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LIFNIM MISHURAT HADIN: THE RABBINIC CONCEPT

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requirements for the Degree of Master of Arts
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DIGEST OF LIFNIM MISHURAT HADIN: THE RABBINIC CONCEPT

The dissertation is based upon the premise that the use of the term lifnim mishurat hadin by the Amoraic teachers of Talmudic literature is technical. It is the primary purpose of the study to determine, in so far as possible, what these teachers meant to convey when they used the term. To do this, all passages from the extant Talmudic literature which use the term lifnim mishurat hadin are analyzed and discussed. There is, as well, a summary of the modern secondary scholarship which treats the term.

"Lifnim mishurat hadin" was used only by the Babylonian Amoraim and their predecessors. The Tannaim were unfamiliar with the term but not with the basic notion of supererogation. In the literature of these rabbis, the term is derived from a suggestive scriptural text in standard midrashic form. In these passages, as well as in passages which praise its worth, the term and its underlying concept are given the official sanction of the Sages and raised to a position, by some, equal to that of the strict law, halachah.

The main source for the determination of the meaning of the concept and its delimitation are various tales which are told about rabbis who are said to have acted according to the principle of lifnim mishurat hadin. From these stories, which primarily deal with economic matters and related torts, but which also include an instance in which a ritual

matter is discussed, a general overview of the nature of the concept is extrapolated. In so far as possible, without imposing a non-existent logical structure upon the material, common denominators and family resemblances are derived.

Lifnim mishurat hadin is seen, finally, as a device of halachah itself designed, through the agency of revolt against it, to soften its harshness. It is similar to, but not contiguous with, the equitas of Roman and English law. It represents a strain in Jewish legislation which endeavors, tapping the moral and ethical excellence of the man who strives for chasidut, to create a greater equality and a finer justice than the strict law is able to maintain by itself.

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CHAPTER I

INTRODUCTION

A student and friend recently sent me the following confession.¹

I am confused and troubled, and find no peace within myself. I had embraced the Lord's commandments, but had kept them poorly, till I did not keep them at all. The law did not live within me, it did not sear and burn in my heart as my faith did and does, so I left the law. And now I am in agony.

The Law is old, it is comforting, and while not easily kept, rewards its followers with a gentle peace. But, dear God, it does not bend. I do not understand Your will that it creates a living, growing, loving, expanding being, and then a rigid, solid, standing law for him to adhere to. Surely, there is some other way to serve you?

Tensions similar to these, coupled with the realization that with all our technology humans must still make moral choices (which are often most difficult), encouraged me to study the concept lifnim mishurat hadin. The conflict of rigid legality with the demands of human flexibility on one hand, and the need for significant, yet non-coercive, guide~~for~~ the individual behaviour on the other, provides a central question for the modern Jew.

The Jew, however, cannot act out of a vacuum. Believing that the individual is existentially autonomous, he is tensed with the overwhelming power of God and his tradition. Only through the dialectical interaction of the two

can he develop his contemporary answer.

The purpose of this study, then, is to expose a relatively hidden rabbinic concept, one which has significant bearing upon these tensions. Lifnim mishurat hadin injects flexibility into the law while leaving it undamaged. Yet, it is a revolt against the law's hegemony over daily activity. It represents a potent manner of ethical behaviour and, even today, is a radical approach to human relations.

This paper will be an attempt to analyze the Talmudic notion, lifnim mishurat hadin. While it uses no particular established methodology, it will strive to determine what type of activity the Amoraic teachers were referring to when they used the term. Part scientific, part homiletic, it will try to establish any common denominators or family resemblances which emerge from the various examples of the use of lifnim mishurat hadin in Talmudic literature. There will be a judicious attempt to avoid imposing any preconceived system or analysis upon the primary texts. The scholarly work done on the topic (which is meagre) will be examined as well.

In many ways this has been a disappointing study. Lifnim mishurat hadin, I have discovered, does not reach the heights of ethical excellence that I would have liked to see it reach. It is, perhaps, not as rigourously self-sacrificing as I would have liked to believe it could be.

Since not many have dealt with the question of the nature and the scope of lifnim mishurat hadin, the concept needed serious examination. This study, however, is incomplete. There is much in the realm of the rabbinic ethics of supererogation which still needs to be carefully analyzed. Post-Talmudic sources still need to be rigourously researched. The questions raised by parallel Roman and Christian concepts are, sadly, beyond the scope of this paper. The demands of curricular obligation expend one's energy on production in numerous areas rather than concentrated and leisurely contemplation in a single area of thought.

Perhaps most of all, it is not so much that I have inadequately recounted what kind of pants the rabbis wore, or have told ineffectively what the rabbis have said and done, their tales, that gives me the greatest pain of failure . But, rather, that I have neglected to detail what the rabbis are still saying today. It is the message of the rabbis for us for which this study must serve as a base, if it is to have any meaning in the eternal plan of Hakadosh Baruch Hu.

I have assumed that lifnim mishurat hadin is a technical term and perhaps I may be accused of begging that assumption. It, nonetheless, seems to be apparent that the term is applied to specifically defined circumstances and is not used as a general ethical imperative.

Perhaps, I have committed the unforgiveable error of scholasticism, "the essence of which is treating what is vague as if it were precise and trying to fit it into an exact logical category."² This is indeed a possibility. I must, however, consider my efforts, rather than being conclusive, to be part of a methodology of critical analysis which, somehow, makes us a little more careful in our speech and behaviour.

I have relied heavily upon the various standard translations listed in the Bibliography for use in the manuscript, though I have taken the liberty to change them when they are unnecessarily archaic or awkward. The original texts, however, served as a base for the research. The original Hebrew and Aramaic texts of relevant passages have been included for the convenience of the serious student. Except for those instances in which there is a well-known, popular transliteration for a term or name, I have followed the Table of General Purpose Romanization (Style I) found in Romanized Hebrew, prepared by Dr. Werner Weinberg (Cincinnati, Hebrew Union College - Jewish Institute of Religion, 1971), pp. 3-7.

Those whom I thank are those who have acted according to lifnim mishurat hadin toward me: my referee and teacher, Dr. Jakob J. Petuchowski, gave wise counsel, and patient assistance while maintaining his sense of humour despite my

abhorrance of established deadlines; my mother, Ms. Evelyn Aronstam, whose example of self-sacrifice goes even beyond lifnim mishurat hadin; and my wife and dearest friend, Georgia, ineffably.

בעזרת השם יתברך.

CHAPTER II

THE PHRASE LIFNIM MISHURAT HADIN AND ITS SOURCES

THE PHRASE

The early rabbinic sources of the phrase lifnim mishurat hadin are unfortunately telegraphic. After examining these passages we are still left questioning the nature of the concept. But this is not the only reason that lifnim mishurat hadin is puzzling to us. The phrase itself is an enigma. Simple linguistic analysis yields no clear meaning. Lifnim mishurat hadin is examined in two parts; the less enigmatic first.

שורת הדין is found numerous times in the literature.¹ Jastrow² defines it as: "the line of justice, strict law". We know that one behaves correctly if his activity is כשורה. שורת הדין is contrasted to תקון העולם.³ According to the Mishnah, the law (שורת הדין) provides that the owner of a slave in setting him free must take extra precautions for the public good (תקון העולם). שורת הדין is considered to be "logic" which is opposed in Gitin 54b to the law.⁴ One does not deviate from the law by showing compassion in legal cases: אין מרחמין בדין.⁵ Din is also the opposite of arbitration.⁶ There is no deviation from the "line", one is not allowed to pity the criminal: לא תחוס עיניך.^{6a}

We are struck by the meaning of the word שורה which

connotes a certain rigidity. When one thinks of a line, he pictures something which might have been drawn with a straight edge. The plumb line, for example, by its very nature, had to be an absolutely rigid standard of measurement.⁷ The notion of a "crooked line" is self-contradictory. The image of the parallel conformity of a farmer's furrows are conveyed by the Biblical use of שורה.⁸ The regularity of a line and its uncompromising consistency are all images which are conveyed by the word שורה.

Then to emphasize matters, שורה is put in construct with דל, hard law. The granitic firmness of legal inflexibility is our immediate apprehension. Legal precedent binds the future possibility with a modicum of permissiveness. The natural ossification of laws system is familiar to the most elementary student of social lag. The difficulty of repeal is notorious.

But law, we posit, is necessary for the maintenance of orderly social relations. Nonetheless, one system of law may be more flexible than another and it is this intrusion of pliancy which is marked by לפנים.

לפנים means "in the midst of, within".⁹ לפנים מן-¹⁰ means after or "in the part that is more inside".¹¹ One might coin the word "innermore"¹² to meet the need for an adequate translation of the Hebrew. In modern Hebrew, לפנים has come to mean something which is obligatory.¹³ Even משורה

Shoshan¹⁴ goes as far as to impose this meaning on the full concept לפנים משורת הדין. It is "Less than the din compels". This may well be the case for the person in whose favor lifnim mishurat hadin is being done. But it is not the case for the person who is performing lifnim mishurat hadin. For other commentators, however, לפנים has taken on a different connotation. In the context of the phrase לפנים משורת הדין, לפנים has been generally translated as "beyond". This situation is reflected in the Soncino translation of the Babylonian Talmud. The various translators do not agree on a single English equivalent. Among the various translations we find "beyond the requirements of the Law",¹⁵ "acting within the line of the law",¹⁶ "(he) went out of his way",¹⁷ and "overstep the line of justice".¹⁸

In all cases, however, we maintain a basic common denominator in which לפנים implies some kind of deviation from the strictness of legal justice. This deviation may either go beyond the general provision that the law makes explicit or it may stay well within them, deviating in some other manner. Explication of the nature of this deviation is the task of this study.

THE SOURCES

The Babylonian Talmud is the primary source for our information concerning lifnim mishurat hadin.¹⁹ Its main formulation and development as a mode of behaviour takes place in the Talmudic period.

Each time the term lifnim mishurat hadin is used in connection with a practical halachic discussion in the Talmud, the comment which is relevant to the concept lifnim mishurat hadin, is a comment made by an Amora, or by the Gemara itself. That is to say that although a baraita may appear as an illustration of lifnim mishurat hadin, Tannaitic comment does not identify the examples as lifnim mishurat hadin. The concept and its terminology appear only in Amoraic comments. There may well have been examples of a lifnim mishurat hadin-type of behaviour in previous periods, and, certainly, that is the impression that the Gemara wants to make. Lifnim mishurat hadin however, appears as a technical, legal term or an explicitly elaborated mode of action only in Amoraic strata. It is clearly absent from the Mishnah, Tosephta, and most Tannaitic Midrash. In Midrashic and Agadic material, lifnim mishurat hadin is used once in all of the extant Tannaitic collections. This is in the Mechilta which has been recently suspect as a Tannaitic collection by Professor Wacholder.²⁰ Though Wacholder's asser-

tions are not conclusive, this Midrash might serve to corroborate his thesis. The parallel texts are baraitot in the Gemara's discussions on Bava Kama 100a and Bava Metsia 30b. In these nearly identical comments the authorities are Rav Yosef, a 3rd generation Amora, and Rabbi Yosef, an indeterminate Tanna, respectively. In the Mechilta the authority is Rabbi Elazar (Eliezer) Hamoda'i,²¹ a third generation Tanna. This confusion of authorities leaves us with inconclusive evidence for a determination of the date of the passage. The Midrash on יהוהרת להם may either have been older or it may have been later and simply attributed to the earlier teacher. If Wacholder is right, then the appearance in the Mechilta does not solve the dilemma. This confusion coupled with the absence of the term lifnim mishurat hadin in any other extant Tannaitic collection, casts doubt on its early origin.

There are two other baraitot which attribute the use of the term lifnim mishurat hadin to Tannaim. Both appear in the later texts and have no extant parallels. One (Berachot 7a) is attributed to Rabbi Yishmael ben Elisha, the supposed author of the Mechilta and the other to a certain Rabbi Chagai who might well have been the 4th generation Amora,²² is found in the very late²³ Deuteronomy Rabah.²⁴ Even if Chagai were a Tanna, we are still left with the considerable gap between the absence of the term lifnim mishurat hadin in

any Tannaitic collection, and the possibility of the attribution of certain statements by later texts to the earlier Rabbis. In all, more serious doubt is cast on the side of the Tannaitic origin of the term.

The tendency, then, to posit lifnim mishurat hadin as a formal legal mode of behaviour was a later, primarily Amoraic, creation. This does not, of course, negate the possibility of the earlier origin of parallel concepts or instances in which people acted in a manner of supererogation. Urbach notes the connection between lifnim mishurat hadin, midat hahasidut, and the passage from Avot 5:10²⁵ in which "the chasid gives up that which is his and does lifnim mishurat hadin and that is the attribute of piety."²⁶ The text says: וְשֵׁלַךְ וְשֵׁלַךְ שֶׁלְךָ חֲסִיד and makes no reference to lifnim mishurat hadin. This is Urbach's correlation and, however valid ideationally, it seems unjustified historically.

The bulk of this material appears in the form of narrative, often taken from early events²⁷ which tell of a sage who acted, in the eyes of the Gemara, according to the principle.

There are twelve separate examples of the use of the term lifnim mishurat hadin in the Babylonian Talmud, spread over five different tractates, and three different orders. This paucity has not contributed to its becoming a particu-

larly popular principle.²⁸ In addition, very little information is included in each statement and as Urbach notes,²⁹ the meaning, nature, and scope of lifnim mishurat hadin is never explained. We are simply told, in most cases, that such and such a person³⁰ acted in accordance with this principle, that such and such a word in a Biblical phrase connotes lifnim mishurat hadin, or that lifnim mishurat hadin was or should be prayed for. The term also appears in two Midrashim not found in the body of the Talmud text.

The task of the following three sections will be to make some attempts at figuring out, in so far as possible, what the concept involved and to determine what kind of behaviour the rabbis were thinking about when they used the term. These sections will deal only with the examples in the Bavli and midrashic literature in which the term lifnim mishurat hadin actually appears. It does not appear in the Yerushalmi and, as we have noted, in any other tannaitic or midrashic literature. Therefore, as far as this writer can determine, every case of the use of lifnim mishurat hadin up to the end of the Talmudic period (c. 500 C.E.) will be examined. This, of course, also excludes all other passages which might have been composed before 500 C.E. which deal with the various related and parallel concepts such as

מידת החסידות, לאמין הדין, ועשיית הטוב והישר, דבר מסור ללב.³¹

It is convenient to divide these passages into two

parts according to the type of passage it is. The first will deal with those passages which are theoretical midrashic exposition of lifnim mishurat hadin (Chapter III). The second will be various examples of the practical application of the concept to concrete halachic situations. Each section will, in turn, be subdivided into two categories. The first part of the chapter on midrashic exposition will deal with passages that are midrash halachah and the second part with passages that are midrash agadah. Chapter IV investigates the bulk of the halachic material which has to do with economic matters and related torts and Chapter V will be a short discussion of the use of lifnim mishurat hadin in ritual matters.

CHAPTER III

THE MIDRASHIC EXEGESIS OF LIFNIM MISHURAT HADIN

MIDRASH HALACHAH

The classic example of the exegesis of lifnim mishurat hadin from the Biblical material is the baraita which appears both in Bava Kama 100a and Bava Metsia 30b. This baraita also appears in the Mechilta.¹ It is an exposition of Exodus 18:20: "Make known to them the way they are to go and the practices they are to follow."² There are two opinions given as to the meaning of the verse. The first is that of R. Yehoshua:³

והודעת להם את הדרך ילכו בה זה תלמוד תורה ואת המעשה אשר יעשו זה מעשה הטוב דברי רבי יהושע.

"Make known to them the way they are to go" means the study of Torah; "and the practices they are to follow" means the good deed. These are the words of R. Yehoshua.

This is immediately followed by the second interpretation which is that of R. Elazar the Moda'i, the 2nd century Tanna:⁴

ר' אליעזר המודעי אומר והודעת להם הודע להם בית הייהם את הדרך זה ביקור חולים ילכו זו קבורת מתים בה זו גמילות חסדים ואת המעשה זה שורת הדין אשר יעשו זה לפנים משורת הדין.

R. Elazar the Moda'i used to say: "Make known to them" means tell them their livelihood; "the way" means visiting the sick; "they are to" means the burial of the dead; "go" means charitable activity;

"and the practices" means the letter of strict law;
"they are to follow" means lifnim mishurat hadin.

R. Elazar divides the verse into more parts than does R. Yehoshua. In both cases, however, recommended basic activities are enumerated: In the first these are "Talmud Torah" and "the good deed".⁵ But in the second, Elazar specifies more detailed activity: one's livelihood, visiting the sick, burying the dead, and charitable practices. After that he adds two more general, overriding aspects of daily strige: strict law and that which is lifnim mishurat hadin.

Neither the midrash of R. Elazar itself nor the comparison of the two midrashim give us any hint as to what might be meant by lifnim mishurat hadin. All that we know is that R. Elazar favors doing lifnim mishurat hadin. We do not, however, know to what extent he would go in its application. By associating lifnim mishurat hadin with those specific things which the individual is encouraged to do, R. Elazar promotes lifnim mishurat hadin.

These recommended activities constitute the minimal standard of ethical behaviour which must be maintained for the perpetuation of an orderly society. If one considers the context of the Exodus verse, it will become apparent that this is its intention:⁶

But Moses' father-in-law said to him: "The thing you are doing is not right; you will surely wear yourself out, you as well as this people. For the task is too heavy for you; you cannot do it alone. Now listen to

me. I will give you counsel, and God be with you! You act for the people in behalf of God: you bring the disputes before God, and enjoin upon them the laws and the teachings, and make known to them the way..."

In the passage, Jethro presents a plan to Moses. The plan is one by which Moses might be able to continue to govern the Israelites, yet, at the same time, lessen his administrative responsibility as sole governing authority. But, in addition, this passage outlines a model for the orderly and efficient government of the Israelites. This model is based upon a concept of shared authority and division of responsibility which demands, in its application, the cooperation and participation of every member of the community.⁷ A minimal system of administration designed in which self-government is primary and the authority of one person over another is reduced to only formal litigation of disputes.

Jethro's plan delineates a hierarchy of authority: at the top is Moses after whom come the elders. The masses of people are directly under the authority of the elders but they themselves have no authority over one another. The top executive of the government, Moses, is to be responsible only to bring the most important disputes before God. The elders actually adjudicate all other disputes and exercise authority over the people. We are told that they wield this authority at all times, though we are not informed of the exact nature of it, beyond the fact that the elders are to

judge all minor disputes and leave the major ones to Moses' agency.

The masses of the people, on the other hand, are to be given a responsibility. They are told the body of law, practices, and customs which are to be followed. This instructional process is designed to enable them to be virtually self-governing. The masses of people, however, have certain distinct responsibilities for which the "authorities" are not directly responsible. Since these are not enumerated, R. Elazar delineates more precisely what they should be.

In order to run an efficient government, Elazar believed that lifnim mishurat hadin (as well as the other things he mentioned) should be a significant part of the activities of the people. This is true, of course, only if we can assume that Elazar had the context of the verse in mind and if he understood that context in the same manner. We know, however, that he took the Torah seriously, so it is not unfair if we posit that lifnim mishurat hadin was intended, by him, as one of those things which the general public should do in order to maintain a society based on some measure of shared responsibility.

At very least we can assume that lifnim mishurat hadin was considered to be an important, if not essential, way in which people should behave. Through Elazar's emphasis in the midrash, lifnim mishurat hadin, the concept, be-

comes a principle of conduct derived from Scripture, and carrying the full endorsement of a rabbinical authority.

The rather casual mention of lifnim mishurat hadin in the text of the Midrash tends to controvert the notion that lifnim mishurat hadin is a concept which was actually derived from Scripture. At least this passage gives no indication that this is true. The concept lifnim mishurat hadin seems to be arbitrarily chosen as the meaning for the phrase. Clearly there is no internal, thematic reason why lifnim mishurat hadin should be chosen. Furthermore, the term was most likely a popular one among the people. Since there is no explanation of the concept, we must assume that people were generally aware of its meaning.⁸ It is relatively safe to conclude that this passage marks an official, authoritative endorsement of the concept rather than an original attempt at derivation of it.^{8a}

A parallel midrash, with slight variations in order, appears on Bava Kama 100a. Instead of being attributed to R. Elazar Hamoda'i, this one is attributed to a 3rd generation Amora, Rav Yosef:⁹

רבי חייא לפניא משורת הדין הוא דעבד כדחני רב יוסף והודיע להם זה בית חיייהם את הדרך זו גמילות חסדים ילכו זו ביקור חולים בה זו קבורה את המעשה זה הדין אשר יעשוון זו לפניא משורת הדין.

R. Chiya acted according to lifnim mishurat hadin on the principle that R. Yosef taught: "Make known to them" means their livelihood; "the way" means deeds

of lovingkindness; "they are to" means visitation
of the sick; "go" means burial; "and the practi-
ces" means the law; "they are to follow" means lif-
nim mishurat hadin.¹⁰

On Bava Metsia 30b, a Tanna, Rabbi Yosef, is credited with the baraita. In this parallel, the remainder of the text is identical to that in Bava Kama 100a. Added to this passage there is an amoraic elaboration of the baraita:

אמר מר אשר ילכו זה ביקור חולים הינו גמילות חסדים לא נצרכה אלא לבן גילו דאמר מר בן גילו נוטל אחד מששים בחליו ואפילו הכי מבעי ליה למיזל לגביה בה זו קבורה הינו גמילות חסדים לא נצרכה אלא לזמן ואינו לפי כבודו.

The Master said: "The way they are to" means the visiting of the sick. That is necessary only in respect to one's affinity.¹¹ For a master said: A man's affinity takes away a sixtieth of his illness; yet, even so, he must visit him; "go" means burial. Isn't this identical with deeds of lovingkindness? This is necessary only in respect of an old man for whom it is undignified.¹²

Both comments question the necessity of mentioning these responsibilities: visiting the sick and burial. They seem to have been taken for granted during that time. The response of the Gemara is, of course, that they are taken for granted by Elazar, but that these comments refer to unusual situations in which, perhaps, the person involved might not be aware of his responsibilities. The Gemara continues:¹³

אשר יעשוך זו לפנים משורת הדין דאמר רבי יוחנן לא חרבה ירושלים אלא על שדנו בה דין תורה אלא דינא דמגזתא לדינא אלא אימא שהעמידו דיניהם על דין תורה ולא עבדו לפנים משורת הדין.

"they are to follow" means lifnim mishurat hadin. R. Yochanan said: Jerusalem was destroyed only because they gave judgments therein in accordance with Biblical law. Were they then to have judged in accordance with untrained arbitrators? But say thus: Because they based their judgments (strictly) on Biblical law and did not go lifnim mishurat hadin.

Jerusalem was destroyed because its judges did not judge according to lifnim mishurat hadin. The Gemara skips the question of "strict law" because, perhaps, no one need be accused of taking this for granted, due to the difficulty of its application. However, one might assume that "strict law" is included incidentally in the comments in the next part of the midrash. In this final part, lifnim mishurat hadin is seen not only as a value encouraged in the action of the people, but a principle which is so important that the judges of Jerusalem were guilty of bringing the city's destruction because of their avoidance of it. It is even to take precedence over strict Biblical law. The importance of judgment according to lifnim mishurat hadin cannot be made more important by the Gemara. God demands that man act according to lifnim mishurat hadin more than strict law.

In addition, here is a juxtaposition of lifnim mishurat hadin with Biblical law. In this context, lifnim mishurat hadin is encouraged over and against Biblical law, and is, therefore, in its relativity,¹⁴ something which strict Biblical law is not. There is no further elucidation of what

what that means: Could it merely mean derabanan (which is more likely) or could it really mean sticking to the Biblical law but with leniency (which is doubtful)?

It is doubtful that the purpose of this portion of the midrash is the same as that of the previous portion. This part is not an explanation of lifnim mishurat hadin as something that is taken for granted, like visiting the sick, burial, gemilut chasadim, or law. Lifnim mishurat hadin was the opposite; it was not taken for granted. The Gemara is saying then: Though you take all these things for granted, the baraita had to mention them, because they refer to special cases. You also take law for granted by slavishly adhering to it and that is a problem, but actually one should act according to a standard other than strict Biblical law, that is lifnim mishurat hadin.

The baraita itself tells us nothing about the concept lifnim mishurat hadin except that it is juxtaposed to din, or shurat hadin, and that it is emphasized and encouraged by rabbinic authorities. It does not replace din, but exists along with it (to what extent we are not told!). It is given an importance equal to that of din itself, or any of the other activities which one must perform in order to maintain an orderly, efficient, yet somewhat participatory society in which there is some division of responsibility and sharing of authority, and in which one man is not the only authority.

In fact, according to this model, no man is the supreme authority. Moses only brings the most important disputes before God. It is a theocracy. We are not told, in the final analysis, what the concept lifnim mishurat hadin involves.

The tannaitic comments are embellished by the Gemara, but only in a minimal way; we find out that lifnim mishurat hadin is not "Biblical law" in any strict sense. But, it should be a part of people's behaviour, perhaps even more than Biblical law. We are left without any positive delimitation of the concept itself. This will not be given to us. Rather, it will have to be extrapolated from the cases presented to us by the Gemara.

MIDRASH HAGADAH

The stories from which the nature and scope of lifnim mishurat hadin will have to be taken are, primarily, legal. However, before investigating them it might be worthwhile to examine several passages which confirm the Rabbinic approval of lifnim mishurat hadin. These passages are midrash agadah which by their very nature are designed to reinforce the importance of a concept.

1. The first is found in Deuteronomy Rabah:¹⁵

ד"א ראה אנכי א"ר אלעזר משאמר הקב"ה הדבר הזה בסיני באותו
שעה מפני עליון לא תצא הרעות והטוב. אלא מאיליה הרעה באה
על עושה הרעה. והטוב באה על עושה הטוב א"ר חגי ולא עוד
שנתתי לכם שני דרכים אלא שנכנסתי לפניכם משורת הדין ואמרתי
לכם ובחרת בחיים.

Another explanation: BEHOLD, I (HAVE SET BEFORE YOU THIS DAY A BLESSING AND A CURSE).¹⁶ R. Elazar said: From the time when God uttered this at Sinai, it has been laid down that "Out of the mouth of the most high proceedeth not evil and good." (Lam. 3:38); but evil cometh on its account to those who do it, and good cometh to those who do good.

R. Chagai said: (God said): And what is more not only have I set two paths before you, but I have not dealt with you according to the strict letter of the law and I have said to you, "Therefore choose life."^{16a}

Again, the midrash clearly underscores the importance of lifnim mishurat hadin. God behaves according to this principle. And in order to argue man's responsibility with regard to it, we need only posit imitatio dei as a goal. To be holy, as God is holy, man should perform lifnim mishurat hadin. But lifnim mishurat hadin, in any pure sense, is a

Godly activity, man can only imitate.

In a similar manner, Berachot 7a records:

מאי מצלי אמר רב זוטרא בר טוביה אמר רב יה"ר מלפני
שיכבשו רחמי את כעסי ויגולו רחמי על מדותי ואחנהג עם
בני כמדת רחמים ואכנס להם לפנים משורת הדין.

What does He (God) pray? Rav Zutra bar Toviyah said in the name of Rav:17 May it be My will that My mercy suppress My anger, and that My mercy prevail over My other attributes, so that I might deal with My children in the attribute of mercy and, on their behalf, do lifnim mishurat hadin.18

The passage continues:

תניא א"ר ישמעאל בן אלישע פעם אחת נכנסתי להקטיר קטורת
לפני ולפנים וראיתי אכאריאל יה' ה' צבאות שהוא יושב על
כסא רם ונשא ואמר לי ישמעאל בני ברכני אמרתי לו יה"ר
מלפניך שיכבשו רחמים את כעסך ויגולו רחמין על מדותיך
ותחנהג עם בניך במדת הרחמים ותכנס להם לפנים משורת
הדין ונענע לי בראשו וקמ"ל שלא תהא ברכת הדיוט קלה בעיניך.

It was taught: R. Yishmael ben Elisha says: I once entered into the innermost part of the sanctuary to offer incense and saw Akatriel Yah, the Lord of Hosts, seated upon a high and exalted throne. He said to me: Yishmael, My son, bless Me! I replied: May it be Your will that Your mercy suppress Your anger and prevail over Your other attributes so that You may deal with Your people according to the attribute of mercy and, on their behalf, do lifnim mishurat hadin. Then He nodded to me with His head. Here we learn (incidentally) that the blessing of an ordinary man must not be considered light in your eyes.19

Lifnim mishurat hadin is, then, not simply something that man does or must do. It is something so ideal in nature that even God strives to use it in His behaviour. But lifnim mishurat hadin is not simply an ordinary prayer or

wish, of God. In certain matters, He actually does behave

lifnim mishurat hadin:

והא אמרת של ראשונות הקב"ה יושב ועוסק בתוקה איפוך
ואיבעית אימא לעולם לא תיפוך תורה דכתיב בה אמת דכתיב
אמת קנה ואל תמכור אין הקב"ה עושה לפניו משורת הדין דלא
כתיב ביה אמת הקב"ה עושה לפניו משורת הדין.

But have you not said: "During the first three hours (of the New Year) the Holy One, Blessed be He, occupies Himself with the Torah; during the second three, He sits in judgment over the whole world?" You may reverse (the order); or, if you wish, you may say it need not be reversed: (While occupied with) the Torah, which Scripture designates as 'truth' as it is written: "Buy the truth and sell it not" (Prov. 23:23), the Holy One, Blessed be He, will not overstep the line of justice; (but when sitting in) judgment, which is not designated by Scripture as 'truth' the Holy One, Blessed be He, may overstep the line of justice (towards mercy).²⁰

Here there are certain matters which may be acted upon according to lifnim mishurat hadin and certain matters which cannot. Though matters of "truth" cannot be adjusted, matters which are not "truth" allow the application of lifnim mishurat hadin. In both cases, however, Scripture is the ultimate arbiter and standard by which truth is to be determined. Both, however, are found in Scripture, but the method of distinguishing between the two is not clear. Of course, there is no clear indicator in the texts which reveals that which is or is not "designated as truth".

This passage is thematically related to the text of Bava Metsia 30b.²¹ In the same way, lifnim mishurat hadin

is a concept which is defined in relationship to the Bible. In Bava Metsia 30b, it would seem that lifnim mishurat hadin is opposed in some way to strict Biblical law. In that passage, lifnim mishurat hadin is to be used as a principle of arbitration instead of strict Biblical law, whereas, in this passage (Avodah Zarah), lifnim mishurat hadin cannot supercede certain laws which the Scripture itself designates as true. This passage qualifies the other. It negates much of the enthusiasm that the other has for lifnim mishurat hadin. The Bava Metsia passage gives a seemingly wholesale endorsement of lifnim mishurat hadin, while the Avodah Zarah passage qualifies the other considerably: Lifnim mishurat hadin can be used only in matters of judgment which are not designated as truth.

However, we must also distinguish between two different realms of judgment: In Bava Metsia we are speaking of the realm in which man judges; and in Avodah Zarah we are talking about the realm in which God judges. Perhaps, it is that the rules governing divine judgment are simply stricter than those governing human judgment. God cannot simply judge everything according to the principle of lifnim mishurat hadin: matters of truth have no leniency or strictness; they have no relativity in the sight of God, truth is truth and that is simply the way of things. On the other hand, man is different: for man to say that truth is truth would

be idolatry, the idolatry of truth. Man cannot fully know truth in the same way that God can. So man's judgment exists metaphysically on a different plane. Man must therefore be more lenient in his judging and may use lifnim mishurat hadin, apparently, in any matter, according to the Bava Metsia passage.

We are left with the difficulty of reconciling these two passages. The problem revolves around the nature of true revelation through Scripture. After truth is revealed, how is man to tell which is designated truth and which is not? This confusion is not resolved.

Lifnim mishurat hadin is, then, not only human activity but divine activity as well. It is seen both as something which God strives for, as well as an ideal for man. God uses it in His judgment, but man has failed to use it.

These passages tell us little of the nature of lifnim mishurat hadin. We have yet to find out what it is that one does when he behaves lifnim mishurat hadin. Though we have seen a bit about the rules governing the concept, we must still examine the details of its nature.

CHAPTER IV

LIFNIM MISHURAT HADIN IN ECONOMIC MATTERS

Various cases involving economic matters and related torts are the context in which the bulk of the Talmudic information regarding lifnim mishurat hadin is found. There are five examples in the Babylonian Talmud, four of which are found in Nezikin, either Bava Kama or Bava Metsia, and one of which is found in Nashim, that is, in Ketuvot.

Each example displays various characteristics which do not necessarily exist in the others. It will be the task of this section to attempt to determine the common denominator of the cases of lifnim mishurat hadin as well as expose any particular characteristics which individual cases of lifnim mishurat hadin might reveal.

Four of the five cases (though not the same four that are in Nezikin) appear in the text with a common form. Each of these passages contains three distinctly discernable parts. Each contains a story which the Gemara relates about a sage who might either be a Tanna¹ or an Amora,² a question, not contained in the context of the story, about it, and an answer, also extra-contextual, which attempts to answer the question.

In each of these cases the story revolved around an economic matter³ in which the protagonist acts in a manner which does not clearly correspond with the provisions of

halachah. The question asks how the actions of the protagonist can be explained, assuming that the legal situation has been constant, the law was existent, and that the protagonist was aware of it.⁴ The solution, which appears, it seems, because no other solution is likely, is that the person in the story acted according to the principle of lifnim mishurat hadin.⁵

The first example is from Bava Kama 99b:⁶

איתתא דאחזיא דינרא לרבי חייא אמר לה מעליה הוא למחר אחאי
לקמיה ואמרה ליה אחזיתיה ואמרו לי בישא הוא ולא קא נפיק
לי אמר ליה לרב זיל חלפיה ניהלה וכתוב אפנקסי דין עסק
ביש ומאי שנא דנכו ואיסור דפטורי משום דלא צריכי למיגמר
רבי חייא נמאי לאו למיגמר קא בעי רבי חייא לפנים משורח
הדין הוא דעבד.

There was a certain woman who showed a dinar to R. Chiya and he told her that it was good. Later, she came to him and said to him, "I, afterwards, showed it (to others) and they said to me that it was bad, and, in fact, I could not pass it." He therefore said to Rav: "Go forth and change it for a good one and write down in my register that this was a bad business." But why (should he be different from) Danko and Isur who would be exempt because they needed no instruction? Rabbi Chiya acted according to lifnim mishurat hadin.

Here the story is told about a famous and learned Tanna, R. Chiya, well versed in the laws of money changing, who acts in a manner which is not contiguous with the halachic provisions for his situation by redeeming a coin he had incorrectly assessed. After the story is presented, the Gemara asks the question why R. Chiya acted in this unusual, extra-legal manner by dismissing the relevant legal

standard. Finally, the answer, ר' חייא לפנים משורת הדין הוא is given by the Gemara.

Indeed, there may be a number of possible answers that the Gemara might have given. Why did Chiya redeem the coin since the law provides (as in the cases of Danko and Isur)⁷ an exemption from such liability for professionals? Was he unaware of his exemption? This, for the Gemara, is unlikely. Of course, the exemption was already legislated.⁸ Did Chiya feel that the exemption did not apply to him? Perhaps, but he must have been aware of the fact that he was a sage and fully competent to judge in such matters. The Gemara rejects these possible solutions.

Rather in its faith that Chiya was fully aware of his legal situation, the Gemara posits that the sage must have been acting in accordance with that awareness. Therefore, Chiya's motivations had to lie in some source other than either his ignorance or his modesty. We can speculate. Perhaps, he was embarrassed at having made a mistake. Perhaps, he felt sympathy for the woman who would bear the hardship of the forgery because of her inability to use the money. Regardless, his attitude demands that he relinquish his exemption from having to rectify his mistake and act as if he were liable to replace the coin.

That is, he had to act under the rules which govern a less prestigious money changer, one who would be required

by halachah to redeem the counterfeit coin for a valid one. Rather than taking advantage of an exemption which was due him, Chiya fulfilled a requirement of the law for which he would have been obligated had he not had this exemption. He, nonetheless, acted according to full halachic procedure, though it was procedure specified for a situation which he might have been in, had he not been exempt. By forfeiting this exemption, Chiya, the Gemara comments, acted according to lifnim mishurat hadin.

The Gemara presents us with a text which is description and analysis. The passage does not prescribe a mode of action.⁹ We assume that the description is an accurate one of an event that actually took place, but this, though it is crucial for the rabbis, is actually irrelevant to our understanding of lifnim mishurat hadin. We do not know if lifnim mishurat hadin was actually the motivation of Chiya himself. The baraita makes no judgment. But this does not matter. The Gemara simply explains a seemingly otherwise inexplicable situation, making the assumption that the sage possessed legal awareness, on the basis of lifnim mishurat hadin. Given the facts of Chiya's behaviour, the Gemara considers it lifnim mishurat hadin. And for the present study that is what matters.

To summarize, this is the situation which the Gemara considered to be lifnim mishurat hadin: A sage (1) gives up an exemption and instead (2) fulfills an obligation for

which he would have been liable had he not had the special exemption.

It is important, before we examine the next case, to note carefully the nature of the exemption which was accorded Chiya and which he relinquished in this situation. He was given this exemption because he was a member of a certain class of people "who would be exempt because they needed no instruction". Chiya is a member of a caste of learned men who maintain immunity from prosecution in certain matters, in this case economic matters. His exemption was accorded to him for personal reasons: he was a member of a certain class of scholars.

In the first example, a sage waives an exemption due him because of his personal status. The second situation is one in which the sage gives up a privilege which is given to him by law because of his personal status but which, it appears, prefers not to actualize this privilege in his behaviour. The form of story followed by question and answer is identical to the first example.¹⁰

רבי ישמעאל ברבי יוסי הוה קאזיל באורחא פגע ביה ההוא גברא
הוה דרי פתכא אותבינהו וקא מיתפח א"ל דלי לי אמר ליה כמה
שוין א"ל פלגא דזוזא יהיב פלגא דזוזא ואפקרה הדר זכה בהו
הדר יהיב ליה פלגא דזוזא ואפקרה חזיה דהוה קא בעי למיהדר
למזכיה בהו א"ל לכולי עלמא אפקרנהו ולך לא אפקרנהו ומי הוי
הפקר כי האי גוונא והתנן בש"א הפקר לעניים הפקר וב"ה אמרים
אינו הפקר עד שיהא הפקר לעניים ולעשירים כשמיטה אלא רבי
ישמעאל ברבי יוסי לכולי עלמא אפקרינהו ובמלתא בעלמא הוא
דאוקמיה רבי ישמעאל ברבי יוסי זקן ואינו לפי כבודו הוה ר'
ישמעאל ברבי יוסי לפניו משורת הדין הוא דעבד.

R. Yishmael, son of R. Yosi, was walking on a road when he met a man carrying a load of faggots. The latter put them down, rested and then said to him: "Help me to take them up." "What is it worth?" he inquired. "Half a zuz" was the answer. So he gave him half a zuz and declared it hefker. Thereupon, he re-acquired it (and again asked R. Yishmael to help him). He gave him another half-zuz and again declared it hefker. Seeing that he was again about to re-acquire it, he said to him: "I have declared it hefker for all but you!" But is it hefker in that case? Have we not learned: Bet Shamai maintains hefker for the poor only is valid hefker; whilst Bet Hillel rules it is valid only if declared hefker for the poor and the rich as in the year of release. But R. Yishmael son of Yosi did in fact render it hefker for all; and he stopped the other (from taking possession again) by mere words. Yet, was not R. Yishmael son of R. Yosi an elder for whom it was undignified (to help one take up a load)? He acted lifnim mishurat hadin.

There are two concerns here. The primary concern, which deals directly with the legal question of limited hefker, is whether or not R. Yishmael could have legally declared it. The secondary concern is whether or not Yishmael would have actually engaged in such an act from which he was exempt. That is, not the declaration of hefker, but the helping of another person load his goods.¹¹

This secondary concern raises the question of the exact nature of the act from which the Rabbi was exempt. The Gemara assumes that, in the story, R. Yishmael did something which was really not dignified for him to do.¹² Actually, there may not be a case of lifnim mishurat hadin at all, because if R. Yishmael actually avoided doing that

act from which he was exempt, there would have been no need for such a concern in the first place.

From what, then, is the sage exempt? He is exempt from "helping to take up a load".¹³ But is it from helping the man actually physically lift the goods or is it from doing anything whatsoever to assist the man in this situation?

A baraita on the previous page (Bava Metsia 30a) gives the precedent for זקן ואיך לפי כבודו:¹⁴

Our Rabbis taught: "And thou shalt hide thyself"; sometimes you may hide yourself and sometimes not. That is, if one was a priest, while the lost animal was in a cemetery; or an old man, and it was inconsistent with his dignity to lead the animal home; or if his own work was more valuable than his neighbour's -- therefore it is said: "And thou shalt hide thyself."¹⁵

The precedent is extended from matters of loss to matters of loading and unloading on page 30b:¹⁶

Rava said: Where one would lead back his own, he must lead back his neighbours, too. And where one would unload his own, he must do so for his neighbour.

The corollary of this is that the man for whom it is undignified to help another load up, need not do so. Though it is not explicit here, the mishnah¹⁷ which is being discussed makes the exemption clear:

מצא שק או קופא וכל דבר שאין דרכו לטול הרי זה לאיטולל.

If one found a sack or a large basket or any article that he does not ordinarily¹⁸ carry about, he does not have to take it.¹⁹

The sages' exemption is from the actual physical lifting of the other man's load. In this case, the activities of R. Yishmael can easily be explained without recourse to lifnim mishurat hadin. Rather than lift the faggots to help the man (and thereby commit an undignified act) Yishmael substituted a non-physical manner of assisting him. He left the package alone, bought it from the man, and then declared it hefker. He never helped the man by physically lifting the goods. In this way Yishmael was able to help the man without risking his dignity, thereby maintaining his exemption from doing such physical labour.²⁰

Theoretically, there may have been activity lifnim mishurat hadin with regard to the declaration of the hefker, in such a case in which it would have been undignified for R. Yishmael to declare hefker. But this would hardly seem to be the case for a man whose business it was to make such legal declarations.

On the other hand, it seems as if the Gemara assumes that the exemption due the sage is one which allows him to avoid assisting the man in any way whatsoever. If this be the case, then lifnim mishurat hadin is a justifiable

explanation. Rabbi Yishmael actually did come to the aid of the man, though not by actual physical means, through a legal method, declaration of hefker, which would have relieved the man of his burden. Through this act he relinquished his exemption.

Assuming this, both concerns become interdependent for the Gemara. The Gemara had to affirm the secondary concern in order to deal with its primary concern. If the secondary question is answered in the negative, then the primary question has no force at all, the credibility of the story is discounted, and the primary concern is, therefore, dissolved. However, if the answer to the secondary question is affirmative, the story is credible and it makes sense to discuss the question of hefker which is its main point. Therefore, assuming that the exemption for the sake of dignity involved helping the man in any way whatsoever begets the logical conclusion that R. Yishmael acted lifnim mishurat hadin.

In this case, then, lifnim mishurat hadin becomes the convenient explanation of an otherwise inexplicable story (given the assumptions that the Gemara makes about the longevity of the tradition and the awareness of the sage). The story was credible only in so far as Yishmael acted lifnim mishurat hadin.

The Gemara seems to get itself into a logical dilemma

by assuming (erroneously) that the exemption involved any help whatsoever. In this case it is forced to have to create the excuse of lifnim mishurat hadin, in order to affirm the credibility of the story. If it had simply made the assumption (which is the correct one) that the sage was exempt only from physical labour, there would have been no question of the credibility of the story.

One wonders why there is this lapse of intelligent logic on the part of the otherwise diligent Gemara? We can only speculate. Since the passage begins a short stream of consciousness discourse on the notion of lifnim mishurat hadin, could it be that lifnim mishurat hadin as an answer to this problem was a convenient transition technique, regardless of its demand for a mistaken assumption?

Notwithstanding this tortuous logical dilemma, the Gemara finds, on the surface, a situation which delineates what it means to act lifnim mishurat hadin. Here, again, we find a form identical to our first example (Bava Kama 99b). There is a narrative form from which lifnim mishurat hadin is explicitly excluded, a question out of the context of the story which asks for an explanation of the unusual behaviour of the sage, and, finally, the explanation that the sage acted according to the principle of lifnim mishurat hadin.

The situation, then, in which R. Yishmael is said to

have acted according to lifnim mishurat hadin, is virtually identical to the situation in which R. Chiya acted in the previous example. First of all, R. Yishmael was accorded a privilege according to law that he did not have to help the individual because it was not in keeping with his dignity as a scholar and leader of the community to do so. However, he was willing to give up this privilege, accorded him simply because he was a member of a certain class of people.²¹ Instead he favoured fulfilling the obligation that would have been incumbent upon him were he an ordinary man and not a sage.

What we have in both these cases is the Gemara explaining seemingly inexplicable cases with the explanation "he acted according to lifnim mishurat hadin". The next case is from Bava Metsia 24b, in which the Gemara is also responding to a case seemingly inexplicable on the basis of strict law, assuming that the sage knew the law which already existed in his time:²²

כ' הא דאבוה דשמואל אשכח הנך חמרי במדברא ואהדרינהו
למר"הוילבחר תריסר ירחי שתא לפנים משורת הדין.

Shmuel's father found some asses in a desert and he returned them to their owner after a year of twelve months; he acted lifnim mishurat hadin.

The law is clear. When something is found after the period during which one still hopes to find the lost object and the original owner has most likely despaired of ever finding it,

which is twelve months, the person who finds it need not return it.²³ Shmuel's father returned the asses, and so, the Gemara claims, he must have been acting lifnim mishurat hadin.

In this case we have a man who deserves an exemption, but who deserves this exemption because he has derived it from an halachic standard which, under the appropriate circumstances, applies to all men and not merely to a specific class of men as was the situation in the previous two cases. However, he wishes to give up this halachic exemption and act according to the law as if there had been no exemption.²⁴

The fourth use of the term lifnim mishurat hadin in the context of an economic matter is found in Ketuvot 97a. It follows the same form that the previous two examples follow, though its details are somewhat different.²⁵

איבעיא להו זבין ולא איצטריכו ליה זוזי הדרי זביני או לא
הדרי זביני תא שמע דההוא גברא דזבין אדעא לרב פפא דאצריכו
ליה זוזי למיזבן חורי לסוף לא איצטריכו ליה ואהדריה ניהליה
רב פפא לארעיה רב פפא לפניו משורת הדין הוא דעבד.

The question was raised: If a man sold a plot of land for the sole reason that he needed money for a specific purpose but on concluding the sale he was no longer in need of the money, may his sale (since he no longer needs the money) be withdrawn on the ground that the sale was made in error or not? (Owing to the fact that at the time of the sale the seller was still in need of money). Come and hear. There was a certain man who sold a plot of land to R. Papa because he was in need of money to buy some oxen, and eventually he did not need it, R. Papa actually returned the land to him. This is no proof since Rav Papa may have acted according to lifnim mishurat hadin.

This situation is similar in form to the previous three. The Gemara is commenting on a situation which is presented to it and for which it must create an explanation. Silberg²⁶ notes that in this case, R. Papa actually acts according to the din. The answer, lifnim mishurat hadin, which was given to explain his behaviour was only a part of a greater debate. It was presented as one possible answer but was quickly discarded as a reasonable response. Silberg claims, however, that this case could indeed have been considered a case of lifnim mishurat hadin but only if its relevant din would have been other than it actually was.

If, nonetheless, we grant this (and for our purposes it makes no difference if the case was actually lifnim mishurat hadin or not), we might still be able to derive the characteristics of behaviour according to lifnim mishurat hadin. Rav Papa returns a field which he has purchased and we assume (incorrectly) that the din was that he was not required to return the field. But the seller no longer needs the money which he received for the sale of the parcel. Since that specific need for the money was the sole reason that he sold the field, Rav Papa returns it to him.

The legal status which Rav Papa gives up here is not simply an exemption or a privilege which is given to him by halachah, either because of his personal status or the

halachic conditions of the case. What Rav Papa gives up is a right to the land which he has purchased. By giving up this right he does not perform an act which is, as in the other situations, one that would have been incumbent upon him had he not had this right. It is absurd to speculate what that would mean. Unlike the previous cases, he gives up no special aspect of his legal situation in order to revert back to another obligation of the halachah. In this case R. Papa behaves in a gratuitous manner. Here he actually denies the provision of the law and behaves in a manner which has no precedent in the law. Indeed, he acts contrary to the provisions of the halachah, abrogating the halachah by giving back the money. It would seem that this is more an act of kindness than an act of lifnim mishurat hadin. For as we have seen in the previous three cases, lifnim mishurat hadin is indeed "within" the law, and the resulting act of the person who behaves according to it follows normal halachic procedure.

The final situation is somewhat more complicated. Its form is entirely different. In this example there is clearly a prescription of desired behaviour. One should act according to lifnim mishurat hadin. There is description and analysis, however, both are within the context of the story which the Gemara tells (Bava Metsia 24b):²⁷

רב יהודה הוה שקיל ואזיל בתריה דמר שמואל בשוקא דבי
דיסא א"ל מצא כאן ארנקי מהו אמר ליה הדי אלו שלו בא
ישראל ינחן בה סימן מהו א"ל חייב להחזיק תדתי אמר
ליה לפנים משורת הדין.

Rav Yehudah once followed Mar Shmuel into a street of whole meal vendors (where crowds congregate) and he asked him: What if one found a purse here? (Would he be entitled to keep it?) (Mar Shmuel) answered: It would belong to the finder. What if a Jew came and indicated an identification mark? (Mar Shmuel) answered: He would have to return it. Don't both these views contradict each other? Mar Shmuel answered: (He should) act lifnim mishurat hadin (and return it).

Like the first three cases, the person who would be acting lifnim mishurat hadin according to the edict of Mar Shmuel would be giving up an exemption. In this case it would be one accorded him halachically because of the facts of his legal situation. He would be exempt from returning a purse which he found in a public place. Acting lifnim mishurat hadin, he would waive this exemption and fulfill an obligation which would have fallen upon him had he not found the purse in a public place.

There is, however, an added condition to the performance of lifnim mishurat hadin in this case. Mar Shmuel suggests that lifnim mishurat hadin be performed, the purse returned, only if the person who identifies it is a Jew. One need not (and we infer this from the passage) return the purse if it belonged to a Gentile. Actually, according to halachah one need not return the purse even if it belonged

to a Jew, but Mar Shmuel recommends returning it.

In the previous cases no distinction is made in terms of who the second party is. Though we must not discount the fact that those were all specific events in which there was a great possibility that the second party in the situation would have been a Jew and that there was no need to mention it. At least there is no case in which it is explicit that the second party was a Gentile. The case of Mar Shmuel (on the other hand) does not relate a specific event but speaks theoretically: "What if a certain situation comes about?" In this case, which, by its very nature would examine an entire universe of possibilities, one performs lifnim mishurat hadin for Jews only. This, of course, raises the crucial question: Whether or not lifnim mishurat hadin was to be performed for Jews only.

It is now necessary to summarize the chapter, digest the conclusions, observe any peculiar characteristics, and attempt to determine a common denominator of the five examples given. It must be kept in mind that each of these examples is distinctive in some way, so that our task is complicated and facile generalizations must be avoided.

For four of these examples, we noted a common tripartite form which consisted of a story, an extraneous question about the story, and an answer to that question. In each case, the story dealt with the behaviour of a sage in an

economic matter and that sage did not act in accordance with the halachic provision that the Gemara expected. The question asks for a reconciliation of the sages' behaviour and the halachah. Then, the solution, that the sage acted lifnim mishurat hadin is posited. It would seem that this solution would be likely, given the various assumptions made by the Gemara.²⁸

In these cases we have both description and analysis of that description. The analysis is, as we have noted, extraneous to the description. There is no ethical imperative. Prescription of lifnim mishurat hadin as a recommended method of behaviour is avoided and can only be claimed by us if we were to juxtapose these examples with the midrashic exegesis of the concept.

In the fifth example the form differs widely from the foregoing cases. Though there is both narrative and questioning, the latter is clearly within the context of the former. Description of the situation and analysis are combined in the narrative. There is, however, an added dimension and this is the clear ethical prescription of lifnim mishurat hadin as a desired mode of behaviour. Within the context of the story that is told about him, Mar Shmuel actually recommends behaving lifnim mishurat hadin.

In each case the protagonist does or would surrender a legal priority which he deserves, as well as the concom-

mitant benefits which would accrue him if he had maintained that priority. There are three types of priorities which the various sages yield. They are a right, an exemption, and a privilege. In each case this priority is conferred upon him halachically by reason of either (1) his personal status as a member of a class of scholars, or (2) the particular facts of the legal situation in which he is found. In the case of R. Chiya, the priority is a personal exemption. For R. Yishmael it is a personal privilege. Both Mar Shmuel and his father relinquish halachic exemptions accorded to them by the particular case in which they are found. And, finally, Rav Papa, theoretically, might have given up his right to certain property which he had purchased.

In every case, except Rav Papa's, the sage performs an act for which there are clear provisions in the halachah. The act is one for which he would be liable, had he not had the certain priority. Since he has relinquished that legal priority, he now finds it obligatory to behave in a manner which is still in accord with halachic precedent. R. Chiya and R. Yishmael both behave as if they were not members of the learned caste, but members of a less prestigious class. Mar Shmuel recommends that the finder act as if he had found the purse in the private domain, and his father returned the asses as if he had found them before the statute of limita-

tions expired. This leads us to believe that the "Lifnim" in the phrase lifnim mishurat hadin, actually means "within" rather than "beyond". Certainly, the sages' behaviour is beyond the expectations of the Gemara, but it is also still within the provisions of the halachah.

The manner in which Rav Papa behaves, is, however, without halachic precedent. If we can at all assume that his is a case of lifnim mishurat hadin, and this is doubtful, he behaves in a manner which is more radical if not significantly different than the others. He relies upon no other halachic obligation applicable in a similar case. He maintains a clear right to certain property and he gives up that right. Though he acts as if there had been no valid contract, by returning the land, it can not really be said that he acted in a manner prescribed in a condition similar to the one in which he found himself. In each of the other cases, the sages relinquished an aspect of their legal situation which did not fundamentally change the legal situation. In these cases only the "personal" legal positions were fundamentally altered. In this case, however, both the positions of the two parties and the basic legal situation are fundamentally altered: Due to the action of Rav Papa, there is essentially no legal situation, there is no contract. Certainly, Rav Papa fulfills the obligation of a man who finds himself in a situation in which he is a party to an

invalid contract, and must act halachically in this manner, but only in this case does the sage act as if he were in a situation opposite of the one in which he actually was.

The quality of R. Papa's case as an example of lifnim mishurat hadin is suspect since Silberg has shown that he theoretically might have acted lifnim mishurat hadin. The fact, however, that R. Papa actually acted according to the din might not be the sole reason that this example is excluded by the Gemara as an example of lifnim mishurat hadin. It may well be that Rav Papa's extreme and radical action went contrary to the law, beyond its provisions, rather than remaining within it.

In each of these cases, we see a sage making the conditions of the halachic situation stricter for himself, while making them more lenient for the individual he is confronting. In each case the sage acting according to lifnim mishurat hadin would be the party who would win the case. He would come out advantageous and the other person (the second party) would be disadvantaged. By acting lifnim mishurat hadin, the sage reverses the outcome of the situation. He will be the one who is disadvantaged legally and the other person will be the advantaged legally. But, actually, the situation is somewhat different. We do not know the extent to which the sage would actually be disadvantaged by the loss of the case, though it varies from

situation to situation, but we can say that the second party would have had to put up with a significant hardship: he would have had to go without his livestock, his purse, the parcel which he carried (or his strength to carry it), an amount of money, or a piece of land.

In some cases, the sage, by performing lifnim mishurat hadin, would not get the benefit of the goods he bought or found. His situation, on the other hand, would not be worsened. At least his status quo would be maintained. Though he would lose the legal case, he would actually lose only what he might have gained. He would not be deprived of anything he had already owned.

In the other cases there seems to be no significant loss. We might think that R. Yashmael lost his honour and in this way was disadvantaged. This is questionable. However, honour is an intangible good and would not have as severely disadvantaged him²⁹ as it would have the porter. R. Chiya lost a coin, but we can safely assume that this caused him no significant hardship, whereas the loss might have hurt the woman.

Before moving to the various questions which this analysis raises it is necessary to note briefly the one qualification explicitly limiting the performance of lifnim mishurat hadin in one case and which may well be covertly operative in the other cases. This is the provision of

Mar Shmuel that lifnim mishurat hadin is to be performed in the case of the loss of a purse found in the public domain only if it belonged to a Jew. This condition confronts us with the real possibility that the rabbis intended lifnim mishurat hadin to be applied in situations in which only Jews were involved.

CHAPTER V

LIFNIM MISHURAT HADIN IN RITUAL MATTERS

Each of the practical applications of lifnim mishurat hadin have had to do with some aspect of concrete economic concern. The disadvantage which would have ensued had lifnim mishurat hadin not been performed would have been clearly economic. In the following practical example of lifnim mishurat hadin, it is unclear what, exactly, the disadvantage would be if lifnim mishurat hadin would not have been performed. Generally, though, we can posit that some type of inconvenience would have been incurred by the second party.

The case revolves clearly around an issue of ritual law: when a person should say the Birkat Hamazon.¹

אמר רבא הא מילתא אמריתא אנא ואיתחמרה משמיה דר' זירא כוונתי
שלושה שאכלו כאחד ולא סיימו עודתם בבח אחת דרך ארץ היא כי
אחד מספיק מסעודתו כדי לאפשר לשנים לזמן ואין השנים מפסיקים
לאחד על כך מקשים ולא וכי אין השנים מפסיקים לאחד הא רב פפא
אפסיק ליה לאבא מר בריה איהו וחדדי ועונים רב פפא לפני
משורת הדין עשה זאת ולא כחובה.

Rava said: The following statement was made by me independently and a similar statement has been made in the name of R. Zira: If three people have been eating together, one breaks off to oblige two,² but two do not have to break off to oblige one. But do they not? Did not R. Papa break off for Aba Mar, his son, he and another with him? R. Papa was different, because he went out of his way to do so, he did lifnim mishurat hadin.

The structure of the passage is similar to previous

practical examples. The actions of a certain sage are coupled with a question about those actions and a possible solution is given. The sage's activities are inexplicable in any manner other than lifnim mishurat hadin, so the Gemara claims that they are motivated by a desire to behave lifnim mishurat hadin.

The fourth century Amora, Rav Papa, is again associated with lifnim mishurat hadin. In a manner similar to the previous examples, Rav Papa gives up a right which he (or any man in his position) maintains: to finish his meal before he recites the Birkat Hamazon.

One is obligated to recite the Birkat Hamazon after he has eaten an amount equivalent to the amount of an olive.³ He is not prohibited from reciting the Birkat Hamazon before he has completed his entire meal. Doing so, however, obligates him to repeat the blessing after he has completed the remainder of his meal, if that portion is the equivalent of an olive.⁴ Why, then, would someone want to say the blessing twice? Here our additional halachah comes to bear on the case. When three (or more) men eat together, they are obligated to say Birkat Hamazon together,⁵ שלושה שאכלו כאחד, and are prohibited from separating until they have,⁶ שלושה שאכלו אינן רשאים לחלק.

The statement of Rava sets the precedent that one should interrupt his meal in order to say grace with the other two.

The action of Rav Papa and his friend extend the spectrum of acceptable behaviour. For them, though it is lifnim mishurat hadin, two men might discontinue their meal to say the Birkat Hamazon with one other who has already finished. All that we are told is that R. Papa and a friend gave up their right to finish their meal before saying the blessing, therefore incurring an additional obligation to recite a second one in order to fulfill the obligation of saying it with the third man.

We may speculate that the third person had to leave. Their motive, therefore, for interrupting, might have been to alleviate the third of any inconvenience which remaining in order to recite the blessing would cause him.. Either possibility would have caused him hardship if he had to be someplace and left without saying the Birkat Hamazon, he would not have fulfilled his obligation. If he remained, he would not be able to do what he had to do. Rashi and the Shulchan Aruch⁷ claim that two might interrupt their meal for a third out of honour or respect for that person. There is, however, more to the case. It is improbable that Rav Papa would have said grace early if there had been no cogent reason for doing so.. In this case it would seem that respect is sufficient reason for doing so only when coupled with the third person's special need.

It can be argued that this example is parallel,

legally, to the previous cases. By relinquishing his legal status, that is, his right as a member of the yet unfinished majority two-thirds of the diners to continue his meal, he finds himself in a difficult halachic situation. The new halachic situation is the one that Rava enumerates in the first part of his statement: "When three people have been eating together, one breaks off to oblige two." R. Papa is somewhat inconvenienced by his own behaviour, but he probably saves the third party of some inconvenience. The activity in which he is engaged is, itself, a situation which has full halachic provisions for its execution. Rav Papa and his friend act halachically, well within the boundaries of din. By acting according to the principle lifnim mishurat hadin, Rav Papa imposes stricter halachic provision on a potentially more lenient halachic situation.

This ritual matter does not differ in any essential manner from the economic cases that preceded. Its form and legal content are basically the same. The fact, however, that the Gemara extends the use of the term lifnim mishurat hadin to matters which are not only economic, is the primary significance of this passage. The relatively heavy concentration of lifnim mishurat hadin with regard to economic matters might clearly lead one to believe that lifnim mishurat hadin is reserved for such concrete, prosaic matters. The use of the concept in such a ritual matter extends the

concept beyond the limitation of economics.

It is, also, significant that in such ritual matters of course only Jews would be involved. In addition, the advantages and disadvantages of legal priority in ritual matters do not affect a person's livelihood, his subsistence. Rather, there is a much more ethereal effect upon his being. His ritual halachic situation, on the other hand, might have consequences for his subsistence (as in this case) but he is wagering metaphysical advantage (or disadvantage) rather than physical. Though the situation of Rav Papa and his eating partners does not completely remove the use of lifnim mishurat hadin from an economic situation (if, for example, the third party had to leave for some subsistence purpose), it does introduce a new variable: the metaphysical effect of ritual obligation.

CHAPTER VI

A REVIEW OF THE SCHOLARSHIP ON LIFNIM MISHURAT HADIN

GENERAL HISTORICAL SURVEY

Perhaps, the most representative writing on the notion lifnim mishurat hadin is Montefiore's conclusion that:

It may be questioned whether even equity is an adequate translation of lifnim mishurat hadin. I am not sure that it does not include all going beyond the letter of the law, whether in legal matters or in any other of the commands, say of benevolence, charity, lovingkindness, which the law enjoins.¹

This uncertainty which surrounds the concept lifnim mishurat hadin has been the hallmark of the scholarship about it. Montefiore was satisfied to leave the concept translated as equity, even though he was doubtful about its intention. Scholarship on the topic lifnim mishurat hadin has been minimal. Most commentators have been satisfied with the rather superficial rendering of the concept in terms of the varied legal notion, equity. This review of that scholarship will examine the various work in chronological order.

Adolf Büchler devotes a footnote² to the concept lifnim mishurat hadin in Some Types of Jewish-Palestinian Piety: From 70 B.C.E. to 70 C.E., the Ancient Pious Men (1922). However, he fails to use, as a primary basis for his analysis, a case in which the term lifnim mishurat hadin appears. Buchler notes a baraita in Bava Kama 103b:

A pious man bought an article from one of two men both of whom claimed purchase money, but he himself did not know from which of them he had obtained the goods. R. Tarfon, before whom he brought the case advised him to put the money in front of both claimants, and to withdraw. The man then went to R. Akiba who replied: There is no other remedy for you but to pay both claimants.³

Büchler comments:

R. Tarfon's decision which exempted the purchaser from double payment was, no doubt, based on strict law, but evidently did not satisfy the conscience of the pious man, and so he submitted his scruples to another authority. As the opening words of his judgment אֵין לך תְּקוּנָה show, R. Akiba did not base it on strict law but went beyond its letter and satisfied the scruples of the pious man.⁴

Büchler finds this similar to the baraita on B. Bava Kama 55b in which R. Yehoshua says: "In four cases a man need not, by law, pay compensations, but God will not forgive him till he has paid such."⁵ Büchler, in his footnote, denies that this has anything to do with the notions of the Essenes as Dr. Kohler claimed "without any evidence".⁶ Büchler is persistent in maintaining the Pharisaic originality of such a concept and in denying the claim of Essenic authorship. He notes, carefully, that R. Yehoshua's comment is lifnim mishurat hadin, which, he claims, is a "point of view in the application of civil law, beyond the line of the law, and which, according to R. Eleazar of Mode'im⁷ advised Moses to teach the children of Israel."⁸

Disregarding his fundamental avoidance of the actual

use of lifnim mishurat hadin, one of the basic elements of Büchler's analysis is that lifnim mishurat hadin represents an "application of civil law". Partially, this means that lifnim mishurat hadin is actually a part of the law system of the Jews and that it is really nothing beyond the law system itself. The word to emphasize in his translation of the concept, beyond the line of the law, is "line".

Lifnim mishurat hadin is not beyond the law itself, it is beyond the "line" of the law, it is beyond the mainstream of strict law, though it might still, in a general sense, be considered to be within the greater realm of the law.

Something must either law or not law. However, there can be conflicting laws within the corpus of law. This means then that a person might well be obligated under halachah to act, in certain situations, lifnim mishurat hadin. This would seem to be the thrust of Büchler's analysis of the concept. In the conflict of decisions between R. Tarfon and R. Akiba then, the decision of R. Akiba would seem to reflect that he used lifnim mishurat hadin as a principle to determine what should be done. It is, then, more than is normally required of an ordinary purchaser, who, in this case, must pay double for the goods which he received according to the ruling of Rabbi Akiba. Lifnim mishurat hadin is, for Büchler, a decision of law which requires of the litigant more than would normally be required of him in a

similar situation.

Though it may be that "Rabbi Akiba did not base (his decision)...on strict law", this alone does not seem to warrant application of the term lifnim mishurat hadin. The Gemara, at least, did not see fit to call it that. More simply, what we have here is not a case of lifnim mishurat hadin at all, but a situation in which two rabbis decide a single case in two different ways. One, R. Tarfon, is lenient with regard to the purchaser, and strict with regard to the seller, and the other, R. Akiba, is strict with the purchaser and lenient with the seller. The words, אֵין לךּ חֲקִנָּה, with which Akiba begins his statement can be taken simply to mean that there is no precedent in this case which can guide the individual in his actions and that a decision must be made. Rather than lifnim mishurat hadin, this must be considered a decision which imposed hardship on the litigant, who, in essence, asked for a hardship to be imposed upon him.

Furthermore, one can question whether the imposition by Büchler, of the term lifnim mishurat hadin on this case is indeed valid. If the concept lifnim mishurat hadin is an amoraic concept and not a tannaitic concept (as is argued above)⁹ the concept lifnim mishurat hadin as refined by the later scholars is not inherent in this Tannaitic statement.

The baraita which Büchler brings in the name of R.

Yehoshua, though reminiscent of the decision of R. Akiba, is, nevertheless, not an example of lifnim mishurat hadin. A man in this case is morally obligated (by God), however he is not legally obligated to make the payments. Indeed, it is a case of doing more than the law requires, however. Whether doing so would be a case of lifnim mishurat hadin is questionable.¹⁰

Montefiore, in Rabbinic Literature and Gospel Teachings (1930) considers lifnim mishurat hadin to be "equity" and, as we have seen,¹¹ translates the concept with this term. However, he does question whether this translation is as all inclusive as the term lifnim mishurat hadin.¹² Montefiore seems to understand equity as a strictly legal concept, that is, one which applies only in matters which are strictly legal. He is uncertain whether or not lifnim mishurat hadin should be considered a much broader concept embracing matters which are extra-legal, but yet which are included in the law. One is, however, not certain exactly what he considers to be legal matters as opposed to "any other of the commands, say of benevolence, charity, or lovingkindness" which in some way are included in the law but which are not legal matters. Perhaps, what Montefiore means by "legal matters" are those matters which are distinct from religious or ethical, which would be civil and criminal law, those laws found primarily in Nezikin. For

Montefiore, this broader construction of the concept is characterized by "fervor and excess in righteousness."¹³

Montefiore, of course, is involved in antinomian apologetics. And this becomes clear with his embarrassment over the case in Bava Metsia 24b in which lifnim mishurat hadin is to be performed only for a Jew.¹⁴ However, he is more concerned that this example, along with numerous other "stories" show, at least, that the rabbis were aware of the principle of equity.¹⁵

In another place, Montefiore considers lifnim mishurat hadin to be "an extra-legal excellence, a virtue which went beyond the mere letter of the law"¹⁶ he distinguishes lifnim mishurat hadin from the New Testament contrast between "keeping the commandments and being or seeking to become... perfect." For the rabbis, there could be "nothing more perfect than a perfect keeping of the commandments." This is apparently in contrast to the statement of Jesus in Matthew 19:21 that if the individual wishes to go the "whole way" to gain eternal life, beyond the keeping of the commandments, he should sell his possessions and give to the poor.

Again, Montefiore is confused. What could be more excellent than perfection? And if there is nothing that is more excellent than perfection, then lifnim mishurat hadin must be within the realm of perfection which is, according to Montefiore, within the realm of commandment-keeping, in

which, therefore, lifnim mishurat hadin must be found. This all makes for a contradiction: Either lifnim mishurat hadin is a seeking for perfection beyond the mere keeping of the commandments or it is within the realm of the law. It cannot be both.

In the Rabbinic Anthology (1938), Montefiore and Loewe bring several examples of lifnim mishurat hadin. The commentary which Montefiore offers is, in fact, less precise than his work in Rabbinic Literature and Gospel Teachings. Again the notion of equity is substituted for the notion of lifnim mishurat hadin:

There is ... sometimes a justice which is higher than the letter of the law. The Rabbis reached the conception of equity though they have no one single word for it. Neither mesharim nor pesharah is the exact equivalent of "equity".¹⁷

Montefiore is mainly concerned with proving that the rabbis were aware of a form of justice which went beyond the dry, detailed minutiae of law observance. In this apology, Montefiore neglects the responsibility to define, in a more precise sense, exactly what he meant by the notion of equity.

R. Travers Herford, in Talmud and Apocrypha (1933) claims that lifnim mishurat hadin is an aspect of rabbinic ethics which maintains that it is not enough merely to act in accordance with judgment given in one's favour. The sense of lifnim mishurat hadin is "always that of refraining from

from insisting on one's legal rights". Herford translates lifnim mishurat hadin as "within the limit of the judgment". This aspect of ethical behaviour was important because it prompted "brotherly love ... between those who were at variance with each other."¹⁸ Herford claims that lifnim mishurat hadin was a familiar term by the time the Mekilta midrash on Exodus 18:20 was written, and that its connection with the text is "merely arbitrary halachah".¹⁹

Herford prefers to consider the passage in Deuteronomy 6:18 as a more likely source for the concept. Though its words are different, its character lends encouragement to the development of the concept. "And you shall do that which is right and good in the sight of the Lord, that it may bewell with thee ...". Herford notes that Rashi equates hayashar and hatov to pesharah (compromise) and lifnim mishurat hadin. Herford takes pesharah to mean agreement (which may not be a justifiable translation):

Agreement is reached when two parties who are at law with each other make up their differences and become friends. The judgment of the court would have been for the one and against the other; that would be strict law. By agreement (pesharah) they refrain from insisting on strict law, and friendship is re-established.²⁰

Herford goes a little too far by asserting that lifnim mishurat hadin makes people friends or that they have even been friends in the first place. Agreement, even if that

is what Rashi means, does not imply that the parties have become friends, although they have made up their differences.

Herford may well have misunderstood Rashi. The comment reads: הישר והטוב זו פשרה לפנים משורת הדין. There is no certainty that Rashi meant that pesharah and lifnim mishurat hadin are to be identified. Indeed hayashar and hatov seem to be taken as one category by Rashi: perhaps they form an hendiadys meaning something like equity. But that is no proof that Rashi is identifying the two terms in his comment. As Herford would read it, Rashi is saying: "The right and the good, means agreement, that is lifnim mishurat hadin." I would rather see the Rashi translated: "The right and the good, means a compromise which comes about through lifnim mishurat hadin."

Lifnim mishurat hadin is not an agreement. It involves yielding a legal priority by the one who would win the case.²¹ Agreement is not necessarily involved. Though ultimately the parties in a certain case might agree lifnim mishurat hadin ~~it is not~~ initiated bilaterally. Lifnim mishurat hadin comes about through the volition of a single party, unilaterally. When lifnim mishurat hadin is used as a principle of behaviour by one of two litigants, a compromise situation is created. No agreement to do so is worked out. There as well are many agreements which do not involve lifnim mishurat hadin. Certainly, on the other hand, the party being benefited by the lifnim mishurat hadin does not have

to agree to let the party who is behaving lifnim mishurat hadin behave that way, by refusing his beneficence.²² Lifnim mishurat hadin may bring about a compromise or agreement but it is not identical with it. The Ramban's notes²³ on this passage distinctly divide the two terms, pesharah and lifnim mishurat hadin, with the copula, thereby indicating the validity of this interpretation.

In the Mordecai Kaplan Festschrift published in 1953, Professor Boaz Cohen has an article entitled "Letter and Spirit in Jewish and Roman Law".²⁴ Cohen notes that in the process of Talmudic interpretation of the law, two attitudes may be distinguished which determine the attitude taken with regard to a specific case. They are strict law and equity.

There were times when the sages deemed it wise to accept the ius strictum, and the interpretation of the law was in keeping with the letter. In other instances equity was the supreme consideration and interpretation was in accordance with the spirit of the law.²⁵

Cohen claims that this was not unusual in the development of law systems and quotes Cairns: "A system of law must consist of a body of invariable rules or it will neither grow nor persist, at the same time it must do substantial justice."²⁶ Cohen claims that this notion of equity (that is, "substantial justice") is called lifnim mishurat hadin, "within the line of the law" and is contrasted to shurat

hadin, strict law. He traces the origin of the term to Isaiah 27:17: וְשָׁמַחַי מִשְׁפָּט לֶקֶן וְצִדְקָה לְמִשְׁקוּלָהּ. "I shall make the law the line, and justice the plummet."²⁷ Then he explains: "Equity is, in a way, a special rule, adapted to specific circumstances."²⁸ The stories which are included in the Talmud are told of "scholars who yielded where the law was on their side."²⁹ Lifnim mishurat hadin was done by the scholars. Aristotle, Cohen notes, said that the man who acts with equity "does not strain the law, but is content to receive a smaller share although he had the law on his side."³⁰

There are, however, other "principles of equity" which appear in Talmud in accordance with Deuteronomy 6:18 like שוֹמֵא הָדָר לְעוֹלָם,³¹ which corresponds to the equity of redemption in English law, and the right of pre-emption (דִּינֵא דְדִבְרֵי מִצְוָה).³²

Cohen notes, however, that:

While considerations of equity were undoubtedly the prime factors which actuated the rabbis to deviate from the letter or the ius strictum, there were other motives which were just as compelling, such as public welfare (מַפְנֵי תְקוּן עוֹלָם) or the interest in a peaceful society (מַפְנֵי דְרָכֵי שְׁלוֹם). On the whole it should be remembered that the Rabbis, like most jurists do not ordinarily disclose their inner motivations but mostly give technical reasons for their interpretations. Consequently, we are frequently left to our resources to conjecture the inner processes of their minds.³³

In a lecture delivered in 1955 and published in the

collection Law and Tradition in Judaism,³⁴ Cohen makes it clear that the principle of equity was "denoted by several terms in Scripture" such as tsedakah, mesharim, and mishpat emet. The rabbis later found allusions to equity in the Pentateuch and formulated it as the doctrine of lifnim mishurat hadin. "Many instances in the Talmud consist of cases where the individual of his own accord acted in harmony with the spirit of equity."³⁵ At any rate, the Rabbinic saying goes: "A judge declares in accordance with the truth as he sees it."³⁶

Horowitz, writing in 1953, (The Spirit of Jewish Law), claims that lifnim mishurat hadin is not equity in the sense that the term is used by most law systems. That is, it is not a "rule fairer or more flexible than the legal rule." The use of the term equity as a translation of lifnim mishurat hadin is a mistake. Lifnim mishurat hadin should, rather, be understood as a "vague ethical principle that one ought to do the finer, nobler thing and forego one's legal rights".³⁷ Lifnim mishurat hadin is not equity as opposed to law. Of course, the technical sense of equity was known to the rabbis and they used it "to correct the harsh effects of the strict law".³⁸ The confusion is basically one of using an ethical norm, which lifnim mishurat hadin is, for a legal "rule of equity" applicable in a court proceeding. Lifnim mishurat hadin is, rather, an instance of noblesse

oblige and, as the instances in the Talmud reveal, "a matter of piety and saintliness". It is a sort of "super-norm".³⁹

Isaac Herzog, in The Main Institutions of Jewish Law (1967), posits the existence "in early times a species of code or body of rules (Mishnah) particularly designed for the guidance of men of piety and virtue (chasidim) in their commercial or contractual relations with men of the average ethical standard". Perhaps it bore the title Mishnat Chasidim. The Mishnah collection found in the Talmud exhibits traces of this manual for the pious, a "preeminently ethico-legal collection".⁴¹ In the Talmud itself, however:

We may perceive an echo of the tendency of that body of teaching exemplifying the "higher law" in the distinction often drawn in the Talmud between the "law", din, and that "which goes beyond the boundaries of the law" -- lifnim mishurat hadin. It was accentuated that the spirit of the law at times demands from man to conform to a loftier norm and standard than that which its letter can enforce. Men to whom the masses looked up for example and leading were, in particular, expected to rise to that high standard, and failure on their part to do so would be regarded as an actual infringement of the law.⁴²

In later rabbinic history, however:

Only considerations of practicability prevented, in general, the "higher law" from crystallizing into actual enforceable law. But here and there, after some struggle, the spirit of the law, by which the post-Biblical authorities, the scribes (sofrim) and the rabbis, were as much swayed as the prophets of old, forced its way into the body of forensic law.

Thus ... appious aspiration to facilitate repentant sinners to return to the path of duty resulted in fixing the law on a point long debated between the two great juristic schools of Shammai and Hillel.⁴³

The case in point here, however, reveals that ultimately a lenient position, rather than a strict position, is accepted by the law rather than a crystallization of lifnim mishurat hadin, per se.

Herzog understands equity in the technical sense in which it was developed in England as one of "two concurrent semi-rival systems"⁴⁴ of law (i.e. Common Law and Equity).

However:

While no exact parallel can be found to this concurrent working of a system designed to remedy the hardship that might be inflicted by the rigidity of the crystallized law, Jewish law showed a marked tendency in that direction.⁴⁵ At a comparatively early period it began to exhibit a strong bent in favor of equitable settlement or compromise, pesharah, with the view of prevailing upon the parties to agree to an equitable settlement. In exceptional circumstances Jewish law in its later stages of development even empowers the judges to adjudicate upon such a basis regardless of the consent of the parties. In this connection, however, we can only speak of a tendency.⁴⁶

The closest he can come to such a comparison with English equity, in terms of two separate systems, within the context of Jewish law is the distinction between deoraita and derabanan which he admits is an inadequate parallel.⁴⁷

E. E. Urbach, in The Sages: Their Concepts and Beliefs (1969) included an analysis of lifnim mishurat hadin

in his chapter on mitsvah.⁴⁸ Lifnim mishurat hadin is a sort of self-determining halachah. That is, it is halachah which is subjective: the individual can determine it.⁴⁹

"Beyond the din and halachah in the Oral Law there is another area: that which a man is able to invent by himself..."⁵⁰

There are certain instances in which the judge, although he is generally obligated to judge according to strict law, must judge in accordance with a principle which is not within the strict law but which is tikun olam.⁵¹ The character of lifnim mishurat hadin is not established by halachah, but is left to the heart of man. One learns through the examples of the sages whose acts are said to be motivated by lifnim mishurat hadin.

That which is defined as lifnim mishurat hadin is not made into din.⁵² The response of Rav in Bava Metsia 83a⁵³ in which he seemingly admits that his ruling which is obviously contrary to the provisions of the law is actually the law, has no bearing upon this thesis. The word, לפני, he explains, appears only in this version, and is missing in other manuscripts and in the commentaries of the earlier rabbis. Therefore, the general claim that lifnim mishurat hadin becomes law is unfounded. In addition he notes the need of the sage to support his teachings on the basis of halachah even though it is not halachah, when he is attempting to teach another sage. Or, Urbach argues, the sage was

aware that his learned pupil would know that the response he gave was actually not in the law and that he used his words only for their rhetorical effect.

A chasid performs lifnim mishurat hadin and gives up that which is his.⁵⁵ Urbach identifies midat hachasidut with lifnim mishurat hadin.

Urbach notes that even Hakadosh Baruch Hu prays that He might act according to lifnim mishurat hadin. A man is not a chasid unless he acts in the manner of the early pious men in regard to such matters.⁵⁷

Urbach concludes that lifnim mishurat hadin is a general type of prescription which includes the various types of behaviour which are not law but which the sages encouraged the people to actuate. Urbach finds that the distinction has often been blurred between that which can be halachah, e.g. do the good and the right, but is not necessarily halachah, and that which cannot be halachah, lifnim mishurat hadin. Lifnim mishurat hadin is strictly midat hachasidut, it cannot be halachah.⁵⁸

PROFESSOR MOSHE SILBERG: KACH DARKO SHEL TALMUD

What remains to be discussed at this point is the significant and lengthy contribution of contemporary Israeli scholar, Professor Moshe Silberg. Silberg's book, Kach Darko shel Talmud (1964) includes an entire chapter which deals with the relation of Law and Equity.⁵⁹

The notion of yosher or equity has its antecedents in the Bible. The notion expressed there is "transcendental"⁶⁰ and has to do with the heart and emotions of the individual. The various uses of the root yshr, יושר-לב, ישרו-לב, ישרת-לבב, ישרים בלבונם⁶¹ are all "types or traits of character that are found over and above the world of the deed".⁶² On the other hand, there is the yshr of the Talmud which is a yosher of deed, יושר של מעשה. It is with this concrete equity of action that Silberg is specifically dealing.

The task of his chapter is to "find the line" which divides the two concepts mishpat, law, and yosher, equity. Then, to define the area over which they each have jurisdiction. In a general sense he contraposes the notions lifnim mishurat hadin and shurat hadin. These two concepts are to be defined in the context of Hebrew law (תורת המשפט העברי). He admits that no distinct line can be drawn and that the definition of the points of convergence and divergence of mishpat and yosher is further complicated by the fact that

there are really various types and levels of yosher.

English Equity and Hebrew yosher are distinguished by their "very different respective contents".⁶³ Though they are not congruent, their motivations lie in the same source, which is:

...the need to blunt the sharp edge of the Law by creating alongside it spices which sweeten or smooth its bumps.⁶⁴

The common denominator in both equity and yosher is that they do not "diminish the effect of the law".⁶⁵ They remain alongside it and do not annul the body of law itself. Nor are they the "stepsister of pure ethical demand".⁶⁶ "Equity follows the law"⁶⁷ and functions in the periphery of the law's jurisdiction. There is, as well, a distinction between yosher and musar (ethics).

There are three types of yosher which point to the obligations which are not strictly legal but which are incumbent upon the individual. Yosher is "quasi-legal, varying in intensity",⁶⁸ depending upon its type. Silberg lists these categories in order from the most demanding (the closest to the legal norm) to the most lenient (the furthest from the legal norm).

The first type is ועשיה הטוב והישר, do the good and the right.⁶⁹ This is, essentially, a legal category which imposes an obligation on the individual. But, unlike most

rabbinic legislation, the sages make no explicit special takanah for this obligation. Though this possesses the force of a full rabbinic takanah, there is no evidence how, when, or by whom it was legislated. This type of yosher and mishpat are not identical. Silberg makes no additional attempt at explaining their divergence.

Silberg is poetically imprecise when he notes that this type of yosher is not din but is "wrapped in the garment of din".⁷⁰ This type of yosher takes the spirit of the law and emphasizes it^m rather than the letter:

It exaggerates the idea that lies at the law's base, but it lifts the sting out of it without injury or damage. Its intrusion into the sphere of strict law is like "breaking the barrel but saving the wine."⁷¹

The second type of yosher is lifnim mishurat hadin. Silberg deals with this by listing

all the instances in the Talmud in which practical halachah deals with the principle, not according to the order in the tractate, but rather according to their inner meaning, from the most lenient to the most stringent.⁷²

A.⁷³ The first example is Bava Metsia 30b in which R. Yishmael b. R. Yosi gives up his privilege accorded to him by the "law of the elder" and helps the man with his bundle, thus fulfilling an obligation of the Torah. The first example of lifnim mishurat hadin is characterized by the giving up of a privilege in order to fulfill another obligation.⁷⁴

B.⁷⁵ The next is an example from the realm of business. Here the question of obligation for the payment of damages incurred by the receipt of erroneous information is discussed (Bava Kama 99b).⁷⁶ R. Chiya has given up an exemption due him because he is an expert in coinage.

This is similar to example A. In both cases something is given up, a privilege of exemption. In the former case, this was done in order to fulfill an obligation of Torah.

C.⁷⁷ The halachah that if one finds something after the period⁷⁸ during which the person is still hopeful of recovering it, he may keep it (Bava Metsia 24b)⁷⁹ is involved in this case. Shmuel's father found asses in the desert twelve months after they were lost and he returned them to their owners even though he was exempt from doing so according to the law.

Silberg comments that ye'ush, despair, is a spiritual fact and hazakah is a legal fact. The father did not rely on his hazakah, the stronger of the two facts, which was given to him by the will of God (or the system of law). He feared that perhaps the owners had not yet despaired over the loss. And if they had not he would have been obligated to return the asses, regardless of the fact that the year period had already passed. He, in essence, protected himself by being strict and giving up an uncertain halachic

hazakah.

This seems like unnecessary and convoluted interpretation since it can be seen that here is simply a case of a man giving up an exemption which is coming to him, by virtue of halachah in order to give back something that had once belonged to someone else.

D.⁸⁰ The fourth situation is more complicated. Rather than being simply a story which the Talmud records, this passage (Ketuvot 97a)⁸¹ is in the midst of an argument which is extraneous to the story, but which is not irrelevant to the point of lifnim mishurat hadin which is being made. The statement that "Rav Papa acted according to lifnim mishurat hadin"⁸² is not a statement of fact but an attempt to refute a previously given argument.⁸³ This is a response for which one cannot find proof. On the surface one cannot tell whether or not Rav Papa acted according to lifnim mishurat hadin, because all of the facts of the case are not revealed in this argument. For the law governing the case is that property returns to the seller when he has sold to another for the expressed purpose of buying something else and he no longer needs the money for that purpose. So, in this case, it could have been that Rav Papa was told of the condition and, indeed, acted according to the law. Or, in order for this to have been lifnim mishurat hadin, one would have to make the mistaken assumption that the law is

that the property does not return. Silberg accepts the former situation. This situation is not really one of lifnim mishurat hadin, but one which is well within the realm of the law itself.⁸⁴

There is only one reason why such a mistake can be justified as a law which is to guard, through formal, clear guidelines, the security of business and commercial deals. This is the only means for justifying the opposite law which, in turn, would make it possible to assert that Rav Papa acted according to lifnim mishurat hadin. Such a law would be for the common good: tikun olam. It would protect the deal from possible reluctance on the part of the seller to sell the property with a condition.⁸⁵ In this situation then, lifnim mishurat hadin would have been the giving up of a right which the individual gains through halachah.

E.⁸⁶ This final example is not an actual instance of practical halachah but an opinion. Silberg notes that this example of yosher does not add anything to what already has been learned through the other four examples. This is the further example in Bava Metsia 24b. Silberg offers no further commentary on it.

Silberg defines lifnim mishurat hadin. One does not enforce this.⁸⁷ "He who behaves according to lifnim mishurat hadin voluntarily becomes a kind of heretic. "He gives up a permitted deviation and returns to an obligatory principle, leaving the periphery he penetrates to the central point."⁸⁸

R. Yishmael b. R. Yosi gave up the privilege accorded to him as "an elder for whom it is not honorable" to do such a thing; Rabbi Chiya gave up the exemption accorded him, personally, as an expert "who needs not study"; Samuel's father gave up formal possession based on resignation which is accorded after twelve months; and Rav Papa, according to the literal understanding of the Talmud, gave up the certain legal assumption which was made for the sake of the community and agreed to see reality as it is, negating, in this concrete situation, the result of this assumption.⁸⁹

Poetically, Silberg concludes:

Their common denominator is the wilful consideration, not of the "landscape" but of the "stem", the enforcing of an inner strict law and its being drawn nearer to a central nucleus.⁹⁰

Silberg's third type of yosher is midat chasidut or "something with which the spirit of the sages is not congenial" (or with which it is congenial) אין רוח חכמים נוחה הימנו (או)

(להיפך).⁹¹ This is the weakest in relationship to the law.

Fulfillment of midat hachasidut is not a mitsvah nor is failure to do it a transgression.⁹² These are matters that are left strictly to the heart of an individual or to the heart of an individual righteous man. Midat chasidut is a norm, "not merely a spontaneous ethical deed"⁹³ which is susceptible to the sundry variables of the specific situation. There are numerous laws which become part of the corpus of halachah, but regardless of their binding nature upon the individual are not consonant with the spirit of the law. To act in the spirit of the law according to

midat chasidut, one must not act according to these laws.

One example which Silberg brings is from the laws of inheritance.⁹⁴ With the death of a man, his property goes to his heirs according to the provisions of the halachah. However, while he is still alive, he may give his property to anyone he desires.⁹⁵ He may increase the portion of the inheritance of one of the heirs on the condition that the smaller portion given to the other heir (or heirs) does not denigrate the heir. There should, in any case, be some indirect result of increasing the portion of the first heir. In other words, this changing of the rights of the heir should be done cautiously, though permitted, must produce some other benefit than merely favoring one heir. There was further tampering with the laws of inheritance, though not directly. If a will, for example, was made out in the form of a promise of a gift rather than in the legal language of an inheritance, the bequest may be made to anyone in any way that the maker desires, even so far as giving all of his estate to someone who is not his legal heir. And in the case of someone who was so dangerously ill that he was expected to die, there is no need for a transaction beyond the oral statement that the receiver is to get the property upon the death of the maker. However, in spite of these concessions, the sages still did not wish to encourage such transference of inheritance from an heir to a non-heir, so it was said,

in this case, that the "spirit of the sages is not congenial to it."⁹⁶ There is no annulment of these provisions that have been established and their legislation is considered a fait accompli.⁹⁷ One is not punished for having acted according to these provisions, however it would have been better that it were avoided. To maintain the strictness of the law would be to act according to this type of yosher.

Another example which he provides (this is not an exhaustive recounting of the examples which he gives), Silberg claims is from the general type of law called midat chasidut. This is a specific type of halachic proscription.⁹⁸ There is really, in this type of law, which is not a statement of the characteristics of chasidut which may or may not exist to a certain extent in the individual but appears only three times in the Babylonian Talmud and each of these times they are given as a statement of Rav Chisda.⁹⁹ They are not matters ben adam lemakom, between man and God, but between man and the other fellow, ben adam lechavero.¹⁰⁰

There is a fourth kind of yosher which Silberg claims does not fall into any of the other categories of equity which he has delineated, but which, however, needs to be discussed. The two versions of this one example¹⁰¹ both reveal the same point.¹⁰² That is, that this is a purely ethical example which Rav, the teacher, is giving to his student Raba bar Bar Huna.¹⁰³ Since the relationship between

the two men actually existed, Silberg notes the influence which the teacher wields over his student. Here the teacher commands his student to perform the ethical obligation rather than stick to the strict letter of the law. The verses, Silberg notes, upon which this ruling is based, are not from the Torah. Since they are from the Hagiographa they cannot be considered as a basis for halachic proscription. Therefore, the intention was not to actually explain to the student what the law was, but to goad him on to ethical activity. It is especially noteworthy that in this instance

there is much weight attached to the fact that the porters laboured all day long and were hungry, and had nothing. It appears that if they were rich, Rav would not have commanded Raba bar Bar Huna to pay them their wages. This matter alone teaches that the matter here is a purely ethical obligation and not a legal obligation or a quasi-legal matter of yosher, for the laws of yosher are like the legal body are equal for all people nor do they discriminate between the rich and poor, hungry or sated.¹⁰⁴

CHAPTER VII

THE GENERAL NATURE AND SCOPE OF LIFNIM MISHURAT HADIN

What remains to be discussed are the various questions which this analysis of the passages in which lifnim mishurat hadin has yielded. First, however, a brief summary of this analysis is in order.

Elazar ha-Moda'i¹ recognized the importance of lifnim mishurat hadin. He gave the concept its official rabbinic recognition and lent his authority to it. With this endorsement, the concept became encouraged as a mode of behaviour. It was considered an action which was necessary for the orderly preservation of a somewhat participatory society in which each person is to act responsibly. If it was not essential, then it was, at least, important. It was, on one hand, so important that Jerusalem was said to have been destroyed because of its neglect. But, on the other, it was limited only to matters which could be considered to be "truth". It is not strict Biblical law and is seen in contradistinction to it. It may be simply lenient decision or it may be entirely new legislation, derabanan. It exists alongside din and does not replace it. It is, at least, as important as din, though it may well be more important. God strives to act in accordance with it. It is ideal. Man may act freely using lifnim mishurat hadin as a standard, but God must not deny truth by doing so.

Though economic matters dominate the cases of lifnim mishurat hadin in the Talmud, it is extended, as well, to the spiritual matters surrounding the ritual obligations of the Jew. In each case, the individual, always a sage, acts in a manner which does not correspond to the halachic provisions for the given episode. In each case, though the details differ, the sage gives up his legally bestowed priority and fulfills the requirements applicable in the revised situation. In this case, rather than take advantage of his legal situation, he gives the advantage to the other party, in a unilateral act of sacrifice.

The various questions, with regard to the nature of lifnim mishurat hadin, that this analysis produces and which will be discussed in this chapter are:

- 1) What is the relationship of lifnim mishurat hadin to the halachah itself?
- 2) What is the significance of the fact that the sages relinquished their personal priorities?
- 3) Is lifnim mishurat hadin performed only for Jews?
- 4) Who should do lifnim mishurat hadin?
- 5) To what extent does lifnim mishurat hadin require self-sacrifice?
- 6) What motivates one to do lifnim mishurat hadin?
- 7) Is lifnim mishurat hadin a convenient explanation for an otherwise inexplicable legal event?
- 8) Is lifnim mishurat hadin equity?

Lifnim mishurat hadin is a device invented by the rabbis which has the effect of softening the rigidity of the law. Law by its very systematic nature, cannot be applied to all life situations. Lifnim mishurat hadin gives the litigant in a case the option to adapt its provisions to meet the demand for moral action. One need not be bound strictly to the law. When one acts according to lifnim mishurat hadin, he is still acting according to the halachah. He has changed the legal status of the case but he still acts according to legal precedents which apply. At the same time that he is softening the rigidity of the law, he is also reaffirming its validity. Lifnim mishurat hadin does not abrogate the law or in any way militate against it. It simply replaces one set of legal criteria for another set. The person acting according to lifnim mishurat hadin then behaves according to the second set of provisions.

The translation "within the limits of the law" is, then, the most accurate translation. What is really understood is that in a specific situation "so-and-so acted within the limits of the law, although he voluntarily changed the applicable criteria." Of course, this is more than any individual is legally expected to do. So, in so far as this is true, the individual does go "beyond" the requirements of the law. In the latter translation, the spirit of lifnim

mishurat hadin is captured rather than its letter.

Lifnim mishurat hadin is actually a halachic device which is not anti-halachic, but serves the function of offering flexibility to a legal situation and increasing the moral responsibility of the person who faces the choice to use it. That choice, however, is essential. The person who acts in this way must want to be flexible.

Lifnim mishurat hadin is not, however, infinitely flexible and its limitations have been discussed. It is not pure ethics. It is intrinsically bound to the law.

The decision to do lifnim mishurat hadin is based on a premise which is, nonetheless, anathema to systems of law. This is the recognition that there is de facto inequality among men, regardless of their theoretical de jure equality.

Numerous passages, among them the famous passage in Avot,² describe the obligation of a judge to be impartial. While lifnim mishurat hadin does not make him partial, it does make the force of the law partial. It is not partial to the rich man but to him who would ultimately be found to be at a disadvantage. Lifnim mishurat hadin gives him the benefit by recognizing the actual inequality of the two parties to a dispute.

By initially recognizing that men actually deserve different treatment, that the poor man needs greater compassion, that men are, in fact, unequal, lifnim mishurat hadin

imposes a greater equality. Lifnim mishurat hadin supercedes a judge's impartiality, the artificial justice of law, and establishes a type of socialist ethic in which, regardless of the "rights and wrongs" in a case, a more equal distribution of wealth is fostered. Need becomes the primary base for winning a legal case. This, though, comes through the agency of a voluntary act.

We notice, as well, that it is always a sage, in the recounting of the situations of lifnim mishurat hadin, who gives up his priorities and acts according to this principle. With regard to the rabbis, Neusner³ notes that they

... did not rule as a privileged class. The rabbinate did not constitute an economic class, or occupy a single stratum within Jewish society. While many of the most important rabbis emerged from, or became part of, the upper classes, their values or ideals were not intrinsically upper class. They recognized tensions between themselves and the rich and powerful classes.

However, Neusner also claims that "the rabbinical estate"⁴

... both actively and successfully sought the power to make their claims effective in the everyday life of ordinary Jews. In so doing, they worked to change all Jews into Rabbis and to reshape the community according to the model of their own sect ... Because of their claim to be holy men, to possess the whole Torah, and to be teachers of God's will for Israel, and because of the ability of some rabbis to authenticate these claims through "miracles", they could exercise influence based upon spiritual, not merely physical, coercion.

Neusner's point is that the rabbis had a certain type

of authority, though not contiguous with the authority of an economic class, which made them, necessarily, a group apart, with a certain message for and mission to the masses, but who operated with a subtle psychological authority. Neusner, however, denies that the rabbis were elitists.⁵

The "Judaism" of the rabbis at this time was in no degree normative, and speaking descriptively, the schools could not be called "elite". Whatever their aspirations for the future and pretensions in the present, the rabbis, though powerful and influential, constituted a minority group seeking to exercise authority without much government support, to dominate without substantial means of coercion. What they wanted to accomplish was the formation of the kingdom of priests and a holy people demanded at Sinai, and to do so according to the revelation of Sinai as they alone possessed it. Admittedly, a description of the rabbinical schools is hardly a portrait of the religious life of Babylonian Jewry. Yet in the author's view, the rabbis did more and more set the standard, the golden measure, the royal way.

Regardless of Neusner's protests one finds significant evidence (among it several of the examples of lifnim mishurat hadin discussed above) for the official sanction of the rabbis as an elite group. They were given certain privileges and exemptions merely because of their status as rabbis. Thus, halachah, which is intrinsically bound to their authority, served to reinforce such a separate and unequal status.

The halachah, however, did not simply support the exemptions of the rabbis. It supported special halachic priorities for others as well.

It is the revolt of the equitable in man, the egali-

tarian thrust of moral and ethical thinking, against its opposite, the counter-thrust of elitism, which lifnim mishurat hadin wages. Lifnim mishurat hadin represents (though it may not have been motivated by) a revolt, within the general framework of halachah, against the built-in, intrinsic factors of establishmentarian authority within its own structure. This is a tension, perhaps, an anomaly. But it is one, nevertheless, motivated by Sinai, and, perhaps, equally motivated by the notion that God's law cannot be clearly replicated, in all its perfection, by man. Hence, inadequacies in the halachah itself and the need for devices like lifnim mishurat hadin. Essentially, the rabbis lived in an halachic glass house but threw, nevertheless, stones of lifnim mishurat hadin.

The revolt of lifnim mishurat hadin against de facto halachic inequities, has shown us that a man's physical livelihood must take precedence over another man's honour. When a man's daily bread is at stake, when the health of his physical being is in jeopardy, there is no room for hurt pride. The rules of lifnim mishurat hadin declare that a man must relinquish his honour, a fragile shard, for the sake of another man's well-being. Confronted with poverty, social status loses its meaning. Its diaphanous fluff is insignificant. Power has no bearing.

The sages were exemplars of Sinai's sanctioned be-

haviour, each formed an image after which the masses were to strive. And so they were used in the lifnim mishurat hadin stories. Lifnim mishurat hadin, through their example, was to be emulated; not by them alone but by everyone who could.

Kimelman⁶ concluded that

alongside the normative legal tradition there existed ...a concomitant undercurrent which may be considered the standard of the hasid.

What must be emphasized (and it is not here) is that this is a standard, not for the chasid alone, but for all.

Kimelman continues to claim that⁷

The hasid was not one who stood on his legal rights, but always sought a solution which would find favor in the eyes of God.

This may be the prototype, but in actuality, one is easily skeptical that it "always" happens this way. But the archetype remains and it remains for all.⁸ As our analysis of lifnim mishurat hadin has revealed: the standard may well stand most poignantly as a guide for the chasid, the sage, himself.

It is, perhaps, a sad admission, but for me, at this time, the remaining questions are basically unanswerable and, for the moment must remain unanswered. They cannot, however, go unasked.

Whether lifnim mishurat hadin is to be performed for

Jews only may be conveniently explained by the rule of reciprocity of law systems. But that does not satisfy our contemporary ethical dilemma.

It is not clearly determinable under which situations a man can avoid doing lifnim mishurat hadin for the reason that the extent of his self-sacrifice is too great. No man is bound to perform according to lifnim mishurat hadin, and the rules for doing it are not distinct.

The Talmudic examples do not leave those who have done lifnim mishurat hadin with any significant hardship. However, there is no clear limitation on the situations in which it might be done, except in the one instance which is restricted to a Jewish recipient. But, within this limited framework there are no other clear indications that lifnim mishurat hadin would be frowned upon if significantly great self-sacrifice were actually involved.

Whether or not lifnim mishurat hadin was a convenient excuse for an otherwise inexplicable legal event is difficult to determine, because it is difficult to determine any motivation. We can only analyze that which is presented to us and take it for its face value. It appears, then, as a legal device which involves a certain amount of self-sacrifice, kindness, and sympathy that may have been motivated by the sage's embarrassment but which, on the other hand, might have been motivated by a desire to produce a more

equitable situation. As we have seen, however, lifnim mishurat hadin does constitute a thrust toward equity.

But can lifnim mishurat hadin be fairly translated "equity"? A standard law dictionary considers equity⁹

In its broadest and most general signification, it denotes the spirit and habit of fairness, justness, and right dealing which would regulate the intercourse of men with men, the rule of doing to all others as we desire them to do to us; or as it is expressed by Justinian, "to live honestly, to harm nobody, to render to everyman his due... It is therefore the synonym of natural right or justice. But in this sense its obligation is ethical rather than juridical, and its discussion belongs to the sphere of morals. It is grounded in the precepts of morals, not in any sanction of positive law.

This would be fine except that we have noticed, more than this, lifnim mishurat hadin is associated directly with the halachah, that equitas sequitur legum, equity follows the law. That is, "equity adopts and follows the rules of law in all cases to which those rules may, in terms, be applicable."¹⁰

A more restricted definition of equity can, however, be produced:¹¹

... the word denotes equal and impartial justice as between two persons whose rights or claims are in conflict; justice, that is, as ascertained by natural reason or ethical insight, but independent of the formulated body of law. This is not a technical meaning of the term, except in so far as courts which administer equity seek to discover it by the agencies above mentioned, or apply it beyond the strict lines of positive law.

This corresponds more closely to the notion of lifnim mishurat hadin in Jewish Law. Here, similarly to lifnim mishurat hadin, there is an extra-legal manipulation of the legal system through the agency of ethical prerequisites. There are, however, divergences. This so-called "equal and impartial justice" as we have noted in lifnim mishurat hadin is derived only after a recognition of de facto inequality.

As well, lifnim mishurat hadin would seem to be a technical designation for a specific type of equity of this sort, which provides optional, but specific rules for behaviour.

The even more restricted sense of equity¹² is that of

... a system of jurisprudence, or branch of remedial justice, administered by certain tribunals, distinct from the common law courts and empowered to decree "equity" in the sense last given above. Here it becomes a complex of well settled and well understood rules, principles, and precedents.

Talmudic lifnim mishurat hadin has not yet reached this stage and it remains to be determined whether or not lifnim mishurat hadin is formalized to such an extent in post-Talmudic literature.

CHAPTER VIII

NOTES

CHAPTER I: INTRODUCTION

1. See the unpublished manuscript by Stefan Presser "Lead, Kindly Light" (Yale, 1972), p. 1.

2. Cited by Abraham J. Heschel in God in Search of Man (Phialdelphia, 1956), pp. 9-10. Quotation of F. P. Ramsey in The Foundations of Mathematics and Other Logical Essays (New York, 1950), p. 296.

CHAPTER II: THE PHRASE LIFNIM MISHURAT HADIN AND ITS SOURCES

1. See Tos. Terumot 2.1, 2.2; Tos. Pesachim 3.7; Seder Eliyahu Raba, ed. Friedman, p. 6; also b. Gitin 50b, 51a, 44b; Mechilta בשלח ד(ז); יז, ב

2. Marcus Jastrow, ed., Dictionary, p. 1542, see entry שורה. For the use of shurah in the Bible see Jb. 24.11, Je. 5.10.

3. M. Gitin IV.4. See Boaz Cohen, "The Letter and Spirit of Jewish and Roman Law", Mordecai M. Kaplan Jubilee Volume (English Section) (New York, 1953), p. 130. Also reprinted in Boaz Cohen, Jewish and Roman Law, p. 52.

4. Cohen, pg. 130.

5. M. Ketuvot, 9.2.

6. Cohen, p. 130. See b. Sanhedrin 6b, Yer. 92a.

6a. Deuteronomy 13.9, 19.13, 19.21, 25.12.

7. In Hebrew, אֵין see Amos 7.7, 8. Isaiah 27.17.

8. See note 1, supra.

9. אברהם אבן-שושן, המלון החדש, דף 1070, entry לפנים
under פנים.

10. Ibid.
11. entry, In Hebrew , בחלק שהוא פנימי יותר, Ibid.
לפנים מן- under פנים.
12. משה זילברג, כך דרכו של תלמוד (ירושלים, 1964), p.132.
13. Even-Shoshan, loc. cit.
14. Ibid.
15. B. Bava Metsia 30b, Soncino edition, pp. 187-188.
16. B. Ketuvot 97a, Soncino edition, pp. 617. Also
see index, p. 226.
17. B. Berachot 45b, Soncino edition, p. 278.
18. B. Avodah Zarah 4b, Soncino edition, p.16.
19. This is not intended to exclude Deuteronomy Rabah
and will be shown in this chapter.
20. Ben Zion Wacholder, "The Date of the Mekilta de-
Rabbi Ishmael", HUCA, Volume XXXIX (Cincinnati, 1968), pp.
117-144.
21. See Lauterbach, ed., Mekilta de-Rabbi Ishmael
(Philadelphia, 1949), vol. I, pp. xli-xlii.
22. Hermann L. Strack, Introduction to the Talmud and
Midrash (New York, 1965), p. 128.
23. Zunz dates it at 900. See Strack, p. 214.
24. Deuteronomy Rabah, Re'eh IV.3.
25. אפרים א. אורבך, חז"ל (ירושלים, תשכ"ט), דף 293.
26. Ibid.
27. See infra., Chapter IV.
28. We can assume that the Pharisaic strain put
greater emphasis on the halachah. The fear that widespread
practice of lifnim mishurat hadin would lead to the disre-
spect for the Law; its abrogation, and, perhaps, anarchy, is
is not totally unwarranted.

29. אורבך, דף 290.

30. The person is, invariably, a sage.

CHAPTER III: THE MIDRASHIC EXEGESIS OF LIFNIM MISHURAT HADIN

1. Mechilta, ed. Horowitz-Rabin, p. 198, line 3.
Yitro, Parashah 2.

2. Translation from The Torah (Philadelphia, 1962),
p. 132.

3. See Lauterbach, Mekilta, Loc. cit.

4. Loc. cit.

5. The use here, of מעשה הטוב in the construct plural is curious. It is not a general prescription to do good deeds. Rather it refers to a specific act or type of acts which are labeled "good".

6. Exodus 18:17-20a, Translation, The Torah (Philadelphia, 1962).

7. See Exodus 18:21-22.

8. This corroborates our thesis that lifnim mishurat hadin is Amoraic. If it was a popular concept, at least, known to the people, why does it not appear in Mishnah or Tosephta?

8a. See R. Travers Herford, Talmud and Apocrypha (London, 1933), p. 140, and infra.

9. A member of Bet Hillel. Alexander Guttman, Rabbinic Judaism in the Making (Detroit, 1970), p. 118. Also v. p. 54.

10. Cohen, p. 130. See note 142.

11. See Soncino edition of The Talmud. Baba Mezia 30b, p. 188, note 8.

12. Op. cit., note 9.

13. Note that the question of strict law is skipped!

14. I.e., Lifnim mishurat hadin can be seen in relation to non-Biblical halachah as well. Lifnim mishurat hadin is a flexible concept which maintains its essential meaning when applied to other systems of halachah, as well.

15. Deuteronomy Rabah, Re'eh IV.3.

16. Deuteronomy XXX.19.

16a. Ibid.

17. Note Rav's role in B. Bava Kama 99. See p. 29 supra. Also note Rav's role in a parallel type of legislation, B. Bava Metsia 83a.

18. B. Berachot 7a. Soncino edition, p. 30.

19. Loc. cit.

20. B. Avodah Zarah 4b, Soncino edition, p. 17. The question of the relationship to דרבנן is raised here. Torah is truth and the distinction between דאורייתא and דרבנן is unclear here.

21. See page 32f supra.

CHAPTER IV: LIFNIM MISHURAT HADIN IN ECONOMIC MATTERS

1. Specifically in Bava Kama 99a, Rabbi Chiya was a late 2nd century Tanna and on Bava Metsia 30b, R. Yishmael b. Yosi was a 6th generation Tanna, according to E. Z. Melamed, Eshnav Hatalmud (Jerusalem, 1965), p. 78.

2. Specifically on Bava Metsia 24b, Shmuel's father was probably a borderline Amora; Shmuel died in 250. And Ketuvot 97a, Rav Papa was a 5th generation Amora. See Melamed, p. 78.

3. This is also seen in a matter which revolves around a ritual matter, infra.

4. It is my contention that the Gemara assumed this. The Gemara itself is not conscious of this as an assumption. It is clearly a description of basic reality, in the scheme of the Gemara, though it may not have been for the Amoraic editors of it.

5. Of these cases three answers with the formulaic phrase ר' פלוני לפניו משורת הדין הוא דעבד, i.e., Bava Metsia 30b, Bava Kama 99b, Ketuvot 97a. Unlike these, Bava Metsia 24b simply says לפניו משורת הדין immediately after the story is recounted, the intermediate question is assumed.

6. Soncino edition, pp. 583-584.

7. B. Bava Kama 99b. Soncino edition, p. 583.

8. Note the notion of the two-fold law.

9. It is only through the juxtaposition of this passage with others above that we can call this passage pre-scriptive.

10. B. Bava Metsia 30b. Soncino edition, pp. 187-188.

11. Ibid.

12. See Moshe Silberg, כך דרכו של תלמוד on the זקן, n. 53, p. 111.

13. Op. cit., Soncino edition Bava Metsia, p. 187.

14. See note 12.

15. See the Rambam's use of ליטול as the obligation. הל' יודה ושמירה הנפש פרק י"ג.

16. See note 15.

17. Mishnah, B. Bava Metsia 29b, M. Bava Metsia 2:8.

18. Soncino edition, p. 181 translates "which it is not dignified for him to take."

19. Translation, Philip Blackman, Mishnayoth (New York, 1965).

20. Keep in mind that the sage probably was completely unaware of this tradition even if it was already in existence. This argument is purely from the point of view of the Gemara which already assumes that a) it was in existence and b) that the sage was fully aware of it. See supra.

21. Note that in both this and the previous case that the law (that is, in so far as it exempts a class of people) is elitist and "recognizes faces" (Deuteronomy 1:17,

B. Sotah 57b, B. Sanhedrin 7b, etc.), whereas the action of the individual in these cases affirms an egalitarian ethic.

22. B. Bava Metsia 24b, Soncino edition, p. 153.

23. Several places in B. Bava Metsia, Chapter א"ל מציאות. See Silberg, p. 112, 59 n.

24. See Silberg's comments. It does not specify if the determining factor in Shmuel's response is due to the fact that the identifying mark has been shown or if the person is a Jew. This discussion is, of course, predicated on the latter.

25. B. Ketuvot 97a. Soncino edition, pp. 616-617.

26. See Silberg, pp. 114-117, and *infra*.

27. B. Bava Metsia 24b, Soncino edition, p. 153.

28. See *infra*.

29. The few cents he gave for the hefker would not have disadvantaged him either.

CHAPTER V: LIFNIM MISHURAT HADIN IN RITUAL MATTERS

1. B. Berachot 45b. Soncino edition, pp. 277-278.

2. See *ibid*, note 9, p. 277.

3. M. Berachot 7.1, B. Berachot 49b.

4. Shulchan Aruch.

5. M. Berachot 7.1.

6. M. Berachot 7.4.

7. Loc. cit. Rashi notes that in the normal case of two men wanting to say birkat hamazon, the other out of courtesy (derech erets) stops to say it with him. In this case, though, the two stopped for the one out of respect to the third. If Rashi is correct, we have a case which is similar to the one in which a Jew, a certain person, motivates the lifnim mishurat hadin activity.

CHAPTER VI: A REVIEW OF THE SCHOLARSHIP ON LIFNIM MISHURAT HADIN

1. Claude Montefiore, Rabbinic Literature and Gospel Teachings (New York, 1970), p. 191.
2. Adolph Büchler, Types of Jewish Palestinian Piety (New York, 1968), p. 36. n.2.
3. Ibid., p. 36.
4. Ibid.
5. Loc. cit., p. 36, n.2.
6. Ibid., p. 37, note top.
7. Note Büchler's use Elazar ha-Moda'i.
8. Op. cit., p. 37.
9. See supra, p. 9ff.
10. Also see M. Shevuot III.1, Yer. Berachot VI.5b.38.
11. See supra, p. 55.
12. Montefiore, Rabbinic Literature, p. 191f.
13. Ibid.
14. The use of "Israelite" rather than "Jew" tends to corroborate this.
15. Ibid., pp. 191f.
16. Ibid., p. 282.
17. Claude Montefiore and H. Loewe, A Rabbinic Anthology (Cleveland, 1963), p. 393.
18. Herford, p. 140.
19. Ibid.
20. Ibid.

21. See supra, p. 43ff.
22. See supra, p. 43ff.
23. See Ramban's commentary on Deuteronomy 6:18.
24. Boaz Cohen, "The Letter and Spirit of Roman and Jewish Law", in the Mordecai M. Kaplan Jubilee Volume (New York, 1953), pp. 109-135.
25. Cohen, pp. 129-130.
26. Cited in Cohen, p. 130, n. 141, from Cairns, Legal Philosophy from Plato to Hegel, p. 369.
27. Cohen, p. 130. According to Rashi on Eruvin 51b, the phrase נמוקו עמו, was applied to R. Yosi, because he was equitable in his decisions דבר ישר כמו משוקלת.
28. Op. cit.
29. Op. cit.
30. Ibid., pp. 130-131. Nichomachean Ethics, v.10.8. (1138a).
31. B. Bava Metsia 16b, 35a.
32. B. Bava Metsia 108a.
33. Cohen, p. 131.
34. (New York, 1969), p. 214. Also in Jewish and Roman Law (New York, 1966), p. 97.
35. See Strack, Commentary on Matthew, p. 341.
36. Cohen, Law and Tradition, p. 214.
37. George Horwitz, The Spirit of Jewish Law (New York, 1963), p. 7.
38. See comments Ibid., p. 2.
39. Ibid., note 22. Quote of Professor Cahn.
40. Omitted text from manuscript.
41. Isaac Herzog, The Main Institutions of Jewish Law (London, 1967), pp. 284-285 (Vol. II).

42. Ibid., Vol. II, p. 385. Note example.
43. Ibid.
44. Ibid., pp. 55-56 (Vol. I).
45. Ibid., p. 56 (Vol. I.)
46. Ibid., p. 56 (Vol. I).
47. Ibid., p. 56f, 5 n.
48. (Jerusalem, 1969), Chapter 13.
49. Urbach, p. 291.
50. Loc. cit.
51. M. Gitin 4.4., Tos. Terumot 2.1.
52. Ibid., p. 29.
53. Op. cit.
54. Ooops. it.!
55. Avot 5.10.
56. Urbach, p. 293.
57. Ibid., p. 292f.
58. Op. cit.
59. (Jerusalem, 1964), Chapter 7, משפט ויזוהר pp. 97-138.
60. Ibid., p. 97.
61. Ibid., p. 97, n.2.
62. Ibid., p. 97.
63. Op. cit.
64. Ibid., p. 98.
65. Op. cit.

66. Op. cit.
67. Op. cit.
68. Op. cit.
69. Ibid., p. 99. Note Scriptural base, Deuteronomy 6:18.
70. Op. cit.
71. Op. cit.
72. Ibid., p. 110. This is not true. Silberg skips Berachot 45b.
73. See infra. p.32. Chapter IV.
74. Op. cit., p. 111.
75. See infra., p. 29. Chapter IV.
76. Bava Kama 99b, Op. cit. pp. 111-112.
77. See infra., p.38. Chapter IV.
78. In the matter of loss, twelve months is hazakah. because the owners have despaired and no longer hope to find the item.
79. Bava Metsia 24b.
80. See infra., p.39. Chapter V.
81. Ketuvot 97a.
82. Loc. cit.
83. Ibid., p. 117.
84. Ibid., p. 114.
85. Ibid., p. 117.
86. See infra., p.42. Chapter IV.
87. Silberg bases this on the post-Talmudic codifiers. See his note 148, p. 132.
88. Ibid., p. 132.

89. Op. cit.
90. Op. cit.
91. For short מידת החסידות. Ibid., p. 118ff.
92. Ibid., p. 133.
93. Loc. cit.
94. Ibid. p. 118f.
95. Bava Batra 30a.
96. See note 91.
97. M. Bava Batra 133b.
98. Ibid., p. 123.
99. Does he err?
100. For examples see Ibid., p. 124ff.
101. Yer. Bava Metsia end perek 6; B. Bava Metsia 83a.
102. Op. cit., 128f.
103. Not bar Hanan according to the Rif and Rashi,
104. Ibid., p. 131.

CHAPTER VII: THE GENERAL NATURE AND SCOPE OF LIFNIM MISHURAT HADIN

1. Or Rav Joseph or Rabbi Joseph.
2. Avot I.8. Also see Deuteronomy 1.17 and note 21.
Chapter IV, supra.
3. Jacob Neusner, There We Sat Down (Nashville, 1972), p. 101.
4. Ibid., p. 127.
5. Ibid., p. 97.

6. Reuven Kimelman, "Non-Violence in the Talmud", Judaism, Summer, 1968, p. 333.

7. Ibid., pp. 333-334.

8. See a differing analysis. Jakob J. Petuchowski, "The Concept of 'Teshuvah' in the Bible and the Talmud", Judaism, Spring, 1968, p.

9. Henry Campbell Black, Black's Law Dictionary, (St. Paul, 1951), p. 634.

10. Ibid., p. 635.

11. Ibid., p. 634.

12. Ibid., p. 634.

CHAPTER IX

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