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

Eugene Korn

Biography: Dr. Eugene Korn edits The Edah Journal. He is Director of Interfaith Affairs at the Anti-Defamation League and Adjunct Professor of Jewish Thought at Seton Hall University.

Abstract: This paper analyzes the relationship of formal halakhah to Jewish ethical values, arguing for the necessity of extra-legal hesed, identified as autonomous action above and beyond the requirement of law (’lifnim mishurat hadin’). On halakhic, theological and philosophic grounds, the essay attempts to refute the theory of hard halakhic positivism, which maintains that formal halakhah constitutes the sole legitimate constraint upon human conduct and denies room in Judaism for moral demands advanced by conscience.
“Is what is holy holy because the Gods approve of it, or do they approve of it because it is holy?” (Plato’s *Euthyphro* 10a)

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

I. Introduction

One dimension of the age-old debate between Christianity and Judaism concerns the nature of the biblical covenant between God and the Jewish people. Paul of Tarsus understood the covenant to consist primarily, perhaps exclusively, of law (Romans 3). Hence the Christian preference to translate ‘Torah’ as ‘Law,’ over the more accurate literal translation ‘teaching,’ which connotes both legal and non-legal dimensions. Because of its purported exclusively legal character, Christian theology deemed the “old” covenant spiritually destructive and needing higher fulfillment (Galatians 3, 5). Jews, of course, understand that Jewish law is constitutive of Judaism and Jewish identity: No interpretation of Torah that disposes of *mitzvot* as binding legal obligations can accurately depict the living covenant between God and the Jewish people. For Jews the question is not whether Jewish law (*halakhah*) is necessary, but whether it is sufficient: Is the ideal Jewish life defined exclusively by the legal decisions of *halakhah*, or is another component required as a complement? Plato and Aristotle framed the question as, “What constitutes the good life?” but I prefer to inquire in the words of Micah, “What does God demand of us?”

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

The issue at hand relates to the more general philosophic debate between natural law advocates and legal positivists. The debate is old, but continues unabated. The former maintain that there exist fundamental moral values, such as justice, that are derived from either reason or nature and that are antecedent—both temporally and axiologically—to any specific empirical legal code. Indeed, the validity of a given legal order is judged by the degree to which it is consistent with or promotes...
these fundamental natural values. “An unjust law is not a law,”3 announces the natural law theorist, for if a rule violates the moral requirements of justice it cannot be valid law. In contrast, the legal positivist maintains that a legal system is validated not by independent values, but by the authority of its legislator and the coherent ordering of its internal norms and principles. Nomic validity remains independent of moral content. In fact, for some positivists ethical values evolve out of the legal code itself, which defines the concrete expression of morality. Acknowledging no external criteria for justice, these legal positivists paradoxically also believe that “An unjust law is not a law,” for if it is law it is eo ipso just.

A Jewish variant of this positivist position has been termed “halakhic positivism.” It claims that all Jewish moral values take the form of halakhic judgments (dinim). In philosophic terms, the halakhic positivist maintains that the proposition, “Jewish legal imperatives delineate Jewish moral behavior,” is a necessary synthetic—and perhaps even analytic—truth. God’s will in every situation for the Jewish people collectively and individually is found in the formal canons of Jewish law. In a word, the objective corpus of halakhah is the ultimate arbiter of what is good, right and just.

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

---

3 “Non viditur esset lex justa non furit.” Augustine, De Liero Arbitrio 5; Aquinas, Summa Theologica, Qu. xcv, Arts. 2,4
7 The ‘soft’ version of positivism, exemplified by H.L.A. Hart in The Concept of Law (Oxford: Clarendon Press, 1961), admits that law must have a minimum moral content. For the hard positivist, law determines morality, and specific content is not an independent criterion of law.
8 Legal formalism may be defined as the thesis that denies the need for individual discretion in the application of rules, because all valid judgments in a particular case follow objectively from clearly formulated rules. See Hart p. 126. For the issue of discretion in halakhah, see A. Kirschenbaum and N. Lamm, “Freedom and Constraint in the Jewish Judicial Process,” Cardozo Law Review, 1 (1979), pp. 99-133.
He contends that “the norms of halakhah constitute the sole constraint upon human conduct” (ibid), denies that “there is any content of natural morality that is not encompassed by the subject matter of the halakhah” (p. 538), and insists that “there is no room in Judaism for accommodation of the moral demands advanced by individual conscience” (p. 536). Thus philosophy sometimes makes strange bedfellows: Traditional halakhic positivists find themselves in complete agreement with Christian polemicists who portray the Torah and Judaic ethics as limited to law. Of course, for many Christians this legal exclusivity rendered the Torah spiritually invalid, while halakhic positivists consider it to contain the very essence of Jewish spirituality.

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

To be sure there are positivist elements in halakhah. A coherent conception of Jewish law may be consistent with a version of ‘soft’ positivism. My immediate concern is the coherence and validity of hard halakhic positivism. I will attempt to demonstrate that this thesis is logically muddled, and that it is indefensible in light of both normative halakhah and Jewish philosophic traditions. More strategically, I wish to formulate a Jewish conception of the relation of law to ethics and thereby identify the place of hesed in proper religious experience.

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

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

---

9 Soft positivism admits to the ‘open texture,’ i.e. non-formal, nature of law. See Hart, pp. 120-132.
pable by the Divine and incurred the harshest punish-
ment known to Jewish history up to that time. They
would have been legally acquitted in a rabbinic court,
yet they were convicted in the “heavenly court.”11 That
there exist other talmudic claims identifying different
failings as responsible for the destruction poses no prob-
lem for this thesis. No talmudic opinion challenges the
intelligibility of the category of ‘lifnim mishurat ha-din’
or the conceptual presuppositions of Rabbi Yohanan’s
statement, i.e. that the Torah demands behavior that
transcends formal halakhic compliance.

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

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

The Talmud explicitly discusses this standard only in
five cases, while Rashi identifies an implicit sixth case.14
The incident recorded in Bava Qama 99b serves as a
starting point for understanding lifnim mishurat ha-din:

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

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

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

11 Of course the phrase, “heavenly court” is merely an inaccurate metaphor for divine judgment. The significance of the entire
Talmudic passage rests on the assumed tension between the absence of grounds for juridically determinable legal liability and
non-legal divine disapproval. On what din could a court—heavenly or otherwise—convict?
12 For five excellent and sometimes contrasting explications of lifnim mishurat ha-din, see Saul Berman, “Lifnim Mishurat
Their Concepts and Beliefs, (Jerusalem; Magnes, 1975) pp. 330-333, II 830-833.
13 Lichtenstein, pp. 114-116
14 In addition to the cases cited, the other cases in the BT are found in Bava Mezia 30b (the dignity of an elder), Ketubot 97a
(the rescission of a contract of sale), Bava Metsi’a 24b (the presumptive abandonment of lost property), and Berakhot 45b (par-
ticipation in public grace after meals, “zimun”).
Rabba bar Bar Hanan had porters who broke his barrels of wine [in transport.] He seized their garments [which they had deposited as collateral.] They brought him to Rav.\(^{15}\) Rav said to him, “Give them their garments.” [Rabba bar Bar Hanan] asked him, “Is this the din?\(^ {15}\) “Even so [In],” he replied: “In order that you may walk in a good path.” (Proverbs 2:20) He returned their garments. They exclaimed, “We are poor, we have labored all day, are hungry and have nothing to show for it!” [Rav] said, “Pay them their wages.” [Rabba bar Bar Hanan] asked further, “Is this the law?” “Even so [In],” he replied: “You shall keep the path of the righteous [tsadiqim].” (ibid)\(^ {16}\)

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

Rashi (ad loc.) identifies “a good path” with lifnim mishurat ha-din. This case is more difficult than the former because Rabba bar Bar Hanan neither did anything wrong nor exercised imprudent judgment (as may have R. Hiyya), yet he is asked to absorb a substantial loss. The narrative also strongly implies that Rabba bar Bar Hanan did not freely concede his rights and money, but did so involuntarily under the pressure of Rav. Lastly, it is clear that Rav’s directives actually contravene basic Jewish tort law (nezeqin). The fundamental principles of Jewish tort law dictate that the porters are liable, and are obligated to make restitution to Rabba bar Bar Hanan for damages caused.\(^ {17}\) Absent such restitution, Rabba bar Bar Hanan possesses full rights to confiscate their garments. Note also that the proof text for Rav’s advice is not a legal pentateuchal passage, but a general moral maxim from Proverbs appealing to undefined generic ideals (“a good path,” and “the path of the righteous”).

The four other talmudic cases of lifnim mishurat ha-din are remarkably similar. They exhibit the following essential characteristics:\(^ {18}\):

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

---

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

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

\(^{17}\) Maimonides, Mishneh Torah, Hilkhot S’khirut [Laws of Hiring] 3:2

\(^{18}\) See Tosafot Bava Qama 100a (s.v. ‘lifnim mishurat ha-din’)
The concept of *lifnim mishurat ha-din* cries out for explanation. ‘Why deviate from the *din*?’ is the obvious legal and philosophic question. Assuming that Torah law is perfect and exhaustive, should it not determine ideal Jewish behavior in those cases? What justification exists for departing from the halakhic norm?

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

III. Rabbinic and Kabbalistic Conceptual Explication

A. Nahmanides

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

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

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

---

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

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

21 See also *Shulhan Arukh, Hoshen Mishpat* 259:5.
human being imitate the infinite God? Answers the Talmud, “Emulate His actions: Just as God clothed the naked, visited the sick, comforted the mourner, and buried the dead, so shall human beings do likewise.” The actions enumerated are the classic instances of hesed—human kindness manifested in gestures of giving to another. Ontologically it is the free flowing extension of one being into another. Crucial to this passage is the opinion of R. Simlai, who maintains that the Torah begins with an act of hesed and ends with an act of hesed. No mere literary observation, one meaning of R. Simlai’s claim is that the entire Torah delineates a lifestyle of hesed. Since for the Ramban, moral goodness (‘ha-tov’) equals ‘hesed,’ the source of ethical goodness is spiritual—the character of God Himself—and the primary thrust of imitatio dei is the emulation of the divine attribute of rahamim, expressed behaviorally in acts of hesed.

We can now appreciate Nahmanides’ conceptual link. God is the infinite, perfect Being and as such is beyond constraint. He is not required by metaphysics or law to act with hesed, or to act at all. Yet according to the Jewish understanding of divinity, God created the world, entered human history, revealed the Torah, and maintains continual relationships with His creatures. Neither God’s relation with the world nor His involvement in human affairs are responses to any imposed natural law or consequences of external necessity; they are natural emanations of divine goodness. Thus the broader implication of the imperative of imitatio dei is that human holiness must include action resulting from a natural autonomous overflow of moral character, in addition to principled obedience to heteronomous legal norms. The former requires identification with and compassion for others, and a refusal to exploit others even when formal law might allow it. When we act naturally with hesed, we transcend legal obligation and act lifnim mishurat ha-din.23 If one confines himself exclusively to the four ells of halakah, to the strict requirement of the law, he may become, in Nahmanides’ potent formulation, a ‘naval b’rshut ha-Torah—“a despicable person within the bounds of the law.”24

B. Maimonides

Maimonides also develops the concept of lifnim mishurat ha-din and connects it to both imitatio dei and hesed. He postulates that human beings are commanded to “walk in His ways,” identifying those ways with “good and straight (yashar) paths,” and interprets the divine emulation to mean adopting attributes exhibiting the Aristotelian mean: “Just as God is called compassionate, so are we to have compassionate character; just as God is called merciful, so are we to have merciful character; just as God is holy, so are we to be holy” (Hilkhot Deot [Laws of Moral Dispositions] 1:6). Maimonides’ formulation focuses on the development of virtuous character rather than on external legal action—what one thinker describes as “agent morality” in contrast to “act morality.”25

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

---

22 One Aramaic reference for Torah, “rahmana” (compassion) supports R. Simlai’s claim. The application of the term, “rahmana” to Torah is actually an extension of its primary referent, God.
23 The analytic linking of lifnim mishurat ha-din with hesed is also indicated in the prior discussion in Bava Mezia 30b that finds an exegetical allusion to both concepts in Exodus 18:20.
24 Nahmanides, commentary on Lev 19:2.
identifies with lifnim mishurat ha-din (Hilkhot Deot [Laws of Moral Dispositions] 1:5). Although Maimonides refers to virtuous character while Nahmanides refers to ethical acts, Maimonides too understands that hesed is a counterpoint to strict legal obligation.

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

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

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

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

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

If I did despise the cause of my manser

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

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

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

26 See Norman Lamm, “Ha-chakham Ve’ha-Hasid Be’mishnat ha-Rambam” (“The Sage and the Saint in the Thought of Maimonides”) in Dr. Samuel Belkin Memorial Volume, (1979)
27 See also Guide, 3:54 and Arot 2:10 and 5:6
28 Translation in accordance with the interpretation of Metzudat David.
29 See I. Twersky, Introduction to the Code of Maimonides (New Haven: Yale University, 1980) Introduction and Chapter V.
a comprehensive influence of Torah ethics makes one a rahaman and ba’al hesed. So emphatic is Maimonides on this essential character of Jewish behavior that he claims should one encounter a Jew lacking compassion and hesed, that Jew’s pedigree should be investigated for probable gentile origin (Hilkhot Issurei Be’ah [Laws of Forbidden Relations] 19:17). Though there are important differences between them, both Nahmanides and Maimonides insist that ideal Jewish behavior occasionally requires transcending strict law and includes non-legal acts of hesed. As religious values, the virtue of compassion and its expression as autonomous giving derive from the character of God, rather than divine legal imperative. Finally, both intimate that specific Torah laws (dinim) have lofty moral ideals as their overarching purpose.

C. Kabbalah

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

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

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

IV. Hesed and Theology

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

---

30 See Zohar, Book II and commentary of R. Elijah of Vilna (GRA) to Book of Creation (Sefer Yetzirah), Chapter I.
31 Note that the rationalist Maimonides conceptualizes hesed similarly in his definition in the Guide 3:53 quoted earlier.
32 This sharpens the issue in Sotah 14a. If din is symbolized by fire, the Talmud is contrasting din (“God is a devouring fire”) with acts of hesed.
33 1785-1841. R. Zvi Elimelekh is known by his major work, Benei Yisakhar, which contains the above point in Ma’amor Hodesh Sivan, Ma’amor 5 (Sayings on the Month of Sivan, Saying 5).
Korn

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

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

The linking of Torah with hesed may also be the reason that rabbinic tradition prescribed reading the Scroll of Ruth—called “megillah sh’kula hesed,” on that holiday. The heroes of the megilah, Boaz and Ruth are persons who act beyond reason and above what is required by law. Only Ploni Almoni adheres to the strict requirement of the law, and tradition obliterated his real name from Jewish history forever. It seems likely that rabbinic tradition chose the Scroll of Ruth for public reading on the holiday commemorating revelation at Sinai in order to pre-empt an erroneous exclusively legal understanding of the content of revelation. The juxtaposition of reading the Decalogue with reading Megilat Ruth emphasizes that Torah is a complementary balance of din and hesed.

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

---

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

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

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


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

The Edah Journal 2:2 / Tammuz 5762

Korn 11


V. Hesed as Mitzvah

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

The second type of Torah imperative is generic, contextual and should not be construed as formal law. Maimonides makes this point in his analysis of the mitzvah of “You shall be holy” (Lev. 19:2), insisting that it not be catalogued as one of the 613 legal imperatives. (Sefer ha-Mitsvot [Book of Commandments], Shoresh 4).

In the words of a noted scholar, this is because the imperative to be holy is a “super-category”, an overarching objective under which specific dinim fall.39 Nahmanides makes the same point in his commentary on that verse—the despicable scoundrel is, after all, still within the bounds of the law—and voices no disagreement with Maimonides’ insistence that the imperative to be holy is not to be catalogued as legal mitzvah.

Maimonides views “You shall be holy,” similar to the same way Nahmanides explains, “You shall do what is right and good in the eyes of God.” These imperatives are not law in the positivist sense—they are more than law. This critical distinction is the reason why both authorities also omit the latter imperative from the list of mitzvot. Interestingly, Maimonides catalogued the other overarching super-categories of “You shall love your peer as yourself,” (positive mitzvah 206) and “You shall walk in His ways,” (positive mitzvah 8) only in terms of developing personality virtues, not in terms of any specific behavioral requirement. The explanation for this may be a function of Maimonides’ theological commitments, but may also be that cataloguing them as law would run counter to the essential thrust of hesed as autonomous activity. There is no sharp wall for Maimonides between legal norms and ethical values.

There appears to be a continuity ranging from specific formal legal requirements on one end to generic directives on the other. The objective of these latter mitzvot is the development of a moral character suffused with rabamim that naturally expresses itself in innumerable—and uncatalogueable—acts of benevolence. All talmudic discussions of lifaim mishurat ha-din presuppose this distinction between strict definable law and the higher moral ideal of acting above and beyond the law. Once again, conceptually this is din in contrast to hesed.

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

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

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

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

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

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

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

42 Kirschenbaum, Equity, p. 20. For examples of talmudic provisions, see pp. 20-21.
43 Deut. 23:20-21
VI. The Argument Against Hard Halakhic Positivism

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

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

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

The proposition put forth in premise (1) is philosophically, empirically and Jewishly questionable. Yet even if we assume (1) to be true, (2) is demonstrably false on Jewish grounds. Consider the following argument: The hard halakhic positivist considers the mishnaic literature known as Pirkei Avot to be of Sinaitic origin. He consistently uses the terms, "revelation," "halakhah," and "objective law" interchangeably, because he claims that the ascription of Sinaitic origin to this literature suffices to prove its objective legal status (R. Bleich, p. 537). Yet it is difficult to see how majority of the maxims in this work—whatever their origin—can be construed as legal or objective judgments. “Rabbi Yohanan said, ‘Be yielding to a superior, pleasant to the young, and receive every person cheerfully’” (3:16). Can the advice to be ‘pleasant to the young’ have objective connotation? Pleasantness is, as we all know, a matter of subjective taste. Is this formal law or simply good moral counsel? Surely no court could find a person liable for rejecting any of these imperatives in this mishna. Despite their wisdom, they have no legal force and no place in a court of law.

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

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

---

44 BT Makkot 23b; Mishna Hulin 7:6, Rashi and Maimonides, Commentary on the Mishnah, ad loc.
45 See Nahmanides commentary on Gen. 26:5 and Lev. 18:25, and R. Naftali Zvi Yehuda Berliner (NeZiV), Ha’ameq Davar, Introduction to Book of Genesis.
tional consideration. In the words of one rabbinic thinker, they denote purpose and direction rather than definitively defined acts. It is here that the inconsistency of hard halakhic positivism is exposed: The only way that (2) can be defended in light of Jewish sources is if the halakhic positivist posits a broad conception of halakhah, one that includes the above open-textured principles. Yet a halakhic positivism that is synonymous with halakhic formalism excludes formal appeal to these generic principles.

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

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

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

47 Kirschenbaum, Equity, pp. lx.-lxi.
48 Lichtenstein, p. 116
49 Maimonides, Mishneh Torah, Hilkhot Avadim [Laws of Servants], op cit; Shulhan Arukh, Yo rah Deah 159:1.
50 See note 16, and note 1 of R. Bleich op cit. R. Bleich’s argument relies strongly on the text containing “In” i.e. an affirmative response to the query whether the directive is law. He therefore is dismissive of the stronger bibliographic evidence to the contrary. Even more than the bibliographical evidence, the critical argument lies in the coherence of the interpretation of non-enforceability over the logical and legal difficulties in interpreting Rav’s response as a legally binding psaq din. In another article, “Judaism and Natural Law,” Jewish Law Annual Vol. VII (1988), pp. 7-10, R. Bleich similarly relies on an incorrect version of Maimonides, Mishneh Torah, Hilkhot Melakhim [Laws of Kings] 8:11 to argue against the concept natural law in Jewish tradition. See my “Gentiles, The World to Come and Judaism: The Odyssey of a Rabbinic Text” in Modern Judaism 14 (1994) pp. 265-287.
52 The text describes Rabbah bar Bar Hanan taking direction from his cousin, Rav, rather than being ordered by a formal bet din. As such, the plain meaning of the text is that Rav—a nephew and student of R. Hiyya, who as we saw in the case cited from Bava Qama 99b advocates voluntary action in accordance with lifnim mishurat ha-din—successfully exercised moral suasion on
category is in accordance with the words of R. Hananel:
“If one wants to act lifnim mishurat ha-din, he returns
(the lost property),”53 and Maimonides: “He who wants
to take the good and straight road and act lifnim mishu-
rat ha-din, should return the lost article.”54 That is, the
decision is up to the finder; his actions are dictated by
conscience.55 Although some Ashkenazic poseqim
accepted the enforceability of lifnim mishurat ha-din,
this view never became the consensus of authoritative
legal opinion in Ashkenaz.56 Even R. Joel Sirkes (Bah),
who makes the most elaborate case for the actionability
of lifnim mishurat ha-din, limits enforceability to situa-
tions where those asked to waive their rights under lif-
im mishurat ha-din are persons of wealth. He explicitly
denies that a court can enforce lifnim mishurat ha-din
when the defendant lacks wealth (Hoshen Mishpat 12:4
and 304:1). So limited, the enforcement cannot be seen
as formal din, for doing so would directly contravene the
scriptural injunction of Lev. 19:15: “You shall not ren-
der an unjust decision: Do not favor the poor or show
dference to the rich.”57 Jewish law, like all valid law,
must be ‘blind,’ i.e. impartial in dispensing justice
between contending parties. Neither wealth nor poverty
can determine just legal decision. Hence even those few
authorities that considered lifnim mishurat ha-din
actionable are forced to admit that its enforceability
depends upon the presence of non-legal subjective crite-
ria.58 A rigorous formal understanding of halakhah that
reduces lifnim mishurat ha-din to din cannot escape
incoherence. Clearly the Talmud considers these acts
desirable acts of hesed, but they represent the expression
of the Torah’s aspirational moral norms, in contrast to
the obligations of formal law. One rabbinic philosopher
has appropriately termed them “Covenental Ethics.”59

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

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

his cousin. The logical difficulties attendant to this latter interpretation may have convinced the majority of rabbinic authorities
to interpret Rav’s response as unenforceable moral suasion. See Kirschenbaum, Equity, p. 123, Be‘er Eliyahu, Hoshen Mishpat
12:2, and Silberg p. 121. For the normative halakhah, see R. Yosef Caro, Bet Yosef, Hoshen Mishpat 12:8.
53 Commentary on BT, Bava Me’sia 24b. See also Shilo pp. 236-366.
55 For an examination of the concept of conscience in traditional Jewish sources, see A. Brill, “Do Jews Have a Conscience?”
(unpublished manuscript)
56 See, R. Moses Isserles (RaMaH), gloss on Shulhan Arukh, Hoshen Mishpat 12:2, and Kirschenbaum, Equity, p. 124-125 for
the positions of various Ashkenazic poseqim.
Sa’adia Gaon as claiming that because of Lev. 19:15, a judge is not permitted to decide in this manner. If he did so—as the
halakhic hard positivist maintains he must—he would be committing injustice. Ch. Albeck, “LeOfeyan Shel Ha’Halakhot bider
Nezikin” (The Character of the Laws in the Order Nezikin), Torah She-Ba’al Peh, Vol. 4, pp. 23-25, comes to the same conclu-
sion.
58 See Shilo p. 369.
59 Wurzburger, Ethics of Responsibility op. cit, chapter 1
halakhic prescriptions. This is exactly the point Nahmanides makes in his explication of “You shall be holy” and why Maimonides as well refuses to count this imperative in his enumeration of legal obligations.

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

The debate over the correctness of halakhic positivism is not one of mere nomenclature, regarding what one subsumes under the rubric of halakhah. Hesed as a spiritual standard transcending strict law is anathema to the hard halakhic positivist. The necessary conclusion is that consistent hard halakhic positivism is philosophically opposed to hesed in theory and, unfortunately, in practice as well. This is indicated by how the halakhic positivist treats the tragic problem of agunot (“chained” wives condemned to unmarriageable status because their husbands refuse to grant them a Jewish bill of divorce).

Relevant authorities include R. Moshe Feinstein and R. Eliyahu Klatzkin. Feinstein accepts qiddushei ta’ut as basis for freeing an agunah in Even Ha-Ezer 1:79 and 4:113. Klatzkin accepts get zikui for freeing an agunah in Milu’ei Even, 29.

---


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


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

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

65 R. Klatzkin accepts get zikui for freeing an agunah in Milu’ei Even, 29.
Possible application of these halakhic instruments toward this end.66 Halakhic positivism's cardinal methodological principle appears to be, "Let the din bore through the mountain," even though Sanhedrin 6b rejects that principle in favor of compromise (bitsuah). At issue is not a possible violation of law, but whether it is proper to approach the halakhic problem with a priori compassion for the agunah that yields a 'hesed bias' to exploit all halakhic possibilities for her release. In contrast, R. Benjamin Slonik articulates the more traditional—and normative—rabbinic method of dealing with agunot:

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

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

VII. Conclusion

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

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

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

---


68 Lichtenstein, ibid.

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

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

71 It is difficult to see how a hard positivist could ever square, "Derekh erez gadamah la-Torah" ["Civility precedes the Torah"] (Avot 3:17), with his thesis. For the classic—and anti-positivist—understanding of this statement, see Lev. Rabbah 9:3 and Tanna Debei Eliyahu Rabbah, chapter 1. R. Bleich does try to explain, “Jerusalem was destroyed only because Jews judged according to the laws of the Torah” (Bava Mezia 30b), but ignores the clear meaning of this text (pp. 527-528) and employs a circular argument to this passage to establish his conclusion: Because the Jewish people incurred divine punishment for ignoring the standard of lifnim mishurat ha-din, he concludes this standard is not a moral but a legal category. He thus assumes that any value to
insignificant, and stretching both essential Jewish texts and the concept of formal law beyond any rational recognition. This conception of Torah may be an old thesis in the Christian theology, but it is a distinctively modern thesis for Jews: No talmudic or medieval rabbinic source subscribed to it.

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

Nahmanides warns that exclusive concern with legal detail can lead to myopia depriving a person from recognizing the overarching ideals of both the spiritual and the moral life. Without these tele to guide sensibility and action, the halakhic positivist can become a spiritually confused, despicable individual (naval b’reshut ha-Torah). And in perhaps the harshest critique of all, Maimonides—arguably the greatest master ever of halakhah—claims that the life of strict legal obedience without the tempering virtue of compassion to motivate extra-legal acts of hesed is a life destined to practice cruelty. This is the antithesis of the Jewish spiritual vision, and its philosophical formulation is ultimately pagan in outlook and action.

The positive correlate of these critiques is that correct Jewish living consists of a delicate blend of law and extra-legal ethics, of din complemented by hesed. Compassion without binding law may be impotent, but legal obedience without hesed is blind. Kabbalistic tradition teaches that tiferet (glory) is achieved only when gevurah (law) combines with gedulah (hesed). As in much of kabbalah, this merger of divine attributes is a cosmic reflection of the ideal life that each Jewish person is challenged to create on earth. The successful spiritual personality blends a principled responsiveness to heteronomous law with the practice of imitatio dei through an autonomous overflow of rahamim that manifests itself in innumerable unlegislated acts of hesed.

Nahmanides warns that exclusive concern with legal detail can lead to myopia depriving a person from recognizing the overarching ideals of both the spiritual and the moral life. Without these tele to guide sensibility and action, the halakhic positivist can become a spiritually confused, despicable individual (naval b’reshut ha-Torah). And in perhaps the harshest critique of all, Maimonides—arguably the greatest master ever of halakhah—claims that the life of strict legal obedience without the tempering virtue of compassion to motivate extra-legal acts of hesed is a life destined to practice cruelty. This is the antithesis of the Jewish spiritual vision, and its philosophical formulation is ultimately pagan in outlook and action.

The positive correlate of these critiques is that correct Jewish living consists of a delicate blend of law and extra-legal ethics, of din complemented by hesed. Compassion without binding law may be impotent, but legal obedience without hesed is blind. Kabbalistic tradition teaches that tiferet (glory) is achieved only when gevurah (law) combines with gedulah (hesed). As in much of kabbalah, this merger of divine attributes is a cosmic reflection of the ideal life that each Jewish person is challenged to create on earth. The successful spiritual personality blends a principled responsiveness to heteronomous law with the practice of imitatio dei through an autonomous overflow of rahamim that manifests itself in innumerable unlegislated acts of hesed.

Nahmanides warns that exclusive concern with legal detail can lead to myopia depriving a person from recognizing the overarching ideals of both the spiritual and the moral life. Without these tele to guide sensibility and action, the halakhic positivist can become a spiritually confused, despicable individual (naval b’reshut ha-Torah). And in perhaps the harshest critique of all, Maimonides—arguably the greatest master ever of halakhah—claims that the life of strict legal obedience without the tempering virtue of compassion to motivate extra-legal acts of hesed is a life destined to practice cruelty. This is the antithesis of the Jewish spiritual vision, and its philosophical formulation is ultimately pagan in outlook and action.

The positive correlate of these critiques is that correct Jewish living consists of a delicate blend of law and extra-legal ethics, of din complemented by hesed. Compassion without binding law may be impotent, but legal obedience without hesed is blind. Kabbalistic tradition teaches that tiferet (glory) is achieved only when gevurah (law) combines with gedulah (hesed). As in much of kabbalah, this merger of divine attributes is a cosmic reflection of the ideal life that each Jewish person is challenged to create on earth. The successful spiritual personality blends a principled responsiveness to heteronomous law with the practice of imitatio dei through an autonomous overflow of rahamim that manifests itself in innumerable unlegislated acts of hesed.

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

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

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

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

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