

Legal Floors and Moral Ceilings: A Jewish Understanding Of Law and Ethics

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Abstract: This paper analyzes the relationship of formal *halakhah* to Jewish ethical values, arguing for the necessity of extra-legal *hesed*, identified as autonomous action above and beyond the requirement of law ('*lifnim mishurat hadin*'). On halakhic, theological and philosophic grounds, the essay attempts to refute the theory of hard halakhic positivism, which maintains that formal *halakhah* constitutes the sole legitimate constraint upon human conduct and denies room in Judaism for moral demands advanced by conscience.



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“Is what is holy holy because the Gods approve of it, or do they approve of it because it is holy?” (Plato’s *Euthyphro* 10a)

“Civility precedes the Torah”
(*Avot* 3:17)

I. Introduction

One dimension of the age-old debate between Christianity and Judaism concerns the nature of the biblical covenant between God and the Jewish people. Paul of Tarsus understood the covenant to consist primarily, perhaps exclusively, of law (Romans 3). Hence the Christian preference to translate ‘Torah’ as ‘Law,’¹ over the more accurate literal translation ‘teaching,’ which connotes both legal and non-legal dimensions. Because of its purported exclusively legal character, Christian theology deemed the “old” covenant spiritually destructive and needing higher fulfillment (Galatians 3, 5). Jews, of course, understand that Jewish law is constitutive of Judaism and Jewish identity: No interpretation of Torah that disposes of *mitsvot* as binding legal

obligations can accurately depict the living covenant between God and the Jewish people. For Jews the question is not whether Jewish law (*halakhah*) is necessary, but whether it is sufficient: Is the ideal Jewish life defined exclusively by the legal decisions of *halakhah*, or is another component required as a complement? Plato and Aristotle framed the question as, “What constitutes the good life?” but I prefer to inquire in the words of Micah, “What does God demand of us?”

For Jews the question is not whether halakhah is necessary, but whether it is sufficient.

The issue at hand relates to the more general philosophical debate between natural law advocates and legal positivists. The debate is old, but continues unabated.² The former maintain that there exist fundamental moral values, such as justice, that are derived from either reason or nature and that are antecedent—both temporally and axiologically—to any specific empirical legal code. Indeed, the validity of a given legal order is judged by the degree to which it is consistent with or promotes

* This essay is dedicated to the memory of Rabbi Walter Wurzbarger, *zichrono l’vrakhab*, an extraordinary leader of the Jewish people who merged uncompromising fidelity to *halakhah* with a profound understanding of the Jewish ethics. The author thanks Professors Martin Golding and Suzanne Stone, Rabbis Saul Berman and Walter Wurzbarger and Joel Linsider for their valuable suggestions to this essay.

¹ This translation has its origins in the pre-Christian Septuagint, which translates ‘Torah’ as the Greek, ‘*nomos*’.

² Leading contemporary natural law theorists are Lon Fuller, *The Morality of Law* (New Haven: Yale University, 1969) and

these fundamental natural values. “An unjust law is not a law,”³ announces the natural law theorist, for if a rule violates the moral requirements of justice it cannot be valid law. In contrast, the legal positivist maintains that a legal system is validated not by independent values, but by the authority of its legislator and the coherent ordering of its internal norms and principles. Nomic validity remains independent of moral content. In fact, for some positivists ethical values evolve out of the legal code itself, which defines the concrete expression of morality. Acknowledging no external criteria for justice, these legal positivists paradoxically also believe that “An unjust law is not a law,” for if it is law it is *eo ipso* just.

A Jewish variant of this positivist position has been termed “halakhic positivism.” It claims that all Jewish moral values take the form of halakhic judgments (*dinim*). In philosophic terms, the halakhic positivist maintains that the proposition, “Jewish legal imperatives delineate Jewish moral behavior,” is a necessary synthetic—and perhaps even analytic—truth. God’s will in every situation for the Jewish people collectively and

individually is found in the formal canons of Jewish law. In a word, the objective corpus of *halakhah* is the ultimate arbiter of what is good, right and just.

Halakhic positivism has acquired high currency among some modern Jewish thinkers, particularly talmudists trained in the analytic method of study that developed in the 19th and early 20th century Lithuanian talmudic academies. A famous example is the pronouncement of R. Abraham Isaiah Karelitz (Hazon Ish): “Ethical obligations are at times.... one with the decisions of Jewish law (*pisqei halakhah*).... The *halakhah* determines the prohibited and the permitted in the realm of ethics.”⁴ Despite the presence of the qualifier “at times,” the remainder of this work seems to indicate that Hazon Ish claims moral obligations to be totally congruent with halakhic decisions.⁵ More recently, an Orthodox rabbi and professor of law provided another paradigm in a philosophic paper.⁶ He argued for an extreme version of halakhic positivism—which I will term ‘hard’ halakhic positivism⁷—that fuses halakhic positivism with halakhic formalism⁸, considering the two synonymous

Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) and *Freedom’s Law* (Cambridge MA: Harvard University Press, 1996). The two primary modern legal positivists are John Austin, *Theory of Jurisprudence Determined*, (New York, 1914) and Hans Kelsen, *General Theory of Law and State* (Cambridge, Harvard University 1946) and *Pure Theory of Law* (Berkeley, CA: U. of California Press, 1970). For an excellent exposition of a Jewish natural law position, see David Novak, *Natural Law in Judaism* (New York: Cambridge University, 1998); for Jewish legal positivism, Jose Faur, “Understanding the Covenant,” *Tradition* 9:4 (Spring 1968) and Marvin Fox, “Aquinas and Maimonides on Natural Law, *Dine Israel* 3 (1972). For many seminal essays on halakhic legal theory, see Martin P. Golding, *Jewish Law and Legal Theory* (New York: New York University, 1993), and *Jewish Law Annual*, vols. VI and VII, (New York: Harwood Academic 1987, 1988).

³ “*Non videtur esses lex justa non furit.*” Augustine, *De Liero Arbitrio* 5; Aquinas, *Summa Theologica*, Qu. xcvi, Arts. 2,4

⁴ *Sefer Hazon Ish Emunah U’Bitakhon [Book of Faith and Trust]*, S. Greenman, editor, Jerusalem, 1954, beg. Chapter 3.

⁵ For a divergent interpretation, see Aharon Lichtenstein, “Does Jewish Tradition Recognize an Ethic Independent of Halakha?” in *Contemporary Jewish Ethics*, M. Kellner editor, (Sanhedrin Press; New York 1978) p. 107.

⁶ Rabbi J. David Bleich, “Is There an Ethic Beyond Halakhah?” in *Studies in Jewish Philosophy: Collected Essays of Academy for Jewish Philosophy* 1980-1985, Norbert M. Samuelson editor, University Press of America 1987, pp 527- 546.

⁷ The ‘soft’ version of positivism, exemplified by H.L.A. Hart in *The Concept of Law* (Oxford: Clarendon Press, 1961), admits that law must have a minimum moral content. For the hard positivist, law determines morality, and specific content is not an independent criterion of law.

⁸ Legal formalism may be defined as the thesis that denies the need for individual discretion in the application of rules, because all valid judgments in a particular case follow objectively from clearly formulated rules. See Hart p. 126. For the issue of discretion in *halakhah*, see A. Kirschenbaum and N. Lamm, “Freedom and Constraint in the Jewish Judicial Process,” *Cardozo Law Review*, 1 (1979), pp. 99-133.

(p. 539). He contends that “the norms of *halakhah* constitute the sole constraint upon human conduct” (*ibid*), denies that “there is any content of natural morality that is not encompassed by the subject matter of the *halakhah*” (p. 538), and insists that “there is no room in Judaism for accommodation of the moral demands advanced by individual conscience” (p. 536). Thus philosophy sometimes makes strange bedfellows: Traditional halakhic positivists find themselves in complete agreement with Christian polemicists who portray the Torah and Judaic ethics as limited to law. Of course, for many Christians this legal exclusivity rendered the Torah spiritually invalid, while halakhic positivists consider it to contain the very essence of Jewish spirituality.

The determination of Jewish law as sufficient or merely necessary for ideal Jewish living is substantive, containing crucial implications for halakhic orientation, moral experience and the quality of Jewish spiritual life.

To be sure there are positivist elements in *halakhah*. A coherent conception of Jewish law may be consistent with a version of ‘soft’ positivism.⁹ My immediate concern is the coherence and validity of hard halakhic positivism. I will attempt to demonstrate that this thesis is logically muddled, and that it is indefensible in light of both normative *halakhah* and Jewish philosophic traditions. More strategically, I wish to formulate a Jewish conception of the relation of law to ethics and thereby identify the place of *hesed* in proper religious experience. Maimonides taught that we can approach a positive conception of God by identifying its negation and purging that idolatry from correct belief (Guide 1:58). By deter-

mining what is rejected, we begin to understand what is true. Thus deconstructing halakhic positivism may help us paint a picture of the holy life that traditional Jewish sources insist upon.

One last introductory point: The determination of Jewish law as sufficient or merely necessary for ideal Jewish living is no mere semantic matter, as Plato and twentieth century meta-ethical philosophers might have it.¹⁰ We shall soon see that the difference is substantive, containing crucial implications for halakhic orientation, moral experience and the quality of Jewish spiritual life.

II. *The Insufficiency of Law*

Plato and legal positivists may have doubts about the empirical independence of law and ethics, but talmudic rabbis did not. Evidently they understood that law neither defines ethical categories (the stronger positivist claim), nor does legal compliance satisfy ideal moral standards (the weaker claim). Consider the following talmudic passage:

R. Yohanan said, ‘Jerusalem was destroyed only because [Jews] judged according to the law (*din*) of the Torah.’ [But] should they have judged according to the laws of tyranny? Rather say, ‘They insisted on the law of the Torah and did not act above and beyond the strict requirement of the law (*lifnim mishurat ha-din*).’ (BT, *Bava Metsi`a* 30b)

Classic Judaism views the destruction of Jerusalem as punishment for the violation of God’s covenant. According to R. Yohanan, this theological failure existed concurrent with impeccable compliance with Torah law (“*danu din Torah*”). Yet the Jewish people were held cul-

⁹ Soft positivism admits to the ‘open texture,’ i.e. non-formal, nature of law. See Hart, pp. 120-132.

¹⁰ For an exploration of meta-ethical issues of moral language, see G.E. Moore, *Principia Ethica* (London: Cambridge University Press, 1966). For an analysis of some meta-ethical considerations in Jewish law, see my “Ethics and Jewish Law,” *Judaism* (24:2) Spring 1975, pp. 201-214.

pable by the Divine and incurred the harshest punishment known to Jewish history up to that time. They would have been legally acquitted in a rabbinic court, yet they were convicted in the “heavenly court.”¹¹ That there exist other talmudic claims identifying different failings as responsible for the destruction poses no problem for this thesis. No talmudic opinion challenges the intelligibility of the category of *lifnim mishurat ha-din* or the conceptual presuppositions of Rabbi Yohanan’s statement, i.e. that the Torah demands behavior that transcends formal halakhic compliance.

The Talmud deals with case law and never offers a definition or conceptual explication of *lifnim mishurat ha-din*. That task is left to medieval Jewish legal authorities with philosophical bents, whose opinions we will explore later. For now, it is important to note a few of the concept’s well-known analytic difficulties. *Lifnim mishurat ha-din* is a complex category subject to varying definition.¹² It is invoked in halakhic discussion, yet the concept transcends formal halakhic parameters. It is concurrently philosophical, moral and contextual. Lastly, it contains subjective dimensions, being influenced by the judgments of those present in the immediate situation, and its particular application is not always derivable from a formal objective legal principle.¹³

Rather than offering a conceptual definition, we do well initially to examine the talmudic usage of *lifnim mishurat ha-din* and analyze its meaning by extension.

The Talmud explicitly discusses this standard only in five cases, while Rashi identifies an implicit sixth case.¹⁴

The incident recorded in *Bava Qama* 99b serves as a starting point for understanding *lifnim mishurat ha-din*:

There was a woman who showed a *dinar* to R. Hiyya. He told her it was good. She later came to him and said, ‘I showed it [to others] and they told me it was bad and I could not use it. He [R. Hiyya] then said to Rav, ‘Go and change it for a good [coin] and write down in my register that this was bad business.’ But why should he be different from Danko and Issur, who were exempt because they needed no instruction? Surely R. Hiyya needed no instruction! —R. Hiyya acted *lifnim mishurat ha-din*!

R. Hiyya was an expert moneychanger (*shulkhani*), and as such his judgment established the standard for usable currency. He thus remained halakhically immune from judgmental error and legal liability. Yet he absorbed the monetary loss by giving the woman an indisputably good coin from his account. Apparently R. Hiyya sensed that reimbursing the woman was the right thing to do, despite his legal dispensation.

Another case found in *Bava Metsi`a* 83a deepens the problem:

¹¹ Of course the phrase, “heavenly court” is merely an inaccurate metaphor for divine judgment. The significance of the entire Talmudic passage rests on the assumed tension between the absence of grounds for juridically determinable legal liability and non-legal divine disapproval. On what *din* could a court—heavenly or otherwise—convict?

¹² For five excellent and sometimes contrasting explications of *lifnim mishurat ha-din*, see Saul Berman, “Lifnim Mishurat Hadin,” *Journal of Jewish Studies*, 26 (1975) pp. 86-104 and 28 (1977) pp. 181-193; Aaron Kirschenbaum, *Equity in Jewish Law*, (KTAV; Hoboken, NJ, 1991) pp. 109-136, 213-221; Lichtenstein, *op. cit.*, pp. 102-123; Shmuel Shilo, “One Aspect of Law and Morals in Jewish Law: *Lifnim Mishurat Hadin*,” in *Israel Law Review* 13, (1978) pp. 359-390, and E.E. Urbach, *The Sages—Their Concepts and Beliefs*, (Jerusalem; Magnes, 1975) pp. 330-333, II 830-833.

¹³ Lichtenstein, pp. 114-116

¹⁴ In addition to the cases cited, the other cases in the BT are found in *Bava Mezia* 30b (the dignity of an elder), *Ketubot* 97a (the rescission of a contract of sale), *Bava Metsi`a* 24b (the presumptive abandonment of lost property), and *Berakhot* 45b (participation in public grace after meals, “*zimun*”).

Rabba bar Bar Hanan had porters who broke his barrels of wine [in transport.] He seized their garments [which they had deposited as collateral.] They brought him to Rav.¹⁵ Rav said to him, “Give them their garments.” [Rabba bar Bar Hanan] asked him, “Is this the *din*?” “Even so [*In*],” he replied: “In order that you may walk in a good path.” (Proverbs 2:20) He returned their garments. They exclaimed, “We are poor, we have labored all day, are hungry and have nothing to show for it!” [Rav] said, “Pay them their wages.” [Rabba bar Bar Hanan] asked further, “Is this the law?” “Even so [*In*],” he replied: “You shall keep the path of the righteous [*tsadiqim*].” (*ibid*)¹⁶

The concept of lifnim mishurat ha-din cries out for explanation. 'Why deviate from the din?'

Rashi (*ad loc.*) identifies “a good path” with *lifnim mishurat ha-din*. This case is more difficult than the former because Rabba bar Bar Hanan neither did anything wrong nor exercised imprudent judgment (as may have R. Hiyya), yet he is asked to absorb a substantial loss. The narrative also strongly implies that Rabba bar Bar Hanan did not freely concede his rights and money, but did so involuntarily under the pressure of Rav. Lastly, it is clear that Rav’s directives actually contravene basic Jewish tort law (*nezeqin*). The fundamental principles of Jewish tort law dictate that the porters are liable, and

are obligated to make restitution to Rabba bar Bar Hanan for damages caused.¹⁷ Absent such restitution, Rabba bar Bar Hanan possesses full rights to confiscate their garments. Note also that the proof text for Rav’s advice is not a legal pentateuchal passage, but a general moral maxim from Proverbs appealing to undefined generic ideals (“a good path,” and “the path of the righteous”).

The four other talmudic cases of *lifnim mishurat ha-din* are remarkably similar. They exhibit the following essential characteristics¹⁸:

1. They depict situations of conflicting or competing human interests, rather than correct application of ritual law (*mitsvot bein adam lamaqom*).
2. The *din* accords major advantage to one party and disadvantage to the other party.
3. The cases are resolved by voluntary agreement of the parties, by moral suasion or by agreed upon third party arbitration, rather than through formal adjudication in a rabbinic court.
4. The cases are resolved by a departure from the *din*, in which the advantaged party waives some or all of his rights to the disad-

¹⁵ Note that Rav appears as an assistant to Rav Hiyya in the prior case of *lifnim mishurat ha-din* cited in *Bava Qama* 99b. Rav Hiyya, Rav, and Rabbah bar Bar Hanan were all related. The relationship of these three personalities is significant for the understanding of this text and will be discussed in Section VI.

¹⁶ See Rif, *ad. loc.*, who identifies the *amora* as Rav Huna, rather than Rabba bar Bar Hanan. The standard editions contain a simple response “*In*” to the question perhaps indicating an affirmative reply to the question, “Is it the law [*din*]?” Rif’s text is “*In af*,” i.e. “Even so” or “Nevertheless,” implying that it is not the *din*. Urbach, p 331, notes that early manuscripts of this passage and the texts used by some *rishonim* do not contain the response, “*In*.” Cf. *Yalkut Shimoni*, Proverbs 20:2, and the parallel account in Palestinian Talmud, *Bava Metsi`a* 6,8, neither of which contain the positive response. See also Shilo, pp. 380. Bibliographical, logical and legal reasons all strongly support either an implicit negative (no direct) response or explicit negative response (“*In af*” – “Nevertheless”) as the correct version.

¹⁷ Maimonides, *Mishneh Torah*, *Hilkhot S'khirut* [Laws of Hiring] 3:2

¹⁸ See Tosafot *Bava Qama* 100a (*s.v.* ‘*lifnim mishurat ha-din*’)

vantaged party.

The concept of *lifnim mishurat ha-din* cries out for explanation. 'Why deviate from the *din*?' is the obvious legal and philosophic question. Assuming that Torah law is perfect and exhaustive, should it not determine ideal Jewish behavior in those cases? What justification exists for departing from the halakhic norm?

The Talmud (*Sanhedrin* 32b) takes up these problems and based upon the verse, "Justice (*tsedeq*), justice you shall pursue" (Deut. 16:20), it intimates two distinct concepts of justice: *tsedeq* as strict *din* and *tsedeq* as '*p'sharah*' (equity), i.e. the fair balance of interests. It was fairness that was R. Hiyya's guiding principle of action. Essentially Rav felt—as did R. Hiyya in the previous case—that to resolve the conflict according to strict *din* would be wrong since it ignores *tsedeq* as equity. Both Rabba bar Bar Hanan and R. Hiyya were businessmen, likely of means. The porters were poor, and perhaps the woman before R. Hiyya was a widow with no husband to manage the household commerce.¹⁹ These wealthy men could easily absorb the loss, whereas their indigent rivals would suffer indignity if denied compensation. As in the initial case, the Talmud's concept of *tsedeq* as equity is normative here, and takes precedence over *tsedeq* as literal application of law.²⁰ In either case, to apply the strict *din* would exploit human weakness and violate a responsibility toward the disadvantaged parties. As such it constitutes unacceptable religious behavior.

III. Rabbinic and Kabbalistic Conceptual Explication

A. Nahmanides

Nahmanides conceptually links *lifnim mishurat ha-din*

with moral correctness and *imitatio dei*, indicated by the generic commandments, "You shall do what is right and good in the eyes of God," (Deut. 6:18) and "You shall be holy, for I the Lord your God am holy (Lev. 19:2).²¹ In his commentary on these Biblical passages, Nahmanides equates what is right (*ha-yashar*) with '*p'sharah*'—equity and fair balance of interests—and what is good (*ha-tov*) with emulating God's attributes—*imitatio dei*. Nahmanides offers a literary insight that is crucial to his conceptualization of the system of divine commandments and law. For him, the specific legal imperatives legislated by the Torah are a non-exhaustive list of examples of how these generic ideals can be realized. The style of the Torah is to summarize the enumeration of specific *mitsvot* with a general imperative, in this case "Do what is right and good in the eyes of God." In other words, there is a broad moral agenda to the system of divine law, one that lies behind the corpus of specific *dinim*. Both Deut. 6:18 and Lev. 19:2 refer to the overarching purposes of Torah law. Hence the fullest realization of Torah values sometimes entails going beyond the particular legal imperatives that the Torah specifies.

There is a broad moral agenda to the system of divine law, one that lies behind the corpus of specific dinim.

Lev. 19:2 emphasizes that the imperative for humans to strive for holiness is rooted in emulating divine holiness. The Talmud (*Sotah* 14a) asks the obvious question: "Is it really possible for a person to walk in the footsteps of the *Shekhinah* (the immanent presence of God)? Is not God a 'devouring fire' (Deut. 4:24)?" How can a finite

¹⁹ This interpretation follows the exposition of R. Joel Sirkes, (Bah) on *Shulhan Arukh, Hoshen Mishpat* 12:4 and 304:1, who maintains that *lifnim mishurat ha-din* applies when the defendant is wealthy and the plaintiff is not.

²⁰ See also the related discussion in *Sanhedrin* 6b regarding whether adherence to strict law or compromise (*bitzuah*) is the most desirable way to resolve disputes. Similar to the conclusion of our cases, normative Jewish practice follows the view of Yehoshua ben Korkha who advocated compromise.

²¹ See also *Shulhan Arukh, Hoshen Mishpat* 259:5.

human being imitate the infinite God? Answers the Talmud, “Emulate His actions: Just as God clothed the naked, visited the sick, comforted the mourner, and buried the dead, so shall human beings do likewise.” The actions enumerated are the classic instances of *hesed*—human kindness manifested in gestures of giving to another. Ontologically it is the free flowing extension of one being into another. Crucial to this passage is the opinion of R. Simlai, who maintains that the Torah begins with an act of *hesed* and ends with an act of *hesed*. No mere literary observation, one meaning of R. Simlai’s claim is that the entire Torah delineates a lifestyle of *hesed*.²² Since for the Ramban, moral goodness (*‘ha-tov’*) equals *‘hesed,’* the source of ethical goodness is spiritual—the character of God Himself—and the primary thrust of *imitatio dei* is the emulation of the divine attribute of *rahamim*, expressed behaviorally in acts of *hesed*.

We can now appreciate Nahmanides’ conceptual link. God is the infinite, perfect Being and as such is beyond constraint. He is not required by metaphysics or law to act with *hesed*, or to act at all. Yet according to the Jewish understanding of divinity, God created the world, entered human history, revealed the Torah, and maintains continual relationships with His creatures. Neither God’s relation with the world nor His involvement in human affairs are responses to any imposed natural law or consequences of external necessity; they are natural emanations of divine goodness. Thus the broader implication of the imperative of *imitatio dei* is that human holiness must include action resulting from a natural autonomous overflow of moral character, in addition to principled obedience to heteronomous legal norms. The

former requires identification with and compassion for others, and a refusal to exploit others even when formal law might allow it. When we act naturally with *hesed*, we transcend legal obligation and act *lifnim mishurat ha-din*.²³ If one confines himself exclusively to the four ells of *halakhah*, to the strict requirement of the law, he may become, in Nahmanides’ potent formulation, a *‘naval brshut ha-Torah’*—“a despicable person within the bounds of the law.”²⁴

B. Maimonides

Maimonides also develops the concept of *lifnim mishurat ha-din* and connects it to both *imitatio dei* and *hesed*. He postulates that human beings are commanded to “walk in His ways,” identifying those ways with “good and straight (*yashar*) paths,” and interprets the divine emulation to mean adopting attributes exhibiting the Aristotelian mean: “Just as God is called compassionate, so are we to have compassionate character; just as God is called merciful, so are we to have merciful character; just as God is holy, so are we to be holy”

(*Hilkhot Deot* [Laws of Moral Dispositions] 1:6).

Maimonides’ formulation focuses on the development of virtuous character rather than on external legal action—what one thinker describes as “agent morality” in contrast to “act morality.”²⁵

Maimonides terms one who follows the strict law of the mean a *‘hakham.’* By contrast, the one who commits himself to strive toward one of the positive extremes, such as humility or patience, is a *hasid*.²⁶ By voluntarily assuming the extra-legal responsibility of going beyond the required mean, the *hasid* exhibits the attribute of *hasidut*. It is precisely *midat hasidut* that Maimonides

²² One Aramaic reference for Torah, “*rahmana*” (compassion) supports R. Simlai’s claim. The application of the term, “*rahmana*” to Torah is actually an extension of its primary referent, God.

²³ The analytic linking of *lifnim mishurat ha-din* with *hesed* is also indicated in the prior discussion in *Bava Mezia 30b* that finds an exegetical allusion to both concepts in Exodus 18:20.

²⁴ Nahmanides, commentary on Lev 19:2.

²⁵ Walter Wurzburger, *Ethics of Responsibility*, (Jewish Publication Society; Philadelphia 1994), Chapter Five

identifies with *lifnim mishurat ha-din* (*Hilkhot Deot* [Laws of Moral Dispositions] 1:5). Although Maimonides refers to virtuous character while Nahmanides refers to ethical acts, Maimonides too understands that *hesed* is a counterpoint to strict legal obligation.

In *The Guide for the Perplexed* Maimonides explicitly formulates the conceptual distinction between the extra-legal nature of *hesed* and legal requirement (*mishpat*):

Hesed is excess (*haflagah*)... In most cases it is applied to excess in beneficence. Beneficence includes two notions, one consisting in the excess of beneficence toward *one who has no right at all to claim this from you*, and the other consisting in the exercise of beneficence toward one who deserves it, but in a greater measure than he deserves it. ... *Mishpat* means judgment concerning what ought to be done to one who is judged (3:53).²⁷

It is in his great legal *oeuvre*, *Mishneh Torah*, however, where Maimonides is unequivocal about the inadequacy of law as an exclusive guide to ideal behavior:

It is permitted to work a Canaanite servant with rigor. Even though the law (*din*) is such, the quality of lovingkindness (*midat hasidut*) and ways of wisdom dictate that a person be merciful (*rahaman*) and pursue righteousness (*tsedeq*) and not increase the servant's burden or cause him distress....

So it is explained in the good paths of Job, in which he prided himself:

If I did despise the cause of my manser-

vant, or of my maidservant, when they contended with me. Did not He who made me in the belly [also] make him? And fashion us both in one womb? (Job 31:13-15)²⁸

Cruelty and brazenness are found only amongst heathens and idolators. However, the children of Abraham our father, that is the people of Israel, whom God has influenced through the goodness of the Torah and commanded them with statutes and righteous laws—they are compassionate to all. Thus in regard to the attributes of the Holy One Blessed Be He, He commanded us to imitate them, as it says, “His mercies are upon all his works” (*Hilkhot Avadim* [Laws of Servants] 9:8).

Law untempered by midat hasidut results in cruelty and brazenness. Evaluated in terms of Jewish values, such behavior is heathen.

This remarkable passage is noteworthy for its extreme language as much as its grand vision. Maimonides, the halakhic voice who is sometimes majestic but rarely extreme²⁹, consciously resorts to immoderate terminology and expansive expression when ending the Book of Acquisition in his code. This stylistic exception makes his point inescapable: Law untempered by *midat hasidut* results in cruelty and brazenness. Evaluated in terms of Jewish values, such behavior is heathen and worthy only of idolators. Again strict legal compliance is contrasted with autonomous agency (*hesed*), whose source is imitation of divine character. Though *din* does not require it,

²⁶ See Norman Lamm, “*Ha-chakham Ve’ba-Hasid Be’mishnat ha-Rambam*” (“The Sage and the Saint in the Thought of Maimonides”) in *Dr. Samuel Belkin Memorial Volume*, (1979)

²⁷ See also *Guide*, 3:54 and *Avot* 2:10 and 5:6

²⁸ Translation in accordance with the interpretation of *Metzudat David*.

²⁹ See I. Twersky, *Introduction to the Code of Maimonides* (New Haven: Yale University, 1980) Introduction and Chapter V.

a comprehensive influence of Torah ethics makes one a *rahaman* and *ba'al hesed*. So emphatic is Maimonides on this essential character of Jewish behavior that he claims should one encounter a Jew lacking compassion and *hesed*, that Jew's pedigree should be investigated for probable gentile origin (*Hilkhot Issurei Be'ah* [Laws of Forbidden Relations] 19:17). Though there are important differences between them, both Nahmanides and Maimonides insist that ideal Jewish behavior occasionally requires transcending strict law and includes non-legal acts of *hesed*. As religious values, the virtue of compassion and its expression as autonomous giving derive from the character of God, rather than divine legal imperative. Finally, both intimate that specific Torah laws (*dinim*) have lofty moral ideals as their overarching purpose.

C. Kabbalah

Jewish mystical tradition also portrays *hesed* as counterpoint to law. *Kabbalah* identifies *hesed* with "*gedulah*" (greatness).³⁰ This is the name of the fourth *sefirah*, manifestation or creative power of God. It is symbolized by water since water naturally flows outward, expanding until it is blocked by an external boundary.³¹ As a divine attribute, *gedulah* is the outward extension of divine infinitude into the finite empirical world. God is characterized through the attribute of *gedulah* by *largesse*: God has, as it were, a magnanimous personality. It was this virtue that caused God to autonomously create the universe and relate voluntarily to something beyond Divinity. The patriarch Abraham is the personification of *hesed*, since he was careful to extend himself in hospitality to others. Prior to revelation at Sinai there was no

formal legal obligation or divine command to so act, hence Abraham's actions were a natural result of his autonomous character.

In contradistinction to *hesed*, *din* is identified with the *sefirah* of "*gevurah*," which is the complement of *gedulah*. *Gevurah* is identified with constraint, best exemplified in the maxim, "Who is a hero [*gibor*], a cognate of "*gevurah*"? He who conquers his impulses" (*Avot* 4:1). *Gevurah* is the virtue of controlled discipline, evidenced by obedience to a heteronomous restraining principle. In opposition to *hesed*, *gevurah* is symbolized by fire, that which devours water or is destroyed by it.³²

For Zvi Elimelekh of Dynow, it is not the Torah's content that characterizes hesed, but the giving of the Torah that is the quintessential act of hesed.

IV. Hesed and Theology

The statement of R. Simlai ("The Torah begins with *hesed* and ends with *hesed*.") now assumes different levels of meaning. As mentioned earlier, one level of interpretation is that the entire Torah is characterized by *hesed*, i.e. it sets forth a vision of the ideal life whose goals are behavior characterized by mercy and compassion. A 19th century hasidic master and kabbalist, Zvi Elimelekh of Dynow³³ offers a second interpretation. For him, it is not the Torah's content that characterizes *hesed*, but *the giving of the Torah* that is the quintessential act of *hesed*. God stands under no moral or logical compulsion to initiate covenants with human beings, or to impart to them the divine word (Torah) or divine will

³⁰ See *Zohar*, Book II and commentary of R. Elijah of Vilna (GRA) to *Book of Creation (Sefer Yetzirah)*, Chapter I.

³¹ Note that the rationalist Maimonides conceptualizes *hesed* similarly in his definition in the Guide 3:53 quoted earlier.

³² This sharpens the issue in *Sotah* 14a. If *din* is symbolized by fire, the Talmud is contrasting *din* ("God is a devouring fire") with acts of *hesed*.

³³ 1785-1841. R. Zvi Elimelekh is known by his major work, *Benei Yissakhar*, which contains the above point in *Ma'amar Hodesh Sivan*, *Ma'amar* 5 (Sayings on the Month of *Sivan*, Saying 5).

(*mitsvot*). Indeed, as deists claim, it is logical for the perfect God to create the universe and then withdraw, leaving the imperfect material world to human devices alone. Though deism may be philosophically more tenable, the Jewish God invests Himself in human affairs by freely maintaining a relationship with humanity and bestowing upon them the gift of Torah. Philosophically, this is *lifnim mishurat ha-din*—the great *hesed* that pervades human history. Hence, claims *Benei Yissakhar*, the blessing that explicitly mentions the giving of the Torah includes only the Tetragrammaton (the name identified with God’s personal and compassionate attribute, i.e. *midat hesed*) and omits *Elohim* (the name identified with *midat ha-din*). Because the giving of the Torah is *hesed* par excellence, Jewish tradition mandated that we eat dairy foods on *hag ha-Shavuot*, the holiday commemorating the giving of the Torah. A mother’s milk is, after all, the universal symbol of *hesed*.³⁴

Creation is metaphysically superfluous, but necessary for the construction of the Jewish moral weltanschauung.

The linking of Torah with *hesed* may also be the reason that rabbinic tradition prescribed reading the Scroll of Ruth—called “*megillah sh’kula hesed*,”³⁵—on that holiday. The heroes of the *megilah*, Boaz and Ruth are persons who act beyond reason and above what is required by law. Only *Ploni Almoni* adheres to the strict require-

ment of the law, and tradition obliterated his real name from Jewish history forever. It seems likely that rabbinic tradition chose the Scroll of Ruth for public reading on the holiday commemorating revelation at Sinai in order to pre-empt an erroneous exclusively legal understanding of the content of revelation. The juxtaposition of reading the Decalogue with reading *Megilat Ruth* emphasizes that Torah is a complementary balance of *din* and *hesed*.

There is a deeper metaphysical third level of meaning to the statement of R. Simlai. Creation itself—the beginning of the Torah—is fundamentally an act of *hesed*. As Aristotle understood, a perfect God has no need or motive to act at all. Hence creation of the cosmos is philosophically unnecessary. Yet Jewish tradition insists that God created the universe and that, “The world is built with *hesed*.” (Ps. 89:3)³⁶ God did so not because of any requirement to act, but because a natural property of His divine goodness is overflow. There is only one thing Aristotle’s self-sufficient God dwelling in splendid isolation cannot do: be a *ba’al hesed*, a giver.³⁷ This limit renders God morally deficient from the perspective of Jewish theology. Creation is metaphysically superfluous, but necessary for the construction of the Jewish moral *weltanschauung*. If the conceptual essence of *hesed* is the natural autonomous overflow of being toward another, then the creation of the life-supporting universe is a cosmic manifestation of divine compassionate nature.³⁸ Philosophically, this divine creation is *hesed* writ on a cosmic level; ethically, the act of cosmic cre-

³⁴ This connection is borne out etymologically, being an example of the known phenomenon of Hebrew grammar where the same verb root takes on contradictory meanings. The Hebrew root, G-M-L, in intensive form (*pe-al*) means to wean (see Genesis 21:8) and in simple (*qal*) form is used to denote the dispensing of *hesed* (*gemilut hesed*). The image of a woman breastfeeding an infant is the most graphic—and poignant—image of the overflow of one person’s being into another that sustains life.

³⁵ *Leqakh Tov to Megilat Ruth*, end. Pertinent also is the following: “Said R. Zeira, ‘This scroll has no [laws of] ritual impurity or purity, and no [matter of] prohibition or permission. Why was it written? To teach how great is the reward to those who dispense *hesed*!’” *Midrash Ruth Rabbah* 2:15

³⁶ See also Rambam, *Guide* III: 53 and 54 who builds on this theme.

³⁷ I am indebted to R. Yitzchak Breitowitz for this insight. See his “Preventing Divorce: How Judaism Nourishes the Family,” in *Agenda – Jewish Education*, Spring 1997.

³⁸ Maimonides also recognized these theological and moral implications of the motif of creation. As we saw, he cites the state-

ation serves as the prototype for human *hesed*.

V. *Hesed as Mitzvah*

It is clear that there are two logical categories of *mitsvot*, just as there are two types of scriptural imperatives. The first type of *mitsvot* can be formulated as *din*: *Dinim* are specific, determinable and in principle actionable. Because they admit of precise definition and quantification, they are given to rational analysis. Their violation can be conclusively demonstrated by formal argumentation, objectively determined by a halakhic authority and adjudicated by a human court. These legal *mitsvot* appear for the most part in the various catalogues of the 613 *mitsvot* compiled by rabbinic authorities.

The second type of Torah imperative is generic, contextual and should not be construed as formal law. Maimonides makes this point in his analysis of the *mitzvah* of “You shall be holy” (Lev. 19:2), insisting that it not be catalogued as one of the 613 legal imperatives. (*Sefer ha-Mitsvot* [Book of Commandments], *Shoresh* 4). In the words of a noted scholar, this is because the imperative to be holy is a “super-category”, an overarching objective under which specific *dinim* fall.³⁹ Nahmanides makes the same point in his commentary on that verse—the despicable scoundrel is, after all, still within the bounds of the law—and voices no disagreement with Maimonides’ insistence that the imperative to be holy is not to be catalogued as legal *mitzvah*.

Maimonides views “You shall be holy,” similar to the same way Nahmanides explains, “You shall do what is right and good in the eyes of God.” These imperatives are not law in the positivist sense—they are more than

law. This critical distinction is the reason why both authorities also omit the latter imperative from the list of *mitsvot*. Interestingly, Maimonides catalogued the other overarching super-categories of “You shall love your peer as yourself,” (positive *mitzvah* 206) and “You shall walk in His ways,” (positive *mitzvah* 8) only in terms of developing personality virtues, not in terms of any specific behavioral requirement. The explanation for this may be a function of Maimonides’ theological commitments⁴⁰, but may also be that cataloguing them as law would run counter to the essential thrust of *hesed* as autonomous activity. There is no sharp wall for Maimonides between legal norms and ethical values. There appears to be a continuity ranging from specific formal legal requirements on one end to generic directives on the other. The objective of these latter *mitsvot* is the development of a moral character suffused with *rahamim* that naturally expresses itself in innumerable—and uncatalogueable—acts of benevolence. All talmudic discussions of *lifnim mishurat ha-din* presuppose this distinction between strict definable law and the higher moral ideal of acting above and beyond the law. Once again, conceptually this is *din* in contrast to *hesed*.

Of course specific acts of *hesed* are sometimes integrated into formal *halakhah*. The *mitsvot* of visiting the sick, comforting the mourner and burying the dead have become the hallmarks of Jewish life and are undeniably legal obligations for all Jews. Another example of *hesed* enshrined as mandatory law is the prohibition of issuing loans on interest. During the Middle Ages Jewish and Christian representatives debated the character of extending interest-free loans. Christian theologians saw it as a corollary of reason (i.e. natural law), and therefore

ment of Job—“Did not He who made me in the belly make him? And fashion us both in one womb?”—in Laws of Servants 9:8 to support extending *hesed* to gentile servants. Note also the etymological connection between womb (*rehem*) and loving compassion (*rahamim*). Metaphorically, God is the compassionate ‘mother’ giving birth to all humanity. I am indebted to R. David Hartman for this observation.

³⁹ R. Yitzhak Twersky, “Make a Fence Around the Torah,” *Torah u-Madda Journal* Vol. 8, 1999, pp. 33-35

⁴⁰ See Walter Wurzbarger, “The Philosophy of Rav Joseph B. Soloveitchik” in *Hazon Nahum*, Y. Elman and J. Gurock eds., Yeshiva University: New York 1997, p. 559-560

applied the prohibition universally. Jews, however, argued that there was nothing illogical to “money making money,” and insisted that the said prohibition was a non-rational act of compassion that the Torah demanded of a Jew toward his fellow Jews:

David and Ezekiel forbade only what the Torah forbade, and the Torah forbade charging interest to the Israelite, but permitted it to the gentile..... An Israelite must perform *hesed* with his fellow Israelite and a loan without interest is *hesed* and loving-kindness—indeed a greater loving-kindness at times than an outright gift, for many people are humiliated at the thought of accepting a gift, but not at accepting a loan. This is not so regarding the relation between an Israelite and a gentile. The Israelite is under no obligation to perform *hesed* with him and to lend him his money without interest, for they generally hate the Israelites. Certainly, however, if the gentile performs *hesed* and loving-kindness with the Israelite, the Israelite should also perform *hesed* and loving-kindness with him.⁴¹

It should be noted that these instances of legally obligatory *hesed* still retain vestiges of their original non-legal nature: As we saw, the Talmud locates the scriptural foundation for these *gimilut hesed* in narratives, not in legal imperatives. Because it is difficult to understand how a legal obligation could be derived from such narrative, Maimonides considers it rabbinic in nature, yet he subsumes it under the scriptural imperative to love one’s peer (*Hilkhot Avel* [Laws of Mourning] 14:1). Had Maimonides understood the verse to be a legal principle of action, he would have considered these acts of *hesed* to be biblically rather than rabbinically mandated.

The *hesed* of granting an interest free loan to one in need is clearly a legal obligation. Yet *halakhah* resisted coercing someone to fulfill that obligation, even though it had ample legal justification for doing so. In actual practice, this obligation was never made an object of judicial coercion.⁴² Rabbinic authorities preferred instead to encourage people to loan voluntarily, thus preserving the original thrust of *hesed*, and emphasizing phenomenologically the autonomous character of the act. Another *lifnim mishurat ha-din* dimension regarding the charging of interest concerns loans extended to non-Jews. The legal prohibition against charging interest does not apply to loans made to a gentile⁴³, yet the Talmud (BT *Makkot* 24a) singles out King David for special commendation because he refused to charge gentiles interest. This was *lifnim mishurat ha-din, hesed* extended. Evidently King David understood the moral impulse behind the legal prohibition of interest. To be true to the Torah ideal present in the rationale of *hesed*, he voluntarily decided to apply this standard universally. Note Radak’s ending remark in his commentary to Psalms 15:5. He, too, advocated this moral—but not halakhically required—ideal.

Rabbinic authorities preferred instead to encourage people to loan voluntarily, thus preserving the original thrust of hesed.

These two instances of *hesed* are exceptions to the rule. That they have become incorporated into the codes of formal *halakhah* in no way justifies hard positivism’s general claim that all *hesed* is legal. Such a generalization nullifies the essential character of *hesed*, conflating it with the legal connotation of *tsedeq*.

⁴¹ R. David Kimchi (RaDaK), commentary on Psalms 15:5, unedited edition published by Avraham Darom (Jerusalem: Mossad Harav Kook, 1967). For a fuller exposition of the Jewish-Christian debate over the nature of the prohibition of charging interest, see A. Kirschenbaum, “Jewish and Christian Theories of Usury in the Middle Ages,” *Jewish Quarterly Review* 75 (1985) 270-298.

⁴² Kirschenbaum, *Equity*, p. 20. For examples of talmudic provisions, see pp. 20-21.

⁴³ Deut. 23:20-21

VI. *The Argument Against Hard Halakhic Positivism*

The essential argument for hard halakhic positivism can be reduced to the following classic syllogism:

- (1) All moral values emerge from revelation.
- (2) Revelation is essentially formal law.
- (3) Therefore all moral values emerge from *halakhah* as formal law.

The word "essentially" in (2) is not intended as a hedge. I assume that even the traditional halakhic positivist concedes the basic principle of Jewish jurisprudence that halakhic obligations derive from Moses at Sinai and not before.⁴⁴ This means that the entire Book of Genesis—both its narrative and non-narrative passages—lacks legal character. (See Rashi on Genesis 1:1.) The well-known rabbinic tradition teaches that the Book of Genesis is included in the Torah because it provides models of high moral character exemplified by the patriarchs—none of whom could have been obligated by formal *halakhah* or *mitsvot*.⁴⁵ These models clearly have normative import in Jewish tradition, but no legal (halakhic) status. This poses a logical difficulty for the halakhic positivist who identifies valid Jewish norms exclusively with formal law (proposition 3). However, it merely foreshadows larger problems.

The proposition put forth in premise (1) is philosophically, empirically and Jewishly questionable. Yet even if we assume (1) to be true, (2) is demonstrably false on Jewish grounds. Consider the following argument: The hard halakhic positivist considers the mishnaic literature known as *Pirkei Avot* to be of Sinaitic origin. He consistently uses the terms, "revelation," "*halakhah*," and "objective law" interchangeably, because he claims that the ascription of Sinaitic origin to this literature suffices to prove its objective legal status (R. Bleich, p. 537). Yet

it is difficult to see how majority of the maxims in this work—whatever their origin—can be construed as legal or objective judgments. "Rabbi Yohanan said, 'Be yielding to a superior, pleasant to the young, and receive every person cheerfully'" (3:16). Can the advice to be 'pleasant to the young' have objective connotation? Pleasantness is, as we all know, a matter of subjective taste. Is this formal law or simply good moral counsel? Surely no court could find a person liable for rejecting any of the three imperatives in this *mishna*. Despite their wisdom, they have no legal force and no place in a court of law.

Even the hard halakhic positivist must acknowledge the existence of lifnim mishurat ha-din as an authentic Jewish value.

The same holds true with the generic moral propositions "Be holy," "Do what is right and good," "Act above and beyond the strict requirement of the law," and "Follow a good path." No code, *qua* law, contains such imperatives. They are too general and contextual to serve as the basis for adjudication or to be enforced in consistent manner. Any correct realization of these ideals in a given situation flows more from the agent's direct moral sense than from an apodictic inference from precisely defined legal principles to the specific case at hand.⁴⁶ For this reason, formal halakhic argumentation does not utilize them. Although talmudic authorities did enact two laws based on the scriptural imperative, "Do what is right and good," this imperative was never used as a source for the promulgation of any subsequent enactments. Moreover, in judicial decisions where 'Do what is right and good,' is cited, it is never presented as the dominant *ratio decidendi*, but as an ancillary, inspira-

⁴⁴ BT *Makkot* 23b; *Mishna Hulin* 7:6, Rashi and Maimonides, Commentary on the Mishnah, *ad loc.*

⁴⁵ See Nahmanides commentary on Gen. 26:5 and Lev. 18:25, and R. Naftali Zvi Yehuda Berliner (NeZiV), *Ha'Ameq Davar*, Introduction to Book of Genesis.

⁴⁶ Lichtenstein, pp. 114-115.

tional consideration.⁴⁷ In the words of one rabbinic thinker, they denote purpose and direction rather than definitively defined acts.⁴⁸ It is here that the inconsistency of hard halakhic positivism is exposed: The only way that (2) can be defended in light of Jewish sources is if the halakhic positivist posits a broad conception of *halakhah*, one that includes the above open-textured principles. Yet a halakhic positivism that is synonymous with halakhic formalism excludes formal appeal to these generic principles.

Of course even the hard halakhic positivist must acknowledge the existence of *lifnim mishurat ha-din* as an authentic Jewish value. To preserve his thesis he is forced to claim that this category is subsumed under *din* itself (R. Bleich pp. 527, 535), and therefore is operative in formal halakhic reasoning. This is a hopeless strategy entailing inevitable contradiction. The terminology, “*lifnim mishurat ha-din*,” implies that attempting to reduce this concept to *din* would entail an infinite regress. In addition to this internal logical problem, consider the earlier cases: No formal halakhic arguments exist proving that a Jew is prohibited legally from treating a gentile servant “with rigor” or that King David was legally obligated to refrain from charging interest to a

gentile. The reason is obvious: Such arguments would flatly contradict codified *halakhah*.⁴⁹

Although some Ashkenazic poseqim accepted the enforceability of lifnim mishurat ha-din, this view never became the consensus of authoritative legal opinion in Ashkenaz.

The case of the negligent porters (*Bava Mets'ia* 83a) further exposes the futility of this attempt. Countenancing that Rabbah bar Bar Hanan is legally obligated to pay the porters' wages impels the halakhic positivist to rely on an inauthentic version of the text⁵⁰, deny codified Jewish tort law that covers this class of cases (Maimonides, *Hilkhot S'khirut* [Laws of Hiring] 3:2; Tur, *Hoshen Mishpat* 304), depart from accepted halakhic methodology by using a non-legal verse in Proverbs as a basis for a halakhic imperative⁵¹, and interpret the text as one that announces an actionable legal requirement when neither the text nor normative *halakhah* indicates any such coercion.⁵² The enforceability of *lifnim mishurat ha-din* was rejected by Sephardic decisors, including *Shulhan Arukh* (*Hoshen Mishpat* 259:5). The normative position regarding this

⁴⁷ Kirschenbaum, *Equity*, pp. lx.-lxi.

⁴⁸ Lichtenstein, p. 116

⁴⁹ Maimonides, *Mishneh Torah, Hilkhot Avadim* [Laws of Servants], *op cit*; *Shulhan Arukh, Yorah Deah* 159:1.

⁵⁰ See note 16, and note 1 of R. Bleich *op cit*. R. Bleich's argument relies strongly on the text containing “*In*” i.e. an affirmative response to the query whether the directive is law. He therefore is dismissive of the stronger bibliographic evidence to the contrary. Even more than the bibliographical evidence, the critical argument lies in the coherence of the interpretation of non-enforceability over the logical and legal difficulties in interpreting Rav's response as a legally binding *psaq din*. In another article, “Judaism and Natural Law,” *Jewish Law Annual* Vol. VII (1988), pp. 7-10, R. Bleich similarly relies on an incorrect version of Maimonides, *Mishneh Torah, Hilkhot Melakhim* [Laws of Kings] 8:11 to argue against the concept natural law in Jewish tradition. See my “Gentiles, The World to Come and Judaism: The Odyssey of a Rabbinic Text” in *Modern Judaism* 14 (1994) pp. 265-287.

⁵¹ “*Divrei Torah mi'divrei kabbalah lo yalfinan.*” See Shilo, p. 255. Judge Moshe Silberg, “Law and Morals in Jewish Jurisprudence,” *Harvard Law Review* (1961), p. 122, points out that the verse from Proverbs was used rather than a Pentateuchal verse to emphasize the ethical, non-legal aspect of Rav's directive.

⁵² The text describes Rabbah bar Bar Hanan taking direction from his cousin, Rav, rather than being ordered by a formal *bet din*. As such, the plain meaning of the text is that Rav—a nephew and student of R. Hiyya, who as we saw in the case cited from *Bava Qama* 99b advocates voluntary action in accordance with *lifnim mishurat ha-din*—successfully exercised moral suasion on

category is in accordance with the words of R. Hananel: “If one wants to act *lifnim mishurat ha-din*, he returns (the lost property),⁵³ and Maimonides: “He who wants to take the good and straight road and act *lifnim mishurat ha-din*, should return the lost article.”⁵⁴ That is, the decision is up to the finder; his actions are dictated by conscience.⁵⁵ Although some Ashkenazic *poseqim* accepted the enforceability of *lifnim mishurat ha-din*, this view never became the consensus of authoritative legal opinion in *Ashkenaz*.⁵⁶ Even R. Joel Sirkes (Bah), who makes the most elaborate case for the actionability of *lifnim mishurat ha-din*, limits enforceability to situations where those asked to waive their rights under *lifnim mishurat ha-din* are persons of wealth. He explicitly denies that a court can enforce *lifnim mishurat ha-din* when the defendant lacks wealth (*Hoshen Mishpat* 12:4 and 304:1). So limited, the enforcement cannot be seen as formal *din*, for doing so would directly contravene the scriptural injunction of Lev. 19:15: “You shall not render an unjust decision: Do not favor the poor or show deference to the rich.”⁵⁷ Jewish law, like all valid law, must be ‘blind,’ i.e. impartial in dispensing justice between contending parties. Neither wealth nor poverty can determine just legal decision. Hence even those few authorities that considered *lifnim mishurat ha-din*

actionable are forced to admit that its enforceability depends upon the presence of non-legal subjective criteria.⁵⁸ A rigorous formal understanding of *halakhah* that reduces *lifnim mishurat ha-din* to *din* cannot escape incoherence. Clearly the Talmud considers these acts desirable acts of *hesed*, but they represent the expression of the Torah’s aspirational moral norms, in contrast to the obligations of formal law. One rabbinic philosopher has appropriately termed them “Covenantal Ethics”⁵⁹

Halakhic formalism may be tenable when it refers to a technical notion of law and concedes that formal halakhic canons are limited in scope, leave laqunae in areas of human behavior, and require complementary authentic non-legal ethical values.

Lifnim mishurat ha-din and its associated generic principles constitute the philosophic or moral ground for specific rules of action enshrined as law, but the grounds themselves possess different conceptual status. At most, one may say that these principles are second-order quasi-legal rules: They constitute non-formal *halakhah*, contrasted with formal *din*. As overarching “super-categories” they constitute meta-halakhic ends to specific

his cousin. The logical difficulties attendant to this latter interpretation may have convinced the majority of rabbinic authorities to interpret Rav’s response as unenforceable moral suasion. See Kirschenbaum, *Equity*, p. 123, *Be’er Eliyahu*, *Hoshen Mishpat* 12:2, and Silberg p. 121. For the normative *halakhah*, see R. Yosef Caro, *Bet Yosef*, *Hoshen Mishpat* 12:8.

⁵³ Commentary on BT, *Bava Metsia* 24b. See also Shilo pp. 236-366.

⁵⁴ *Mishneh Torah*, *Hilkhot Gezeilah V’avedah* [Laws of Theft and Robbery] 11:7.

⁵⁵ For an examination of the concept of conscience in traditional Jewish sources, see A. Brill, “Do Jews Have a Conscience?” (unpublished manuscript)

⁵⁶ See, R. Moses Isserles (RaMaH), gloss on *Shulhan Arukh*, *Hoshen Mishpat* 12:2, and Kirschenbaum, *Equity*, p. 124-125 for the positions of various Ashkenazic *poseqim*.

⁵⁷ See S. Y. Cohen “*Lifnim Mishurat Hadin*” in the *Adam Noah Braun Memorial Volume* (Jerusalem, 1969) p. 166, who cites R. Sa’adia Gaon as claiming that because of Lev. 19:15, a judge is *not permitted* to decide in this manner. If he did so—as the halakhic hard positivist maintains he must—he would be committing injustice. Ch. Albeck, “*LeOfyan Shel Ha’Halakhot b’seder Nezekin*” (The Character of the Laws in the Order *Nezekin*), *Torah She-Ba’al Peh*, Vol. 4, pp. 23-25, comes to the same conclusion.

⁵⁸ See Shilo p. 369.

⁵⁹ Wurzbarger, *Ethics of Responsibility op. cit.*, chapter 1

halakhic prescriptions. This is exactly the point Nahmanides makes in his explication of “You shall be holy” and why Maimonides as well refuses to count this imperative in his enumeration of legal obligations.

Lastly, rules *qua* law, must apply to a given class of people and cannot view each individual *sui generis*⁶⁰. Valid positive law is not relative to individual persons nor humanly undeterminable, yet hard halakhic positivism is forced to attribute these qualities to Jewish law in order to make sense of Jewish sources. According to the hard halakhic positivist, *halakhah* posits different relative obligations for every person “commensurate with each individual's apprehension of the Divine essence” (R. Bleich, p.540), laws whose fulfillment and violation are “undetectable by any human court,” and standards that are “objective and mandatory only in the eyes of the Deity” (p. 542). This is a very strange notion of law indeed for any legal positivist or formalist⁶¹, certainly for the analytic talmudic school that celebrates legal rigor and the determination of precise quantity, timing and definition of *dinim*. Recall that Hazon Ish identified moral obligations as identical with the well-defined decisions of *halakhah* (*pisqei halakhah*), not a conception of halakhic standards that are in principle relative and unknowable to human beings. Positivist *halakhah* is objective, open to human analysis and determination; its study is a cognitive and discursive enterprise, not an intuitive nor a

mystic experience.⁶² As philosopher, the hard halakhic positivist is forced to admit that *halakhot* are relative, indefinable, and undeterminable to account for Talmudic ‘data’—yet as formalist he is bound to a rigorous quantifiable and determinable conception of *halakhot*.

The debate over the correctness of halakhic positivism is not one of mere nomenclature, regarding what one subsumes under the rubric of *halakhah*. *Hesed* as a spiritual standard transcending strict law is anathema to the hard halakhic positivist. The necessary conclusion is that consistent hard halakhic positivism is philosophically opposed to *hesed* in theory and, unfortunately, in practice as well. This is indicated by how the halakhic positivist treats the tragic problem of *agunot* (“chained” wives condemned to unmarriageable status because their husbands refuse to grant them a Jewish bill of divorce-ment).⁶³ He rejects in principle employing the mechanisms of state law, *qiddushei ta’ut* (defective marriage) and *get zikui* (divorce via constructive agency) as solutions to the problem, even when established halakhic authorities such as R. Moshe Feinstein⁶⁴ and R. Eliyahu Klatzkin⁶⁵ deemed these mechanisms acceptable. It is important to note that because these rejections flow from an unyielding hard positivism, they are directed not merely at a particular application by any specific rabbinic court, but apply categorically, i.e. to every pos-

⁶⁰ Aristotle, *Nicomachean Ethics*, 5:10; Maimonides, Guide 3:34, Hart, Ch. VII, Lichtenstein p. 115. See also K. Greenawalt, *Law and Objectivity* (New York Oxford University 1992) Chapter 8.

⁶¹ The ‘soft’ positivist Hart (Chapter VI) maintains that valid legal rules must be subject to a “rule of recognition” and “rules of adjudication.” The failure of *lifnim mishurat ha-din* in the form of specific action to appear in classic halakhic codes or catalogues indicates that it does not pass Hart’s “rule of recognition” criterion. Rules whose fulfillment and violation are “undetectable by any human court,” and standards that are “objective and mandatory only in the eyes of the Deity” fail Hart’s adjudicability test. The analytic talmudic school would fully agree with these requirements.

⁶² See R. Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia; Jewish Publication Society 1983) p. 79.

⁶³ This author was present at a recent conference when R. Bleich insisted that *hesed* play no role resolving cases of *agunot*, claiming “Such cases should be handled with the full rigor to the law. We should not utilize *hesed*.”

⁶⁴ R. Feinstein accepts *qiddushei ta’ut* as basis for freeing an *agunah* in *Even Ha-Ezer* 1:79 and 4:113.

⁶⁵ R. Klatzkin accepts *get zikui* for freeing an *agunah* in *Milu’ei Even*, 29.

sible application of these halakhic instruments toward this end.⁶⁶ Halakhic positivism's cardinal methodological principle appears to be, "Let the *din* bore through the mountain," even though *Sanhedrin* 6b rejects that principle in favor of compromise (*bitsuah*). At issue is not a possible violation of law, but whether it is proper to approach the halakhic problem with *a priori* compassion for the *agunah* that yields a 'hesed bias' to exploit all halakhic possibilities for her release. In contrast, R. Benjamin Slonik articulates the more traditional—and normative—rabbinic method of dealing with *agunot*:

I follow the well-trodden path of the earlier and later shepherds, who sought with all their strength all manner of considerations, primary and secondary, to be lenient in matters pertaining to *agunot*, as I have cited above.⁶⁷

To one prominent contemporary rabbinic authority, this halakhic orientation is "self evident to one familiar with the history [of *psaq* regarding *agunot*]."⁶⁸

VII. Conclusion

It is possible that soft halakhic positivism is a defensible

thesis when it refers to a broad conception of *halakhah* that encompasses extra-legal moral norms as well formal law.⁶⁹ Halakhic formalism may also be tenable when it refers to a technical notion of law and concedes that formal halakhic canons are limited in scope, leave *laqunae* in areas of human behavior, and require complementary authentic non-legal ethical values. Hard halakhic positivism as a fusion of an imperial halakhic positivism with a formalistic conception of *halakhah*, however, is quite another matter.

Compassion without binding law may be impotent, but legal obedience without hesed is blind.

One can understand why hard halakhic positivism is attractive today: As a binary thesis, it appears as an unambiguous effective response to the antinomian impulses of modernity. Upon analysis, however, it proves to be only a rhetorical position, one that is logically incoherent and impossible to defend on Jewish and normative halakhic grounds. It is advanced only by generalizing from non-normative minority sources⁷⁰, ignoring selected classical Jewish sources⁷¹, dismissing others as

⁶⁶ See *Tradition* 32:1 p. 99 (Fall 1997) for his rejection of NY State *Get* Law; *Tradition*, 33:1 (Fall 1998) pp. 90-128 for *qid-dushei ta'ut*; and *Tradition* 35:4 (Winter 2001) pp. 49-73 for the rejection of *get zikui*.

⁶⁷ *Masat Binyamin* 109. See also R. Shmuel Edels (MaRSHAh) end BT *Yevamot*, R. Hayim Volozhin, *Hut Ha-Meshulash* 8, and Yitzhak Zev Hahana, *Le-Takkanat Agunot* (Jerusalem, 1947) *passim*, as cited by R. Aharon Lichtenstein in "The Human and Social Factor in Halakha," *Tradition* 36:1 (Spring 2002) pp. 7-8.

⁶⁸ Lichtenstein, *ibid.*

⁶⁹ Such halakhic positivism would have difficulty explaining the overarching *tele* or ends of the halakhic system as postulated by Nahmanides and Maimonides. Rational purposiveness is, after all, a characteristic of natural, rather than positive, law. See Martin P. Golding, *Philosophy of Law* (Englewood Cliffs, NJ; Prentice Hall 1975) Chapter 2.

⁷⁰ R. Bleich relies on the opinions of Ravan and Ravva on the enforceability of *lifnim mishurat ha-din*. As indicated earlier, these opinions are rejected as normative law. He similarly cites R. Isaac of Corbeille (*Sefer Mitsvot Qatan*) who lists *lifnim mishurat ha-din*, as one of the 613 *mitsvot*. As we saw, this codification was rejected by both Maimonides and Nahmanides

⁷¹ It is difficult to see how a hard positivist could ever square, "*Derekh eretz qadmah la-Torah*" ["Civility precedes the Torah"] (*Avot* 3:17), with his thesis. For the classic—and anti-positivist—understanding of this statement, see Lev. Rabbah 9:3 and *Tanna Debei Eliyahu Rabbah*, chapter 1. R. Bleich does try to explain, "Jerusalem was destroyed only because Jews judged according to the laws of the Torah" (*Bava Mezia* 30b), but ignores the clear meaning of this text (pp. 527-528) and employs a circular argument to this passage to establish his conclusion: Because the Jewish people incurred divine punishment for ignoring the standard of *lifnim mishurat ha-din*, he concludes this standard is not a moral but a legal category. He thus *assumes* that any value to

insignificant⁷², and stretching both essential Jewish texts and the concept of formal law beyond any rational recognition. This conception of Torah may be an old thesis in the Christian theology, but it is a distinctively modern thesis for Jews: No talmudic or medieval rabbinic source subscribed to it.

As indicated, deciding whether *din* is sufficient or merely necessary for the Jewish conception of the good life is not a trivial choice between Tweedle-Dee and Tweedle-Dum. All Jewish traditions—talmudic, philosophic and mystical—warn against the devastating consequences to the spiritual life of assuming a posture of strict *din* without *hesed*. As we saw, the text of *Bava Metsi'a* 30b indicates that at one time such an ethic led to spiritual pettiness. This smallness of character caused the breakdown of social responsibility and ultimately destroyed the Second Jewish Commonwealth. When Jews of that period refused to act above and beyond the requirement of *din*, they became selfish and intolerant, lost identification with each other, thus rendering the Jewish people defenseless against the Roman Empire. “Standing upon *din* entailed ruin.”⁷³

Nahmanides warns that exclusive concern with legal detail can lead to myopia depriving a person from recognizing the overarching ideals of both the spiritual and the moral life. Without these *tele* to guide sensibility and action, the halakic positivist can become a spiritually confused, despicable individual (*naval b'reshut ha-Torah*). And in perhaps the harshest critique of all, Maimonides—arguably the greatest master ever of *halakhab*—claims that the life of strict legal obedience without the tempering virtue of compassion to motivate

extra-legal acts of *hesed* is a life destined to practice cruelty. This is the antithesis of the Jewish spiritual vision, and its philosophical formulation is ultimately pagan in outlook and action.

The positive correlate of these critiques is that correct Jewish living consists of a delicate blend of law and extra-legal ethics, of *din* complemented by *hesed*. Compassion without binding law may be impotent, but legal obedience without *hesed* is blind. Kabbalistic tradition teaches that *tiferet* (glory) is achieved only when *gevurah* (law) combines with *gedulah* (*hesed*). As in much of *kabbalah*, this merger of divine attributes is a cosmic reflection of the ideal life that each Jewish person is challenged to create on earth. The successful spiritual personality blends a principled responsiveness to heteronomous law with the practice of *imitatio dei* through an autonomous overflow of *rahamim* that manifests itself in innumerable unlegislated acts of *hesed*. The talmudic passage in *Sotah* 14a teaches us noble behavior through imitating God's acts of *hesed*. Living the holy life also entails imitating divine aspiration. To what does God aspire? Again, tradition provides rich insight into a spiritually elevated character, both divine and human:

What does the Holy One Blessed Be He pray?
Mar Zutra said in the name of Rav:

“May it be My will that My mercy suppress My anger, and that My mercy prevail over My other attributes so that I may deal with My children out of mercy and act above and beyond the strict requirement of the law.” (BT, *Berakhot* 7a)

which people are held accountable is legal—but this is precisely what is to be demonstrated.

⁷² As noted, the positivist first cites *Sefer Mitsvot Qatan* as proof that *lifnim mishurat ha-din* is “normative and binding.” When later forced to admit that this is a minority opinion that is rejected by later authorities who catalogued *mitsvot*, the positivist claims curiously that, “in all cases, inclusion or exclusion from the formal catalogue of 613 *mitsvot* is entirely devoid of substantive import” (p. 528).

⁷³ Maharal, *Netivot Olam*, Chapter 5. See also the depiction of events leading to the destruction of Jerusalem in BT *Gittin* 55b-56, and R. Naftali Zvi Berliner, *Ha'Ameq Davar*, op cit.