for flexibility in relation to reality is derived not only from this intellectual enhancement, but also from normative changes in life customs. Addressing the halakhic concept “nishtanu ha-teva'yim”¹⁹⁹ (conditions of [human] nature have changed), Berkovits writes:

It seems to me that psychological presumptions [*hazaqot*] ... are absolutely time-place dependent. Being related to the customs of society, to changes in psychological behavior, and in the functionality of moral values in society, halakhic implications might change as well.²⁰⁰

¹⁹⁶ See Roth, *Orthodox Judaism*, 82–97.

¹⁹⁷ Hence the halakhic concept of a temporary dispensation (*hora'at sha'ah*; compare b. Yevamot 35a). Even Maimonides, with his philosophy of static halakhah (see *Guide of the Perplexed*, trans. Shlomo Pines [Chicago: University of Chicago Press, 1963], 3:34 [534–535]), acknowledged that such temporary adjustments are inevitable. See Moshe Halbertal, *Maimonides: Life and Thought*, trans. Joel Linsider (Princeton: Princeton University Press, 2014), 346–347.

¹⁹⁸ This kind of halakhic attitude is by no mean exclusive to Berkovits. For a similar attitude, see Ari Ackerman, “Judging the Sinner Favorably: R. Chayyim Hirschensohn on the Need for Leniency in Halakhic Decision Making,” *Modern Judaism* 22 (2002): 261–280. For a Sephardic example of halakhic leniency, see Rabbi Yosef Mashash's book *Mayyim Hayyim*, and David Biton, “Law, Reason and Time: Rabbi Mashash in times of Change” [Hebrew], MA thesis (Hebrew University, 2002), 13–52. On Sephardic fallibilist halakhic rulings, see Zvi Zohar, “Teleological Decision-Making in Halakha: Empirical Examples and General Principles,” *Jewish Law Association Studies* 22 (2012): 331–362. As Zohar notes (342–344), teleological halakhic orientation is not necessary a lenient (*le-qula*) one. I intend to elaborate elsewhere on the inherent common ground between pragmatic fallibilism and Jewish traditionality (and its formulation by Meir Buzaglo and Yaakov Yadgar).

¹⁹⁹ On various halakhic uses of this concept, see Gutel, *Changes*. Gutel criticizes Berkovits for what he sees as an unconstrained use of the term “changes of nature” (ibid., 220 n. 525). However, it seems that Berkovits is indeed limiting the halakhic implications of this principle.

²⁰⁰ Berkovits, *Halakhah*, 64–65 (compare idem, *Not in Heaven*, 107). See also Moshe Beeri, “Presumptions based on Human Nature as Evidence in Jewish Law” [Hebrew] (PhD diss.,

Berkovits asks, for example, whether we could really apply halakhic presumptions like “holding that a man will not scruple to commit fornication” (b. Gittin 81b) in the contemporary modern context. Following Yosef Albo, who wrote about the insufficient generality of the law, which can never fully cover all potential cases, Berkovits concludes that halakhah ought to consider seriously the conditions of time and reality. Berkovits emphasizes that the legitimacy of modifying halakhah is a necessary conclusion not only because *reality* has changed, but also because our *conception of reality* has changed:

Not only have the meanings of nature and “natural” changed; rather, our understanding of the nature of reality developed as a consequence of the advancement in all the branches of science and social studies. Nowadays also, and in all fields, understanding reality is tied to the quality of our knowledge.²⁰¹

Berkovits thus utilizes *sevarah* and its ability to consider reality as a means of moral humane judgment, practicing halakhic leniency where appropriate. When a *poseq* (halakhic decisor) utilizes *sevarah*, however, it is not necessarily a result of halakhic leniency, nor does the use of *sevarah* inevitably lead to a lenient ruling. To be halakhically pragmatic is not identical to being lenient, although the two often overlap. From a critical perspective, we may note that this point was less elaborated in Berkovits’s account of halakhah, and hence Chaim Twerski criticized Berkovits for his emphasis on the mechanisms of halakhic change and his comparative neglect of halakhic conservation.²⁰²

4.2.4 Reality, *sevarah*, and Authority

Given the tradition-laden character of halakhah, the question is how the use of *sevarah*, considering reality and current conditions, affects the halakhic authority of rabbis. Berkovits acknowledges the possibility of human judicial errors—which, as we saw above, is recognized in biblical and rabbinic thought alike—but he nevertheless affirms the ability of later halakhic decisors to innovate (*le-ḥadesh*) and regulate (*le-taqen taqanot*, literally “to legislate

Bar-Ilan University, 2005), 269–284. On the link between halakhic presumptions and halakhic anti-skepticism, see Baris, “Skepticism in Maimonides,” 164–209.

201 Berkovits, *Halakhah*, 69 (compare b. Sotah 47b). On the reliance of halakhic deliberation on halakhic world-knowledge, see Daniel Sperber, *Ways of Pesikah: Methods and Approaches for Proper Halakhic Decision Making* [Hebrew], ed. Yoav Sorek (Jerusalem: Reuven Maas, 2008).

202 Chaim E. Twerski, “The Limiting Factors of Halakhah: The Other Side of the Coin,” *Academic Journal of Hebrew Theological College* 1 (2001): 80–106.

enactments”) in every generation.²⁰³ This basic manifestation of halakhic institutional fallibility enables the renewal of halakhah. Berkovits thus employs the following constitutive Talmudic text to sustain this position:

And why were the names of the elders not explicit [in the Torah]? To teach that every three [sages] that stood up as [a rabbinical] court for Israel, are like the court of Moses.... Jerubbaal [Gideon] in his generation is like Moses in his generation, Bedan [Samson] in his generation is like Aaron in his generation, Jephthah in his generation is like Samuel in his generation, to teach you that even the most despised person that has been appointed as a leader for the public, he is the most noble man, and it is written: “And thou shall come unto the priests the Levites, and unto the judge that shall be in those days” (Deut 17:9), would you imagine a person going to a judge not in his days? Therefore, you should go only to your contemporary judge, and it says “Say not thou: ‘How was it that the former days were better than these?’” (Eccl 7:10)²⁰⁴

The phrase “that shall be in those days” from Deuteronomy enables the continuity of halakhic deliberation and ruling, despite a possible decline in the quality of the halakhic knowledge of the decisors. Furthermore, the admonition against saying “The former days were better than these” is for Berkovits a negation of regressive-deterministic pessimism regarding human nature and history, and it offers contemporary halakhic rulers an opportunity to continue the line of former halakhic authorities.²⁰⁵

203 See, for instance, *Not in Heaven*, 24, 37. On the basis for halakhic renewal from the perspective of the Jewish covenant, see Joseph (Yossi) Turner, “The Authority of the Jewish People and the Torah in R. Hayyim Hirschenson’s Concept of the State” [Hebrew], in *Religion and State in Twentieth Century Jewish Thought*, ed. Aviezer Ravitzky (Jerusalem: The Israel Democracy Institute, 2005), 193–217.

204 b. Rosh ha-Shanah 25a–b. See Berkovits, *Not in Heaven*, 112 (compare idem, *Halakhah*, 264–265).

205 In this context, the halakhic rule *hilkheta ke-batr’ai* (opinions of later generations have a priority in determining halakhah) is significant. Documented in halakhic texts from the Gaonic period forward, this halakhic rule has proliferated in modernity, from the sixteenth century onward. See Israel M. Ta-Shma, *Ritual, Custom and Reality in Franco-Germany, 1000–1350* [Hebrew] (Jerusalem: Magnes, 1996), 58–78, esp. 62; Joel Roth, *The Halakhic Process: A Systemic Analysis* (New York: Jewish Theological Seminary, 1986), 364–370; Shai A. Wozner, “Hilkheta ke-Batray: A Reassessment” [Hebrew], *Shenaton ha-Mishpat ha-Tvri* 20 (1995–1997): 151–167. However, since *hilkheta ke-batr’ai* is empowering the later generations regardless of their halakhic approach (lenient or stringent), it is thus a double-edged sword.

Berkovits emphasizes an additional halakhic fallibilistic rule that “a judge must be guided only by what his eyes see” (b. Sanhedrin 6b),²⁰⁶ a juridical norm that helps to untether the decisor from binding precedents,²⁰⁷ enabling the necessary halakhic autonomy and flexibility, albeit in a local and temporary context.²⁰⁸ Berkovits also stresses the special status that an individual rabbi has within the rules of *pesiqah* (halakhic legislation), when this specific rabbi is considered as having supreme religious-intellectual ability:

On a central point the norms of *pesiqah* exceed the rule “the many [sages] and the individual [sage]—Halakhah is determined according to the majority”: in relation to individuals, for example, [we recall the norm] “the doctrine of R. Eliezer son of Jacob is small in proportion but clear” or “R. Yossi’s reasons are sound” and so on. Regarding [these outstanding] individuals, the focus is on the quality of their study and the content of their system, which is considered preferable by the majority disputing them. Halakhah is fixed according to them because they [the rabbis] are comparing one method to another, choosing the ones of R. Eliezer ben Jacob or R. Yossi, and therefore there is also no distinction in [this issue] between Written and Oral Law [*de-oraita u-de-rabanan*].²⁰⁹

²⁰⁶ *Not in Heaven*, 80 (compare Berkovits, *Halakhah*, 221). On this juridical norm in the history of Jewish law, see also Roth, *Halakhic Process*, 81–113. Klayman recognizes this juridical feature, or “grass roots judging,” as a main character of halakhic deliberation by which American jurisprudence may be inspired. “Pragmatism in Halakhah,” 632. For a counter-opinion, stating that there are some essential differences between normative religious systems and secular-civil-political ones, see Suzanne Last Stone, “In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory,” *Harvard Law Review* 106 (1993): 813–894.

²⁰⁷ Berkovits anchors his view in the halakhic responsa of Avraham the son of Maimonides, and on Aryeh Leib ha-Cohen Heller’s introduction to his *Qeṣot ha-Ḥoshen*, both assessing the inherent inability of a written law to encompass every future event. See also Menachem Lorberbaum, *Politics and the Limits of Law: Secularizing the Political in Medieval Jewish Thought* (Stanford: Stanford University Press, 2001), 35–52.

²⁰⁸ It is not coincidental that Berkovits bases his judicial interpretive theory mainly on the Babylonian Talmud. Ḥanina Ben-Menahem argued that while the Yerushalmi (namely, the editors of the Jerusalem Talmud) tend to limit the role of the judge to the proper application of the law to the cases at hand, the Bavli generally holds that the judge may exceed the limits of the former law. *Judicial Deviation*, 55–98.

²⁰⁹ Berkovits, *Halakhah*, 34.

The intellectual power of Rabbi Eliezer ben Jacob and Rabbi Yossi confers authority to determine halakhah.²¹⁰ In other words, their authority is parallel to the fallibility of the previous authoritative sources, and the fallibility of their opponents (this awareness of the fallibility of earlier authorities appears in American legal pragmatism as well²¹¹). However, even such outstanding halakhic scholars are not immune from halakhic mistakes, and therefore future disputes and later generations will be able to rule with an authority that corresponds to their own.

Berkovits' acknowledgment of halakhic fallibility leads him to criticize attempts to codify halakhah.²¹² He recalls the rabbinic belief in the vitality of the Oral Law, according to which it was forbidden to commit it to writing,²¹³ explaining that according to the Talmud "the *dayan* is obligated to rule in accordance with his own understanding of the case before him."²¹⁴ The opportunity for halakhic change and renewal remains a living option that should not be eliminated by codification.²¹⁵

By pursuing this argument, Berkovits walks the path of the MaHarShaL (Rabbi Shlomo Luria) and Rabbi Judah Loew ben Bešalel (the MaHaRaL of Prague), two sixteenth-century sages who criticized the codification of the *Shulhan Arukh*.²¹⁶ Berkovits walks a very interesting path between formalism (or positivism) with regard to authority, and non-positivism with regard to

210 For an argument regarding an intensification of halakhic reasoning throughout Talmudic texts, see David Weiss Halivni, *Midrash, Mishnah, and Gemara: The Jewish Predilection for Justified Law* (Cambridge, MA: Harvard University Press, 1986).

211 See Holmes, "The Path of the Law"; Cardozo, *Judicial Process*, 150, 165–167. John Dewey also made an argument about the shortcomings of codification (which implicitly echoes Rabbi Yosef Albo, whom we mentioned above): "Rigid moral codes that attempt to lay down definite injunctions and prohibitions for every occasion in life turn out in fact loose and slack." *Human Nature and Conduct: An Introduction to Social Psychology* (New York: Modern Library, 1930), 103.

212 Here and elsewhere Berkovits shows proximity to Shmuel D. Luzzatto and Zechariah Frankel; see n. 119 above.

213 On the problematic status of relying on written (as opposed to memorized) text in the early rabbinic world, see Rebecca Scharbach Wollenberg, "The Dangers of Reading As We Know It: Sight Reading As a Source of Heresy in Early Rabbinic Traditions," *Journal of the American Academy of Religion* 85 (2017): 709–745.

214 *Not in Heaven*, 141; compare Berkovits, *Halakhah*, 292: "Because this makes them ignore the principle that the Judge has only what his eyes see."

215 Compare Daniel Rynhold, *Two Models of Jewish Philosophy: Justifying One's Practices* (Oxford: Oxford University Press, 2005), 151–153. Rynhold labels Berkovits as a "priority of practice" type of thinker (179).

216 For an analysis of their critique of Rabbi Yosef Karo's project of codification, see Leon Wiener Dow, "Opposition to the 'Shulhan Aruch': Articulating a Common Law Conception of Halacha," *Hebraic Political Studies* 3 (2008): 352–376.

juridical reasoning.²¹⁷ This does not mean that Berkovits believed that “everything goes,” or that interpretation is without limits, but that no participant in the house of study is granted a kind of “rabbinic infallibility.” Note that in his translation cited above (“for the *dayan* is obligated to rule in accordance with his own understanding of the case before him”), Berkovits considerably relaxes the original Hebrew rule that “the judge has only what his eyes see,” emphasizing the need to pay attention to the actual case without necessarily denying the basic authoritativeness of previous courts’ precedents.²¹⁸ Whereas the original Talmudic rule is allegedly formulated in a presumable narrow-eliminative way, Berkovits translates it in a *nonliteral* way. It seems that he reveals a deep awareness of the perils of modern reductionism²¹⁹ and “hyper-fallibility,” and of the modern-historicist negative attitude towards the traditional past.²²⁰ Berkovits embedded this awareness in his translation of this profound halakhic principle.

To be sure, Berkovits was not the only halakhist to advocate this kind of “halakhic activism,”²²¹ but he represents a worthy example of this unique integration of tradition and autonomy.²²² Nevertheless, the question remains whether such a halakhic approach is in continuity with Jewish tradition; as Zachary Braiterman has argued, “the more insistently he [Berkovits] claims the influence of tradition, the more it is evident that he has radically revised it.”²²³

217 A detailed discussion of Berkovits’ attitude is beyond the scope of the present paper. Brafman (*Halakhah*, 331–344) justifiably characterized Berkovits’ stance as reflecting a middle ground of “inclusive positivism” or post-positivism. It seems that the halakhic attitude that Benjamin Brown identifies as “intuitive formalism” may also shed important light on Berkovits’ thought. “Formalism and Values: Three Models” [Hebrew], in *New Streams in the Philosophy of Halakhah*, ed. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Van-Leer and Magnes, 2008), 233–257.

218 See my comment below on the “traditionalism” of both halakhic sages and the CAPS.

219 Berkovits explicitly criticized the modernist reductionist inclination and its cultural Pygmalion effect: “The scientism of the modern age, which for several generations now has been disabusing man of his ‘illusions’ ... and teaching him that ... man is really ‘nothing but.’ What wonder what [i.e., that] he is acting more and more like one who is ‘nothing but.’” Eliezer Berkovits, *Crisis and Faith* (New York: Sanhedrin, 1976), 73.

220 On major aspects of this hermeneutical *Zeitgeist* in nineteenth-century Germany, see Yosef Hayim Yerushalmi, *Zakhor: Jewish History and Jewish Memory* (New York: Schocken, 1989), 81–103, and George Y. Kohler, *Reading Maimonides’ Philosophy in Nineteenth Century Germany: The Guide to Religious Reform* (Dordrecht: Springer, 2014).

221 To use Avi Sagi’s term. See his *Halakhic Loyalty: Between Openness and Closure* [Hebrew] (Ramat Gan: Bar-Ilan University, 2012), 196–202.

222 On the intertwined texture of autonomy and heteronomy (or God’s transcendence) in halakhah, see Hashkes, *Rabbinic Discourse*, 107–110.

223 Zachary Braiterman, (*God*) *After Auschwitz: Tradition and Change in Post-Holocaust Jewish Thought* (Princeton: Princeton University Press, 1998), 132.

As fallibility was shown earlier in this paper to be an inherent part of halakhic discourse itself, there are good reasons to identify Berkovits as a faithful heir of traditional halakhah (rather than a radical reviser of it), as will be demonstrated in the following section.

5 Pragmatic Fallibilism and Modern Jewish Thought

Modern man is also a victim of clarity. Much of our difficulty proceeds from the demand for certitude and an inability to recognize and live with the irreducibility of shadows.

JOHN J. McDERMOTT²²⁴

5.1 *Jewish Tradition and the Anxious Encounter with Modernity*

Having demonstrated one link between Jewish thought and pragmatism (fallibilism) and investigated some aspects of halakhic fallibility in Berkovits' work, we turn to the question of how and why his halakhic view became relatively uncommon in traditional Judaism in the modern world.²²⁵ In place of an exhaustive treatment of the figures and concepts that will be mentioned, I will only lay the groundwork for a more detailed discussion. If my hypothesis proves a worthy one, it will invite further work, both diachronically (Berkovits vis-à-vis classical rabbinic literature and the subsequent history of halakhic thought) and synchronically (Berkovits in comparison to his Orthodox and Ultra-Orthodox contemporaries).

It is commonplace to say that modernity influenced liberal streams of Judaism.²²⁶ I wish to claim further that modern philosophy implicitly influ-

224 John J. McDermott, *The Drama of Possibility: Experience as Philosophy of Culture* (New York: Fordham University Press, 2007), 350.

225 Searching for the roots of this phenomenon is beyond the scope of the current discussion. However, it seems that the political-social aspect is key. See Menachem Friedman, "The Market Model and Religious Radicalism," in *Jewish Fundamentalism in Comparative Perspective: Religion, Ideology, and the Crisis of Modernity*, ed. Laurence J. Silbersten (New York: New York University Press, 1993), 192–215, and Shai Akavia Wozner, "Reform Halakhah: In the Wake of the Book *Sane Halakhah*" [Hebrew], in *Reform Judaism: Thought, Culture and Sociology*, ed. Avinoam Rosenak (Tel Aviv: Ha-Kibbutz ha-Me'uhad; Jerusalem: Van Leer Institute, 2014), 261–286, esp. 286.

226 On the other hand, from an intellectual standpoint, many have argued that modernity exerted a sociological influence on Ultra-Orthodoxy. See, for example, Joseph Dan, "Ultra-Orthodoxy Taking Over: A Product of Secular Israel" [Hebrew], *Alpayim* 15 (1998): 234–253.

enced Orthodoxy and Ultra-Orthodoxy (Haredi Judaism) as well.²²⁷ David Sorotzkin, for example, identified the influence of Martin Luther's dichotomous and dualistic infrastructure²²⁸ on the ideology of the MaHaRaL.²²⁹

The contribution of the present paper to this line of research is the suggestion that both Cartesianism and its critique by CAP represent another significant axis for understanding Jewish currents in modernity. More specifically, my proposal is that nineteenth-century Ultra-Orthodox introversion arose, at least to some extent, due to the deep *affiliation* between Jewish tradition and modern-pragmatic fallibilism. I demonstrated this affiliation through the appearances of fallibilism in classical Jewish sources and in Berkovits' philosophy of halakhah. This notable resemblance between Judaism and modern fallibilism, in turn, provoked in reaction an undermining of the role of fallibility in Jewish sources, resulting in an implicit Ultra-Orthodox turn to the Cartesian radical-foundationalist side of modernity.

From this perspective, the clash between Jewish tradition and modernity is not a consequence of some inevitable, inherent contradiction between them, but rather a product of the very affinity and resemblance they share. Ultra-Orthodox halakhic leaders confronted modern fallibility, which had been a significant and longstanding aspect of Jewish law. These leaders tried to distinguish their Jewish identity from the modern spirit of fallibility,²³⁰ yet in doing so they implicitly succumbed to the dominant Cartesian temptation of radical foundationalism (in fact, the presupposition of divine infallibility is shared by many atheists as well²³¹). To be sure, religious radical-foundationalism and dogmatism existed in Jewish tradition long before the advent of

227 I refer to the halakhic works from Rabbi Moshe Sofer (HaTaM Sofer) onward.

228 See, for example, Martin Luther, "The Freedom of a Christian" (1520), in his *Three Treatises*, trans. W. A. Lambert and rev. Harold J. Grimm (Philadelphia: Muhlenberg Press, 1960), 265–316. Compare Ernst Troeltsch, *The Social Teaching of the Christian Churches*, vol. 2, trans. Olive Wyon (New York: Harper & Row, 1960), 465–477.

229 David Sorotzkin, *Orthodoxy and Modern Disciplinaion: The Production of the Jewish Tradition in Europe in Modern Times* [Hebrew] (Tel Aviv: Ha-Kibbutz ha-Me'uhad, 2011), 150–247.

230 At the implicit level, however, sheer loyalty to some idealized fixed history and previous halakhic datum is not what actually take place in Orthodoxy/Ultra-Orthodoxy. See Marc B. Shapiro, *Changing the Immutable: How Orthodox Judaism Rewrites Its History* (Portland, OR: Littman, 2014).

231 James Rachels, for instance, has argued that the assessment that God's will is changing excludes Him from being a worthy object of religious worship. See James Rachels, "God and Human Attitudes," in *Divine Commands and Morality*, ed. Paul Helm (New York: Oxford University Press, 1981), 34–48. Such an infallibilist premise, in its turn, corresponds to some religious traditions, including in Islam (compare n. 101 above).

modernity.²³² Nevertheless, as many have already noted, the phenomenon of Ultra-Orthodoxy is in many ways a distinctively modern one, as I will shortly demonstrate.²³³

From a bird's-eye view, religious radical foundationalism is reflected in Ultra-Orthodoxy mainly in the assessment that halakhah does not change. The most famous formulation of this principle is ḤaTaM Sofer's renowned slogan, "the 'new' is forbidden by the Torah."²³⁴ This orientation was manifested in "dogmatizing" halakhic norms and expanding *ḥumrot* (stringencies).²³⁵ Corresponding to the Cartesian radical skepticist side of modernity, we see an intensification of religious anxiety surrounding halakhic doubts, such as regarding *ḥammeṣ* during Passover.²³⁶ *Ḥammeṣ* was always a pressing issue for Jews, and as McDermott's epigraph at the beginning of this section indicates it is not difficult to imagine how Cartesian foundationalism and skepticism could intensify halakhic stringencies. Thus Ultra-Orthodoxy, which presumed to protest against modernity, appears in some aspects as a withdrawal into the unpragmatic "spirit of Cartesianism."²³⁷ The radical foundationalism of Descartes and the "halakhic infallibility" manifested in some avenues of Ḥaredi thought²³⁸ might be yet another echo of the vast direct and indirect influence of the old Greco-Roman legacy on classical and medieval Judaism, which fostered the conception that the divinity of Torah lies in its immutability.²³⁹ Put differently,

²³² Maimonides may serve as a key example of this; see n. 107 above.

²³³ See Katz, *Halakhah in Straits*, and the wide work of his successors. To be sure, this halakhic rigidity resulted from other factors besides the philosophical one. See, for example, Leora Batnitzky, "From Politics to Law: Modern Jewish Thought and the Invention of Jewish Law," *Diné Israel* 26–27 (2009–2010): 7–44. Batnitzky argues that Rabbi Samson Raphael Hirsch was influenced by the German legal concept of *Rechtsstaat*, in which law is conceived as conceptually independent from the political sphere.

²³⁴ See *Responsa of Hatam Sofer*, part "Orah-Ḥayim" [Hebrew] (Jerusalem, 2008), section 28, 51–52. For a more recent radical orthodox approach, see the following formulation by J. David Bleich: "Let it be stated unequivocally: *Jewish law does not change*." "Halakhah as an Absolute," *Judaism* 29 (1980): 31, italics in original.

²³⁵ On basic modes of Ultra-Orthodox halakhic stringency, see Benjamin Brown, "Halakhic Stringency: Five Types in Modern Times" [Hebrew], *Diné Israel* 20–21 (2001): 123–237.

²³⁶ For the contrary phenomenon, namely the halakhic leniency of Talmudic sages regarding *ḥammeṣ*, see my "'If so, There Would be No End to the Matter' as Halakhic Argument in Rabbinic Texts" [Hebrew] (MA thesis, Hebrew University, 2007), 31–39.

²³⁷ Brown points out that the Ashkenazi rabbi Yair Bakharakh (1638–1702) seems to be the point of departure in early modernity, for in his responsa we find an increased use of the term Da'at Torah. "Daat Torah," 598. Whether this might be an implicit or explicit reaction by Bakharakh to Cartesian skepticism is worth a more detailed analysis.

²³⁸ See Kaplan, "Daas Torah"; Bacon, *Politics of Tradition*; Brown, "Daat Torah."

²³⁹ See Hayes, *Divine Law*, 54–61, 371–377. Brown argues that academic scholarship on Ultra-Orthodoxy exaggerated the amount of halakhic stringency that was indeed practiced.

the late antique intellectual conventions described by Christine Hayes has been reversed in the modern era: while in late antiquity, Greco-Roman culture took immutability to be a sign of divine law, and Talmudic law was by and large held to be fallible, in modern times, many observant (and nonobservant) Jews adopted the static picture of divine law as a sign of their distinctiveness from the non-Jewish world.²⁴⁰ This halakhic immutability was reinforced by modernist positivistic currents, as Haim Soloveitchik has argued:

And then a dramatic shift occurs. A theoretical position that had been around for close to two centuries suddenly begins in the 1950's to assume practical significance and within a decade becomes authoritative. From then on, traditional conduct, no matter how venerable, how elementary, or how closely remembered, yields to the demands of theoretical knowledge. Established practice can no longer hold its own against the demands of the written word.²⁴¹

Soloveitchik also connects this inclination to a loss of faith in God's presence in the life of halakhic Jews.²⁴² This, however, is not to say that Orthodox or Ultra-Orthodox halakhists lack any sort of pragmatic fallibilism. In fact, at the implicit level, the opposite is often true, for instance in the case of Rabbi Avraham Y. Kareliş (the *Ḥazon Ish*) and his pragmatic halakhic inclination,²⁴³

"Stringency," 232–235. Brown observes that utilizing a strict halakhic *policy* with respect to specific religious-social problems is not a new phenomenon in Jewish tradition. However, it is hard to object that, in general, many halakhic fields and rulings have undergone a stringent reorientation in modernity.

240 I thank Christine Hayes for her comments on this hypothesis, which helped me to formulate it better. On a related transformation of Jewish tradition, compare Kellner, *Must a Jew*, 104–106.

241 Haym Soloveitchik, "Rupture and Reconstruction: The Transformation of Contemporary Orthodoxy," *Tradition* 28, no. 4 (1994): 64–130, at 69. This observation is supported by Rorty's assessment (n. 179 above).

242 "Having lost the touch of His presence, they seek now solace in the pressure of His yoke." Soloveitchik, "Rupture," 103. Compare Menahem Friedman, "Life Tradition and Book Tradition in the Development of Ultra-Orthodox Judaism," in *Judaism from Within and from Without: Anthropological Studies*, ed. Harvey E. Goldberg (Albany: SUNY Press, 1987), 235–255; Daniel Statman, "Negative Theology and the Meaning of the Commandments in Modern Orthodoxy," *Tradition* 39 (2005): 58–71.

243 See Moshe Samet, *Chapters in the History of Orthodoxy* [Hebrew] (Jerusalem: Hebrew University and Carmel, 2005), 409. On Rabbi Kareliş's implicit pragmatism, see Benjamin Brown, *The Ḥazon Ish: Halakhist, Believer, and Leader of Ḥaredi Revolution* [Hebrew] (New York: Yeshiva University; Jerusalem: Magnes, 2011); Peter Ochs, "Pragmatism and the Logic of Jewish Political Messianism," in *Pragmatic Studies in Judaism*, ed. Andrew Schumann (Piscataway NJ: Gorgias Press, 2013), 135–178 (esp. 161–170).

or Rabbi Elijah Dessler and his pedagogical *musar* approach.²⁴⁴ This phenomenon is even clearer when Orthodox halakhic decisors are examined in comparison to their immediate halakhic colleagues.²⁴⁵ Given all this, what can we conclude regarding Berkovits' fallibilistic halakhic approach?

5.2 *Berkovits' Fallibilistic Halakhic Approach*

Compared to those who embraced the static picture of divine law, Berkovits walked a different path. He argued that his halakhic method is neither a compromise with modernity nor a submission to it, but the opposite: the pragmatic wisdom of the feasible is in fact what makes the teachings of the Torah great and glorious. Here we encounter an interesting paradox. It is precisely Berkovits' certainty regarding the eternity of the *values* and principles underlying halakhah, that made him feel more secure regarding the fallibility of individual halakhic *norms*. This is perhaps what John Dewey had in mind when he wrote that "everyone, in my conception, must be dogmatic at some point in order to get anywhere with other matters."²⁴⁶

Yet, some scholars viewed Berkovits as venturing beyond the boundaries of orthodoxy,²⁴⁷ and some of his colleagues found it difficult to accept him.²⁴⁸ The most famous halakhic debate in which Berkovits was involved concerned his solution to the problem of the *'agunah*²⁴⁹ under the halakhic umbrella of conditionality in marriage and divorce.²⁵⁰ Were Berkovits' opponents right? Does Jewish tradition indeed require an absolute negation of any dynamic

244 See Elijah Dessler, *Mikhtav me-Eliyahu*, vol. 1, ed. Aryeh Carmel and Alter Halpern (Jerusalem: Sifriyati, 2007), 94–96, and Shapiro, *Changing the Immutable*, 23–24, 284. Shapiro's study is significant for its appreciation of the gap between the explicit Orthodox discourse of immutability, and the actual performing of changes in tradition. On current transformations of Daat Torah in some pragmatic directions, see Benjamin Brown, *Toward Democratization in the Haredi Leadership? The Doctrine of Da'at Torah at the Turn of the Twentieth and Twenty-First Centuries* [Hebrew] (Jerusalem: Israel Democracy Institute, 2011), 106–111.

245 See Benjamin, *Hazon Ish*, 535.

246 See n. 65 above.

247 Consider the following quote: "Yet it must be said that he has overstepped the boundary which separates traditional Judaism from other, heterodox versions of our faith." Allan L. Nadler, "Eliezer Berkovits's Not in Heaven," *Tradition* 21 (1984): 91–97, at 94.

248 For instance, Rabbi Ahron Soloveichik and Rabbi Dr. Chaim Zimmerman, who were prominent figures at the Hebrew Theological College. See Roth, *Orthodox Judaism*, 417–422.

249 Literally a "chained" woman, bound by marriage to a husband who is missing and not proved dead, or who refuses to grant a writ of divorce.

250 See Berkovits' *Tenai be-Nisu'in u-ve-Get* [Conditionality in Marriage and Divorce] (Jerusalem: Mosad ha-Rav Kook, 1966). On the tangled consequences of this halakhic debate, including the severe critique by Rabbi Menachem Mendel Kasher, see Roth, *Orthodox Judaism*, 344–387, and Brafman, "Halakhah," 287–295.

conception of the world and of halakhah? Was Berkovits misinterpreting Orthodox halakhah?²⁵¹ Or does Orthodox halakhah itself in many cases misinterpret the halakhic ethos of the talmudic sages?²⁵² These remain open questions that call out for further consideration.²⁵³

However, we may note that the close correlation between “tradition” and “rigidity,” as conceived by many Ultra-Orthodox Jews, is not a necessary one, to say the least. Obviously, facing Sabbateanism and antinomianism more broadly,²⁵⁴ halakhic Jewish authorities tried to shield Jewish normativity. However, we often find that what was intended to be an addition, was initially a subtraction (as in b. Sanhedrin 29a, *kol ha-mosif gore’a*). Considering the significant place that fallibility has in classical rabbinic sources (see above, section 3.2), the following thesis may be stated: it seems that the intellectual rigidity of some Ultra-Orthodox Jews (and some atheists, as well) is conceptually more closely affiliated with Cartesian radical foundationalism and Catholic infallibility²⁵⁵ than with what was here identified as a dominant strain of fallibilism in traditional halakhic discourse. This dimension of fallibility, however, does not undermine the assumption that halakhah is authoritative for Jews.²⁵⁶

251 As Nadler (“Not in Heaven,” 96–97) and Twerski (“Limiting Factors”) have argued. An alternative viewpoint on Berkovits’ description of halakhic fallibility, however, may follow from Beeri, “Jewish Law,” 308–314.

252 On the term “Orthodoxy” as semantically constitutive of the rigidity of halakhah in modern times (and hence the misconception of halakhah as static and unchanging), see Avi Sagi, “Orthodoxy as a Problem” [Hebrew], in *Jewish Orthodoxy: New Perspectives*, ed. Yosef Salmon, Aviezer Ravitzky, and Adam Ferziger (Jerusalem: Magnes, 2006), 21–53.

253 Charging Berkovits with absorbing “foreign” modernist influences was perhaps a kind of Freudian projection on the part of his opponents. Alternatively, in the words of the Talmud, “kol ha-posel, be-mumo posel” (“one who disqualifies others is self-invalidating,” b. Kiddushin 70b).

254 On Sabbatai Zevi’s anti-nomism, see Gershom Scholem, “Sabbatianism and Mystical Heresy,” in *Major Trends in Jewish Mysticism* (New York: Schocken, 1995), 287–324.

255 Brown argues that an essential and direct equivalence to papal infallibility does not appear in Haredi sources until the third stage of Da’at Torah (that of Rabbi Dessler). *Toward Democratization*, 62. Two further observations may be added here: first, as Brown himself assesses, “when we speak of evolutionary stages of a religious doctrine we should consider not only the explicit and formulated ideas, but also the hidden premises, the un verbalized attitudes and the special atmosphere it reflects.” Furthermore, the fourth stage of Da’at Torah (that of Rabbi [Elazar Menachem Man] Shakh) was characterized by Brown as an attempt at a “monopolization of Daat Torah,” or the concentration of rabbinic power in the hands of one halakhic leader. The resemblance to papal infallibility here might be less of a coincidence.

256 As noted by David Novak, for instance. “Can Halakhah Be Both Authoritative and Changing?,” in *Halakhah in a Theological Dimension* (Chico, CA: Scholar’s Press, 1985), 1–10.

6 Conclusion

This paper has demonstrated parallels to a pragmatic idea—fallibilism—in Jewish tradition and in one aspect of the work of one Jewish thinker. Based on these findings, what may we say about halakhic Judaism and CAP in the realm of the history of ideas?

6.1 *Jewish Thought and Pragmatism in the History of Ideas*

There are two main methodologies by which this question may be addressed: Arthur Lovejoy's "history of ideas" and the discipline of "intellectual history."²⁵⁷ The scholar of intellectual history looks for a consequential influence on a given thinker, a sort of philosophical "smoking gun," to prove influence. The historian of ideas, on the other hand, examines the broader human intellectual arena and the universal realm of concepts, showing less regard for the interpersonal dimension.²⁵⁸ Lovejoy's attempt to investigate ideas as if they were akin to Platonic hypostases was justifiably criticized by Quentin Skinner, who stressed the incommensurability of different intellectual systems.²⁵⁹ The road taken here is thus an attempt to benefit from Lovejoy's methodology without committing to his specific Platonic assumption regarding the ontological-metaphysical existence of these ideas independent of human intellectual formation. Exploring both strategies, I suggest that regardless of Berkovits's personal-intellectual exposure to CAP, he was educated in a pragmatic form of traditional rabbinic thought, specifically that of halakhic fallibility, which in the final account contains ideas for which CAP provides a conceptual philosophical vocabulary.²⁶⁰

In a broader perspective, our discussion may lead to a conclusion that paraphrases the subtitle of William James's renowned book *Pragmatism: A New*

257 For the notion that there is a shared human intellectual arena, see Arthur Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (New York: Harper & Row, 1965), 3–23. Compare Peter E. Gordon, "What is Intellectual History? A Frankly Partisan Introduction to a Frequently Misunderstood Field" (revised version, Summer 2013), http://scholar.harvard.edu/files/pgordon/files/what_is_intell_history_pgordon_mar2012.pdf.

258 This, in general, was also Harry Austryn Wolfson's attitude: "Since beliefs and opinions are not necessarily tied, in Wolfson's view, to particular historical and geographical 'culture zones,' their derivatives cannot be traced exclusively through textual evidence of direct empirical influence." Jonathan Cohen, *Philosophers and Scholars: Wolfson, Guttman, and Strauss on the History of Jewish Philosophy*, trans. Rachel Yarden (Lanham, MD: Lexington, 2007), 103.

259 Quentin Skinner, "Meaning and Understanding in the History of Ideas," *History and Theory* 8, no. 1 (1969): 3–53, esp. 10.

260 For elaboration, see Berman S., "Jewish Thought and Pragmatism," ch. 1.

Name for Some Old Ways of Thinking. For fallibilism in CAP appears to be a new name for traditional Jewish halakhic ways of thinking. The pragmatic themes in Berkovits' work have deep roots in talmudic literature and halakhic tradition, as demonstrated above. As Hayes put it, "the implied fallibility of the divine lawgiver did not impinge upon the Law's divinity in the eyes of the rabbis," and in fact this fallibility was itself a major component *constituting* it.²⁶¹ In this respect, CAP was not the exclusive source of Berkovits' pragmatic orientation regarding halakhah. Furthermore, the rabbinic formulations he employed and the ways in which he wove halakhic precedents into his work indicate that the halakhic tradition was for him intellectually fertile soil. This is the place to note another significant similarity between halakhah and CAP, namely their status as interpretive traditions. Interestingly, we find in both a respectful attitude toward the wisdom of past tradition.²⁶² It is common to acknowledge this inclination in the case of halakhah, but it is not at all taken for granted in the case of the CAPs, considering the emergence of an anti-traditionalist image of CAP, in presumed opposition to the philosophical tradition.²⁶³ This, however, is not correct, since we do find a "traditionalist" attitude toward philosophy in Peirce,²⁶⁴ James,²⁶⁵ and Dewey.²⁶⁶

To put it differently, it may be argued that the "rabbinic mind"²⁶⁷ (and particularly the halakhic school of Hillel) and CAP are conceptually affiliated philosophies: Talmudic-rabbinic thought reflects a proto-pragmatic state of mind

261 Hayes, *Divine Law*, 326. However, I disagree with Hayes' thesis about the fundamental *non-rationality* of rabbinic halakhic discourse; I think that there are good reasons to argue that it is indeed largely rational when this term is construed pragmatically (as opposed to idealistically). Cf. Menachem Fisch, *Rational Rabbis*. On Fisch's stance as pragmatic, see Martin Kavka, "Rational Neopragmatist Rabbis," in *The Future of Jewish Philosophy*, ed. Hava Tirosh-Samuels and Aaron W. Hughes (Leiden: Brill, 2018), 151–169.

262 On the rise of secularizing neo-pragmatist interpretations of classical pragmatism as marginalizing its pro-traditionalism, see Randy L. Friedman, "Traditions of Pragmatism and the Myth of the Emersonian Democrat," *Transactions of the Charles S. Peirce Society* 43 (2007): 154–184.

263 For instance, in Rorty's description of pragmatism in his *Consequences of Pragmatism* (see n. 3 above).

264 "The rivulets at the head of the river of pragmatism are easily traced back to almost any desired antiquity. Socrates bathed in these waters. Aristotle rejoices when he can find them." *CP* 5.11.

265 Pragmatism was to him a "new name for some old ways of thinking."

266 Who named his book *Reconstruction in Philosophy*, not of *Philosophy*, and was surely not willing to give up philosophy altogether.

267 To paraphrase Max Kadushin (see his *Rabbinic Mind*). On Kadushin's attitude, see Peter Ochs, "Max Kadushin as Rabbinic Pragmatist," in *Understanding the Rabbinic Mind: Essays on the Hermeneutic of Max Kadushin*, ed. Peter Ochs (Atlanta: University of South Florida, 1990), 165–196.

that later found mature philosophical expression, though obviously in many ways, in CAP.²⁶⁸ To be sure, CAP developed in a Christian *Weltanschauung*. The CAPs had indeed a profound interest in religion and religious metaphysics.²⁶⁹ However, given the vast influence Jewish thought had on Christianity through Christian Hebraism, at least from the early modern period forward, and the unique philosophical emphasis of the CAPs on worldliness and the social dimension of religion, CAP may perhaps be described, from a Jewish perspective, as somewhat ‘neighboring’ Christian philosophy.²⁷⁰ This relationship, of course, would constitute an indirect and implicit influence, as the CAPs did not proclaim Jewish tradition as a resource for the production of their pragmatic ideas.²⁷¹ The argument of the present paper thus implies that pragmatic ideas may have found expression both in classical talmudic and rabbinic thought and in CAP.²⁷²

As Berkovits noted, the realm of thought is universally shared, so the above observations are perhaps not surprising. In conclusion, fallibilism was demonstrated here to be a vital conceptual framework for the examination of Berkovits’s thought, and presumably for that of many other halakhic thinkers as well.

6.2 *Postscript*

Taking a broader perspective, we may point out two significant contexts for identifying the vast importance of fallibility. First, pragmatic fallible

268 For a connection between the rationality of talmudic rabbis and that of modern philosophers of science, see Fisch, *Rational Rabbis*.

269 This is true for Dewey, and not only in the case of Peirce and James. Slater criticizes Richard Rorty and Phillip Kitcher for misunderstanding this. Slater, *Pragmatism*, 131–170.

270 Compare Franks, “Peirce’s Idealism.” For a wider argument regarding a presumed “Judaizing” of certain Christian thinkers, see Louis Israel Newman, *Jewish Influence on Christian Reform Movements* (New York: Columbia University Press, 1966).

271 In fact, the fathers of CAP were indeed influenced by specific Jewish thinkers. Nima (Nehama) Hirschensohn Adlerblum described the influence her father, Rabbi Hayyim Hirschensohn, had on John Dewey: “Esther [Nima’s sister] and I would usually share with *avi* [literally, “my father”] our courses in philosophy and report his remarks to our professors. To their surprise, he sometimes discovered flaws in their thinking, of which they had not been aware. John Dewey was interested in reading the pages of Avi’s manuscript on education, which I had translated [for Dewey].” Nima H. Adlerblum, *Memoirs of Childhood: An Approach to Jewish Philosophy*, ed. Els Bendheim (Northvale, NJ: J. Aronson, 1999), 310.

272 It may even be argued that the halakhah’s rich tools for normative discourse and concretization endow it with greater pragmatic capacity. See Kadushin, *Rabbinic Mind*, 79–80, and Peter Ochs, “Rabbinic Text Process Theology,” *Journal of Jewish Thought and Theology* 1 (1991): 141–177 (esp. 152).

tendencies may serve as a prism for examining other normative religions on their own terms.²⁷³ For in an age of rising religious fundamentalism and political vulgarism,²⁷⁴ a sense of self-criticism seems ethically and intellectually crucial.²⁷⁵ This, of course, should not deter us from acknowledging the plurality of normative and legal frameworks and from observing significant differences between them.²⁷⁶

Second, fallibility seems to be a main feature of human deliberation. However, many conceive of fallibility as incoherence and as weakness.²⁷⁷ Parallel to this, a significant technological effort is being made to develop what many theoreticians view as an infallible artificial intelligence (AI) that will represent moral reasoning in algorithmic form, including autonomous cars, autonomous weapon systems, systems for assisting human judges, and many more.²⁷⁸ The essential question of whether AI can alter fallible human deliberation adequately and efficiently—and in which cases, and to what extent—appears to be central for the sustainability of humanity. I believe that some of the questions and observations in this paper may inform discussions of relevant ethical dilemmas.

273 Islam, for instance. For an analysis of “pragmatic eclecticism” in Islamic legal sources, see Ahmed Fekry Ibrahim, *Pragmatism in Islamic Law: A Social and Intellectual History* (New York: Syracuse University Press, 2015).

274 Fallibility, it is important to recall, is a crucial feature of democratic discourse and institutions, while the doctrine of the ruler’s infallibility plays a key function in dictatorships. On fallibilism as a democratic Jewish value, compare Mordechai Kremnitzer and Nadav Berman Shifman, “Criticizing the Israeli Army is a Jewish Obligation,” *Haaretz*, October 5, 2018.

275 Compare n. 145 above.

276 Compare Last Stone, “Jewish Legal Model” (n. 206 above).

277 See the discussion of fallibility in early Jewish sources in section 3.2 above.

278 For an analysis of the halakhic-moral questions regarding autonomous weapon systems, see my article “Autonomous Weapon Systems and Jewish Law: Ethical-Political Perspectives” (forthcoming).