LIFNIM MISHURAT HADIN:

A LIBERAL INTERPRETATION

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1. Introduction

The term[1] *lifnim mishurat hadin* (hereinafter *LMH*, except where the meaning of *lifnim* itself is discussed) literally means "within the line of the law" – לפנים from the root פנים meaning "in front of" or "inside of"; שורה meaning "line" or "rule of conduct" and דין meaning "law." "*Shurat hadin*" is a construct form connoting the "strict line of the law."[2] In some contexts the phrase means "beyond the line of the law" as will be discussed later in this thesis. The phrase is of considerable scholarly interest because it is an example of the influence of ethical principles embedded in *halakhah.* The instances in the *Bavli* have attracted considerable commentary from medieval post-Talmud commentators, and have inspired enduring interest in the modern scholarly literature on the relationship of morality and law in Judaism.

These instances of *lifnim mishurat hadin* engendered a considerable level of interest in the English language scholarly literature between the 1970s and the 1990s, because the citations in the aggregate can be read to imply there is, at a minimum, guidance, and at a maximum, obligation to behave in ways that appear to be above or beyond the strict direction of *halakhah.*[3] Such a notion is a threat to one version of the Orthodox conception of *halakhah* as a unified whole: the positivist conception, that *halakhah*, comprising all law, is a self-contained system that does not admit of external

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[1] All definitions from Marcus Jastrow, *Dictionary of the Targumim, Talmud Bavli, and Talmud Yerushalmi and Midrashic Literature,* Judaica Treasury 2004.

[2] *Shurat Hadin* is a term appearing four times in BT (Gittin 40b, Gittin 41a and Gittin 54b) and one time in TY (Gittin 45b). The sense of the meaning is always the strict line or plain meaning of the law.

[3] For liberal Jewish commentators such as Eugene Borowitz, the question is not about waiving exemptions, but whether the ethical norms embodied in Torah, in Talmud, and the later literature can provide justification for acting on the basis of reason, even if that might result in transgression of a specific halakhic requirement.

ethical guidance. Other, less positivist views of *halakhah* as a unified system could encompass guidance to act beyond the literal meaning of the law, and we shall see in later sections examples of modern Orthodox writers who hold this view. In addition, one might read some of these cases as establishing some aspects of *din* as rights not duties. As a strategy to deflate the idea that there is some ethic beyond *halakhah*, some medieval commentators, such as Nachmanides, attempted to make acting *lifnim mishurat hadin* obligatory,[4] while others, such as Maimonides, attempt to restrict it to the class of ethically superior individuals.[5] Over against this conception of unified *halakhah*, where through one strategy or another *LMH* is subsumed within *halakhah* (and here the definition of *halakhah* is critical as we shall see) are the range of more progressive conceptions of the relationship of ethics to law, which we shall also explore later in this paper.

The phrase *LMH* appears seven times in the Babylonian Talmud and over 20 times in the classical Midrashim. *Tosafot*, Rashi, Isaac of Corbeille, Nachmanides and Maimonides are among the medieval commentators who comment on this phrase. Some of the citations of *LMH* in the Bavli are clearly in the realm of *aggadah*, or ethical principles embodied in a textual interpretation and these instances appear to establish a behavioral ethic that is exemplified in the other five instances in the Bavli, where case law appears to be established. Some of these cases are in the form in which A has a privilege or right with respect to B. In these cases, A waives his right – in one way or another – in order to confer a benefit on B to which B is not strictly halakhically entitled. Others among these cases are in the form where there are two alternative *halachot* for the

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[4] *Torat Hayim, Devarim, samech alef* and *Vayikrah, qof ayin dalet*
[5] Maimonides, *Mishne Torah: Hilchot Yisudei Torah* 5:11; *Hilchot Deot* 1:15

same situation, and one figure in the case (A) chooses the one that disadvantages himself in order to confer a benefit on another (B). In both of these types of cases, in so doing, A is said to act *lifnim mishurat hadin*, and A's action is considered virtuous.

If one accepts the premise that not every potential human action or activity is subject to halakhic prescription or proscription, and that in large domains of human activity moral judgment should be exercised, then the question arises whether there is some set of rules or guidelines superordinate to *halakhah* that one should follow, in order to decide how one should act. More specifically, in the particular case law instances of *LMH*, the question arises as to whether one should waive a right for the benefit of another. In the *aggadic* instances taken by themselves, the guidance seems to fall under two general rubrics. The first rubric suggests that when one is confronted with an opportunity to act consistent with strict judgment versus acting with mercy, one is clearly encouraged to choose the merciful course, as God would also do. The second rubric, based on Exodus 18:20, suggests that one must understand that fulfilling the law entails doing *gemilut hasadim* (something the tradition calls an obligation "without measure")[6] that one must not be content to fulfill the strict letter of the law, but one must go beyond it in the spirit of treating others with *hesed*. We will explore these *aggadot* more fully below, as well as the connection between the two general rubrics. But of course, the citations providing the general guidance are but a small part of the *aggadot* in the Talmud that infuse *halakhah* with its ethical sense.

[6] The exegesis of Exodus 18:20 appears in *Bavli Bava Metzi'a* 30b, *Bava Kamma* 99b-100a, *Mechilta d'R Ishmael, Mechilta d'Rav Shimon bar Yochai*, and other midrashic sources. The notion of *gemilut hasadim* without measure appears in *Mishnah Peah* 1:1.

In Section 2 we shall first discuss the instances in the *Bavli* that provide the broad ethical guidance which shape the other instances treated. The ordering is meant to imply that the general "ethical" citations of *LMH* do indeed provide guidance for the behavior described in the other five citations. In Section 3, I will discuss in detail the other five, as well as the case of the porters who broke a wine cask in *Bava Metzi'a 83a*. A number of commentators include this case as an example of LMH, although *LMH* is not mentioned in it. In Section 4, I will discuss the medieval commentators; in Section 5, the modern scholarship on LMH, and various non-Orthodox conceptions of the relation of law to morality.

2. The Pre-Talmudic Development of *Shurat Hadin* and *LMH.*

It will be rewarding to discuss the development of the key terms before launching into an analysis of *LMH* in the Babylonian Talmud. Tzvi Novick, in a recent paper,[7] describes how the term *LMH* evolved from pre-Talmudic, Tannaitic sources. He describes four phases of this evolution. Novick observes that the term LMH occurs in parallel passages in the *Mechilta d'Rabbi Ishmael* and the *Mechilta d'Rabbi Shimon bar Yohai* – the exegesis of Exodus 18:20. In the first, the phrase at the end is: "'and the deed:' this is *shurat hadin,*" whereas in Mechilta d'Rabbi Shimon bar Yohai, the phrase is "'and the deed:' this is *din.*" In this first phase, then, *din* and *shurat hadin* are close to synonyms. *Shurat ha-din* occurs without *lifnim min* in seven other pericopes, one in the Mishnah, four in Tosefta, and these two passages from the two *Mechiltas*. In the *Mishnah* passage (m.Git 4:4) as well as the passages from *Tosefta*, Novick argues that while the terms

[7] Tzvi Novick, "Naming Normativity: The Early History of the Terms Shurat HaDin and Lifnim Mishurat HaDin," *Journal of Semitic Studies*, LV/2 (2010): 391-406.

'*shurat hadin*' and '*din*' appear to have overlapping meanings, '*shurat hadin*' carries what Novick calls a "trumping implication." To call a rule *shurat hadin* is to say that it should be trumped by a different course of action. In the case in *Mishnah*, a master borrows money and pledges his slave as collateral for the debt; then he frees the slave. The *Mishnah* indicates that in '*shurat hadin*' the slave is not liable for the debt. However on grounds of '*tikkun haolam*' – from fear that the lender attempts to seize the freed slave as collateral, or to protect lenders from such devious practices – the borrower is forced to confirm the slave's freedom and write out a document pledging the value of the slave as collateral in place of the slave himself. Here the norm of '*shurat hadin*' is supplanted by a different norm that is more demanding on the borrower/master, one that ensures both the freedom of the slave and his obligation to pay the debt. The Toseftan pericopes all involve a situation where one buys food, and then after the sale, the seller informs the buyer it is not fit for consumption because the requisite tithe has not been given. The first anonymous opinion is '*shurat hadin:*' one may disbelieve the seller. While permission is granted to disbelieve, the implication is that the seller should be believed. R. Yehuda objects, saying the particular seller's character must be taken into account. According to the technically correct rule (*shurat hadin*), the buyer would be disadvantaged. However, the rule is replaced by a different rule that protects the victimized party: the seller must make the food fit, by providing the necessary tithe on the food. And the new rule is compelled. Novick's conclusion is that the new rule that trumps the *'shurat hadin'* is not supererogatory – that is, not a voluntary action above and beyond what is required, nor a waiver of entitlement as we see in the Talmud – but rather a compelled alternative that produces a more equitable result.

In the next evolution of the term, the use of the term '*shurat hadin*' does not necessarily carry the trumping implication. *Shurat hadin* can signal either the governing rule or the rule supplanted by other considerations. Likewise, so can the term '*din*' or '*badin.*' Further, the terms '*shurat hadin,*' '*din*' and '*shura*' alone can be interchanged with '*derech eretz*'. This latter term, Novick writes, is the contextual equivalent of '*din*'. This overlapping usage of these terms conveys the sense that '*shurat hadin*' is a norm or a rule. Its usage can, but need not, imply that some other rule does or should govern. The term itself may have arisen by the combination of the rough synonyms '*shura*' and '*din*' in a construct phrase, a phenomenon known in Hebrew verse as *givuv*, or piling. Novick writes that since '*din*' in the sense of 'appropriate rule' occurs far more often than the other terms discussed, *shurat hadin* was designed to be a synonym for *din*. *Lifnim mishurat hadin,* according to Novick, "concretizes the metaphor latent in the word *shura.*" The preposition *lifnim min* governs nouns indicating either an area (a courtyard) or a boundary (such as a wall). Something '*lifnim min* an area' is inward from it, further away from the street, while something '*lifnim min* a boundary' is within it. Therefore the phrase *LMH* seems to imply the area inside of the *shurat hadin*. The phrase *LMH* seems to encode a later, secondary interpretation of *shurat hadin*, originally 'the norm' then, later, as 'the line of the law.'

Novick then attempts to makes an important distinction in the meanings of *LMH*, based on the verb for which the phrase *LMH* is an object. The verb *nikhnas*, to enter, appears in multiple contexts with *lifnim min*, whereas the use of *asa* (to do) or its Aramaic equivalent *avad* is unattested except with *LMH*. He concludes that the use of *asa* or *avad* depends on *LMH* as a technical term. In those cases, it indicates a waiver of

personal exemption, as is discussed elsewhere in this paper. In contrast, cases with *nikhnas* operate differently: the verb is used interestingly enough in the aggadic *sugya* in *Berachot* 7a, where God is asked to 'enter' *LMH* and judge the people accordingly. In *Avodah Zarah* 4b, with *asa*, (an exception to the point Novick is making) but otherwise the distinction is sharp: *asa/avad* + *LMH* signals waiver of an exemption, whereas *nikhnas* + *LMH* indicates something like mercy or kindness from an individual in power. To enter within the line of the law is to settle for less than one might extract. One retreats from the outermost bound of one's power.

The sharp distinction that Novick wants to draw seems less sharp on closer inspection. *Asa* is used in *Avodah Zarah* 4b, instead of *nikhnas.* Novick concedes this point, but he considers it an exception. However, we are dealing with a limited number of citations in the Babylonian Talmud. One might argue that the use of *asa* in *Avodah Zarah* is intended to tie the two uses together. Further, the notion of settling for less than one might extract seems to require an element of mercy or kindness. The distinction that Novick is drawing is a distinction that Berman also makes (see the analysis below), but even with the philological analysis that Novick provides, the meanings of *LMH*, whether with *nikhnas* in *Berachot* 7a or *asa* in *Avodah Zarah* 4b and the other citations, seem to be closely linked. This point is important as we consider the citations with general ethical guidance in the next section.

3. The Citations with General Ethical Guidance

How the *sugyas* that cite *LMH* are grouped for analytic purposes influences the analysis itself. The modern Orthodox scholars who group the occurrences of *LMH* in the Babylonian Talmud for purposes of analysis, group them as follows: two sugyas,

Berachot 7a and *Avodah Zarah* 4b, that are either aggadic in form or merely state general ethical principles, and then the five others.[8] Saul Berman has a positivist point of view in his articles, and his proposed separation of the two groups (in two separate parts to his article spaced two years apart) enables him to distance the ethical, non-judicial *sugyas* from the five instances, in an effort to diminish the influence of the former over the latter, that is, to focus on the five almost exclusively. Berman writes that in these cases,

> [T]he fine lines we have come to expect in the use of this phrase as legal terminology becomes blurred, and recognizable only by its general outlines in its use as a theological or theologically derivative term.[9]

In these sugyas, Berman suggests that *LMH*

> is used ... to describe the fashion in which man desires God to relate to him in His [God's] action....There is very little basis for suggesting that the relationship being dealt with here is the judicial one.... [The way in which the term is used aggadically] does not propound *lifnim* as a competing judicial standard, but rather as a descriptive term, while not identical to its legal homonym, does not refer to a totally different order of concepts.

Thus Berman attempts to disconnect the use of *LMH* in these aggadic *sugyas* from the five halakhic instances.

Shmuel Shilo[10] groups them in this manner as well, although he has a position intermediate between Berman's positivist view and a view that in modern parlance would be called 'realist.' He holds that the aggadic passages here are but a subset of a larger set of ethical notions (*midat hassidut, gemilut hasadim*) that give guidance in areas of

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[8] Notably, Saul Berman, "Lifnim Mishurat Hadin" *Journal of Jewish Studies 26* (1975) pp 86-104 and 28 (1977) pp 181-93 (hereinafter Berman), and Shmuel Shilo, "One Aspect of Law and Morals in Jewish Law: Lifnim Mishurat Hadin, *Israel Law Review 13: 3* (1978), pp 359-387 (hereinafter Shilo).

[9] Berman, 1977, p 184.

[10] Shmuel Shilo, "On One Aspect of Law and Morals in Jewish Law: Lifnim Mishurat Hadin," *Israel Law Journal* 13, no 3, 1978, pp 359-390.

activity where prescriptive law is silent. Louis Newman,[11] a Conservative rabbi and academic, adds to these two *sugyas* the exegesis of Exodus 18:20, which appears in *Bava Metzi'a* 30b, *Bava Kamma* 99b-100a, *Mechilta d'R. Ishmael,*[12] and *Mechilta d'Rav Shimon bar Yochai.*[13] *Bava Metzi'a* 30b and *Bava Kamma* 99b-100a also contain specific case instances of *LMH*, but while the Orthodox scholars address the halakhic components of these pericopes, they surprisingly do not address directly this piece of exegesis of Exodus 18:20 in their analysis. Here we follow Newman's grouping, because including the midrashic exegesis of Exodus 18:20 enriches our understanding of the ethical elements that inform the anecdotal instances of *LMH*.

a. Bavli Berachot 7a: Imitating God in God's aspect of mercy

אמר רבי יוחנן משום רבי יוסי: מנין שהקדוש ברוך הוא מתפלל? שנאמר (ישעיהו נ"ו) והביאותים אל הר קדשי ושמחתים בבית תפלתי, תפלתם לא נאמר אלא תפלתי, מכאן שהקדוש ברוך הוא מתפלל. מאי מצלי? אמר רב זוטרא בר טוביה אמר רב: יהי רצון מלפני שיכבשו רחמי את כעסי, ויגולו רחמי על מדותי, ואתנהג עם בני במדת רחמים, ואכנס להם **לפנים משורת הדין**. תניא, אמר רבי ישמעאל בן אלישע: פעם אחת נכנסתי להקטיר קטורת לפני ולפנים, וראיתי אכתריאל יה ה' צבאות שהוא יושב על כסא רם ונשא ואמר לי: ישמעאל בני, ברכני - אמרתי לו: יהי רצון מלפניך שיכבשו רחמיך את כעסך ויגולו רחמיך על מדותיך ותתנהג עם בניך במדת הרחמים ותכנס להם **לפנים משורת הדין**, ונענע לי בראשו

Rabbi Yochanan said in the name of Rabbi Yose: From where [is it known] that the Holy One, Blessed be God, prays? It is said: (Isaiah 56:7) "I will bring them to my holy mountain and make them joyful in the house of My prayer" It is not

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[11] Louis Newman, "Law, Virtue, and Supererogation in the *Halakhah*: The Problem of *LMH* Reconsidered," *Journal of Jewish Studies*, 40:1 (1989): 61-88.

[12] *Mechilta d'R Yishmael*, ed. Jacob Lauterbach, Jewish Publication Society, 2004. *Masechet D'Amalek, Parasha dalet*:283-4.

[13] *Mechilta d'R Shimon Bar Yochai*, ed. Jacob Lauterbach, Jewish Publication Society, 2006. Perek 18, Pasuk 20: 205-206.

> said "your prayer" but rather "My prayer." Thus, [it is deduced] that the Holy One, Blessed be He, prays.
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> What does He [God] pray? Rav Zutra bar Tuvyah said in the name of Rav: May it be My will, that My mercy (*rahamim*) suppress My anger; and that My mercy redeem My [stricter] attributes, and that I conduct myself toward My children with a measure of mercy, and that I act for them *beyond the line of the law*.
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> It was taught in a *Baraita*: Rabbi Ishmael ben Elisha said: One time I entered [into the Temple Holy of Holies] to burn incense, and I saw Achteriel,[14] praise Him, the God of Hosts, and God was sitting on a high and elevated throne, and [God] said to me: Yishmael My son, Bless Me. I said to God: My it be Your will that Your mercy suppress Your anger, and that Your mercy redeem your [stricter] attributes, and that You conduct Yourself toward Your children with a measure of mercy, and that You conduct yourself for them *beyond the line of the law*. He nodded to me with his head.

This is a two part passage: the first part establishes that God prays; and Rav Zutra reports that God's prayer is that when God judges, God's mercy outweigh God's sense of strict justice, that God prays for the ability to go beyond the line of the law. By this it is meant not to consider the law in its literal narrow sense. The prayer by Rav Zutra is then completely reprised in the next part of this *sugya*, where Rabbi Ishmael enters the Holy of Holies to burn incense, and sees God on the divine throne, God asks Rabbi Ishmael to say a blessing for God. And Rabbi Ishmael repeats the blessing, but addressed to God in the second person, not to himself.

The idea of God balancing the attributes of mercy and justice appears in Torah itself, most notably in Exodus 34:6-7:

> "Adonai! Adonai! A God compassionate and gracious, slow to anger, abounding in kindness and faithfulness, extending kindness to the thousandth generation, forgiving iniquity, transgression and sin; yet God does not remit all punishment,

[14] Either an angel of God, or God, the text is not clear

> but visits the iniquity of the parents upon children and children's children, upon the third and fourth generations."[15]

The notion of a balance between mercy and justice also appears in the kabbalistic *sefirot* formulations – *Hesed* (love, grace) is balanced with *gevurah* (law or judgment). The prayer is to tip the balance toward *rahamim* and away from strictly *din* (judgment or law). This idea is also prominent in the High Holiday liturgy as we pray to God to consider us mercifully in accounting for our misdeeds.

This *sugya* is also notable in that God asks Rabbi Ishmael for a blessing. Ishmael's blessing is a petition for God to act in a certain way towards humanity. The setting for the second part of this citation is in the Holy of Holies at Yom Kippur, in which God has the Jewish people in the balance of judgment. Here God considers humans, as humans themselves consider their own children. The parallel construction points to man imitating God, in God's compassion, as an ethic to which man should aspire.

The idea of a person favoring one's children is also seen in Torah and Talmud. We see here a plea to tip the scales toward mercy when dealing with one's children. So too, for example, at Leviticus 25:35-37:

> If your kinsman, being in straits, comes under your authority, and you hold him as though a resident alien, let him live by your side; do not exact from him advance or accrued interest, but fear your God. Let him live by your side as your kinsman. Do not lend him money at advance interest, or give him your food at accrued interest.

This biblical injunction is quoted in a number of places in the Bavli,[16] which we will discuss in more detail in the analysis of Berachot 45b, below. These exceptions for the

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[15] *JPS Hebrew English Tanakh*, Jewish Publication Society, 1999. All translations of biblical texts in this paper are from this volume, unless otherwise specified, and are noted with "JPS" and a page number.

son arguably have their source in the notion of God treating human beings as a children of God, and God providing mercy, grace, or special consideration for them.

It is important to notice, however, that the literal meaning of *lifnim mishurat hadin* here is different from the five anecdotal cases in the Bavli, discussed below, where *LMH* has the narrower sense of waiving a right with respect to another in order to confer a benefit upon that individual, or choosing one of two alternative *halachot* in order to confer a benefit on another. I will comment further on this difference below, after the citation from *Avodah Zarah* 4b and *Bava Metzi'a* 30b are also discussed.

b. *Avodah Zarah* 4b: The right time to pray to elicit God's mercy

אמר רב יוסף: לא ליצלי איניש צלותא דמוספי בתלת שעי קמייתא דיומא ביומא קמא דריש שתא ביחיד, דלמא כיון דמפקיד דינא, דלמא מעייני בעובדיה ודחפו ליה מידחי. אי הכי, דצבור נמי דצבור נפישא זכותיה. אי הכי, דיחיד דצפרא נמי לא כיון דאיכא צבורא דקא מצלו לא קא מדחי. והא אמרת: שלש ראשונות הקב"ה יושב ועוסק בתורה איפוך. ואיבעית אימא: לעולם לא תיפוך, תורה דכתיב בה אמת, דכתיב: (משלי כג) אמת קנה ואל תמכור - אין הקב"ה עושה לפנים משורת הדין, דין דלא כתיב ביה אמת - הקב"ה עושה **לפנים משורת הדין**

> Rabbi Yosef said: One should not pray the Musaf prayer, during the first three hours of the day, on the first day of the year alone [by oneself]. Perhaps, since judgment is called forth, God may look with God's eyes upon his works (or his service) and reject [his prayers]. If so, even the congregation [should not so pray]? A congregation has many merits. [and so their prayer will not be rejected]. If that is so, even in the morning one should not [pray] alone? Since some congregation is praying, they [his prayers] will not be rejected. Why, you have said, the first three hours, the Holy One, Blessed be God, sits and concerns Godself with Torah? Reverse [it]. [That is God judges in the first three hours, and is occupied with Torah in the second three hours]. Or, if you wish, do not reverse: Torah, which it is written in it "Truth" for it is written "Purchase truth (Torah) and do not sell"[17] and the Holy One, Blessed be God, does not go beyond the line of the law. Law, about when 'Truth' is not written: the Holy One, Blessed be God, does act *beyond the line of the law* [in the second three hours].

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[16] For example, in *Nedarim* 65b, an individual may be excused from a vow in order to support one's kin; first kin who are poor go to the family before going to the communal fund; *Bava Metzi'a* 71a makes one's family a priority in charitable support, The *Shulkhan Aruch* codifies this at *Yoreh Deah* 251:3.

[17] Proverbs 23:23 – one can pay someone to teach you Torah if you need to; but one should not charge tuition to others – do not sell

One should not pray the Musaf prayer by oneself: one's own failings will result in one's prayer being rejected; but if one prays in the company of others, at least some will have merit, and so one's prayer will be accepted. This is the predicate for a distinction in the second part of the *sugya*: as long as there is merit in the *kahal*, then God will not judge strictly, because God will notice the merit. Then the question is asked – what about the *shaharit* prayers, which one prays alone upon arising. (In Talmudic times, the *Birkhot Hashakhar* was said in the morning, with blessings said as the acts of getting up, getting dressed, etc. were performed, and one would ordinarily be alone, that is not in the company of the *kahal*). Did not Rabbi Yosef teach that God judges strictly in the first three hours. While the response is a bit circuitous, the important point is, God is not ultimately concerned solely about truth, and God will judge "beyond the line of the law." Here the meaning of *LMH* is different than the five specific anecdotal instances that follow below – but the import is the same as in the citation in Berachot 7a: that God will judge mercifully when God does not merely consider the truth.

There is an additional implicit component to this *sugya*, the notion that merit is found not necessarily in the individual, but in the *kahal*. This idea complements the notion of *hesed* and *gemilut hasadim* (see immediately below): *hesed*, as opposed to *hen* traditionally is grace or kindness directed towards one's fellow Jew, as opposed to *hen*, which is directed to Gentiles. This distinction between Jew and Gentile is also seen in a number of these *sugyas*.

c. *Bava Metzi'a* 30b, *Bava Kamma* 99b-100a, *Mechilta d'R Ishmael, Mechilta d'Rav Shimon bar Yochai.*

Bava Metzi'a 30b and *Bava Kamma* 99b-100a each contain one of the specific instances where a right is waived, and I will consider those specific instances in section 3. Here I want to consider sections of these *sugyas* that add to the general ethical principle contained in the first two *sugyas* considered above. These sections are virtually identical – they are a quote of a *Baraita* by Rabbi Yose explicating Exodus 18:20. The fullest citation of the *Baraita* occurs in *Bava Metzi'a* 30b:

רבי ישמעאל ברבי יוסי **לפנים משורת הדין** הוא דעבד. דתני רב יוסף: (שמות י"ח) והודעת להם - זה בית חייהם, את הדרך - זו גמילות חסדים, (אשר) ילכו - זה ביקור חולים, בה - זו קבורה, ואת המעשה - זה הדין, אשר יעשון - זו **לפנים משורת הדין**.

> Rabbi Ishmael son of Rabbi Yose went *beyond the line of the law* [in purchasing the wood from a traveler with a load, rather than help him unload it, or exercising his waiver not to unload because of his age]. As Rabbi Yosef taught [quoting Exodus 18:20]: "And you shall make known to them:" this is their livelihood; "the way:" this is *gemilut hasadim*; "(that) they may walk:" this is visiting the sick; "in it:" this is burying the dead; "and the actions:" this is the law (*din*); "that they should do:" this is going *beyond the line of the law.*

אמר מר: (אשר) ילכו - זה ביקור חולים, היינו גמילות חסדים - לא נצרכה אלא לבן גילו. דאמר מר: בן גילו נוטל אחד משישים בחליו, ואפילו הכי מבעי ליה למיזל לגביה. בה - זו קבורה. היינו גמילות חסדים - לא נצרכה אלא לזקן ואינו לפי כבודו. אשר יעשון - זו **לפנים משורת הדין**. דאמר רבי יוחנן: לא חרבה ירושלים אלא על שדנו בה דין תורה. - אלא דיני דמגיזתא לדיינו? - אלא אימא: שהעמידו דיניהם על דין תורה, ולא עבדו **לפנים משורת הדין**.

> The master said: "(that) they may walk": this refers to visiting the sick. These are [acts of] *gemilut hasadim* [so why mention them specifically?]. It is necessary, only for a person of his [hour]. The master said: "(that) they may walk:" this is visiting the sick, these are [acts of] *gemilut hasadim* – it is not necessary, except for a person of his hour [that is, born under the same sign]; the master said: "when a person of [one's hour comes to visit] he takes one sixtieth of one's sickness. Even so, he is obligated to go to him. "In it:" this is burying [the dead]. This is also a kind of *gemilut hasadim.*[so why mention it specifically?] It is necessary [to mention], for an elderly man, before whose honor it is not [fitting for that elderly man to bury him – that is, mention it in order to give the elderly person an exemption from the duty]. "That they should do:" this is [to act] *beyond the line of the law*. Rabbi Yochanan said: Jerusalem was destroyed only because (they)

> decided according to Torah law. Should they have decided instead according to the law of tyranny? Rather, say: because they limited their decisions to the letter of the law of the Torah, and did not perform actions *beyond the line of the law.*

The quotation above is replicated almost exactly in BK 99b-100a, in Mechilta d'R Yishmael[18] and in Mechilta d'R Shimon bar Yochai[19] in slightly different language but with the same intrinsic meaning.

This *sugya* provides an ethical basis complementary to that of the first *sugya* from *Berachot* 7a. The biblical context of Exodus 18:20 lies immediately prior to the giving of the Ten Commandments. Yitro, Moses' father-in-law, is giving Moses advice about how to manage his leadership role. He tells Moses his primary role is as a teacher of law, and as one who settles major disputes; the minor disputes should be settled by deputies, so as to relieve Moses of the burden of deciding all such disputes. The Torah verse starts with "...והזהרתה אתכם את החוקים ואת התורת" "and enjoin upon them the laws and teachings." Notably, the Talmudic exegesis skips over this phrase, assuming as it were that Moses would teach, and the Israelites would learn and do the specific *mitzvot* which Moses will teach them.

The exegesis starts with "והודעת להם את הדרך ילכו בה" "make known to them the way they are to follow." Here the Babylonian Talmud is incisively noticing a seeming redundancy – just the phrase before, it speaks about Moses teaching the laws and teachings. So why the additional "way they are to go?" Because, the Talmud implies, this is not redundant, it's about earning a livelihood, because without a

[18] *Mechilta d'R Yishmael*, ed Jacob Lauterbach, *loc cit.*
[19] *Mechilta d'R Shimon Bar Yochai*, ed Jacob Lauterbach, *loc cit.*

livelihood one cannot survive.[20] The phrase "*et ha-derech*" ("the way") is interpreted not as law, but rather as *gemilut hasadim*, since already in the first phrase of verse 20, the laws and teachings are already covered. Once one has a way to make a livelihood, one is able not merely to keep the *mitzvot,* but to do deeds of *gemilut hasadim*. "ילכו" ("they are to go") is interpreted as visiting the sick. The word "בה" ("in it") is not translated in the English rendering of any major translator (JPS, Fox, Alter) because in the literal sense it refers back to *ha-derech*; but the Talmud, by separating it out, infuses it with its own meaning, here the act of burying the dead. "ואת מעשה" ("And the action") in both the Torah text and in the exegesis refer to the *mitzvot* in the first part of the verse not part of the exegesis. "יעשון" ("That they should do") in the Torah text has the same root as *ma-aseh* (עשה) – but in the Talmudic exegesis it is given a different meaning, one that is parallel to the interpretation of *ha-derech* as *gemilut hasadim*: it is going *beyond the line of the law*. What is meant here is to go beyond the strict requirements of the law to do acts of *gemilut hasadim*.

The Talmud exegesis embeds *gemilut hasadim* and going beyond the line of the law into words and phrases that in their *pshat* sense refer strictly to the law, thus making them an integral part of the law, yet separate and distinct. Visiting the sick is separated out, because one can take away part of the sick person's illness by visiting him. And burying the dead is mentioned only to exempt the elderly, and thereby make it required for all others.

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[20] And elsewhere in Talmud, one of the responsibilities of a father is to teach his son a livelihood.

The acts described in the exegetical unpacking are familiar to us in *Peah* 1:1 (and in our Shabbat liturgy). They are "אלו דברים שאין להם שעור:" "These are the things without limit." The way this phrase is interpreted is that the expectation to do these things is not finite: that is, there is no set number of them that relieves you of the obligation to do them; but rather, these are expectations that you will do without any limit or measure. Here the sense of limit is different: rather than a line that provides an exemption – as in the anecdotal examples below, it's a limit – which if it existed – once you've reached it, you'd be exempt from doing the act again. Despite the difference in meaning, the use of the same term is meant, I think, to bring the notion of 'without limit' to bear on the expectation to 'go beyond the line of the law,' that is, to make 'acting beyond the line of the law' one of those precepts that has no limit. One might even interpret going beyond the line of the law as a special instance of *gemilut hasadim* – and we will see, as I analyze the specific instances in the next section – that mercy and lovingkindness become considerations in waiving the exemptions that would ordinarily apply.

In sum, the expectation is that one will fulfill *mitzvot*, but that is not the end of what one should do. One also is expected to undertake other actions – and no finite number of instances can fulfill this requirement, because, in fact there is no formal requirement. One or two acts of judging with mercy, or waiving an exemption to a duty, or doing an act of *gemilut hasadim* – will not fulfill the expectation. This exegesis of Exodus 18:20, completes, as it were, the expectation: once or ten times, or one hundred times, is not enough; there is no ultimate fulfillment for these acts, both because they are not commanded, and because the expectation is that all along the way you will do them.

The specific examples in this *sugya* – livelihood, sickness, death – these in a way recapitulate the important elements of a life, reinforcing the notion that one will do these throughout life, without limit.

The *sugya* concludes with a statement that Jerusalem was destroyed because decisions were made strictly within the law – and presumably without regard for the impact such decision-making might have upon those involved.

The Tosafot on this passage refers to Yoma 9b, where it is stated that Jerusalem was destroyed because of unwarranted hate to others.

> But why was the second Sanctuary destroyed, seeing that in its time they were occupying themselves with Torah, [observance of] precepts, and the practice of charity? Because therein prevailed hatred without cause. That teaches you that groundless hatred is considered as of even gravity with the three sins of idolatry, immorality, and bloodshed together.[21]

This is the extreme opposite of *hesed* – so to get as far away from the sins that brought the destruction of the Temple, one must perform *gemilut hasadim* whenever one has the opportunity.

To summarize the aggadic and exegetical passages: the ethical norm is to imitate God in God's merciful aspect in judgment (and here judgment has a broader meaning than merely judicial judgment – but rather judgment in the sense of deciding upon courses of action); to consider in particular mercy or *hesed* in the treatment of one's own family and children; to do *gemilut hasadim* without limitation, including specifically visiting the sick – and burying the dead (except if one is elderly), and going beyond the line (here meaning strict meaning) of the law. Thus the injunction is in operation all the time – and when one sees an opportunity, one should take it.

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[21] *b. Yoma* 9b

4. The Five Anecdotal Instances in the Bavli

There are five instances of *lifnim mishurat hadin* which consist of specific cases. In two, and perhaps arguably three cases, an individual has a right with respect to another, but waives that right in order to confer a benefit upon the other individual.

There is no unifying theme to the concrete details among these, rather, they span ritual acts (relating to a *zimmun*), commercial acts (selling property, changing money), and everyday interactions (helping to unload a donkey, restoring lost objects to their owners). The breadth of examples perhaps suggests that the underlying principle of acting *lifnim mishurat hadin* applies to many facets of life. Shilo and Newman group these five according to whether there is financial loss or not; Shilo also groups them as to whether the situation involves waiving of a right (the case of the *zimmun* clearly does not, and the rescission of a property sale is ambiguous). Newman understands all but the *zimmun* case as examples of one individual waiving exemptions or rights with respect to another. Berman's analysis is unique: he asserts that either there was no accepted *din* in the matter at the time the passage is dated, and therefore no exception; or there was no exception to the *din* that operated at the time the passage is dated. In either case, one cannot therefore say that the individual in the passage acted *LMH*. I will discuss the specifics of each of these writers in the analysis of each of the cases.

a. Bava Kamma 99b-100a: Liability of an Expert Money Changer for advice

איתמר: המראה דינר לשולחני ונמצא רע, תני חדא: אומן - פטור, הדיוט - חייב, ותניא אידך: בין אומן בין הדיוט - חייב אמר רב פפא: כי תניא אומן פטור - כגון דנכו ואיסור, דלא צריכי למיגמר כלל. אלא במאי טעו? טעו בסיכתא חדתא, דההיא שעתא דנפק מתותי סיכתא. ההיא איתתא דאחזיא דינרא לרבי חייא, אמר לה: מעליא הוא. למחר אתאי 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 דפטירי? משום דלא צריכי למיגמר, רבי חייא נמי לאו למיגמר קא בעי רבי חייא **לפנים משורת הדין**

הוא דעבד כדתני רב יוסף: (שמות י"ח) והודעת להם - זה בית חייהם, את הדרך - זו גמילות חסדים, ילכו - זו ביקור חולים, בה - זו קבורה, את המעשה - זה הדין, אשר יעשו - זו **לפנים משורת הדין**

> It was stated: one who shows a *dinar* to a money changer [to determine if it is genuine, and the money changer said it was], and it was found to be bad, one *Baraita* says: An expert is not liable, [but] a novice is liable. And it was taught in another *Baraita*: whether an expert or a novice, he is liable. Rav Pappa said: when it was taught in the *Baraita* that an expert is not liable, the examples [it had in mind were these two experts] Danku and Issur, who do not need to learn at all (that is, they are the ultimate experts). Then, in what did they err? They erred with respect to the new stamping die at the very time that it came out from under the stamping die. [that is, since they were experts, they could not have been fooled by a counterfeit, but only by a brand new coin they had not had the opportunity to see before]. There was a certain woman who showed a dinar to Rabbi Hiyya; he said to her it was good. The next day she came before him and said to him: I showed it, and they said to me it is bad, and I cannot use it as currency. He said to Rav: Go exchange it for her, and write on my ledger, this was a bad deal. And why is [this] different from Danku and Issur, who are not liable, because they do not need to learn. Rabbi Hiyya also did not need to learn (that is, he is as expert as Danku and Issur). Rabbi Hiyya went *beyond the letter of the law*. As Rav Yosef taught in a *Baraita*: and you shall make known to them: this is their livelihood. The way: this is *gemilut hasadim*; that they shall walk: this is visiting the sick; in it: this is burying [the dead]. The actions: this is the law. That they shall do: this is *beyond the letter of the law.*

The question is whether the expertise of the money changer affects his liability when a mistake is made. This *sugya* argues that the expert is not liable. A mistake made by the experts Danku and Issur is explained away: they had not yet seen the new coinage, so could not properly pronounce upon it. The case of Rabbi Hiyya is offered to challenge that assertion. The woman asks Rabbi Hiyya – presumably an expert – for his opinion on a coin. He says it is good, then she tries to use it, and it is not accepted. Hiyya is entitled to the exemption from liability of an expert, but he waives his exemption, and

compensates the woman, even though he is under no responsibility to do so. He is said to go beyond the line of the law - *LMH.* The exegesis of Exodus 18:20 that immediately follows (discussed in section 2c above), is clearly intended to show that what Hiyya does is a specific example of the *gemilut hasadim* described in the exegesis of Exodus 18:20. The preceding analysis is essentially subscribed to explicitly by both Newman[22] and Shilo[23] and implicitly accepted by J. David Bleich.[24]

Berman's take on this *sugya* is slightly different: there is an anonymous *baraita* that only an amateur is liable, not an expert. Berman decides this with what he refers to as a quote from *Tosefta*: there is no distinction between an amateur and an expert. Rav Pappa is brought (as he is in other cases) to resolve the disagreement. He does so by saying that *Tosefta* is the general rule, the *baraita* the exception. Rav Pappa creates a new law by judicial interpretation, which becomes the *shurat hadin* and proceeds to treat it as if it has always been the law. So Rabbi Hiyya, several generations prior to Rav Pappa, when he assumed responsibility, acted as he understood the law, as stated in *Tosefta.* That explains why he termed it 'bad business' not *LMH.* Berman asserts: "The entry "this is a bad deal' does not mean 'I erred, but I am not liable, but I will pay;' rather it means "I am liable, so I will pay.'" Berman writes that the Amoraim wanted to resolve the discrepancy, and so took the path of least resistance. "*They did this on legal analysis, not on the historical development of the law.*" [emphasis added] [25] This point demonstrates that Berman is using the term *lifnim mishurat hadin* merely as a technical

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[22] Newman, *op. cit.*
[23] Shilo, *op. cit.*
[24] J. David Bleich, "Is there an Ethic Beyond *Halakhah*?" in *Studies in Jewish Philosophy*, ed. Norbert M. Samuelson (Lanham, MD 1987):527-546.
[25] Berman, *op. cit.*

legal term that later authorities – here the Amoraim – used to explain why a sage acted in accordance with a broad legal standard, rather than in accordance with the exception or exemption that applied later. For Berman, the legal meaning in these five instances is different from the meaning in the aggadic passages, where it means to treat another with *gemilut hasadim*. But this is problematic: precisely in this *sugya*, as well as the one following, the exegesis of Exodus 18:20 immediately follows the case. It is therefore strained, to say the least, to posit that the redactors of the Talmud placed the case and the exegesis of Ex 18:20 adjacent to each other, without intending to tie the meaning of one to the other. Rather, the better argument is that the case means to provide a concrete illustration what is meant by *LMH*.

More generally, here, as well as in other instances, Berman appears to have a positivist agenda: if he can establish that exceptions to the law (the exceptions he terms '*shurat hadin*') really are a post-facto legal analytic tool, he can vitiate the claim that anyone in these cases was acting outside of what the law was at that time. If that is the case, then there is no need to invoke any ethic that would explain or justify acting outside the law, because in these examples there is no acting outside the law. Berman has the benefit of seeing commentators as diverse as Rashi, Maimonides, Nachmanides, and other post-talmudic commentators all understanding *LMH* as referring to an ethical standard, of which at least this case is a specific instance. However, while he cites these medieval commentators in his detailed analysis, he seems to ignore the overall import of their comments on *LMH*. Basically, he does not explain why the redactors went to the trouble of including these examples of *LMH*, if in each case the individuals acted according to the law.

b. *Bava Metzi'a* 30b: Helping to unload and load a donkey

אמר רבא: כל שבשלו מחזיר - בשל חבירו נמי מחזיר, וכל שבשלו פורק וטוען - בשל חבירו נמי פורק וטוען. רבי ישמעאל ברבי יוסי הוה קאזיל באורחא, פגע ביה ההוא גברא, הוה דרי פתכא דאופי, אותבינהו וקא מיתפח. אמר ליה: דלי לי. אמר ליה: כמה שוין? - אמר ליה: פלגא דזוזא. יהיב ליה פלגא דזוזא, ואפקרה. הדר זכה בהו, הדר יהיב ליה פלגא דזוזא ואפקרה. חזייה דהוה קא בעי למיהדר למזכיה בהו, אמר ליה: לכולי עלמא אפקרנהו ולך לא אפקרנהו. - ומי הוי הפקר כי האי גוונא? והתנן, בית שמאי אומרים: הפקר לעניים - הפקר, ובית הלל אומרים: אינו הפקר, עד שיהא הפקר לעניים ולעשירים כשמיטה. - אלא רבי ישמעאל ברבי יוסי לכולי עלמא אפקרינהו, ובמלתא בעלמא הוא דאוקמיה. והא רבי ישמעאל ברבי יוסי זקן ואינו לפי כבודו הוה - רבי ישמעאל ברבי יוסי **לפנים משורת הדין** הוא דעבד

> Rava said: all that one would return [if it were] his own, he must also return [if it is] his colleague's. And all that one would unload or load [if it] were his own, he must also unload or load [if it were] his friend's.[26] Rabbi Ishmael son of Rabbi Yose was traveling on the road, when a certain man met him. He [the man] had been carrying a bundle of wood, he put it [down], and he was resting. [Then] he said to him [Ishmael]: load me. He [Ishmael] said to him: how much is it worth? He said: half a *zuz*. He then gave him [the man] half a *zuz*, and pronounced it [the wood] ownerless. He [the man] took possession of it [the wood]. Again he [Ishmael] gave him half a *zuz* and pronounced it ownerless. He saw that he [the man] wanted to go after and acquire it. He said to him: For the entire world, it is ownerless, but for you, I have not pronounced them ownerless. Can it really become ownerless in this way? But we learned in a Mishnah: The House of Shammai says: ownerless with respect to the poor only, then it is ownerless; but the House of Hillel says: it is not ownerless, unless it has been pronounced ownerless for the poor and for the rich as the sabbatical year. Rather, Rabbi Ishmael son of Rabbi Yose pronounced ownerless for the whole world, and he restrained him with words. But Rabbi Ishmael son of Rabbi Yose was elderly, and it would not dignified [for him to load the animal for the man]. Rabbi Ishmael son of Rabbi Yose went *beyond the line of the law* [in purchasing the wood from the traveler with the load, rather than help him load it, or exercising his waiver not to load because of his age].

Here is a general rule: that one must help load and unload a donkey (or beast of burden).

"If you see your fellow's ass or ox fallen on the road, do not ignore it; you must help him raise it."[27] The rule is made stronger by applying it to one's enemy: "When you

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[26] Based on Exodus 23:5. Rashi's commentary in *Torat Hayim (Commentary on the Torah)* on this verse is that one helps by unloading the animal to lighten its burden. ..[but] if you old and frail, you refrain. Ibn Ezra has a similar comment on how to help.
[27] Deuteronomy 22:4

encounter your enemy's ox or ass wandering, you must take it back to him."[28] It is implied that Rabbi Ishmael is elderly, and therefore he is exempt from loading and unloading. Being exempt, he was within his rights simply to refuse to load. Rabbi Ishmael does not directly waive his exemption in order to help load, but rather purchases the load of wood (short-cutting, as it were, the completion of the man's journey and his presumed sale of the wood), in order to relieve the man of his ownership of it, and thereby relieve himself of the obligation to load, had he waived the exemption. Rabbi Ishmael thus accomplishes substantively the same end: the man has the value of wood in hand, and Rabbi Ishmael has done more than his exemption from loading would otherwise require. The man's action in wanting to reclaim the wood is ambiguous: he can be seen as not satisfied with the compensation in lieu of having the load of wood (it may have been for his personal consumption, and therefore he'd want the wood – one can't burn a *zuz*), or it may be that he wants both compensation and wood. Rabbi Ishmael is restraining him to avoid paying more than once for the value of the wood. What immediately follows in this *sugya* is the exegesis of Exodus 18:20, which was discussed above in Section 2b. It puts Rabbi Ishmael's action in the category of *gemilut hasadim*.

Berman's analysis of this *sugya* follows his approach to the *sugya* about the money changer. One must assume the exemption for the elderly existed at the time he acted, but such an exemption cannot be found in either Mishnah, *Tosefta*, nor in the Jerusalem Talmud. The relevant section of the *sugya* has two parts, according to Berman: "for our rabbis taught" is Tannaitic, but the second part, starting with "if one is

[28] Exodus 23:5.

in a cemetery" is probably Amoraic, and the source of the exemption. Therefore Rabbi Ishmael's action – he lived in the Tannaitic era – was not availing himself of an exemption, but the actual law itself. Berman cites the Rosh: "How is it that an elder has the right to waive the dignity which the Torah grants him, in order to fulfill a responsibility of which the Torah has relieved him?" Berman also cites Rambam, *Sefer Mitzvot Hagadol* and the *Shulkhan Aruch* in confirming the obligation to load and unload. Why would they do this without providing a technical basis for overriding the dignity of the elder? The answer, Berman says, is that the exemption for the elderly is not a biblical grant, but an Amoraic provision tied to a verse as mere *asmakhta* (meaning, something hinted at but not actually in Torah). In response to Berman, one could just as easily ask: why does the Talmud contain this *sugya* in the first place? And why does it have appended to it the exegesis of Exodus 18:20, if not to make a point that this is a concrete example of the ethical standard of *LMH* characterized in that exegesis? In general, Berman's approach is to peel back the layers of the Talmud to render explicit the historical layers, in order to render the notion of *LMH* a consistent anachronism.[29] One also senses he is troubled by the notion that an obligation imposed by what he terms undifferentiated *din* – here to help the man load his donkey -- may be construed as a duty

[29] A more contemporary hypothetical will explain this more clearly: The general rule on thank-you notes is that they must be handwritten, but if one's handwriting is sloppy, they may be typed. Great-great-grandfather Isaac, who lived in the mid-19th century, had sloppy handwriting, but he declined his exemption, in order to confer respect on those to whom he wrote. Berman's argument is simply: there was no exemption in the mid-19th century – there were no typewriters! If Isaac wrote all his letters, he was simply following the general rule, not declining an exemption to which he was entitled, because the exemption did not exist at that time. But this example is not exactly parallel for a reason: here, the technology was not available, so the letter-writer could not have used it; in the approach that Berman takes, while he finds no exemption in the Tannaitic literature – at the time the case took place, it doesn't necessarily follow that there was no exemption – only that it was not recorded.

that is even susceptible exceptions or exemptions. For to do so would entail that individuals who possessed those exemptions would then be free to avail themselves of the exemption or not – creating choice in a matter of duty. A choice leaves open to the individual the opportunity to make a subjective judgment about whether to exercise or waive one's exemption, and thus transforms exemptions from duties into rights, and also inserts into the realm of *halakhah* subjective judgment – anathema to a positivist. Newman's analysis here and in other examples highlights this point:

> Acting in this extra-legal fashion [waiving the exemption] does not involve violating any positive legal duty. Neither Hiyya nor Ishmael acts in a way which could be called illegal, Rather, each has a right to refrain from behaving in accordance with the general duty incumbent upon others, but chooses to forego that legal right.[30]

c. *Bava Metzi'a* 24b: Obligation to return lost objects

ואיבעית אימא: לעולם רבנן, מי קתני הן שלו? אינו חייב להכריז קתני, ויניח וייתי ישראל ויהיב ביה סימנא, ושקיל. תא שמע דאמר רב אסי: מצא חבית יין בעיר שרובה נכרים - מותרת משום מציאה, ואסורה בהנאה. בא ישראל ונתן בה סימן - מותרת בשתיה למוצאה. כמאן - כרבי שמעון בן אלעזר, שמע מינה: כי קאמר רבי שמעון בן אלעזר - ברוב נכרים, אבל ברוב ישראל - לא. - לעולם אימא לך רבי שמעון בן אלעזר אפילו ברוב ישראל נמי קאמר, ורב אסי סבר לה כוותיה בחדא, ופליג עליה בחדא. וכי מאחר דאסירא בהנאה, מותרת משום מציאה למאי הלכתא? - אמר רב אשי: לקנקנה. ההוא גברא דאשכח ארבעה זוזי דציירי בסדינא ושדו בנהר בירן. אתא לקמיה דרב יהודה. אמר ליה: זיל אכריז. - והא זוטו של ים הוא - שאני נהר בירן, כיון דמתקיל לא מיאש. - והא רובא נכרים נינהו, שמע מינה אין הלכה כרבי שמעון בן אלעזר אפילו ברוב נכרים - שאני נהר בירן, דישראל סכרו ליה, וישראל כרו ליה. כיון דישראל סכרו ליה - אימור מישראל נפל, וכיון דישראל כרו ליה - לא מיאש. רב יהודה הוה שקיל ואזיל בתריה דמר שמואל בשוקא דבי דיסא, אמר ליה: מצא כאן ארנקי מהו? - אמר ליה: הרי אלו שלו. - בא ישראל ונתן בה סימן מהו? - אמר ליה: חייב להחזיר. - תרתי? - אמר ליה: **לפנים משורת הדין**. כי הא דאבוה דשמואל אשכח הנך חמרי במדברא, ואהדרינהו למרייהו לבתר תריסר ירחי שתא, **לפנים משורת הדין**

> And if you prefer, say in fact – it is always the opinion of our Rabbis [that is, the Mishnah, in *Machshirin*, concerning an object found in a city with a mixed population, follows the view of the Rabbis, rather than Shimon ben Eleazar.] Does it [the Mishnah] state they [the lost objects] belong to [the finders]? The

[30] Newman: 65.

Mishnah says: he [the finder] is not obligated to announce [that he found it]. He should set [it] aside, and let a Jew come and give an identifying mark and take [the found object].

Come and hear: Rav Assi said: If one finds a barrel of wine in a town where the majority are Gentiles he is permitted as regards found objects [that is, he has no obligation to announce it] but he is forbidden to derive benefit. If a Jew came and gave for it a sign [an identifying mark] it is permitted to the finder for drinking [that is to say, it is still the case that the owner is deemed to have despaired of recovery, which presumption applies where most of the populace is Gentile, so the finder gets to keep and enjoy the wine]. Since the Jew identified it, that removes the likelihood that it's Gentile wine; Gentile wine is forbidden, because some of it may have been used in rituals for pagan deities].

In accordance with whom? In accordance with Rabbi Shimon ben Eleazar [who holds that one must consider the majority of the populace in the area in which the lost item is found]. Learn from this [ruling of Assi – that one may keep the wine in an area that is predominantly Gentile]. Why does Rabbi Shimon ben Eleazar state [that one may keep a found object in an area frequented by many?] [Only in an area] with a majority of Gentiles, but [in an area] with a majority of Jews, it is not [permitted].

Rabbi Shimon b. Eleazar would always say that, even with a majority of Israelites. Rav Assi agrees with him in one case [where there is a Gentile majority] but differs from him in one case [where there is an Israelite majority]. Since it is forbidden to derive benefit from this wine, what is the law about whether it is permitted as regards a found object? Rav Ashi said: In regard to its container. [that is one may keep and use the barrel, but not the wine].

A certain man found four *zuzim* tied up in a cloth and cast into the Biran River. He came before Rav Yehudah, He told him: Go and announce. This case is like the tides of the sea.....The Biran River is different, since there are obstacles [to catch the item] he [the owner] does not despair. But surely a majority are Gentiles. Hear, the *halakhah* is not in accordance with R Shimon ben Eleazar, even with a majority of Gentiles. [But] the Biran River is different because Jews dam it and Jews dredge it. Since Jews dam it, one may say that it fell from a Jew; and since Jews dredge it, he [the owner] does not despair [of finding it].

Rav Yehuda was following behind the master, Shmuel, in the market of stores of grain. He said, if one finds a purse here, what [is the law]? He replied: These belong (lit: are here) to him [the finder]. If a Jew comes, and gives a mark on it, what is [the law]? He said: he is obligated to return it. Both [the rulings seem contradictory]?

He [Shmuel] said to him: [the second ruling] *is going beyond the line of the law.* Like this, about Shmuel's father – he found these donkeys in the wilderness, and

he returned them to their masters after twelve months of the year, [going] *beyond the line of the law.*

In order to understand fully this sugya, some preliminary background is needed. In *BM* 21a, the most general rules are laid out about found objects: some are kept by the finder, others must be announced, so the one who lost it may come to claim it. In *BM* 21b, the notion of despair (*ye'ush*) is introduced – whether one who lost the item despairs of recovering it. Despair on the part of the owner who loses an object is a precondition for the object to be considered abandoned. But if a lost object has an identification mark, it is not deemed abandoned. In *BM* 24a, Rabbi Eleazar defines the circumstances under which an object is deemed lost: found from a wild animal, or from the tide of the sea, or the flood of the river, it is found in a broad square, or any place where crowds gather. Further in *BM* 24a, if an object is found among Gentiles, there is no need to announce it (if it is in the category where announcement is required), but if among Jews, one must announce the find. In the first instance, the general rule, is that in a public place with much traffic,[31] one assumes that the one who lost the item has already despaired of finding it. Mishnah says one does not have to announce that he found it, but merely to set it aside, and let a Jew come and identify it to claim it. Shimon ben Eleazar excludes the obligation to return in an area with crowds of a mixed population – thus providing an exclusion to the Mishnaic injunction to set the item aside, in case a Jew lost it and might claim it. A colloquy follows where Rav Assi and Rabbi Simeon ben Eleazar disagree on whether the exception to the Mishnaic rule to return applies only to areas with crowds of predominantly Gentile populations, or whether it applies in areas with both Jewish and Gentile populations. Shimon ben Eleazar wants the exception to the obligation to return

[31] Rashi's comment on this sugya.

to apply in both Jewish and Gentile areas, whereas Rav Assi wants it to apply only in Gentile areas.

In order to demonstrate that Rabbi Shimon is not correct [and neither is Rav Assi, even in his more limited exception], the case of a purse found in the Biran River is adduced: because Jews dam it, it's likely it was a Jew who lost it, and because Jews dredge it, it's likely that the one who lost did not despair of finding it, even though it is in an area predominated by Gentiles. This case is intended to provide an exception to the situation where an object is found in the flood of the river (as described in *BM* 24a above).

Now comes the case of Shmuel and his disciple Rav Yehuda in a market frequented by many. Rav Yehuda has two questions:

a. If a purse is lost, may the finder keep it? The answer is yes. This is the general rule that if an object is lost in an area with crowds, it belongs to the finder.

b. If a Jew comes and identifies it, may the finder keep it? The answer is no: and the rationale for this is *LMH.* This pronouncement provides an exclusion to the statement that an object lost in crowds goes to the finder, even if the one who lost it can identify it. The basis of the exclusion is that the one who lost it is Jewish. This seems to be a resolution of the potential conflict between the finder of an object in a crowd keeping the lost object; and the obligation to return an object to a Jew. This case is different, in that the finder is not waiving a right to keep the object; rather, it is a pronouncement about what one must do in the specific circumstance

described. And it is different from the other cases, in that it is a hypothetical, not an actual case.

This answer is supported by citing Shmuel's father, who returned donkeys he found in the desert, which he kept for more than a year[32] and returned them to the owner. His actions were characterized as *LMH.*

One assumes that in the market there are both Jews and Gentiles. There are three ways one might interpret this:

a. One may view the obligation to return the identified purse as consistent with and analogous to the purse thrown in the Biran River: even though the market has a mixed population or even a predominance of Gentiles, because the Jew identified it (as presumably the Jew would identify the purse in the Biran River), he would be entitled to get it back.

b. Or one may view this as simply consistent with the Mishnaic rule that one does not have to announce, but lay the object aside, and if a Jew comes to identify it, then the object must be returned. Note that in this case Shmuel does not say the find must be announced.

c. Or one could say the exclusion of keeping an object found in a crowd has a further exception – if a Jew comes and identifies, the finder can't keep it. But this has the same practical effect as option b above.

   Or one could say there is no obligation to return it at all, but an *LMH* exception is made in this case, because of the Mishnaic rule, and because, despite the

[32] This represents a time period after which the owner despairs of having them returned, based *on b.BM* 28b, which is about large animals like cattle, which are held and tended up to a year. The case here extrapolates from large cattle to donkeys.

superficial similarity to the case of the purse in the Biran River, it is not exactly analogous. One could say this is at best a highly ambiguous text, and applying the label *LMH* is a short-cut way to say returning the purse is the right thing to do. However, a reading in light of the general rules that precede in earlier sugyas in *BM* suggests in this case, that it is a further categorization of lost objects, and is merely stating the *din* in a very specific case, like Berman argues, below.

Berman analyzes the case as follows:

1. First, the law of returning objects does not distinguish as to where the objects are found, except to the extent that it is a place that indicates abandonment. Here Mishnah states: one does not have to announce it, but one must set it aside (in the case that someone comes to identify it).
2. Second, Rabbi Simon ben Eleazar excludes the obligation to return the object when crowds are present. The question is whether that exemption from the responsibility to return should be further limited only to where "heathen" [Gentiles] are in the majority. When the majority are Jews, the law is to return the article – thus the point about the damming and dredging of the Biran River.
3. Third, Mar Shmuel first stated the law in accordance with the *shurat hadin* of Rabbi Simeon, then when asked if it were a Jew and he could identify, then the law is the undifferentiated *din*. Mar Samuel said the second part was *LMH* – but it's really just undifferentiated *din*.

This analysis is consistent with Berman's approach in the examples above.

Newman agrees that this is not a case of waiving an exemption, but rather a case where the text is ambiguous about whether the return of the purse is a legal duty, or

merely the right thing to do (*LMH* in its ethical sense, not in the sense of waiving an exemption). The purse found in the market seems to be very much like the case of the Biran River: lost in an area with a mixed population, but not so large that one would despair of finding a dropped purse (for example, by retracing one's steps). But perhaps it is different enough that Mar Shmuel thought it didn't fit, thus he called it *LMH*.

The last part has to do with the return of the asses. Rashi says he returned the asses even though they had been lost for twelve months and presumably abandoned. Berman argues that nowhere does the Gemara assert that lost objects are deemed abandoned after twelve months. Tosafot suggests that he found them and kept them for twelve months after finding them, and at that point he could have legally sold them. Later if the owners appeared, he could give them the proceeds of the sale. Instead he continued to care for the animals. Finders of lost cattle may put them out for hire to cover the expense of feeding them until the owner identifies them (Mishnah *BM* 2:7). But there is nothing in Mishnah, Tosefta or Jerusalem Talmud that permits the sale and subsequent return of cash to the owners, should they come. Limiting the period of care-taking to twelve months is first suggested in *BM* 28b by Rav Nahman in the name of Samuel. Here, in this case, Shmuel's father did not sell the asses [here, taking the place of cattle], but continued to care for them. His action was described as *LMH*. But, according to Berman, if the new limitation to twelve months described in *BM* 28b arose after the actions of Shmuel's father, then what he did was the undifferentiated *din*. The limitation to twelve months came subsequently, and the issue is resolved by calling his action *LMH*. A critique of this analysis similar to that of Berman's earlier analyses could be applied to this case.

The plainer reading is simply: a year's time is the outer limit of responsibility to return the lost donkeys, but Shmuel's father waives his right to sell the animals in order to do the right thing, to go beyond the line of the law. Newman doesn't believe this helps resolve the ambiguity of the case of the purse lost in the Jewish market. Newman believes the cases are dissimilar, and perhaps the redactors of the Talmud recognized the ambiguity. Having recognized that ambiguity, they attempted to resolve it in favor of *LMH*, by making the case of the lost purse analogous to the animals not sold after twelve months.

d. *Ketubbot* 97a: When property sales may be rescinded.

איבעיא להו: זבין ולא איצטריכו ליה זוזי, הדרי זביני או לא הדרי זביני? תא שמע: דההוא גברא דזבין ארעא לרב פפא, דאצטריכו ליה זוזי למיזבן תורי, לסוף לא איצטריכו ליה, ואהדריה ניהליה רב פפא לארעיה. רב פפא **לפנים משורת הדין** הוא דעבד.

> They inquired: if one sold [land because one needed money], but he did not need the money [as it turned out], is the sale rescinded, or is it not rescinded? [The question at hand is whether if one's intention is well known, but not put in writing as a condition of the sale, may the deal be undone]. Come, hear: there was a certain man who sold land to Rav Pappa because he needed money to buy oxen. [This was widely known, but not stipulated in writing, according to Rashi]. In the end, he did not need it, and Rav Pappa returned his land to him. Rav Pappa went *beyond the line of the law*.

Here, the question is what conditions must obtain for the sale to be rescinded? Clearly, there is no explicit condition in the sale document itself, otherwise this question simply would not arise. Absent an express condition of the sale, the possibilities are that

- He didn't announce it, but it was well-known in the area
- He didn't announce it, and it wasn't well known

We can dismiss the second option because in that case, the sale would certainly not be voidable. So the question is, does the fact that he needed the funds to buy oxen, and the fact that that fact was well known but not stipulated, make the sale voidable if it turns out

he doesn't need the money? The statement that "In the end, he did not need it, and Rav Pappa returned his land to him" is an initial statement that an unexpressed, but well-known condition is sufficient to void the sale. The statement that Rav Pappa went beyond the limit of the law rejects that ruling: instead it says Rav Pappa was entitled to keep the land, notwithstanding the fact that the unexpressed, well-known condition was not met, but he returned the land anyway.

Rav Pappa waives his entitlement to keep the land, in order to do the right thing: to recognize that the man did not need the money after all, and that he would be better off with the sale undone.

The *sugya* goes on to further clarify:

ת"ש: דההוא בצורתא דהוה בנהרדעא, זבנינהו כולי עלמא לאפדנייהו, לסוף אתו חיטי, אמר להו רב נחמן: דינא הוא, דהדרי אפדני למרייהו. התם נמי זביני בטעות הוו, דאיגלאי מילתא דארבא בעקולי הוה קיימא. אי הכי, היינו דאמר ליה רמי בר שמואל לרב נחמן: אם כן, נמצאת מכשילן לעתיד לבא אמר ליה: אטו כל יומא בצורתא שכיחא? אמר ליה: אין, בצורתא בנהרדעא משכח שכיחא. והלכתא: זבין ולא איצטריכו ליה זוזי, הדרי זביני

> Come, hear: there occurred a shortage [of food] in Nehardea, everyone sold their mansions; in the end, however, wheat arrived. Rav Nachman told them: The law is that mansions return to their owners. There indeed the sales were in error [at the outset], for it was revealed that the ship was standing in the eddies [that is, it was not after the fact that the supplies arrived, and therefore the cases are not comparable]. This is why Rami bar Shmuel said to Rav Nachman: if so [that is, if your ruling is correct], then it is found that you are hindering [sales] in the future. He (Nachman) said to him: Is a shortage
> found every day? [that is, it is no moral hazard if the event is rare]. He (Rami) replied: Yes – shortages in Nehardea are quite common. And the law is: if one sold, but he did not need money, the sale is rescinded. [We interpret this to mean 'not need the money right at the time of the sale].

Rav Nachman holds that the mansions are returned. But the Gemara says, this instance is not a contradiction to the law that a well-known but unexpressed exception does not void the sale: the cases aren't comparable, because the need for the oxen disappeared after

the sale, whereas in this case, the need was not present at the time of the sale. Since the ships were in the eddies, the sales were mistaken even at the outset. The statement of the law 'one sold, but he did not need the money, the sale is rescinded,' given the context, seems to apply only when the need is not present immediately at the time of the sale, but discovered after the fact. That is the point of the illustration. The colloquy on the moral hazard is a side issue.

Berman's analysis is this: sales may be voidable in three cases:

1. From an express condition at the time of the sale;

2. From manifest implied condition created by legal presumption, e.g. "I am selling you this land because I am going to settle in Israel," but that's not made an express condition of the sale

3. No express condition, but one merely known to the purchaser, and also generally well-known, that seller was selling only for one reason. This position is rejected by the Tosafists, who insist an explicit statement be made.

Here, a certain man sells land to Rav Pappa because he was in need of money to buy some oxen, and as he eventually did not need it, Rav Pappa returned the land to him – Rav Pappa acted *LMH*. But then Gemara resolves it a different way, for after the citation of an additional case, Gemara says: "and the law is that if a man sold a plot of land and on concluding the sale was no longer in need of money, the sale may be withdrawn." So Rav Pappa's action was not *LMH*, according to Berman, but simple *din*. But here Berman does not take the last statement in the context of the example of the food shortages – the law as stated is limited only where there is no need right at the time of sale, as we argued above.

Berman goes on to argue that this case is different. It is not a resolution that confirms the propounded law, but a rejection of the authority of the action described, and thus a return to the initial question of whether a sale under such circumstances is voidable. Note that Rav Pappa did not designate his action as *LMH*, that was done by the later Amoraim. Rav Pappa did not describe his action that way, because he did no more and no less than the law required. Berman's re-statement:

1. The undifferentiated *din* provides that sales are voidable subject to fulfillment or non-fulfillment of the condition.
2. Amora 1 asks (according to Rashi's interpretation): If the vendor makes no condition and no express statement, but we know and the purchaser knows the reason, but after the sale the purchaser did not need the cash, is this a conditional sale and voidable, or not a conditional sale and therefore final?
3. Amora 2: the *shurat hadin*[33] is the point at which there exists common knowledge and knowledge by the purchaser – even absent a formal condition or express statement.
4. Amora 3: No evidence can be accrued from Rav Pappa. Mere knowledge of the reason should not justify holding the sale to be voidable. How then to explain what Rav Pappa did? Simple: he acted according to the undifferentiated law despite the existence of an exception (the *shurat hadin*) which limited the scope of voidable sales. That is, he acted *LMH*.
5. Amora 4 concludes: No, it is apparent from another story – the famine at Nehardea and the decision of Rav Nachman) that the *shurat hadin* is exactly as

[33] A term Berman uses in his analysis.

Amora 2 described it, and Rav Pappa acted exactly in accordance with that *shurat hadin.*

As our initial analysis of the *sugya* before the statement of Berman's take on the *sugya* indicates, I disagree with Berman's reading. Instead this is a simple case: where the condition is not expressed, but well known, it doesn't void the sale if *after* the sale it appears there is no need for the money. But if there is no need right at the time of sale, the sale is voided. Therefore, in the case of the sale of the land, Rav Pappa acted *LMH.* If Rav Pappa were instead selling food stores in Nehardea, and the ships were in the eddies, the sale would not be valid in the first instance.

This case is very important for another reason: we do not have an exemption to a general law which A (in this case, Rav Pappa) waives: rather we have a general rule that sales with unexpressed but generally known conditions are not voidable if the lack of the condition appears after the sale. And Pappa waives his simple entitlement to keep the land, rather than waiving an exemption from a general rule. This forcefully makes the point that the general rule here is not a requirement to keep the land, but merely an entitlement to keep it. And where there are entitlements not requirements, one has the freedom to keep one's entitlement or give it up.

e. Berachot 45b: Interrupting a meal to allow participation in a *zimmun*.

The citation below is preceded by a lengthy discussion of who may participate in *zimmun*, and the minimum number of individuals required for *zimmun*, a group prayer at the meal.

אמר רבא, הא מילתא אמריתא אנא, ואיתמרה משמיה דרבי זירא כוותי: שלשה שאכלו כאחת - אחד מפסיק לשנים ואין שנים מפסיקין לאחד. ולא? והא רב פפא אפסיק ליה לאבא מר בריה, איהו וחד - שאני רב פפא **דלפנים משורת הדין** הוא דעבד.

> The following thing I said for myself, and a statement was heard in the name of Rabbi Zeira agreeing with me: three people who eat as one (together); one interrupts for [joining] two [in *zimmun*], but two do not interrupt for one. Really? Rav Pappa interrupted for the sake of his son, Abba Mar, and it was he [Rav Pappa] and one [other person who interrupted for Abba Mar]. It's different [for] Rav Pappa: he went *beyond the letter of the law.*

Here the pattern established in the other cases is not precisely followed. There is no apparent right here, (except perhaps not to have one's meal disturbed by one who departs early from a meal). Nor is there any ambiguity about the rule. Here, the general rule – that two should not interrupt their meal for one to say *zimmun* is violated in a completely *ad hoc* manner by Rav Pappa. Rav Pappa can be said to waive his right not to be disturbed, but he has in fact disturbed his table mates. The justification for this is that simply that it was Rav Pappa's son. This example is tied to Berachot 7a, where God treats God's children with mercy. Here, by analogy: God is to God's people as one's father is to his son. To afford his son an opportunity to participate in *zimmun* is an example of a father's treating his son with *hesed.* We see other examples of favored treatment to sons elsewhere in Torah[34] and Talmud.[35] More importantly, his action alludes indirectly back to God treating God's children with mercy in *Berachot* 7a and *Avodah Zarah* 4b.

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[34] For example, at Leviticus 25:35-37: "If your kinsman, being in straits, comes under your authority, and you hold him as though a resident alien, let him live by your side; do not exact from him advance or accrued interest, but fear your God. Let him live by your side as your kinsman. Do not lend him money at advance interest, or give him your food at accrued interest

[35] For example, in *Nedarim* 65b, it is cited where the issue is whether a father is responsible to support his son, or whether the son falls upon the communal charity. In *Bava Batra* 174b, we find a case where a father guaranteed his daughter-in-law's *ketubbah*, and then his son fell into financial straits. The rhetorical question is asked 'won't anyone suggest to the son that he divorce his wife, so his father will pay off the ketubah, then he could re-marry his wife. The text then points out the moral hazard involved in such a transaction: "Rava said [the only way this is permitted is that] this one

f. The Case of the Porters: *Bava Metzi'a* 83a

We include this case because it is cited by some modern commentators as an example of *LMH.* The case is as follows:

רבה בר בר חנן תברו ליה הנהו שקולאי חביתא דחמרא. שקל לגלימייהו, אתו אמרו לרב. אמר ליה: הב להו גלימייהו. - אמר ליה: דינא הכי? - אמר ליה: אין, +משלי ב'+ למען תלך בדרך טובים. יהיב להו גלימייהו. אמרו ליה: עניי אנן, וטרחינן כולה יומא, וכפינן, ולית לן מידי. אמר ליה: זיל הב אגרייהו. - אמר ליה: דינא הכי? - אמר ליה: אין, +משלי ב'+ וארחות צדיקים תשמר.

> Some porters broke a barrel of wine belong to Rabba bar bar Chanan. He took their garments, so they reported to Rav. He said to him [Rabba]: you must return their garments. He [Rabbah] said to him [Rav]: Is that the law? He said to him (quoting Proverbs 2:20) "in order that you walk in the way of the good." He gave them [back] their garments. They said (further) to him [Rav]: We are poor, we have worked all day, and we are starving and have nothing. He [Rav] said to him [Rabba]: Pay them their wage. He [Rabba] said: "is this the law." He [Rav] replied: Yes: keep the path of the righteous.

The case of the porters does not appear to fall in the category of *LMH*: *LMH* is not cited as a reason for the decisions in the case, it's not a case of waiving of rights, but rather a case where the liabilities of the porters are <u>not</u> waived by the aggrieved party, but overridden by a judge acting with mercy toward impoverished porters. While the actions are consistent with the guidance in the *aggadot* that provide moral guidance, in form and substance the case of the porters is not an instance of *lifnim* – that is, it doesn't have the logical structure of the five cited instances, where an individual with a right waives it himself to confer a benefit upon another. This is recognized by the Tosafot commentary to *BM* 24b discussed below.. Other commentators explain the action of Rav in a variety

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[the son] must make a stipulation that she not benefit." But why was the son given this advice in the first place? The *Gemara* answers: "*When it is his son, it is different*, and where he is a rabbinic scholar it is different." [italics added].

of ways: as the result of a *Takkanah* to favor workers in this situation, otherwise it would be difficult to find workers if they were strictly liable for damages that they could ill afford; or that this case is between Rav and Rabba bar bar Chanan, a master-disciple relationship, and the adjuration to pay the workers and return their cloaks is an example of a master telling a disciple the way he is expected to act. The adducing of the quote from Proverbs is to emphasize that this is not a halakhic decision.

Some modern commentators include the case of the porters, because the judge in the case compelled the payment of wages and dismissed the liability claim, even though there was no basis to do it. Because the judge had no basis, he was said to act *LMH,* even though his behavior was not described as such. This case also figures in later medieval discussions about whether *LMH* is justiciable: that is, whether one can be compelled to act *LMH*, or whether a judge may rule on the basis of *LMH.*

5. General Discussion of the Specific Cases

Summarized below are the key features of the cases in which *LMH* is mentioned.

	Money Changer	**Loading a Donkey**	**Returning Lost Property**	**Rescission of Property Sale**	**Interrupting a *Zimmun***
Waived exemption or entitlement	Yes (an exemption)	Yes (waiving an exemption with an in-kind substitution)	Unclear (If yes, then an entitlement – but here no action is taken; it's a hypothetical)	Yes (an entitlement, not an exemption)	Yes, waived an entitlement to finish the meal to say *birkhat hamazon* to honor his son
Choice of Applicable Law	No	No	probably	No	No
Commercial Transaction	Yes	No	No	Yes	No
Material Value	Yes	Yes	Yes	Yes	No
Ritual	No	No	No	No	Yes
Includes Ex 18:20 Exegesis	Yes	Yes	No	No	No
Person whose action is described as *LMH*	Hiyya (TA or AB2)[36]	Rabbi Ishmael son of Yose (T6)	Rav Yehuda (gets advice) (AB2)	Rav Pappa (AB5)	Rav Pappa (AB5)

These instances where case law is made are meant as concrete examples of what the aggadic citations are pointing to in a general way: in the ordinary course of everyday life, where one has a choice between strictly following a rule, or choosing an alternative

[36] Adin Steinsaltz, *The Talmud: A Reference Guide* (New YorkRandom House,1989), 30-36. TA is the transition period between the *Tanaiim* and the *Amoraim*, AB2 is the second generation *Amoraim* in Babylonia, T6 is the sixth generation *Tannaim*, and AB5 is the fifth generation *Amoraim* in Babylonia.

course that does not violate an express prohibition or prescription, but treats another with *hesed*, we are meant to choose the latter course.

These instances of *lifnim mishurat hadin* do not, in fact, create actual obligations beyond or in contradiction to *halakhah*, because in some of the cited cases, an individual is not bound by a commandment that requires him to take an action that in fact he does not take (or conversely, is he proscribed from taking an action he does take); but rather, the individual exercises a degree of freedom to waive a right he otherwise has in order to confer a benefit upon another. The actions in question fall outside the realm of obligatory and forbidden behavior, but rather in the realm where moral judgment can, and is expected to be exercised.[37]

This critically turns on whether a number of halakhic rules exemplified in these instances are to be interpreted as strict requirements (e.g. if you enter a contract with no express conditions you must execute the contract), vs. merely entitlements or rights (e.g. if you enter such a contract, and the other person wants to get out the contract, you are entitled to either enforce it or not). A corollary (or precondition) of this point is that these cases in fact establish this principle: not all *din* is required; some of it merely confers rights (particularly in the commercial transaction realm).

If one examines the table of characteristics at the beginning of this section, and one leaves aside for a moment the case of the *zimmun*, one sees that the four remaining cases involve transactions. The sense of transaction here is meant in its broadest sense: two people interact, one does something of tangible (as opposed to intangible) value for another. Two of the four are commercial transactions: the money changer case and the

[37] The only possible exception is the case of the *zimmun,* where a halakhic rule appears to be broken.

rescission of sale case, whereas the unloading case and the return of the lost article are not commercial but nonetheless transactional, in that something of tangible value is conferred. In the category of waived exemption or entitlement, the four cases span the breadth of possibility: the money changer is a waiver of exemption, in which money changes hands on account of the waiver; the unloading case is a waiver of exemption, the elderly individual does not actually help with the loading, but pays the value of the load instead (showing that waiving the exemption can have different forms). The case of returning the lost property is a waiver of entitlement to keep the lost article, or it can be interpreted as the selection of one of two alternative interpretations of law. The rescission of sale is likewise a waiver of entitlement.

These last two cases demonstrate that one does not need an exemption to waive, but merely an entitlement. The rescission of sale case also accomplishes something more profound: it says, I believe, that in a commercial transaction involving a contract, where one party has certain obligations to perform, and the other party has corresponding rights with respect to the first party's obligation, the one holding the rights can waive his right, and let the party with the obligation off the hook, as it were.[38] Note in this example, it is not that the seller is necessarily poor, or has some moral claim to be let off: it is merely that his need to sell no longer obtains. This example, it seems to me, infuses the entirety of commercial transactions with the option and opportunity "to do the right thing."

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[38] This calls to mind a personal anecdote from almost a quarter century ago. I had contracted to purchase a home in Pittsburgh, where I was then employed. The seller then called to say that his wife had contracted a serious illness, and could not possibly undertake a move in any near time frame, and would I consent to void the sale? I did void the sale, as there were plenty of other potential houses to buy, and it seemed like the right thing to do.

The case of the *zimmun* shares some features with the other four cases. In this case, Rav Pappa waives his honor and ability to comfortably finish his meal without interruption to say the *birkat hamazon* with his son, in order to give honor, or *hesed* to his son. This case extends the general warrant to waive an entitlement to ritual matters. The other cases were all commercial or everyday transactions; here what appears to be a halakhic rule on ritual is violated. No medieval or modern commentator has commented on this. ;. However, one might also conclude that the warrant to act *LMH* in ritual matters implied by this case may be limited to the special privileges and responsibilities fathers have with respect to their sons, alluded to in citations above in the discussion of the *zimmun* case – the gender restriction here is intended as faithful to the text – give the father warrant to act as he does.

If one considers the aggadic citations that we discussed first, one may view *LMH* as the application of a general rule of *gemilut hasadim*, or as Nachmanides would have it, "do the right and the good," to the world of transactions over tangibles, whether those transactions are overtly commercial or not.[39] These transactions stand in contrast to acts of *gemilut hasadim* such as visiting the sick, or burying the dead in which nothing tangible is transacted. This application of *gemilut hasadim* greatly broadens the potential application of doing the right thing to the realm where most individuals operate on a day to day basis, particularly with those outside one's immediate family. It suffuses the spirit of *gemilut hasadim* more universally in the realm of the everyday, and makes acting in this manner something that is "without measure."

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[39] As discussed above, the case of the *zimmun* extends the warrant to act *LMH* to interrupting a meal to saythe *birchat hamazon.* It is also a case of waiving an entitlement, here to finish the meal comfortably before the *birchat hamazon.*

Notice also that the choice of what to do in a given situation is not perfectly specified. The one with the entitlement can weigh the circumstance of the one who is obligated in a completely *ad hoc* fashion. The ethical principle here is completely unspecific: it gives the reader the opportunity to judge how one might act mercifully, without regard to the strict letter of the law, or how one might arrive at precisely what is the 'right thing to do' – and while this may be unnerving to the formalist, it is entirely consistent with the sense of personal autonomy married to a strong Jewish ethical sense that marks the modern liberal Jew.

In summary,[40] we can say that *LMH* in these cases is implicitly or explicitly contrasted with legal duties – *LMH* defines an action that is distinct from, and defined in relationship to the law; the cases seem to be about legal duties, but by the end of the case, the person is said to act *LMH*, defeating the notion that these acts were absolutely obligatory in the first instance. All (except the *zimmun* case) are about relinquishing or waiving an entitlement or right, and that the party that waives does so out of concern for the other party, who otherwise would be harmed or disadvantaged if the right were exercised. One who waives a right gives something up – either tangible or intangible for the sake of another. In every case, it's considered an act of compassion or generosity. The action is not necessarily charitable – it's not necessarily about one who is poor with respect to the one who waives. And the actions are not necessarily to rectify an injustice. *LMH* is not an absolute standard, but is situational or contextual. The guidance is from a combination of citations – the exegesis of Exodus 18:20, and the *aggadah* in Berachot

[40] This summary flows from the analysis of the cases above, and is informed by the article by Louis Newman, "Law, Virtue and Supererogation in the *Halakhah*: "The Problem of '*Lifnim Mishurat Hadin*' Reconsidered" *Journal of Jewish Studies 40* (1989), 61-88.

7a. But there is no specific guidance about how to apply these notions. *LMH* is not a "higher law" – it is not mere obedience to conscience, but rather guided by these passages. Whether *LMH* is a moral or legal duty is not clear: the medieval commentators who wrote about *LMH* take different views, as we will discuss immediately below.

6. The Medieval Commentators

The medieval commentators had much to say about *LMH*. Generally, the Ashkenazic writers tended to elevate *LMH* to a legal obligation, not a choice; whereas the Sephardic writers kept it in the realm of optional moral duty. The commentators also divided on whether *LMH* is incumbent on all, or whether its obligatory character is limited to a specific group of individuals of higher standing. It will be seen below, that these medieval commentators have defined, for the most part, the parameters of the modern discussion, at least in Orthodox circles.

Is LMH Mandatory? The Ashenazic Commentators

Tosafot to *BM* 24b, s.v. *lifnim*, grade *LMH* into three different levels. The cases where LMH is explicitly adduced are the cases best characterizing what is meant: generally one is bound by a specific duty (or *din*), a particular individual is privileged with an exemption, and *LMH requires* [emphasis added] one to waive his right. These are, for example, the case of Rabbi Hiyya in the money changer case, and Rabbi Ishmael in the unloading case. The second level is a case in which no exemption is adduced, but an individual is expected to act *LMH*. The lost property case exemplifies this level – there is no exemption or privilege to be waived, but one is expected to return the property, even after the owner's *ye'ush* (despair of finding it). The third level is *not* an example of *LMH*: it is a case where one has caused loss to another, and nevertheless Jewish law advises the one damaged to waive his claim for damages. The porters

breaking the wine casks are an example of this level. One might add to *Tosafot* that in this case, the injured party does not act *LMH*, but rather the judge compels him to waive his right. That Rav quoted Proverbs acknowledges that the law regarding damages is at odds with his decision in this case.

Rabbi Eliezer b. Nathan (*Ra-avan*) took the position that if an individual is a person of means who can afford to act *LMH,* then he is obliged to do so, and a court can so compel him. In this interpretation, he is followed by *Ra'avia,* Mordechai b Hillel HaKohen, and Rabbi Meir of Rothenberg.[41] But as Shilo points out, the legal system does not countenance the financial situation of a claimant and this view of *Ra'avan* and others is something less than a full legal norm, albeit one that is between the purely legal and the moral. Enforcement is only admitted when the circumstance is such that the one with the exemption has the means to waive it.

Rabbi Isaac of Corbeille in *Sefer Mitzvot Katan*, enumerates *LMH* as one of the 613 commandments.[42] Later commentators, Joel Sirkes and R Menahem Mendel Krochmal take this view.[43] Their argument stems from an analysis of the case of the porters who broke the wine casks. At the end of that case, the Amora is asked whether the owner of the broken casks is obliged to waive his claim for damages and is obliged to pay the wages of the porters. The Amora Rav said he was so obliged. This analysis of course, turns on whether the action required can be characterized as *LMH*, even though the term *LMH* appears nowhere in that case, and the particulars of the case are substantially different from the cases where *LMH* is mentioned. Further, the Amora does not quote

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[41] Summarized in Shilo, 366.
[42] *Semak* 49, as quoted by Shilo, 371.
[43] As summarized by Shilo, 367

the law, he quotes Proverbs, recognizing that the law is otherwise in this case. Sirkes and argue that *hayav* is used in the lost article case to describe the requirement to return the lost article. But, as Shilo observes, *hayav* is used not merely in cases compelling performance, but also in cases where the imperative is only moral.

Is LMH Mandatory? The Medieval Geonic and Sephardic Commentators

Rabbenu Hananel, in his commentary on the lost article case, says: "If he *wants* [emphasis added] to act *LMH* he returns [the lost property].[44] The decision is up to the finder. The *Ritba* also explains this passage in a similar way. The Provencal R. Jonathan explicitly states that one cannot be compelled to act *LMH*, as does Asheri.[45]

Joseph Caro, in *Bet Yosef* to *Tur Hoshen Mishpat* writes as follows:

> R. Yeruham wrote in the name of Asheri that one does not compel action in *LMH*, and this is self-evident in my view. And I am amazed with what the Mordekhai wrote in Chapter two of Metzi'a that one is compelled to act *LMH;* from the Talmudic cases he cites as proof, there is no mention of compulsion.[46]

Upon Whom is LMH incumbent?

This is a distinct question from whether *LMH* is obligatory or optional. The foremost commentator taking the position that *LMH* is incumbent upon all is Nachmanides. He writes in his commentary on Deuteronomy 6:18:

> And our rabbis have a fine interpretation of this: ("And you shall do the right and the good"). They said: this refers to compromise and *lifnim mishurat hadin*. The intent of this is that, initially, God had said that you should observe the laws and statutes which God had commanded you. Now God says that, with respect to what God has not commanded, you should likewise take heed to do the good and the right in God's eyes, for God loves the good and the right. And this is a great matter. For it is impossible to mention in the Torah all a person's actions toward his neighbors and acquaintances, all of his

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[44] *Rabbenu Hananel* to *b.* Bava *Metzi'a* 24b as quoted in Shilo, 370
[45] *Ritba* to BM 24b; *Piskei HaRosh* BM Chapter 2, section 7, as quoted in Shilo,371
[46] *Bet Yosef* to *Tur Hoshen Mishpat* section 12, 8.

> commercial activity, and all social and political institutions. So after God had mentioned many of them such as "You shall not go about as a talebearer (Lev 19:6) you shall not take vengeance nor bear any grudge (Lev 19:18); You shall not stand idly by the blood of your fellow (Lev 19:16); you shall not curse the deaf (Lev 19:14), you shall rise up before age (Lev 19:32) and the like, God resumes to say generally that one should do the good and the right in all matters, so that there are included in this compromise, *lifnim mishurat hadin* and [matters] similar to that which they [the Rabbis] mentioned concerning the law of the abutter (*BM* 108) – even that which they said "whose youth had been unblemished" (Ta'anit 16a), or "He converses gently" (Yoma 86a) so that he is regarded as perfect and right in all matters.[47]

This complements what Nachmanides writes in explaining Lev 19:2:

> After giving the specific details of how business is to be conducted fairly, the Torah concludes, "Do what is right and good in the sight of Adonai" (Deut 6:18), including a general demand for honesty and euqity within the specifics of the law. So one must actually *go beyond the letter of the law* and act in a way that will win the approval of others, as I shall explain (God willing) when I reach that text.[48]

Notice here, however, that Nachmanides assimilates *LMH* to the injunction to do "what is right and good." Here he is taking the position of other Sephardic writers, who do not assimilate *LMH* to *din*, but consider it optional. Nachmanides makes *LMH* a moral duty, not a legal one; but he makes everyone subject to it.

Maimonides' discussion of *LMH* is in a number of sections of *Mishneh Torah.* His analysis refers directly to some of the specific cases in the Bavli. He observes, in each of the cases he cites, that the main figure in the cases, the individual who acts *LMH*, is a figure of high status – a Rabbi or a Rav, and when he waives his exemption and acts *LMH*, he is acting to treat those of lesser social or religious status in a kind and generous manner. Maimonides extrapolates from the stature of the figures in the specific cases of

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[47] *Torat Hayim*, loc. cit. (commentary on Deut 6:18)
[48] Torat Hayim, loc. cit. (commentary on Lev 19:2).

LMH in the Bavli to the view is that acting *LMH* is a requirement upon the *hasid*, the pious one, but not necessarily a requirement of the ordinary man.

Maimonides[49] describes the most desirable set of character traits as the mean between the extremes. In this, Maimonides was clearly influenced by Aristotle. One who lives according to the mean is a *hacham*, a wise one. Further, Maimonides argues that living a life according to the mean is required, since it is the "good and upright way." Biblical support for this is found at Deuteronomy 28:9, "and you shall walk in God's ways." God is the model for acting according to the mean: "Just as he is called gracious, so you shall be gracious; just as God is called merciful, so you be merciful."

Somewhat inconsistently, Maimonides, in *De'ot* 2:1-2 says there are two character traits for which it is forbidden to act according to the mean. These two character traits are arrogance and anger. In the case of arrogance:

> [A] man may [not] be merely humble, but he must have a lowly spirit, and his spirit be very submissive. Therefore it was said of Moses, that he was "very humble," and not merely humble. (Numbers 12:3). And therefore the wise men commanded: "Have a very, very lowly spirit." Likewise, anger is an extremely bad character trait, and it is proper for a man to move away from it to the other extreme, and to teach himself not to become angry even over something it is proper to be angry about....The wise men of old said: "Anyone who is angry – it is as if he worships idols." If he is a wise man, his wisdom departs from him; if he is a prophet, his prophecy departs from him.

Maimonides is rejecting the Aristotelian mean for these two character traits, and the one who is successful at the effort to cultivate extreme meekness and impassivity is the *hasid.* For Maimonides, the *hasid* is exemplified by the main figures in each of the cases of *LMH* discussed above.

He writes further in *De'ot* 1:5:

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[49] *Mishne Torah, De'ot* 1:1-4.

> One who shuns pride and turns to the other extreme and carries himself lowly is called pious. This is the quality of piety. However, if he separates himself [from pride] only to the extent that he reaches the mean and displays humility, he is called wise (*hacham*). This is the quality of wisdom.....The pious of the early generations would bend their temperaments from the intermediate path towards the two extremes. For some traits they would veer toward the final extreme, for others toward the first extreme. This is referred to as [behavior] *lifnim mishurat hadin.* We are commanded in these intermediate paths – and they are good and straight paths – as it is written: "And you shall walk in God's ways."

Having made the distinction between the *hacham* – the wise one – who will tend toward the mean, and the *hasid* – the pious one – who will cultivate extreme meekness and impassivity, Maimonides goes on to draw a distinction between behavior that is expected of the *hasid,* but not necessarily of the *hacham.*

> In *Yesodei HaTorah*, Chapter 5:11, Rambam continues his discussion of *LMH:*
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> There are other deeds which are also included in [the category of] the desecration of [God's] name, if performed by a person of great Torah stature who is renowned for his piety - i.e., deeds which, although they are not transgressions, [will cause] people to speak disparagingly of him. This also constitutes the desecration of [God's] name.
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> For example, a person who purchases [merchandise] and does not pay for it immediately, although he possesses the money, and thus, the sellers demand payment and he pushes them off; a person who jests immoderately; or who eats and drinks near or among the common people; or whose conduct with other people is not gentle and he does not receive them with a favorable countenance, but rather contests with them and vents his anger; and the like. Everything depends on the stature of the sage. [The extent to which] he must be careful with himself and *go beyond the line of the law* [depends on the level of his stature.]
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> [The converse is] also [true]. When a sage is stringent with himself, speaks pleasantly with others, his social conduct is [attractive] to others, he receives them pleasantly, he is humbled by them and does not humble them in return, he honors them - even though they disrespect him - he does business faithfully, and does not frequently accept the hospitality of the common people or sit with them, and at all times is seen only studying Torah, wrapped in *tzitzit,* crowned with *tefillin,* and carrying out all his deeds *beyond the line of the law* - provided he does not separate too far [from normal living] and thus become forlorn – to the extent that all praise him, love him, and find his deeds attractive - such a person sanctifies [God's] name. The verse [Isaiah 49:3]: "And He said to me: "Israel, you are My servant, in whom I will be glorified'" refers to him.

Notice Maimonides is saying that even if a transgression committed by a Torah sage is not technically a violation of the law, if one's behavior causes people to speak disparagingly about it, then it is a desecration of God's name. One who acts according to the principle of sanctification of God's name is characterized as a *hasid*, and as someone who acts *lifnim mishurat hadin*. He also displays the virtues of meekness and impassivity. Maimonides then goes on to quote some of the cases of *LMH* from the Bavli.

In The Law of Robbery and Return of Lost Articles, 11:7, Maimonides summarizes the case of the lost article:

> Different rules apply if the majority of the inhabitants of the city are Gentiles. If a Jew finds a lost object in a place where most of the people located there are Jewish, he is obligated to announce its discovery. If he finds it on a public thoroughfare, a public market place or in a synagogue or a house of study where gentiles are often found, or in any place where many people are found, the finder may keep the object he discovers.
> This applies even when another Jew comes and describes marks with which the object can be identified. We assume that the owner despaired of its return when it fell, for he will say: "A gentile found it." Although a person is entitled to keep a lost article that he discovers, one who wishes to follow a good and an upright path should *go beyond the line of the law* and return the lost article to a Jew, if he describes marks with which the object can be identified.

And in the Laws of Robbery and Return of Lost Articles, 11:17:

> A person who seeks to follow a good and upright path and *go beyond the line of the law* should return a lost article at all times, even if it is unbecoming to his dignity.

In Laws of Murders and Protection of Life, 13:1-5:

> If, on the road, one encounters a person whose animal is crouching under the weight of its burden, he is enjoined to unload the burden from the animal whether the burden is suited to it or too heavy for it. This is a positive commandment, for Scripture says: "You must nevertheless raise it with him (Ex 23:5). If the passerby is a priest and the animal is crouching in a cemetery, he may not defile himself on its account, just as he may not defile himself in order to return lost

> property. Similarly if one is an elder unaccustomed to loading or unloading he is exempt seeing that the act is not in keeping with his dignity. This is the general principle: If the animal were his own and he would unload and reload it, he is obligated to unload and reload it for a colleague. If he is pious (*hasid*) and *goes beyond the line of the law,* even if he is a great *nasi*, and sees an animal belonging to a colleague fallen under a load of straw, reeds or the like, he should unload and load it with its owner.

For Maimonides, the key element in all of the specific cases of *LMH* in the *Bavli* are that the main figure in the cases is an individual of superior social status, and one who is a Torah sage (all of these figures are named transitional or Amoraic sages in the Talmud) who is dealing with an ordinary person, a member of *am ha-aretz.* Robert Eisen argues that Maimonides formulated his position on the need of the *hasid* to act *LMH* from the Bavli cases.[50] Maimonides enjoined this behavior also on a *nasi* – an individual of high rank – who might not be a Torah scholar.

Eisen also refers to *Berachot 7a*, citing there the need to quell anger to allow mercy to prevail. Eisen argues that this passage must also have had a significant impact on Maimonides' formulation of the ability of the *hasid* to suppress anger to an extreme degree. Eisen's argument is that for Maimonides, *LMH* is not only a principle denoting a certain type of behavior, but also that it emanates from an ethical disposition of a specific sort. Eisen concludes that Maimonides viewed *LMH* as optional for the many, but aspirational; but required for the *hasid.*

7. Is There in Jewish Tradition an Ethic Beyond *Halakhah?*

a. Orthodox Viewpoints

This question has received considerable attention in the scholarly literature in the last thirty years, mostly from Orthodox scholars. To a large extent, the sources of these

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[50] Robert Eisen, "'*Lifnim Mishurat HaDin*' in Maimonides' Mishne Torah", *The Jewish Quarterly Review*, LXXXIX, Nos. 3-4 (January – April 1999): 291-317.

writers' views can be tracked back to the medieval commentators, particularly to the Ashkenazic commentators – which is not surprising, given the patrimony of modern Orthodoxy. Before considering what Orthodox scholars have to say about *LMH*, it is worthwhile setting forth the Orthodox position in general, so that the position of the scholars we discuss on *LMH* can be understood in this context. While it would be presumptuous and incorrect to posit a single Orthodox position, the review article on "Law and Morality"[51] in the *Encylopedia Judaica* gives a certain imprimatur to the views of its author, Saul Berman, also one of the scholars writing on *LMH*.

According to Berman, there is no definitional distinction between legal and moral norms in the Bible. Both are presented via revelation; moral norms through prophetic revelation. The authority of both is divine command. The breaches of social morality which form the prophetic critique are all premised on legal-moral behavioral norms, that is, the 'immorality' of the Jewish people was in reality 'illegal' behavior.

In the Tannaitic period, Berman cites the development of three types of relationship between the moral and the legal: morality as a source of law, morality as a source of private, higher standards of legal liability, and morality in legal form. In the first category, Berman cites tannaitic legislation where morality was a source or motive: *mi'penei darkhei shalom* ("in the interest of peace") that is to prevent communal conflict, and *mi-penei tikkun ha'olam*, "for the benefit of society." Examples of the former include the protection of the reputation of individuals or groups and exclusion of groups from societal privileges and responsibilities. Examples of the latter include prevention of

[51] Saul Berman, "Law and Morality", *Encyclopedia Judaica, Second Edition, Volume 12*, 2007.

bastardy and *agunot*, deterrence of theft, encouragement for lending and returning property, and encouragement of care for orphans and widows.

In the Amoraic period, the role of morality as a source of law shifted from the realm of legislation to judicial interpretation. Two standards dominate: "doing the right and the good" (and here Berman cites the sugyas referred to below in *Bava Metzi'a*), and *darkhei noam*, "ways of pleasantness," directed at judicial interpretation that would avoid loss of personal dignity or injury to a marital relationship.

Morality as a source of private, higher standards of legal liability is represented by a number of devices created to address issues that are not subject to law, but where the individual is made to feel liable to Heaven. Some of these are discussed below in footnote 57. Berman cites "two uniquely amoraic devices" which he terms "legal fictions:" *middat hasidut* (pious behavior) and *lifnim mishurat hadin*. He characterizes these as attempts to explain tannaitic statements (in our case, most of the sugyas in which *LMH* appears) which in reality might have been based on completely different reasons. In Amoraic times these were not enforceable, but as we have seen in our discussion above, medieval writers tried to make them enforceable.

Morality in legal form results from the rabbinic formulation of moral principles in legal form. "The unwillingness of the rabbinic mind to accept seriously any substantial gap between the two realms is evidenced by the gradual assimilation into the realm of law of forms of behavior which were not initially enforceable but were formulated in the terminology of legal behavior." The prime categories are where immoral behavior is compared to illegal behavior, and where the seriousness of the behavior is indicated by a disproportionate penalty.

In sum, this view of the law has these key characteristics:

- There is not a substantial difference in authority between laws and moral standards, both are derived from revelation.
- Ideally, most morality is ultimately translated into law or judicial rulings.
- A smaller category of morality not subject to law or judicial ruling is conveyed in categories defined by the rabbis, and where the sanction is some form of communal censure.
- The entire set of morals and law thus defined is determined by rabbis, and given to the community with the same authority as revelation. In this system, there is little or no room for individual decision-making about what is moral and what is legal.

Of the modern Orthodox scholars writing on *LMH*, Berman's views on *LMH* are entirely consistent with the general views described above. The point of the first part of Berman's analysis is to reduce presumed examples of *LMH* to *din* itself, thus denying any reality to the notion that the individuals in the cases acted in any other way but in strict adherence to the law itself. He summarizes this argument by stating that the search for equity is confined to the law itself, and here he means *din.* His underlying presumption is that *LMH* is a judicial standard, not a description of behavior in a transactional situation. We have examined this position at length in the section on the cases themselves. Berman, in the second section of his paper, analyzes the meaning of *LMH* in the aggadic portions as somewhat different from those in the cases. In his view, *LMH* in the aggadic portions merely refers to guidance for human relationships. This interpretation "does not propound *LMH* as a competing judicial standard *[sic]* but rather as a descriptive

term..."[52] Berman's analysis of the notion in the exegesis of Exodus 18:20 that Jerusalem was destroyed because they gave judgments in accordance with the law and not *LMH* is as follows:

The two passages (the bazaars of Beth Hini were destroyed in *BM* 88a-b and that Jerusalem was destroyed in *Yoma* 9b because they did not act *LMH*) have an identical thrust – the suggestion that destruction because the Jews observe biblical law to the neglect and detriment of Rabbinic law, and that this was what R Johanan meant by his statement. [53]

This analysis suffers from anachronism.[54] (There was no rabbinical law at the destruction of the first temple, and hardly any to speak of at the destruction of the second temple). His analysis of the notion of *LMH* as used by the Amoraic commentators in this portion is that they meant for mercy to be used in the process of man judging his fellow man [*sic*]. In sum, he says: "The sages did not turn outside the legal system to any vague "spirit" or unspecified "higher law." The term *LMH* designates rather the use of the legal system as a whole, its positive law and its superceded law, to produce just results."[55]

J. David Bleich offers a view that admits *LMH* is a standard of conduct that is not totally co-extensive with *din*, as Berman would have it. He argues that the literature is "replete" with examples of *LMH*, and therefore, of course there is a standard of conduct beyond the simple *din* itself. But for Bleich *LMH* is an integral part of *halakhah:* he quotes Isaac of Corbeille, a French Tosafist who wrote in the 13th century. Isaac of

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[52] Berman, 1977, 169
[53] Berman, 1977, 171
[54] That Berman would make such an anachronistic argument after attending so carefully to the historicity of the law in his analysis of the cases is startling.
[55] Berman, 1977, 173.

Corbeille wrote in his *Sefer Mitzvot Katan* that *LMH* is normative and binding and "endowed with the essential attributes of *halakhah.*"[56] Moreover, he follows the prevailing medieval view that *LMH* is normative and binding. He discusses the differences between the *Rosh* (who wrote in the late 13th and early 14th century and who was the last of the Tosafists and the father of the *Tur)* – that a court cannot compel action according to *LMH* with the Mordechai (a 13th century German Tosafist whose work was one of the sources of the Shulkhan Aruch), who cites the *Ra'avan* (a 12th century German Tosafist) and the *Ra'avia* (grandson of the Ra'avan, a late 12th century early 13th century Tosafist) that a court can compel action *LMH.* He cites the porter case as proof that LMH can be compelled by a court. But as we have discussed earlier, the porter case does not explicitly mention *LMH*, and structurally is quite dissimilar to the other cases in which *LMH* is cited.

Bleich then circumscribes his claim of justiciability, saying that not all cases of *LMH* are actionable in a court. Actionability, he argues, is the exception and not the norm. He then cites a number of categories of *LMH* which do not ordinarily give rise to actionable claims.[57] This is a remarkable list – but the only thing that ties them to *LMH* as Bleich understands it, is that they are actions that are expected to be taken, but if not,

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[56] Bleich, 1977, 527.

[57] These include *dinei hashamayim*, obligations in which the individual is culpable under the "Judgments of Heaven;" *Nikra Rasha*, acts of omission or commission in which a person can publicly be called an evil person; *mi shepara*, a formal curse on a vendor who takes unfair advantage; *latzet y'dei shamayim*, a duty imposed by the hand of heaven; *mehusar amana*, a untrustworthy person subject to censure; *ain ruach hachamim noheh heimeinu*, a person who does something opprobrious, while not illegal, such as disinheriting one's children; *ein lo alav eal ta-aramot*, an agreement to do a service canceled by one party, where the other party has a grievance; and *midat hassidut*: an example of which is the requirement of a rich wayfarer who relies on charity on the road, to make good the charity he received when he returns home.

then subject to non-judicial sanctions. If one assumes that *LMH* is not subject to any sanction at all – as Caro seems to say in the *Shulhan Aruch*, then there is nothing that ties *LMH* to any of these, except perhaps *middat hassidut*. He then assimilates the expectations in these cases, and the cases of *LMH*, to *din*. But of course, that begs the question as to what *din* is: is *din* limited to what is actionable, or to what is actionable and what is merely subject to censure or reproof if not performed? This is a semantic sleight of hand, which Aharon Lichtenstein clearly identifies in his article, to which we will turn shortly. Bleich then goes on – seeming to respond indirectly to Borowitz (whom will we discuss in the next section) that any ethic discovered by reason, or any subjective morality, is out of bounds in Judaism (at least Bleich's version of it). He cites *Eruvin* 100b: "If the Torah had not been given, we could have learned modesty from the calf, not to rob from the ant, chastity from the dove, proper conjugal behavior from the rooster." Bleich argues that the phrase "If the Torah had not been given.." indicates that these maxims have been subsumed in Sinaitic law, and therefore there is no need to rely on natural morality, when Jews have revealed law. Bleich then relaxes what might be termed his proto-formalistic stance, saying that there are broad categories of conduct, such as "You shall walk in his ways" (Deut 28:9) and "You shall be holy for I am holy" (Lev 19:2). Bleich says these statements are primarily "ontological" and only secondarily about human actions. "The command is normative, but relative, commensurate with each individual's ability." Here Bleich is channeling Maimonides, but in a much more limited way. He cites the case of Rabbi Judah and the calf from *BM* 85a:

> A calf is going to slaughter and hangs its head under the Rabbi's cloak. The Rabbi says "Go, for this you were created." In heaven they said: "Since he has no

> mercy, let suffering come upon him." One day when his maid was sweeping the house, some young weasels were lying there and she was sweeping them away. Let them be, it is written: "And his tender mercies are over all his works." (Ps 135:9). In Heaven they said: "He is compassionate, so let us be compassionate to him." And so his pain was relieved.

Bleich writes that this story makes the distinction between normative law and ethical conduct above and beyond the law. "Normative law applies to everyone, but man must aspire to a higher standard, which is posited as a moral desideratum, albeit not a norm enforceable by human courts." He voices concern that trying to capture the essence of the Divine may degenerate into antinomianism. He ends up accepting the idea that there is an ethic beyond recorded *halakhah*: it is in *aggadah*, and by its nature can't be captured in clear unequivocal formulas. Bleich's overall strategy is to concede that there is an ethic beyond *halakhah*, but to make that realm more general and highly dependent entirely on *aggadah*, even as he removes *LMH* from that realm, and places in firmly in the realm of obligatory *halakhah*. This of course vitiates the plain point of the cases: that acting *LMH* is embedded in the transactions that are otherwise subject to halakhic rules. The strategy appears to substantially downplay the notion that the transactions described in most of the cases of *LMH* involve entitlements or rights and corresponding duties, and that the holders of entitlements may waive them or not. While Bleich never directly addresses this issue, it is an implicit sticking point for both Berman and him. What is left is a troubling ambivalence in Bleich's position, in which *LMH* is assimilated to *din*, not by the technique that Berman uses, but by assimilating *LMH* to a category of obligatory behavior, some cases of which are justiciable, and some cases which are not.

Shmuel Shilo, also an Orthodox scholar, has a more expansive understanding of *LMH* than does Berman or Bleich, and one that (in this reader's opinion) is more faithful

to the texts, because his analysis admits that one has choices within the context of the law itself – that the choice of a course of action is not compelled by the law, and that choice instead is influenced by the circumstance and the general ethical principles that accompanies the cited cases. Shilo reviews the medieval commentators, and concludes that *LMH* is not a legal imperative equal to other legal imperatives. One clearly *cannot* be forced to act *LMH,* according to Shilo.

Shilo presents the views of Maimonides, as we have discussed in the last section of this paper, and buttresses his support of this view by adducing later scholars, such as Rabbi Azaria Figo (a German rabbi of the 19th century) and Rabbi Shlomo Ha'Kohen of Vilna (a late 19th century rabbi), who hold similar views, that the greater man carries a higher expectation upon himself, and that acting *LMH* is not incumbent on the ordinary man.

Shilo finally compares *LMH* to other categories of moral behavior. Shilo recognizes that scholars have used the phrase *LMH* in a very general sense to refer to conduct that goes beyond what strict law requires. Most commonly, he writes, *LMH* is equated to *midat hassidut* – the standard of men of piety and *gemilut hesed* – deeds of lovingkindness. Shilo recognizes that *LMH* is unique and cannot be assimilated to any of these other categories.

> Shilo[58] concludes by quoting Lord Moulton, an early 20th century British jurist:[59]
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> [This is] the Domain of Obedience to the Unenforceable. Lord Moulton has pointed out "the dangers that threaten the maintenance of this domain by the "countless supporters of the movement to enlarge the sphere of Positive Law," and we have seen this threat in the Jewish legal system by those who attempt to

[58] Shmuel Shilo, *op cit.*, p 387.
[59] J.F. Moulton, "Law and Manners," *The Atlantic Monthly*, July 1924, pp 1-5, as quoted in Shilo, 387.

> make *lifnim mishurat hadin* actionable and enforceable even by coercion. We fell that in spite of some voices to the contrary in the later development of the *halakhah, lifnim mishurat hadin* is an excellent example of what Lord Moulton is discussing, when he writes: "In that domain of action, there is no law which inexorably determines our course of action, and yet we feel that we are not free to choose as we would...The obedience is the obedience of a man to that which he cannot be forced to obey." He is the enforcer of the law upon himself...The infinite variety of circumstances surrounding the individual and rightly influencing his action make it impossible to subject him in all things to rules rigidly prescribed and duly enforced. Thus was wisely left the intermediate domain, which, so far as Positive Law is concerned, is a land of freedom of action, but in which the individual should feel that he was not wholly free....But there is a widespread tendency to regard the fact that they can do a thing as meaning that they may do it. There can be no more fatal error that this. Between 'can do' and 'may do' ought to exist the whole realm which recognizes the sway of duty, fairness, sympathy, taste, and all the other things that make life beautiful and society possible." [Shilo concludes by asking]: Does the Jewish system of values and law agree with Lord Moulton that "the true greatness of a nation, its true civilization, is measured by this land of Obedience to the Unenforceable?"

It is not surprising that Shilo finds this piece by a presumed Christian so congenial – it is consistent with Nachmanides' commentary on Deuteronomy 6:18, as cited and discussed above.

Menachem Elon, in his definitive treatise on Jewish law,[60] also discusses *LMH*. He writes that *LMH* is an example of a moral imperative that over time was transformed into a legal duty. He dwells not at all on the instances of *LMH* in the Bavli, but instead immediately jumps to the case of the porters to illustrate how acting more generously than the strict law may sometimes be an enforceable legal norm. He discusses the medieval commentators we have discussed in the preceding section, and then approvingly quotes Joel Sirkes in his *Derishah* to *Tur Hoshen Mishpat* 1 as follows:

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[60] Menachem Elon, *HaMishpat Ha-Ivri* (vol. 1 of *Jewish Law, History, Sources, Principles*. Philadelphia: Jewish Publication Society, 1994), 165-176.

> What is meant by "a judgment that is completely and truly correct"...is that one should judge in accordance with the particular place and time, so that the judgment is in full conformity with the truth, rather than always inflexibly apply the law precisely as it is set forth in the Torah. For sometimes a judge's decision must go *lifnim mishurat hadin* and reflect what is called for by the particular time and circumstances. When the judge does not do this, then even if his judgment is correct, it is not "a true judgment to its very truth." This is the meaning of the statement of the Sages: "Jerusalem was destroyed because they based their judgment on the law of the Torah and did not go *lifnim mishurat hadin.*"

The thrust of Sirkes' comment is to make *LMH* a technical judicial tool, one that authorizes in certain circumstances a decision in an individual case that is more just than simply applying a rule. Here Elon is following (or perhaps leading) the other Orthodox scholars we have discussed, particularly Berman, who consider *LMH* a technical legal term.

The irony of Elon's position however, is demonstrated in the citations he provides of modern cases in the Israeli court system. In one case, an employer was sued for negligence in not properly supervising a security guard, who, while away from the job, killed the husband and father of two plaintiffs with a company-issued revolver. The trial court found that the causal connection between the employer's negligence and the killing of the deceased had not been established, so damages were rejected. The respondent proposed to compensate the plaintiffs more generously than the law allowed. The court wrote in its opinion:

> In our current legal system [in the state of Israel], we do not compel anyone to act more generously than the law requires; such action is left to the initiative and will of the party involved. However, the expression by the judge of such an aspiration in certain circumstances would seem to be appropriate.....

Another justice on the court wrote this:

> "...I strongly dissent from the objective revealed between the lines of the opinion of my distinguished colleague, that seeks to elevate payment of compensation lifnim mishurat hadin to the status of a settled general principle of the law of

> torts.....such an approach will necessarily bring about the filing of frivolous appeals and thus add to the difficulties with which the courts are struggling; for if one is not required to rely on arguments that rest on the law alone in order to obtain compensation, why not take every case up through the court system to the very highest court possible? ....Moreover, a legal system that deliberately chooses to abandon the boundary lines marked out in the substantive law and to add, as an additional and alternative stratum and as an established part of the system, a recommendation for the payment of compensation beyond what the law requires, necessarily acts according to impossibly vague standards, which ultimately depend upon the fortuity of which particular judge sits when the case is reached. Such a system will, over the course of time, bring about confusion in the law and adversely affect the rights of the parties. The absence of clear standards may also often actually produce inconsistent results.

The first judge wrote in response that this was an unusual case, and did not mean to make *LMH* a generally applicable principle.

In another case, where a Kibbutz held on to a deposit for an apartment, and neither provided the apartment nor returned the deposit, the court held that, according to the applicable law, it could not award damages, but nevertheless ruled that the kibbutz pay the plaintiff's legal costs, as a way to show the court's displeasure with the unwillingness of the kibbutz, in fairness, to return the amount of the deposit, with adjustment to its current value.

Elon intends these cases to show the tension in the law between making *LMH* required – with all the ambiguity, confusion, and loss of equity for other cases – and simply urging *LMH* upon the party who should do it voluntarily. Compulsion of *LMH* however, creates an additional problem – it vitiates the voluntary nature of *LMH* that makes it a hallmark of morality.

The seminal article on *LMH* – the one that is quoted most often - is "Does Jewish Tradition Recognize an Ethic Independent of *Halakhah*" by Aharon Lichtenstein.[61] Lichtenstein poses this central question: "Are the demands of *halakhah* so definitive and comprehensive as to preclude the necessity for – and in a sense the legitimacy -- of any other ethic?"[62] Lichtenstein assumes that *halakhah* constitutes or at least contains an ethical system:

> "The extent to which *halakhah* as a whole is pervaded by an ethical moment or the degree to which a specific mitzvah is rooted, if at all, in moral considerations is debatable.....however...the ethical element is presented as the reason for seeking knowledge of God.....[t]he religious and the ethical are...inextricably interwoven. What holds true of religious knowledge holds equally true of religious action. This fusion is central to the whole rabbinic tradition. From its perspective, the divorce of *halakhah* from morality not only eviscerates but falsifies it.[63]

Lichtenstein further argues that one can only speak of a complement to *halakhah*, not an alternative to it. He points out that while there are circumstances in which *halakhah* might be breached in exigent situations – the preservation of life, the enhancement of human dignity – these breaches are sanctioned within *halakhah.* If however, we believe that everything can be looked up, every moral dilemma resolved by reference to canon or code, the notion is "palpably naïve and patently false."[64] And, Lichtenstein concedes, "that even the full discharge of one's whole formal duty as defined by the *din* often appears palpably insufficient."[65] Lichtenstein then cites Nachmanides' commentaries on Lev 19:2 and Deuteronomy 6:18:

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[61] Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of *Halakhah*?" " in *Modern Jewish Ethics*, (ed. Marvin Fox Columbus, OH 1975), 62-88.
[62] Lichtenstein, 66.
[63] Lichtenstein, 67.
[64] Lichtenstein, 68.
[65] Lichtenstein, 68.

> For it is impossible to mention in Torah all of a person's actions toward his neighbors and acquaintances, all of his commercial activity, and all social and political institutions. So after God mentioned many of them, God resumed to say generally that one should do the good and the right in all matters, to the point that they are included in this compromise, *lifnim mishurat hadin*...

Lichtenstein writes that only if one interprets *halakhah* and *din* to be co-extensive, then ethics and *halakhah* are separate and independent. If one interprets, as he does, *halakhah* as "multiplanar and many dimensional" – that is, including much more than what is required or prohibited by specific rules, then the ethical moment is an integral part of *halakhah*. The demand to transcend *din* is part of *halakhah*. He buttresses this argument by quoting the exegesis of Exodus 18:20, which we have already discussed, and is found in *BM* 30b, BK 99b-100a, and both the *Mechilta* of Rabbi Ishmael and that of Shimon bar Yochai. He argues that the conjunction of "good conduct" or *LMH* with thoroughly mandatory elements – by assimilating these to the laws and statutes in the same Torah verse – clearly indicate that it is mandatory. Lichtenstein acknowledges Maimonides' view, explicated above, but then says "every Jew has the obligation to aspire." He cites Maimonides, in *Hilchot De'ot* 1:5: Scripture, he says, ascribes certain attributes to God "in order to inform us that they are good and right ways and that a person is obligated to guide himself by them." Further, Lichtenstein interprets Maimonides to imply that even the 'median ethic', the one applicable to the ordinary individual, demands much that cannot be completely specified, and can be assimilated to *LMH,* or as Nachmanides would have it, the right and the good. Lichtenstein then goes on to cite the porter case as evidence that *LMH* is actionable. We have dealt with that claim above.

Lichtenstein then makes a more interesting argument. He quotes *Ketubbot* 103a that "we coerce over a trait of Sodom." He says that if *LMH* is intended to warn against

and prohibit actions that can be characterized as *midat Sodom* – intense selfishness, nastiness, or mindless apathy, or even merely the notion that what is mine is mine and what is yours is yours – then one cannot relegate *LMH* to the realm of supererogatory behavior – one must include *LMH* in the realm of the obligatory. He argues that *LMH* covers a range from rigorous obligation to supreme idealism. But one can hardly understand that statement. Either it's obligatory or not. Lichtenstein quotes the Maharal of Prague (a 16th century rabbi), who equates *gemilut hasadim* with *LMH*. The antithesis of *gemilut hasadim*, according to the Maharal, is that person who does not want to do any good toward another, standing upon the *din* and refusing to act *LMH*.[66] Lichtenstein cites Maharal's analysis of the Gemara's statement on the destruction of Jerusalem, saying it was not retributive, merely the natural consequence of relying wholly on a legalistic approach. (This of course, is a much better reading of that text than Berman's, above.) Supralegal conduct is the cement of human society. And the Maharal makes *LMH* the source of such coercion.

Lichtenstein then asks the obvious question: isn't this a feat of semantic legerdemain? That is, isn't one really re-defining what is meant by *halakhah,* in order to include *LMH* specifically, and the ethical more generally, within it? Lichtenstein responds to that by saying that *LMH* is "less rigorous, less exacting" in the degree and force of obligation, but more flexible. Its duty is more readily definable in the light of the exigencies of particular circumstances. Once it is determined that in a given case, realization of "the right and the good" requires a particular course, its pursuit is mandatory. Laws are general rules, he writes, but *LMH* is "in the sphere of contextual

[66] Maharal, *Netivot Olam, "Netiv Gemilut Hasadim*" chapter 5. Cited by Lichtenstein, 76.

morality. The contextualist is guided by only the most universal and most local of factors, not by "middle-distance" guidelines. Lichtenstein hastens to add that Judaism has rejected contextualist ethics as self-sufficient. But in practice it's the *modus operandi* for a large part of human experience. These lie in the realm of *LMH*. In this area, he writes, the halakhic norm itself is situational: "Do the right and the good." The metaphors denote purpose and direction. In *din*, the Jew focuses on the specific commanded act; in *LMH* – he is looking before and after, concerned with results, as well as origins. Din involves fixed objective standards, *LMH* involves the demands that arise from a specific situation.

Lichtenstein then confronts another objection: having acknowledged that din is inadequate, *halakhah* acknowledges the need for a complement, only to neutralize this admission by claiming the complement has been part of *halakhah* all along. But the upshot is that the tradition does recognize an ethic independent of *halakhah*.

But of course, this statement really turns on how *halakhah* is defined: is it an exhaustive collection of *din*, or is *halakhah* defined more broadly to include the ethical guidance in specific situations that Lichtenstein so persuasively describes above?

His response is that integration with *halakhah* helps to define the specifics of supra-legal, or supererogatory conduct. Here he takes a step beyond Shilo, who acknowledges the plain sense of *LMH*, and quotes Moulton (who channels Nachmanides), but who still in the end restricts *LMH* to *halakhah*. Lichtenstein frames the issue differently and more expansively: related *halakhah* can help define the circumstances in which one might justifiably act *LMH*: where one might refuse to avail oneself of exemptions, or where one may disregard technicalities that may make a law

inapplicable in a given situation, when in fact the law, without the technicalities applies. Also included in this category are situations where a law can be enlarged or extrapolated to circumstances beyond its formal scope, but where the law and the situation at hand share a common objective. Lichtenstein seems to admit more judgment and interpretation to the decision making than does Shilo, let alone Bleich. Lichtenstein calls these the "penumbra of mitzvot,"[67] where relation to specific *mitzvot* are essential. But then he goes on to two more categories, saying not all supra- legal conduct is like this, tied to specific *mitzvot*. Sometimes, he writes, there are lacunae, which *LMH* fills in. And sometimes the halakhic connection is at a third level, when we are concerned about ethics as a "polestar." In one's relationship to God, sometimes supra-legal conduct is necessary. Lichtenstein concludes:

> Traditional halakhic Judaism requires adherence to *halakhah* and a commitment to an ethical moment that though different from *halakhah* is nevertheless of a piece with it and in *its own way* fully imperative [emphasis added].

Eugene Borowitz[68] uses this phrase characterizing the "ethical moment" as a point of departure for an extended liberal critique of Lichtenstein. Borowitz writes: "Lichtenstein does not say "...and commitment to an ethical moment that though different from *Halakhah* is nevertheless of a piece with it and fully imperative." Borowitz observes that the phrase "in its own way" dilutes the force of the ethical moment in Judaism. Borowitz restates Lichtenstein's argument that treats *LMH* not as optional but as obligatory, but argues that the sense in which it is obligatory is not at all

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[67] The choice of the word "penumbra" reminds one of Justice Douglas' finding a right of privacy in the "penumbra" of the Constitution's Bill of Rights.

[68] Eugene Borowitz, "The Authority of the Ethical Impulse in 'Halakhah,'" in *Studies in Jewish Philosophy*, (ed. Norbert M. Samuelson,Lanham, MD 1987), 489-506

clear in Lichtenstein's paper. Borowitz reviews Lichtenstein's discussion of the medieval philosophers (which we have also reviewed in the section preceding this one) and concludes that while Lichtenstein observes that the *rishonim* held *LMH* to be in principle actionable, and as a result part of *halakhah*, the fact that there is a wide divergence of opinion about the degree to which *LMH* is actionable or justiciable, it leaves open the question of just where the "ethical moment" stands within *halakhah*. Borowitz makes the further point that Lichtenstein recognizes that most Jewish authorities do not believe that *LMH* is a requirement in every case: for to act on *LMH* in every instance would render the law unenforceable. So Lichtenstein is left with "in its own way fully imperative," a formulation Borowitz finds unsatisfactory. Borowitz further critiques Lichenstein as holding both of these positions: the one elucidated on page 58 in the bottom paragraph, describing three levels of *LMH*, none of which are obligatory, and, at the same time, that *LMH* is obligatory.

Borowitz goes on to make the essential liberal point that "an ethics that was less than required would hardly have much Jewish status."[69] He characterizes Lichtenstein's position (and by extension, that of Shilo and Bleich) as

> [T]he law is authoritative unless occasionally supervened. The ethical must make a case for itself should there be a conflict between them. Even then, its legitimacy and functioning will be defined by the legists. The law is clear....[but] the supralegal functions in a hazy area... One who takes seriously the obligatory character of ethics...which ought to come as a categorical or unmediated experience, operates within Judaism in a quite qualified, mediated way. A substantial difference exists between a system of action in which ethics is commandingly primary and one in which, though it remains imperative, is can often be a subsidiary consideration.[70]

[69] Borowitz, 499.
[70] Borowitz, 499.

Borowitz goes on to observe that this is not merely an academic matter: the issues of *agunot, mamzerim*, and the status of women all turn on the primacy of the ethical over the power of law, as understood by traditional rabbinic authorities.

To make some sense out of the spectrum of opinion among the various writers, Louis Newman[71] offers these observations. One may analyze Jewish sources that treat ethical matters using categories drawn from contemporary philosophy, but it is difficult to do this, because *halakhah* blurs the distinction between law and ethics. Ethical obligations, like all divine imperatives will be understood as an integral part of *halakhah.* The close relationship between ethics and piety – between doing the right thing and doing the holy thing – tends to weaken the difference between moral obligation and doing more than is required. Acts that moderns would take to be doing more than is required would be regarded as duties in the Jewish tradition. So to try to impose these categories on rabbinic material will lead to confusion: that is, in Jewish law, there is not a sharp distinction between the legal and the moral. As we have seen in the discussion of the medieval writers and the modern take on the Talmudic and medieval material, the tradition does not speak with one voice. There is no single view about what constitutes "law" and what constitutes "ethics", and moreover, neither law nor ethics are fixed categories.

b. Reframing the Relationship between Ethics and Law – Liberal Views

LMH is first conceived in the Talmud as a voluntary action, driven by very general ethical concerns, where one foregoes an entitlement or privilege, or for a given situation, choosing between two alternative interpretations of the law. *LMH* then follows a trajectory among the Ashkenazic medieval commentators, who largely attempt to make

[71] Newman, 86-88.

LMH obligatory. This trajectory, as we have seen, seems to be driven by two complementary motives: one, to make *halakhah* self-sufficient and to avoid enfranchising individual Jews to make ethical determinations about when to 'go beyond the law;' and second, to develop the implicit general consideration for one's fellow human being that is the essence of *LMH* into a more refined notion of equity and fairness that can be the topic of judges' determinations. Hence the motive to include the case of the porters within the purview of *LMH*, even though, as we have observed, *LMH* is not mentioned in the case, and the court compelled the individual who hired the porters to recompense them despite their negligence. The view that *LMH* is obligatory is largely adopted by the Orthodox commentators discussed in the last section.

In order to discuss liberal ways to think about *LMH* and supererogatory acts in general, we first must analyze two areas: first, how is *LMH* similar and different from concepts closely related to it. including *gemilut hasadim* (acts of kindness or mercy or love towards kin), *ha-yashar v'hatov* (the right and the good), and *derech eretz* (roughly, the general rules of acceptable social behavior, including all the ethical rules). We undertake this analysis in order to demonstrate that while these concepts are related, *LMH* can be clearly distinguished from them. That distinction, once drawn, will help explain why *LMH* aroused so much interest among both medieval and modern Orthodox thinkers.

The next step in the analysis will be to focus upon what it really means to make *LMH* obligatory. Here I hope to demonstrate that by its very nature it is hard – even self-contradictory -- to make *LMH* obligatory in any meaningful sense. Such a demonstration will highlight why *LMH* so exercised all the thinkers who addressed it.

This analysis in turn will uncover the larger issue hidden in the discussion about *LMH*: to what extent ethical considerations either affect or at times will supervene what I will neutrally call "Jewish rules of behavior."

LMH versus *Gemilut Hasadim* and *Hayashar v'hatov*

The (overarching communal) ethical values in the Jewish tradition might well be, at least in part, those that are central in the aggadic passages that we discussed earlier in this study. The primary idea, that humanity is created in God's image, might be considered ontological, that is, a statement about reality in Jewish terms. From this, a closely related, highly general directive arises, which is both ontological and ethical: "You shall be holy, for I the Lord Your God, am holy." From Leviticus 19:2, this passage is followed by a large number of specific examples. They collectively constitute the Holiness Code, but they do not exhaust the scope of Lev 19:2. Nachmanides alluded to the Holiness Code in his commentary on Deuteronomy 6:18 and observes it is not exhaustive, as part of his argument about "*hayashar v'hatov*." Operating still at a general level, is Akiva's dictum: What is hateful to you, do not do to another person. Akiva's dictum is not directly mentioned in any of the citations of *LMH*, but it clearly provides part of the animating force to act *LMH*. From Exodus 34:6-7 and from *Avodah Zarah* 4b: Temper justice with mercy. This idea is explicitly an ethical basis for *LMH*.

Beyond the one ontological statement about humanity being created in God's image, and the highly general directions embodied in the texts above, the unpacking of Exodus 18:20 in *Bava Metzi'a* 30b[72] moves us to the action-oriented, but still general, ethical

[72] "And you shall make known to them:" this is their livelihood; "the way:" this is *gemilut hasadim*; "(that) they may walk:" this is visiting the sick; "in it:" this is burying

directives. This exegesis also accomplishes two things: it extends the legitimacy of the specific laws given to Moses to the extra-legal, ethical directives in the exegesis, and secondly, it gives the first of many warrants to decide when to act *LMH*, and by extension, what is meant by *gemilut hasadim*. *Gemilut hasadim,* according to *Mishnah Avot 1:2* is one of three pillars on which the world rests (Torah, *Avodah*, and *Gemilut Hasadim*). *Gemilut hasadim*[73] is "without measure" – that is, unlimited in scope, at least in what one may do (as opposed to how much of one's wealth one may give). It can be done for both rich and poor, and for the living and the dead. One might view *LMH* as a species of *gemilut hasadim* made specific in the transactional mode between individuals.

But *LMH* is unique, in that it is an action taken directly in the context of the requirement to follow specific laws, whereas *gemilut hasadim* is in a realm where one is not necessarily following specific *din*. This unique characteristic is what makes *LMH* such a challenge for the Orthodox writers we have considered: it is one thing to separate out *aggadah,* textual interpretation, or general ethical principles from *din* in a general way; it is quite another to contemplate that *shurat hadin* may not be followed if one acts *LMH*.

Finally, another key general ethical directive tied to those cited above is "to do the right and the good."[74] There are five instances of *hayashar v'hatov* (the right and the good) cited in the Bavli. Four of these are in *Bava Metzi'a*. All four of these are instances of rules of transactions – whether to return an instrument of indebtedness found in the street (*BM* 16b), the return of valuables placed in safe-keeping that are

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the dead; "and the actions:" this is the law (*din*); "that they should do:" this is going *beyond the line of the law.*

[73] Jack Spiro, "An Exploration of Gemilut Hasadim", *Judaism*, 2001, 448-457.

[74] Deut 6:18.

subsequently lost (*BM* 35a), (notice the similarity to the return of lost objects in *BM* 24b where *LMH* operates), the removal of someone who takes possession of land between two partners or two family members (*BM* 108a, 108b). These are all cases strikingly like the cases of *LMH*: they involve doing something that is not in conformance with at least one interpretation of the law (here more like the example of returning lost property in *BM* 24b, where the analysis showed *LMH* to be a case of choosing between alternative interpretations of the law). These cases are very similar to *LMH:* they involve transactions, but unlike the citations of *LMH*, where the decision to act *LMH* can be read as heuristic (that is, here are examples of *LMH*, the reader is to generalize), the cases of *hayashar v'hatov* seem to be more prescriptive for more clearly defined situations. Nevertheless, they are close enough, so that Nachmanides, in his commentary on Deuteronomy 6:18, assimilates "do the right and the good" to *LMH*:

> Now God says that, with respect to what God has not commanded, you should likewise take heed to do the good and the right in God's eyes, for God loves the good and the right.... For it is impossible to mention in the Torah all a person's actions toward his neighbors and acquaintances, all of his commercial activity, and all social and political institutions. So after God had mentioned many of them.....God resumes to say generally that one should do the good and the right in all matters, so that there are included in this compromise, *lifnim mishurat hadin.*[75]

Nachmanides, in his assimilation of *LMH* to the right and the good, no doubt understood that both involved behavior in transactions where judgment was required, because the law was not perfectly clear.

It must be made clear that these ethical principles are but a small part of the ethical principles embedded in *aggadah* or textual interpretation in the Bavli or midrashic literature An entire other set of principles involving the pursuit of justice and equity

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[75] *Torat Hayim, Devarim*, loc.cit.

would also be included, and as we have seen *LMH* has been brought into the service of developing the idea of justice and equity in Jewish law. A brilliant rabbinical thesis by Stephanie Kolin[76] covers this ground nicely, and shows the interconnection of the concepts discussed here with the pursuit of justice.

The heuristic cast to the citations of *LMH* seems to provide a warrant for individual Jews to decide to act or not to act *LMH*. One can even consider the cases of *hayashar v'hatov* similarly. This implied warrant was clearly of concern to the medieval commentators, and to the more positivist-leaning modern Orthodox commentators.

What Does it Mean to Make LMH subject to Legal Obligation?

Now let us examine what might really be meant by making *LMH* subject to legal obligation. There are several possibilities, as follows:

- First, it can be considered a step to bring the open-ended elements of *LMH* – to treat another with consideration, kindness, or mercy – into the courtroom: to give judges a warrant to consider those elements in rendering judicial decisions. Thus the motive of the medieval and modern commentators to assimilate the case of the porters to *LMH*. This is a meritorious goal, in that it gives judges greater latitude to consider all elements of the case before them in rendering a fair decision. This motive accounts for Berman's characterization of *LMH* as a legal technical term. It then makes the cases in which *LMH* is deployed part of the set of precedents which future judges may act upon. By extension, it gave medieval self governing Jewish communities warrant to use non-judicial means to coerce individuals to behave in a manner

[76] Stephanie Kolin, *Empathy, Equity and the Establishment*, (MHL diss., Hebrew Union College, New York, 2006).

that they would have if they had a finely developed ethical sense. There are other areas in which the rabbis in medieval times forced behavior: compelling the rich to give charity, forcing a husband to give a *get,* censuring those who backed out of business deals, and so on.[77] However, such a step to move *LMH* into the area of what is justiciable, or merely what is subject to informal community sanction could implicitly or explicitly take away from the individual actor the opportunity to act *LMH.*

- Second, it could suggest that in every case, particularly in transactions involving things of value, that one ought not exact one's full entitlement. But as the judges' discussion in the cases that Elon cites, such a posture would vitiate the very rules that one is acting upon, whether one is in a courtroom or not. The whole point of contracts or agreements – both informal and formal – is to obligate the parties to do what they promise to do, or at least what one expects them to do. For *LMH* to be a useful and effective form of behavior, it must be the exception, not the general rule.
- One could imagine a regime in which in all cases such as those in which *LMH* or *hayashar v'hatov* are cited, (or cases which the commentators might have included under this rubric by halakhic extension), one could be obliged to act as described in those citations. But this would not be *LMH* as described in the citations: to compel by law what is essentially a voluntary act is to drain from *LMH* its essential voluntary moral quality. While it is clear that there is not a formal distinction between morals and law in Judaism, in the modern era that

[77] Bleich discusses these in his article – see n. 57 on p. 52. See also the discussion of Berman's "Law and Morality" above.

distinction simply cannot be avoided. There is none of one's own *hesed* in an act when someone else compels it. The ethical characteristics in the cases of *LMH* require some intentional moral component on the part of the actor – whether it is kindness, consideration, or equity. Now, to be sure Jews and secular authorites use law to change not merely behavior but attitude – an excellent example can be found in the civil rights and fair housing laws of the sixties. But those cases are ones in which the bar is raised higher within the law itself, not cases in which one goes beyond the law.

- Finally, and most tellingly, there are no guidelines to operationalize *LMH*: even if the law compels it, there are no guidelines to say precisely to which cases (beyond the citations in the Talmud) the injunction to act *LMH* applies; and even if there are such guidelines as to the type of case (let's say transactions of any type), there are no guidelines as to the factors that would make one act *LMH*. Indeed, Nachmanides' commentary points out that *the essential nature of LMH is to operate in that very space that is not otherwise specified.* The two essential elements of *LMH*, at least in the Talmudic citations, are that it is voluntary, and secondly, that no specific criteria are provided: none of the cases are acts of charity; the respective economic circumstances of the actors are not specified; it is not just in the case of commercial transactions. This very lack of specificity leaves it entirely up to the actor. The stature of the actors in the citations suggests that acting *LMH* is meritorious (and clearly Maimonides bases his view of *LMH* in part on the stature of the actors).

But as liberal Jews we want to have the ethical to have the same, or even a prior claim upon us as a duty. As Borowitz writes:[78]

> The ethical, which ought to come as a categorical or unmediated imperative, operates within Judaism in quite a different, qualified way [according to Lichtenstein]. A substantial difference exists between a system of action in which ethics is commandingly primary and one in which, though it remains imperative, it can often be a subsidiary situation. . .

In what sense, then would we understand *LMH* to be obligatory? It is to have a certain mindfulness about acting beyond what is required, to have that mindfulness operate prior to any specific rule or law – in particular those rules or laws where there is neither prescription nor proscription - and to cultivate that mindfulness and act upon it when it is appropriate as part of meeting one's Jewish duty. These are cases where the potential of acting *LMH* should trigger a sense that taking full advantage of one's entitlements is not the best course of action – for example, not giving up a subway seat to someone who is infirm.[79] The obligation here, is, as Novick would put it, not exacting the full measure of what the law will permit you. This can be read as a proscription against *middat S'dom*: do not behave in every instance as if "what is mine is mine, and what is yours, is yours."

The notion of making *LMH* a matter of legal obligation founders on its self-contradiction. Shilo admits as much when he quotes Moulton, who in turn is channeling Nachmanides. Where does that leave a Jewish actor in considering whether to act *LMH*? It leaves him as his own decisor, as it were, going back to the general ontological and ethical principles on which *LMH* and *hayashar v'hatov* are based, in order to decide if the instance before him merits acting *LMH*. This is precisely the unmediated force of the

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[78] Borowitz, 500.

[79] While there is no law that requires one to give up a seat to an elderly or infirm person, the MTA encourages it with signs. It could be considered merely *derech eretz*, but it is also very much like the unloading case.

ethical imperative about which Borowitz writes. The mindfulness mentioned above requires a complete openness to the ethical imperative. One cannot really find it anywhere in *halakhah* (as *din*) because it is not logically possible to reduce it to *din*! Such a position of autonomy and individual decision-making might be anathema to some, but this is the place in which *any* Jew who wishes to take *LMH* seriously finds oneself. It is precisely the inherent logic of *LMH* which makes it a matter not really susceptible to the traditional approach of incorporating ethics into *halakhah.*

Borowitz takes on the issue of whether such concerns as the status of women do not represent the importation of non-Jewish ethics into Judaism. He observes that traditional Judaism sees different roles for men and women, and so no "ethical moment" arises for this issue. He confronts the issue:[80]

> Is all that Jews can call ethical fundamentally given in the Torah or may we ever gain significant ethical insight from gentiles? We American Jews should acknowledge that the gentile notion of universalism and common humanity has reminded us of the Torah's teaching that there is, in fact, but one Jewish family. . . The issue of democracy takes us a step further. This extraordinary notion, with its corollaries of pluralism and tolerance, did not arise within Rabbinic Judaism. We have yet to hear a good theological argument (as against a pragmatic case) being made within the terms of Rabbinic Judaism to endorse, much less to mandate, the practice of democracy. And this matter would immediately leave the hypothetical realm should the Orthodox parties of the State of Israel come to power.

Packed into this rhetoric are a number of underlying issues: whether to read Torah literally or in the light of modern scholarship; how to understand revelation – what actually happened at Sinai, and how open revelation is to being re-interpreted through the ages; consequently whether an understanding of women's roles are divinely ordained or merely period social convention. We will not digress to dwell upon those issues here. Borowitz might have found a warrant in a re-interpretation of the general ethical

[80] Borowitz, 502.

guidance represented in "man created in God's image" and in Akiva's dictum, but clearly he chose to tackle the issue of universal ethics, and in doing so, tackle a central tenet of Orthodox belief.

Borowitz then provides the liberal counter-statement[81] to the Orthodox view, even as expressed by Lichtenstein:

> To many Jews today the Torah's ethical behests come with such imperative quality that they can consider them properly heard only when they are accepted categorically. To qualify their functioning as substantially as do the spokesmen of contemporary Rabbinic Judaism cannot be seen by them as other than less than what God now demands of the people of Israel.[82] They therefore cannot consider Rabbinic Judaism as presently interpreted God's will for the people of God's covenant.

What is operating in this statement are two very different, but reinforcing notions: the first is the posture of Reform Judaism to valorize each individual Jew to read directly prophetic revelation and personally internalize it, rather than have the reading of revelation interpreted and attested by an authorized elite.[83] The second is the openness of post-Enlightenment Jews to the ideas in the larger culture. But this openness is merely a difference in degree, not in kind, to what has transpired in other eras. There has really been no era in which ideas from the outside did not penetrate self-enclosed Jewish communities. We have seen some evidence of that in medieval halakhic evolution, but it is also true in non-halakhic areas, such as the influence of Aristotle on Maimonides, the influence of Sufism on Jewish mysticism, and the influence of renaissance ideas on

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[81] Borowitz, 502.
[82] That is to say: if one limits the function of the ethical imperative as Lichtenstein proposes, then the force of what God expects of Israel is thereby significantly vitiated, a result that is simply unacceptable.
[83] This is both the blessing and the bane of Reform Judaism.

Jewish thought. And of course Kant and neo-Kantian thought has had a profound influence on Reform Judaism with its centrality of personal autonomy.

Borowitz would then extend the primacy of the unmediated ethical imperative to include issues where the ethical imperative contradicts established *halakhah* on such topics as as *mamzerim, agunot*, or (when he wrote this piece) the status of women,[84] so that:

> The ethical issue is so categorically felt as to require the vaunted flexibility inherent in *Halakhah* to operate and accomplish an ethical revision of existing law and practice.

While we do not in this thesis directly tackle the issue of how *halakhah* is done, Borowitz' comment here (written in 1975) anticipated with great prescience a major issue that recently confronted Conservative Judaism, which is worth alluding to within the context of this thesis. Elliot Cosgrove[85] wrote a stunning article shortly after the Conservative Committee on Law and Standards issued its conflicting decisions on the status of homosexuals in the clergy. Those decisions, and the dissent by Gordon Tucker, which was deemed a *takkanah* and therefore made to require thirteen votes instead of six to be accepted as a ruling, form the central focus of Cosgrove's article. Cosgrove's central theme is one that is entirely consistent with Borowitz's point of view on the primacy of the ethical imperative. Cosgrove writes: ". . .Conservative Judaism. . . has failed to construct an approach to halakhah that reflect[s] the theological premises of the movement. . . The legal method employed by the Conservative movement operates independently, or at odds with its most basic theological and intellectual commitments. It

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[84] Borowitz, 501.
[85] Elliot Cosgrove, "Conservative Judaism's Consistent Inconsistency," Conservative Judaism, Spring 2007, 59 (3), 3-26.

is time to bring an internal consistency to our halakhah and theology."[86] Conservative Judaism shares some of the same intellectual commitments with Reform Judaism: a commitment to modern biblical scholarship, a notion of revelation at Sinai as non-verbal, and subject to continuing evolution through the generations, the notion that the sacredness of the Bible is not contingent on its Divine origins but upon the "enduring engagement of God and Israel by way of Torah."[87] These intellectual commitments go hand in hand with – and one might even say require – the kind of unmediated openness to the ethical imperative we find through Torah and the rest of the canon. It is precisely this openness for which Cosgrove (and Tucker) are arguing. This issue within Conservative Judaism sheds light on our issue, in that once one accepts the premises that both Conservative Judaism and Reform Judaism share, an openness to the ethical impulse operating in the autonomous "Jewish self" is entailed. *LMH* is a small marker the authors of the Talmud left for us that such an autonomous Jewish self, exercising individual ethical judgment in his interactions with his fellow human beings, even to the point of not following the law, is at the heart of authentic Judaism.

Conclusion

This thesis has analyzed the logic and meaning of the *sugyas* in which *LMH* appears in the Babylonian Talmud and selected midrashic literature. There are two *sugyas* which are of general ethical import, and these also appear in the Mechiltas of Rabbi Ishmael and Rabbi Shimon bar Yochai. The position of this thesis is that these ethical *sugyas* provide the ethical force for the other five cases about specific transactions. Some of these cases were transactions that explicitly involved things of

[86] Cosgrove, 4.
[87] Cosgrove, 5.

value, for example, the money changer case and the sale of property case; others were about interactions more generally (the unloading case), and some were even about transgressing *halakhah* in ritual matters (the *zimmun* case). The essential feature of all the cases was the decision of the individual to follow the general ethical guidance provided and thereby not take full advantage of his entitlement. The case of the porters was also discussed, and an explanation adduced for its inclusion in *LMH* by medieval commentators, even though it does not mention *LMH* and does not form the form of the other *LMH* case citations.

The thesis then traced how the notion of *LMH* was transformed in the medieval period and how differently the Ashkenazic and Sephardic *rishonim* wrote about it. We evaluated the views of both modern Orthodox and liberal commentators on *LMH.* From this analysis, *LMH* emerges as an important instance in which the writers of the Talmud intended to provide an opportunity for individual Jews to act in a way beyond what the law required, or in an alternative formulation, not to exact one's full entitlements in a transactional situation. In doing so, the authors of the Talmud gave Jews a warrant to make ethical judgments about the law itself, which was, in a way, a foreshadowing of the ethical autonomy of modern liberal Jews.

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