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LAW, ETHICS, AND HERMENEUTICS: A LITERARY APPROACH TO *LIFNIM MI-SHURAT HA-DIN*

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The rabbinic phrase *lifnim mi-shurat ha-din* sits at the center of contemporary debates over how to understand the relationship between Jewish ethics and Jewish law. The phrase, which literally translates as "within the line of the law,"[1] is quite rare in rabbinic literature, occurring in only eight independent textual traditions.[2] It became a touchstone in

[1] Some prefer to translate this phrase as either "before the line of the law" or "facing the line of the law." Both "within" and "before" fall within the linguistic range of the term *lifnim.* For further discussion of this spatial metaphor, see Rachel Adelman, "Seduction and Recognition in the Story of Judah and Tamar and the Book of Ruth," *Nashim: A Journal of Jewish Women's Studies & Gender Issues* 23 (2012): 102, or my own discussion in "A Judge with No Courtroom: Law, Ethics and the Rabbinic Idea of *Lifnim Mi-Shurat Ha-Din*" (Ph.D. Diss, University of Virginia, 2016), 8-10.

[2] The phrase appears in a tannaitic midrash on Ex. 18:20 that is cited in both the *Mekhilta de Rabbi Ishmael* and the *Mekhilta of Shimon Bar Yochai.* Since the midrash is almost identical in each version, I refer to this as one textual tradition. The phrase also appears in seven sugyot in the Babylonian Talmud *(Avodah Zarah* 4b; *Bava Kamma* 99b-100a; *Bava Metzi'a* 24b and 30b; *Berakhot* 7a and 45b; and *Ketubot* 97a). While the phrase appears in *Midrash Tannaim*, Tzvi Novick has convincingly argued that its dating to the tannaitic period is dubious at best and

current debates largely due to a 1975 essay by Rabbi Aharon Lichtenstein, in which he uses the idea of *lifnim mi-shurat ha-din* as a site to interrogate and clarify the nature of Jewish law and its relationship to Jewish ethics.[3] This conceptual framing has been adopted by numerous other scholars, yielding two prominent—and competing—understandings of this phrase. One side argues for what I will call the "supererogation model."[4] They claim that *lifnim mi-shurat ha-din* points to supererogatory behavior, often translating it (against the literal meaning of the Hebrew) as "beyond the line of the law." The phrase therefore shows that law and ethics are independent (if closely related) systems within rabbinic thought. The other side argues for what I will call the "waiver of rights model."[5] They claim that *lifnim mi-shurat ha-din* marks cases in which a person is ethically motivated to waive a special legal right or privilege.[6] The phrase therefore

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that the phrase may have been appended to an earlier midrash as late as the medieval period. While the dating is not definitive, it is unlikely that this reference to *lifnim mi-shurat ha-din* predates the Bavli, so I do not include it here. See Tzvi Novick, "Naming Normativity: The Early History of the Terms Sûrat Ha-Dîn and Lifnîm Mis-Sûrat Ha-Dîn," *Journal of Semitic Studies* LV, no. 2 (2010): 393, n. 7. Finally, although many scholars also reference a passage in *Bava Metzia* 83a as a Talmudic example of *lifnim mi-shurat ha-din*, the phrase itself never appears in the sugya. It is described as a case of *lifnim mi-shurat ha-din* by the Tosafot and many of the *rishonim*, but that ascription post-dates the Bavli.

[3] Aharon Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?" in *Modern Jewish Ethics,* ed. Marvin Fox (Columbus: Ohio State University Press, 1975), 62-88.

[4] For a discussion of this model and some of its proponents, see Louis Newman, "Law, Virtue and Supererogation," *Journal of Jewish Studies* 40, no. 1 (1989): 61-88. It is notable that some scholars try to adopt elements of both models. See, for example, Aaron Kirschenbaum, *Equity in Jewish Law: Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (Hoboken NJ: KTAV Publishing House, 1991). Kirschenbaum describes *lifnim mi-shurat ha-din* as "the generic term for supererogatory acts" (Kirschenbaum, 109). However, he later qualifies this view by arguing that, in the Talmud, the concept is "limited to one's waiver of rights and potential profits and is inoperative if it leads to one's loss of money or property" (Kirschenbaum, 118).

[5] For examples of this view, see Shmuel Shilo, "On One Aspect of Law and Morals: Lifnim Meshurat Hadin," *Israel Law Review,* 13 (1978): 359-390 and Christine Hayes, *What's Divine About Divine Law*? *Early Perspectives* (Princeton: Princeton University Press, 2015), 177-178 and 187-188.

[6] While the supererogation model is often more explicit about the role of ethical motivations, Christine Hayes highlights the role they play in the waiver of rights model as well. She

demonstrates that law and ethics are closely interwoven in rabbinic tradition; moral considerations guide legal decision-making and cannot be separated from it. Curiously, scholars in both camps cite the same Talmudic sources as conclusive proof for their position. Since most studies of *lifnim mi-shurat ha-din* adopt one of these conceptual models, new research has only led the debate to become more deeply entrenched.

This essay seeks to move the debate forward by arguing that the roots of the current impasse are methodological, rather than intrinsic to the sources. I begin by tracing how each side of the debate explains the idea of *lifnim mi-shurat ha-din*. Using examples from Berakhot 45b and Bava Kamma 99b-100a, I identify two different problems that each model encounters. First, neither model seems to accurately describe the actions that are labeled as *lifnim mi-shurat ha-din* in Berakhot 45b. This sugya demonstrates the limited explanatory power of each model. Second, both models successfully account for the actions described as *lifnim mi-shurat ha-din* in Bava Kamma 99b-100a, but their accounts are equally compelling. While this sugya demonstrates the strength of each model, it also highlights the difficulty of adjudicating between them.

I propose that it is possible to sidestep these difficulties and gain a clearer understanding of how the phrase *lifnim mi-shurat ha-din* operates by employing a literary approach to these sugyot. By a literary approach, I mean a method of reading that integrates text criticism with an analysis of the literary structure and composition of each sugya. Using methods from source criticism and form criticism, a literary analysis will first identify different strata within the text.[7] In particular, I differentiate the

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argues that "[t]he pious individual, who prioritizes religious values such a modesty, peace or charity, should at times forgo his right to theoretically correct norm or ruling (stop short of the strict law), for in so doing he upholds these other values" (Hayes, 178). In other words, the pious individual will be motivated by his religious and ethical values to waive certain rights and stop short of what he could legally demand under the law, thereby acting *lifnim mi-shurat ha-din*.

[7] For a discussion of text critical methods in the analysis of the Talmud, see Shamma Friedman, "Pereq ha'isha ravva babavli," (Hebrew) in *Mehaqrim umeqorot*, ed. H. Dimitrovski (New York: Jewish Theological Seminary, 1977), 283-321. Although Friedman developed this

activity of the Talmudic editors from the earlier sources upon which they comment. As I will show, the phrase *lifnim mi-shurat hadin* consistently appears as part of the anonymous editorial commentary, also known as the stam.[8] Having identified when the phrase *lifnim mi-shurat ha-din* is used, and by whom, a literary analysis will then analyze the final form of the sugya.[9] In particular, I explore the effect of these editorial insertions on the sugya as a whole. What function or purpose does the phrase *lifnim mi-shurat ha-din* serve, and how does it alter the reader's understanding of the narrative upon which it comments? As I will demonstrate, the Talmudic editors use this phrase to resolve apparent contradictions between stated legal rules and rabbinic behavior. They accomplish this by distinguishing between two types of rabbinic behavior: examples from which a rule can be derived, and examples from which no general rule can be derived. By allowing the reader to more clearly trace the editorial activity within the sugya, a literary analysis helps to clarify the conceptual significance of *lifnim mi-shurat ha-din* by identifying the way this phrase is used to address and resolve textual and legal problems.

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methodology to study *halakhic* literature, Jeffrey Rubenstein has demonstrated that it can be adapted and applied to *aggadic* passages as well. See Jeffrey L. Rubenstein, "Criteria of Stammaitic Intervention in Aggada," in *Creation and Composition: The Contribution of the Bavli Redactors (Stammaim) to the Aggada*, ed. Jeffrey L. Rubenstein (Tubingen: Mohr Siebeck, 2006), 417-440. For a broader discussion of how to identify and understand the activity of the Talmudic editors, as well as competing theories of the editorial process, see Richard Kalmin, *The Redaction of the Babylonian Talmud: Amoraic or Saboraic*? (Cincinnati: Hebrew Union College, 1989) and Moulie Vidas, *Tradition and the Formation of the Babylonian Talmud* (Princeton: Princeton University Press, 2014).

[8] Since a literary approach focuses on the final version of the text, I refer throughout to the Talmudic editors or the editorial commentary as an active voice within the sugya. A source-critical approach, which focuses on the component parts of the text and its historical compilation, would likely refer to this commentary as the stammaitic strata of the text.

[9] While a literary approach typically includes text-critical or compositional analysis, the emphasis placed on textual strata as opposed to the final form of the text differs among scholars. See, for example, Jeffrey Rubenstein, *Talmudic Stories: Narrative Art, Composition, and Culture* (Baltimore: Johns Hopkins University Press, 1999), especially pp. 1-33, and Vidas, especially pp. 45-80.

I. The Conceptual Approach: Two Challenges

Before exploring how a literary approach reveals a new understanding of the Talmudic phrase *lifnim mi-shurat ha-din*, it is necessary first to demonstrate why a different approach is warranted. I begin by briefly illustrating the strengths and weaknesses of the two dominant conceptual models for *lifnim mi-shurat ha-din*. Five sugyot use this phrase to characterize rabbinic behavior: *Bava Metzia* 24b and 30b, *Berakhot* 45b, *Ketubot* 97a and *Bava Kamma* 99b-100a. Since it is beyond the scope of the present article to examine all five sugyot in depth, I will rely on two illustrative examples from *Berakhot* 45b and *Bava Kamma* 99b-100a.

Berakhot 45b discusses the halakhic requirements for joining in a *zimmun*, the invitation to the grace after meals (*birkat ha-mazon*) that is recited collectively. The discussion begins by citing a mishnah, which states that three who eat together are required to join in the *zimmun*. Two questions are then raised about the mishnah. First, are two people who dine together allowed to join in a *zimmun* if they so wish, or must a minimum of three people be present? Second, what happens if three people eat together, but they do not complete their meal at the same time? Do they still join in the *zimmun*? The first question is resolved quickly by citing a ruling from Abbaye, which is itself based on a tannaitic tradition: two people are not permitted to join in a *zimmun* but must separate to recite the grace after meals.

אמר אביי: נקיטינן שנים שאכלו כאחת מצוה ליחלק	Abbaye said, "We have a tradition that two who ate together as one are required to separate."
תניא נמי הכי שנים שאכלו כאחת מצוה ליחלק	This was also taught in a baraita, two who eat together are required to separate.

The second question is thornier, as the Talmudic editors present two apparently contradictory views on the matter: a ruling by Rava (echoed by R. Zeira), and the conduct of Rav Pappa. The contradiction is resolved by labeling Rav Pappa's actions as *lifnim mi-shurat ha-din.*

אמר רבא: הא מילתא אמריתא אנא, ואיתמרה משמיה דרבי זירא כוותי: שלשה שאכלו כאחת, אחד מפסיק לשנים, ואין שנים מפסיקין לאחד.

Rava said, "This is a statement of mine, and it has also been stated in the name of R. Zeira, in accordance with my opinion: in the case of three who dined together, one interrupts [his meal] on behalf of two, but two do not interrupt on behalf of one."

ולא?! והא רב פפא אפסיק ליה לאבא מר בריה, איהו וחד? שאני רב פפא, דלפנים משורת הדין הוא דעבד.

No?! But didn't Rav Pappa interrupt his meal for his son Abba Mar, [both] himself and another person? The case of Rav Pappa is different, because Rav Pappa acted *lifnim mi-shurat ha-din*.

Rava's statement addresses two possible iterations of the case in which three people eat together, but do not finish eating at the same time. In the first scenario, two of the dining companions finish while the third is still eating. In this case, the third is required to interrupt his meal to join his fellows in the *zimmun*. In the second scenario, one of the dining companions completes his meal before the other two. In this case, he recites *birkat ha-mazon* on his own and leaves. His companions will do the same when they complete their respective meals, and no *zimmun* will occur.

While Rava's statement is both clear and comprehensive, the Talmudic editors immediately raise a problem. They are aware of an occasion on which Rav Pappa dined with two companions—his son, Abba Mar, and another, unnamed person—and Abba Mar finished eating before the other two. Given Rava's statement, one expects that Abba Mar will recite *birkat ha-mazon* on his own and that the others will do likewise when they finished eating. Instead, they interrupt their meals to join Abba Mar in the *zimmun*. This might seem unproblematic, since there is no rule that prohibits them from doing so. As I discuss at greater length below, however, the Talmudic editors often assume that rabbinic behavior transparently communicates legal rules. This assumption creates a problem if it is applied to Rav Pappa's conduct at the meal, since it leads to the conclusion that two diners *do* interrupt on behalf of one. This

directly contradicts Rava's statement. To resolve this tension, the editors differentiate Rav Pappa's actions (שאני רב פפא) by labeling them *lifnim mi-shurat ha-din*.

To understand what this label means, we must identify how it resolves the apparent conflict between Rava and Rav Pappa. The supererogation and waiver of rights models both agree that Rav Pappa's actions were unusual, but they explain his conduct differently. According to the supererogation model, when Rav Pappa interrupts his meal to join his son in the *zimmun*, he goes beyond his legal obligations to fulfill a moral duty. The first part of this account seems accurate: Rav Pappa has no legal obligation to interrupt his meal, but he chooses to do so. It is difficult, however, to identify what moral duty he fulfills in doing so. One can imagine a variety of reasons that Rav Pappa might wish to interrupt his meal and join his son in the *zimmun*. Perhaps he wished to honor his son in front of his guest. Perhaps he saw the opportunity to participate in a *zimmun* as desirable in and of itself. Perhaps he wished to offer either his son or his guest some form of ritual instruction. The narrative does not explain the reasons for his actions, and the editors offer no moral evaluation of his conduct; while there are various Talmudic terms that clearly signal either approbation or disapproval,[10] none of them appear in

[10] Many scholars view the term *lifnim mi-shurat ha-din* as conceptually related to phrases such as *dinei shamayim* (Shilo, "On One Aspect of Law and Morals," 377), *middat hasidut* (Shilo, "On One Aspect of Law and Morals," 377 and Newman, "Ethics as Law, Law as Religion: Reflection on the Problem of Law and Ethics in Judaism," *Shofar: An Interdisciplinary Journal of Jewish Studies* 9, no. 1 [1990]: 15), *ruah hachamim noha heimeinu* (Newman, "Ethics as Law," 14) and *kofin al middat sodom* (Shilo, "*Kofin Al Middat S'dom*: Jewish Law's Concept of Abuse of Rights," *Israel Law Review* 49, [1980]: 49-78 and Newman, "Ethics as Law," 15). However, these terms never appear in conjunction with *lifnim mi-shurat ha-din*. Furthermore, Mark Rosen has argued for an important distinction between the way these categories function and the way I argue that *lifnim mi-shurat ha-din* functions below. He writes, "[M]any halakhic categories can function as conduits for moral considerations. Examples include darche no'am, bi'tzelem elokim, kavod ha'briot, shalom bait, kol yisrael arevim zeh-bi-zeh, kiddush hashem/chilul hashem, vi'chai bahem, and ayt laa-sot. What characterizes such conduits is that they have broad, open-ended language that the traditional halakhic corpus has not transformed into a rule-like legal test." Unlike the "broad, open-ended language" of these other categories, I argue that *lifnim mi-shurat ha-din* has a precise technical function: it

conjunction with the phrase *lifnim mi-shurat ha-din* (here or elsewhere), and the editors do not suggest that others should imitate Rav Pappa's conduct. Thus, while it is certainly possible that Rav Papa was ethically prompted to interrupt his meal, this is far from clear. There is nothing in the text itself that suggests this explanation should be preferred over others.

The waiver of rights model also assumes that Rav Pappa's actions are ethically motivated, and it therefore faces similar difficulties. In addition, it encounters a structural problem. While one might argue that Rav Pappa waives his 'right' to continue eating by interrupting his meal and joining his son in the *zimmun,* that description does not correspond with the typical articulation of the waiver of rights model. First, the model assumes that Rav Pappa possesses a special status that would exempt him from the standard rules governing the *zimmun* or *birkat ha-mazon*, but no such privilege is ever mentioned. Second, even if it were, the model assumes that Rav Pappa would then waive that right in preference for following the general rule. In this case, however, the general rule is that he should *not* interrupt his meal. As a result, there are significant gaps between the conceptual model and the textual evidence. Since the phrase *lifnim mi-shurat ha-din* appears rarely, the presence of such omissions or gaps between these models and even one sugya raises significant concerns about their descriptive accuracy.

Despite these problems, each model also has significant explanatory power when applied to other sugyot. *Bava Kamma* 99b-100a illustrates this strength while highlighting a different set of challenges. Like *Berakhot* 45b, it begins with a legal discussion. In this case, the discussion centers on the legal liability of a banker who misidentifies a counterfeit coin as valid currency. The passage discusses three levels of bankers —laymen, professionals, and expert professionals—and differentiates between their respective responsibilities. Laymen and professional bankers are both

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establishes that no general rule for behavior can be derived from the actions so described. See Mark Rosen, "Reframing Professor Statman's Inquiry: From History to Culture," *The Journal of Textual Reasonin*g 6, no. 1 (2010).

liable for their errors, but expert professionals are declared exempt from liability. Such a conclusion may initially seem to be counterintuitive. Clients are likely to expect that the accuracy of the banker will correspond directly to his level of training; one might therefore expect expert bankers to bear the greatest degree of responsibility for their mistakes. The passage, however, suggests an alternative logic. Expert professionals are understood to have such a high degree of training that their mistakes are always due to factors beyond their control, thereby exempting them from liability. This logic is illustrated by Rav Pappa, who cites the example of Dancho and Issur. As the Talmudic editors explain, Dancho and Issur were two expert bankers who erred when a new mint of coin came into circulation without being announced. Since they had no way of knowing that the new coin was valid currency, they mistakenly declared it to be counterfeit. Such a mistake could not have been avoided, no matter how conscientious the bankers were or what their level of training was. Through the discussion of this example, the sugya implies that this is the only type of error expert bankers will make. As a result, they are exempt from all liability.

Having established this exemption, the passage then goes on to explore the case of an expert banker, R. Hiyya, who made a similar mistake to Dancho and Issur, but who chose to compensate his client. R. Hiyya's actions are characterized in the sugya as *lifnim mi-shurat ha-din.* For clarity, I have divided the sugya into three subsections: the legal framework [A], the narrative about R. Hiyya [B], and the analysis of that narrative [C].

[A] 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.

[A] It was stated: "[Regarding the case of] a person [who] showed a *dinar* to a banker [who declared it a good coin] and it was later found to be bad–one *baraita* states that a professional is exempt but a layman is liable, while another *baraita* states that both the professional and the layman are liable." Rav Pappa said: "The *baraita* which teaches that a

professional is exempt refers specifically to experts like Dancho and Issur who do not require any further instruction." In what case did they [Dancho and Issur] err? A new coin stamp was issued; when the first coin with that new stamp came into circulation, they made a mistake [and identified the coin as counterfeit].

[B] 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 בישׁ.

[B] A woman came and showed a *dinar* to R. Hiyya, and he told her it was a good coin. Later, she returned and said to him, "I showed it [to others], and they said it was a bad coin. No one would take it from me." R. Hiyya said to Rav, "Go and exchange this coin [for a good one] and write it down in my register as a loss."

[C] 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: *והודעת להם* – זה בית חייהם; *את הדרך* – זו גמילות חסדים; *ילכו* – זו ביקור חולים; *בה* – זו קבורה; *את המעשה* – זה הדין; *אשר יעשון* – זו לפנים משורת הדין.

[C] How is this case different from that of Dancho and Issur, who required no further instruction? Wasn't R. Hiyya also an expert who required no further instruction? We must say that R. Hiyya acted *lifnim mi-shurat hadin,* as Rav Yosef taught: *You shall make known to them* (Ex. 18:20) – this refers to their livelihood; *the way* – this refers to deeds of loving-kindness; *they will walk* – this refers to visiting the sick; *upon* – this refers to burial; *and the deeds* – this refers to *din; they shall do* – this refers to *lifnim mishurat ha-din.*

The sugya begins with a discussion that establishes a three-tiered system for classifying bankers and their respective liability [A]. It then recounts a narrative which, at first blush, appears to provide an illustration of the law

as articulated [B]. A woman comes to a banker, R. Hiyya, and shows him a coin, which he identifies as valid. When the coin is later shown to be counterfeit, he compensates her for the mistake, in accordance with the legal requirements incumbent upon most bankers. The Talmudic editors then complicate this narrative by revealing that R. Hiyya was an expert banker, making him exempt from this requirement [C]. Given this, why does he offer to exchange her counterfeit coin for a valid one from his own coffers, taking the financial loss upon himself? The editors explain his unexpected conduct by stating that he acted *lifnim mi-shurat ha-din*. The passage concludes by citing a variant of the midrashic tradition in which this phrase first appears.[11]

As with the case of *Berakhot* 45b, the editors use the phrase *lifnim mi-shurat ha-din* to differentiate R. Hiyya's conduct from the general rule outlined in the preceding legal discussion. On what basis do they make this distinction? The supererogation model would suggest that R. Hiyya felt a moral obligation to repay his client, even though he had no legal obligation to do so. This description seems reasonable. The narrative makes it clear that R. Hiyya bears no legal responsibility for the mistake. It also presents his decision to repay his client as generous, since he voluntarily accepted the financial loss involved. Since it is reasonable to view such generosity as morally praiseworthy, R. Hiyya's conduct matches the supererogation model well.

R. Hiyya's actions also fit the waiver of rights model. As an expert banker, the law explicitly exempts him from liability for his mistake, but R. Hiyya elects to waive this exemption. Following the general rule for bankers, he repays his client. Like the supererogation model, the waiver of rights model also assumes that R. Hiyya is motivated by ethics or piety, but it explains his actions differently. In choosing to repay the woman, R. Hiyya does not go "beyond the law" or hold himself to some higher ethical standard. Since a person is never obligated to exercise a legal exemption,

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[11] The midrash presented here is almost identical to the version found in the *Mekhilta of Shimon bar Yochai,* but there it is attributed to R. Elazar of Modi'in, not Rav Yehuda.

R. Hiyya is free to choose whether to compensate his client.[12] Both legal options are open to him, and he selects the option that he finds morally preferable.[13] According to this account, R. Hiyya's ethical concerns do not supersede or replace legal ones; instead, they guide his legal decision-making.

I have demonstrated that both the supererogation and waiver of rights models offer compelling explanations of R. Hiyya's behavior. Both explain how the label *lifnim mi-shurat ha-din* differentiates his actions from other cases, thereby resolving any tensions between his conduct and the general rule. Unfortunately, however, the sugya does not provide additional information that would help us decide between these two models. The narrative does not describe R. Hiyya's motivations or his reasoning process; it simply provides an account of his actions.

These challenges pinpoint the difficulty of relying on a conceptual approach to analyze these sugyot. Both models seek to clarify the relationship between Jewish ethics and Jewish law by explaining how ethical concerns or motivations interact with legal rules. As we have seen, however, the sugyot in question provide no information about the concerns or motivations of the rabbis who act *lifnim mi-shurat ha-din*. A

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[12] A source critical analysis suggests that the Palestinian rabbinic community may have held all bankers liable for their errors, while the Bavli exempts expert bankers. R. Hiyya is known to have spent significant time in Palestine. It is therefore quite possible that, rather than acting *lifnim mi-shurat ha-din*, R. Hiyya understood himself to be obligated by rabbinic law to compensate his client. The Talmudic editors, however, seem unaware of this potential difference in legal practice, and they therefore explain his conduct as *lifnim mi-shurat ha-din*. For a fuller source critical analysis, see Barer, "A Judge with No Courtroom," 118-137, and Saul Berman, "Lifnim Mishurat Hadin," *Journal of Jewish Studies,* 26, nos. 12 (1975): 87-91.

[13] Ira Bedzow has proposed a different but related model of *lifnim mi-shurat ha-din* as "voluntary obedience to the spirit of the law" (Ira Bedzow, *Maimonides for Moderns: A Statement of Contemporary Jewish Philosophy* [New York: Palgrave Macmillan, 2017], 293). On this model, one might say that R. Hiyya adheres to the rationale that grounds the general rule: bankers should compensate their clients for avoidable mistakes. Perhaps R. Hiyya felt that, unlike the case of Dancho and Issur, he had been careless in his evaluation of the coin and therefore bore responsibility for the error. Like proponents of the waiver of rights model, however, Bedzow argues for the inseparability of law and ethics, since "it is the law that provides the beliefs which motivate such action" (Bedzow, 293). For a full discussion, see Bedzow, 293-305.

literary analysis of *Berakhot* 45b suggests that the assumption that they are motivated by ethical concerns may not be warranted. This lack of textual evidence explains why scholars have been able to marshal these passages to support the view that that Jewish ethics is part of *halakhah,* as well as the view that Jewish ethics is independent of *halakhah,* even though these positions are contradictory. The conceptual approach is asking a question that the texts simply do not provide the information to answer.

II. The Literary Approach: New Perspectives

While it may not be possible to fully determine why the rabbis in these passages act the way that they do, a literary analysis can provide greater clarity about what labeling their actions as *lifnim mi-shurat ha-din* accomplishes. It highlights three primary pieces of information about this phrase that have largely been overlooked in previous studies: 1) the phrase *lifnim mi-shurat ha-din* is primarily used by the Talmudic editors to describe rabbinic actions, not by named rabbis to explain their behavior;[14] 2) the phrase describes cases in which rabbinic conduct appears to deviate from stated legal rules; 3) the phrase signals to the reader that no rules for behavior can be derived from these cases, thereby neutralizing any legal problems they might pose. The actions described as *lifnim mi-shurat ha-din* each represent a permissible deviation from expected behavior, but they do not alter existing standards for behavior or establish new ones. This final point is significant, because the assumption that rabbinic actions reveal or instantiate new rules for behavior is a central feature of the

[14] A significant exception is the work of Saul Berman, who expressly acknowledges that the term *lifnim mi-shurat ha-din* is a later addition to these sugyot. In fact, Berman argues that, in some cases, the rabbis who act *lifnim mi-shurat ha-din* were following the legal requirements of their time. Their behavior only appears to be confusing to later readers because those requirements were waived in subsequent years. Conceptually, however, Berman's analysis overlaps significantly with the waiver of rights model. He argues that rabbis who act *lifnim mi-shurat ha-din* act "in accordance with the undifferentiated law in preference to shurat hadin" (Berman, 95). In other words, those who act *lifnim mishurat ha-din* are exempt from the general rule (which Berman called the "undifferentiated law") but elect to follow it anyway.

Talmudic editors' legal hermeneutic. I argue that this assumption does not apply in the cases labeled as *lifnim mi-shurat ha-din* because the editors conclude that the rabbis in these narratives do not rely upon a rule-based process of decision-making. To demonstrate this, it will be helpful to discuss each of these features in some detail.

One of the central features that a literary approach highlights is the placement of the phrase *lifnim mishurat ha-din* within the sugya. As seen in the previous discussion, the phrase usually appears in the editorial layer of the text, as part of a repeated literary structure.[15] The sugya begins by presenting a legal rule (or set of rules). Following this legal discussion, a narrative is presented in which a rabbi's behavior does not seem to conform to the rules just presented. The anonymous voice of the editors then highlights this point of conflict between the rule and the narrative. Finally, the editors resolve that conflict by stating that the rabbi in the narrative acted *lifnim mi-shurat ha-din*. I quote briefly from each sugya again below, with the editors' comments in bold.

Berakhot 45b

Rava said, "This is a statement of mine, and it has also been stated in the name of R. Zeira, in accordance with my opinion: in the case of three who dined together, one interrupts [his meal] on behalf of two, but two do not interrupt on behalf of one." **No?! But didn't Rav Pappa interrupt his meal for his son Abba Mar, [both] himself and another person? The**

[15] Of the five sugyot that describe rabbis acting *lifnim mi-shurat ha-din*, only *Bava Metzi'a* 24b potentially places this phrase in the mouth of a named rabbi. In some manuscripts, the sugya follows the same literary structure observed in *Berakhot* 45b and *Bava Kamma* 99b-100a. The editors present a narrative and then raise a potential problem or objection, which they resolve by labeling the actions of statements of a specific rabbi as *lifnim mi-shurat ha-din*. The following translation reflects the version found in Hamburg 165: "Rav Yehuda was following Mar Shmuel in the grain-pounder's market. He [Rav Yehuda] said to him [Mar Shmuel]: 'If a person found a purse here, what is the ruling?' He [Mar Shmuel] replied: 'It is his [it belongs to the finder].' 'And if a Jew came and showed him an identifying mark [thereby proving the purse was his], what is the ruling?' He replied, 'He is obligated to return it.' Both?! *Lifnim mi-shurat ha-din*." Other manuscripts, however, insert the words **ליה אמר** ('he said') before the last two lines of the passage, positioning both the question 'both?!' and the answer of *lifnim mi-shurat ha-din* as part of the dialogue between Rav Yehuda and Mar Shmuel. The Vilna Shas includes these insertions.

case of Rav Pappa is different, because Rav Pappa acted *lifnim mi-shurat ha-din*.

Bava Kamma 99b-100a

A woman came and showed a *dinar* to R. Hiyya, and he told her it was a good coin. Later, she returned and said to him, "I showed it [to others], and they said it was a bad coin. No one would take it from me." R. Hiyya said to Rav, "Go and exchange this coin [for a good one] and write it down in my register as a loss." **How is this case different from that of Dancho and Issur, who required no further instruction? Wasn't R. Hiyya also an expert who required no further instruction? We must say that R. Hiyya acted *lifnim mi-shurat ha-din*.**

In *Berakhot* 45b, the editors highlight the conflict between Rava's statement and Rav Pappa's behavior. If, according to Rava, two diners do not interrupt on behalf of a third companion, then why did Rav Pappa and his companion interrupt their meal for Abba Mar? The challenge is resolved by explaining that Rav Pappa acted *lifnim mi-shurat ha-din*. The same pattern applies to the excerpt from *Bava Kamma*, where R. Hiyya's actions appear to contradict the rule exempting expert bankers from liability (articulated earlier in the sugya). If, like Dancho and Issur, R. Hiyya was not required to repay his client due to his level of expertise, why did he do so? Again, this problem is resolved by explaining that R. Hiyya acted *lifnim mi-shurat ha-din*.

In both cases, the phrase *lifnim mi-shurat ha-din* performs an identical function. The editors use it to explain why Rav Pappa and R. Hiyya do not adhere to expected norms of behavior. By marking such behavior as unusual, the editors reveal a central aspect of their understanding of how law operates. A primary function of legal rules is to require or prohibit certain actions. For example, in *Berakhot* 45b, the rule that "three who eat together as one are required to join in a *zimmun*" creates a clear obligation, just as the rule that "two who eat together as one are required to separate" creates a clear prohibition. If two people dine together, and then join in a *zimmun,* they have violated the laws of *birkat ha-mazon*. The continuation of the sugya suggests, however, that rules can also set behavioral

expectations by creating a type of normative script. Rava's statement that "two do not interrupt on behalf of one" has both descriptive and normative force. While it does not prohibit two diners from interrupting their meals on behalf of a third, it creates the *expectation* that they will not do so. When Rav Pappa and his companion interrupt their meals to join Abba Mar in the *zimmun*, they violate this expectation. To understand why this unexpected behavior is so unsettling to the Talmudic editors, we first need to understand a core tenet of their legal hermeneutic.

The primary activity of the Talmudic editors is to collect, arrange, and interpret a vast collection of inherited traditions from earlier generations of rabbis. Their sources include explicit statements or teachings by earlier rabbis, but they also include narratives about those rabbis and their conduct in specific cases. The editors assume that it is possible to derive general rules for behavior from these narrative examples, and they often signal such inferences with the technical term שמע מינה, "learn from it" or "derive from it."[16] By way of illustration, consider the following example from *Hullin* 106a. The sugya recounts an instance in which a basket of fruit was offered to two rabbis, R. Ami and R. Asi. Both rabbis ate the fruit without ritually washing their hands beforehand. From this narrative example, the editors draw several conclusions, including that the obligation to ritually wash before eating does not extend to fruit. They summarize that conclusion in the form of a rule: "Learn from this (שמע מינה) that there is no ritual washing of hands for fruit."

This technique allows the editors to produce more robust guidelines for behavior than if they were limited to explicit teachings alone, but it creates problems in both *Berakhot* 45b and *Bava Kamma* 99b-100a. A reader who assumes that general rules can be derived from narrative examples will be primed to read the story about Rav Pappa's meal and conclude that

[16] Louis Jacobs includes this phrase as one of several that indicate an "argument by comparison" or "the deduction of a rule, not stated explicitly, from an accepted teaching to which it bears a strong resemblance." (Louis Jacobs, *The Talmudic Argument* [New York: Cambridge University Press, 1984], 14.) My analysis builds on his framework but specifies that the editors treat narratives of rabbinic action as a type of 'accepted teaching' from which rules can be derived.

two diners ought to interrupt their meal to join their third companion in a *zimmun*. Such a reader will also be likely to read the story about R. Hiyya and conclude that expert bankers are required to compensate clients for their mistakes. In both cases, the reader will derive a rule that contradicts an explicitly stated teaching, signaling a problem with the inference.

Such cases are jarring. They interrupt the editors' standard reading process by calling into question the fundamental assumption that general rules can be derived from narrative sources. The editors can resolve this problem in one of two ways: they can either revise their general assumption or explain why it does not apply to these specific cases. They opt for the latter approach. By labeling these examples *lifnim mi-shurat ha-din*, the editors indicate that there is something unusual about these cases, and that therefore the standard assumptions about rabbinic behavior do not apply.

III. Conceptual Implications

These observations not only clarify why the editors label certain actions *lifnim mi-shurat ha-din*, but they also suggest a new conceptual framework for understanding these passages. I have argued that the editors use *lifnim mi-shurat ha-din* to resolve a potential conflict between rabbinic actions and legal rules by stating that no general rules for behavior can be derived from these cases. Although the rabbis in these narratives may upset behavioral expectations, a legal conflict only arises if one attempts to abstract a broader rule or principle from their conduct. What differentiates the behavior of these rabbis from rule-setting behavior?

I have argued that the Talmudic editors assume, in most cases, that general rules can be derived from specific examples of rabbinic conduct. I propose that this assumption rests on a corollary assumption that rabbis usually engage in a process of rule-based decision-making. When rabbis encounter a new scenario, they consider the facts of the case, review the relevant rules, determine which rule best governs the case at hand, and then apply it. Consider the example from *Hullin* 106a. The editors presume

that when R. Ami and R. Asi are presented with the basket of fruit, they mentally review their knowledge of the various rules that govern ritual handwashing. They determine that there are no rules that would require handwashing for fruit, and so they eat without washing. Their action—eating without ritually washing—communicates this rule as clearly as if they had stated it explicitly, enabling the editors to easily derive the rule from their actions.

When the editors label the actions of a rabbi as *lifnim mi-shurat ha-din*, they signal that, unlike R. Ami and R. Asi, the rabbi in this case did not engage in a process of rule-based decision-making. What, then, guided his actions? Numerous legal theorists have discussed alternatives to rule-based decision-making.[17] While they use different language to describe each process, these theorists largely agree that rule-based reasoning is a streamlined and structured process that allows decision-makers to focus their attention on "easily identified, easily applied and easily externally checked factors."[18] This process enables decisionmakers to quickly isolate the relevant details in the case and to determine which rules apply to it. Scholars often juxtapose this streamlined model with a form of reasoning that is highly contextual and responsive to the particularities of each case. This approach places higher demands on decision-makers, requiring them to "scrutinize a large, complex and variable array of factors,"[19] but it also enables them to respond with greater nuance to the specifics of the case at hand. Legal theorists sometimes call this form of reasoning "particularistic"[20] or "contextual,"[21] but I refer to it as "discretionary judgment" because of the similarities it bears to the idea of judicial discretion. Both forms of reasoning require judges or decision-makers to

[17] See, for example, Frederick Schauer's discussion of "particularistic decision-making" in *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 2002), especially 77-78, and Catharine P. Wells, "Situated Decisionmaking" *Southern California Law Review* 63, (1990): 1727-1746, especially 1731ff.

[18] Schauer, 152.

[19] Ibid.

[20] Schauer, 77-78.

[21] Wells, 1731.

rely on their personal experience, knowledge, and discernment to determine the best course of action in the case at hand.

If the actions classified as *lifnim mi-shurat ha-din* are based on discretionary judgment, rather than rule-based judgments, this reinforces the conclusion that no rules can be derived from them. As Ronald Dworkin has argued, "when the judge decides an issue by exercising his discretion, he is not enforcing a legal right as to that issue."[22] By this, Dworkin means that a decision reached through discretionary judgment does not establish a legal obligation, since he understands legal rights as imposing an obligation on others to act in a certain way toward the person possessing that right. While not identical, this observation parallels the editors' conclusion that no legal rules can be derived from actions undertaken *lifnim mi-shurat ha-din.* Just as the judge does not enforce a right or obligation when he or she exercises judicial discretion in deciding a case in a courtroom, so too a rabbi does not instantiate a new rule or obligation when he exercises discretionary judgment and acts *lifnim mi-shurat ha-din* in his daily life.

It is beyond the scope of the present paper to provide a more complete discussion of different forms of rabbinic decision-making here. I suggest, however, that analyzing these sugyot from the perspective of decision-making could contribute to broader debates about Jewish law and ethics in several concrete ways. First, it is notable that the rabbis who are described as acting *lifnim mi-shurat ha-din* do not do so in their official capacity as judges,[23] nor do they cite *lifnim mi-shurat ha-din* as the rationale or principle for their actions. Rather, as noted above, it is the Talmudic

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[22] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 17.

[23] It should be noted that while rabbis are not described as acting *lifnim mi-shurat ha-din* in their official capacity as judges, God is. However, the relational nature of this type of decision-making is still highlighted: God acts *lifnim mi-shurat ha-din* when judging the conduct of individuals and assessing their merits (*Avodah Zarah* 4b). There is no indication that God acts *lifnim mi-shurat ha-din* when formulating rules or commandments; in fact, the sugya suggests that *lifnim mi-shurat ha-din* is incompatible with Torah study, an activity more closely associated with the formulation and interpretation of rules.

editors who use this phrase to categorize specific narratives about rabbinic behavior and to reduce tensions between the actions of the rabbis in those narratives and the normative expectations established by formal law and legal discourse. As a result, these texts suggest that different modes of decision-making may be appropriate to different arenas of life. Rule-based judgments dominate judicial discourse and legislative debates and appear to be the only type of decision-making that the Talmudic editors think can generate new rules. By way of contrast, discretionary judgment emerges as a form of embedded decision-making that takes place outside the realm of formal legal discourse, in the context of everyday life. Such decisions are also framed by social relationships, such the relationship between a father and his son (*Ber*. 45b) or a banker and his client (*B.K.* 99b).

Having identified this alternative model of decision-making, the core question for contemporary discussions of *halakhah* and ethics is when it should be activated. The mere fact that one is interacting outside of the judicial or legislative realm is insufficient. Within the classical rabbinic corpus, the phrase *lifnim mi-shurat ha-din* is rare, and rabbis are often depicted as relying on rule-based decision-making in the course of their everyday lives. When, then, is it appropriate to exercise discretionary judgment? The sources minimally suggest two criteria: 1) the individual must be personally involved in the case or scenario and be directly impacted by its outcome, and 2) the individual must be unable to fully address some type of interpersonal concern if they follow the status quo and act in the expected manner. The sources also provide an important limiting guideline about *how* to exercise discretionary judgment in such cases: while a person can deviate from the expected course of behavior, they cannot go 'off script' in a way that causes them to violate the law.

Such guidance, however, remains minimal. It may still be difficult for individual actors to determine when to exercise discretionary judgment and how to reach an appropriate decision when they do so. This is due, in part, to formal differences between rule-based decision-making and discretionary judgment. As noted above, one of the virtues of rule-based reasoning is that it enables decision-makers to streamline complex cases and reduce the relevant variables to a set of factors that can be easily

identified and applied. Exercising discretionary judgment does not allow for this process of simplification. As a result, decision-makers must balance a wide variety of complex factors and considerations, including the facts of the case; any obligations or prohibitions established by law; the potential consequences of any decision they make; and a variety of other mitigating factors, such as their personal relationships with the other actors involved and the values that guide those relationships. While rule-based decision-making constrains the choices available, exercising discretionary judgment expands them. This means that it creates the possibility for both better *and* worse outcomes. As a result, it places far greater weight and responsibility on the judgment of the individual.

Perhaps due to its these risks and difficulties, the Talmud never applies this phrase to non-rabbinic actors, nor does it seem to suggest that this is a type of decision-making that should be widely or regularly employed. This raises further questions about who, in the contemporary context, is appropriately situated to exercise discretionary judgment. Is this type of decision-making only accessible to those who have a thorough knowledge of rabbinic law and the various prohibitions and obligations that might constrain their behavior in the case at hand? Is it only available to those who have been trained in specific modes of legal or ethical reasoning? While the Talmudic sources seem to point in this direction, such conclusions would restrict the exercise of discretionary judgment to an elite group of scholars and judges. Those who wish to adapt or adopt *lifnim mi-shurat ha-din* as a model for contemporary decision-making must therefore consider both *when* and *how* to exercise discretionary judgment, as well as *who* can engage in such judgments.

Understanding *lifnim mi-shurat ha-din* as discretionary judgment also impacts scholarly debates about Jewish law and ethics. Focusing on decision-making shifts the emphasis of these discussions from rules and principles to behavior. Law and ethics are both systems for guiding human behavior, and scholars interested in the relationship between the two should clarify how each system accomplishes this. Do actors reason from ethical principles in largely the same way they reason from legal rules? Or do we assume that ethical and legal reasoning employ different

structures of decision-making? If the former, legal rules may have different content than ethical principles, but each would guide human behavior in a similar manner. If the latter, law and ethics denote different types of reasoning, and therefore the ways in which they guide human behavior would be quite different.

There is a rich body of literature on decision-making. Bringing this literature into conversation with the Talmudic sources about *lifnim mi-shurat ha-din* may highlight new points of contact with recent studies that explore the relationship between rabbinic narratives and *halakhah*,[24] or broader questions of rabbinic normativity.[25] Much of the existing literature discusses ways in which ethical considerations and concerns for justice impact legal decision-making. Although there are important differences between secular American law and rabbinic law, these studies may enrich our vocabulary for thinking about the ways that a range of normative concerns impact rabbinic reasoning and action.

I have argued that the Talmudic editors primarily use the label of *lifnim mi-shurat ha-din* to resolve legal tensions between the different sources that they inherit, and to clarify that no broader rules for behavior can be derived from these examples. I have suggested that the reason no rules can be derived from these cases is because the rabbis in question relied on their discretionary judgment, rather than on rule-based decision-making. Further explorations of rabbinic decision-making could clarify the myriad ways in which both legal and ethical considerations shape rabbinic behavior, as well as the degree to which these rabbinic narratives provide practical instruction for Jewish decision-making today.

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[24] See, for example, Barry Wimpfheimer, *Narrating the Law: A Poetics of Talmudic Legal Stories* (Philadelphia: University of Pennsylvania Press, 2011) and Moshe Simon-Shoshan, *Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah* (Oxford: Oxford University Press, 2012).

[25] See, for example, Tzvi Novick, *What is Good and What God Demands: Normative Structures in Tannaitic Literature* (Leiden: Brill, 2010).