A Judge With No Courtroom:
Law, Ethics and the Rabbinic Idea of *Lifnim Mi-Shurat Ha-Din*

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Abstract

*A Judge With No Courtroom: Law, Ethics and the Rabbinic Idea of Lifnim Mi-Shurat Ha-Din* offers a new paradigm for understanding the enigmatic Hebrew phrase *lifnim mi-shurat ha-din*, which lies at the center of ongoing debates over the relationship between Jewish ethics and Jewish law. Contemporary scholars largely understand *lifnim mi-shurat ha-din* as indicating one of two types of morally praiseworthy action: cases in which a person ethically exceeds his or her legal duty, or cases in which a person forgoes a special right or privilege under the law. Over and against these two models, the present study argues that the Talmudic use of this phrase does not indicate a specific type of action, but instead refers to a specific type of rabbinic decision-making.

The dissertation claims that the Talmudic editors primarily adopt the phrase *lifnim mi-shurat ha-din*, which first appears in tannaitic literature, as a way of addressing a set of narratives about rabbis whose behavior does not conform to established rabbinic norms and standards. By classifying such behaviors as *lifnim mi-shurat ha-din*, the editors preclude them from establishing legal precedent and neutralize potential conflicts among their sources. The application of this label does not simply resolve hermeneutic or legal challenges, however, but also establishes a new model of rabbinic decision-making. Through an analysis of the classical rabbinic sources that create this category, this study examines how the Talmud constructs an understanding of *lifnim mi-shurat ha-din* as discretionary judgment, both in relation and in opposition to the more prominent Talmudic model of rule-based judgment.

The primary focus of the present work is to elucidate and clarify the idea of *lifnim mi-shurat ha-din* in Talmudic sources. By highlighting the role that questions of judgment play in discussions of rabbinic behavior, however, it also introduces a new framework for exploring contemporary Jewish approaches to ethics, law and normative decision-making.
For my mother, Joyce, who taught me to pursue justice, 
and for my father, Philippe, who taught me compassion.
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Distinguishing Between the Mishnah, Tosefta and the Two Talmuds

Texts from the Mishnah, the Tosefta, the Palestinian Talmud (also known as the Yerushalmi) and the Babylonian Talmud (also known as the Bavli) often share titles. In order to delineate between sources, texts from the Mishnah will be preceded by the letter 'm', texts from the Tosefta by a 't' and texts from the Palestinian Talmud by a 'y'. Since the majority of sources considered here are from the Babylonian Talmud, these texts will not be preceded by an additional indicator, as in the following example:

m. B.M. — Mishnah Bava Metzi'a

t. B.M. — Tosefta Bava Metzi'a

y. B.M. — Palestinian Talmud Bava Metzi'a

B.M. — Babylonian Talmud Bava Metzi'a

Variant Spellings

Several of the Hebrew terms in this dissertation have variant English spellings, including the core term that I investigate, lifnim mi-shurat ha-din (which is rendered by many scholars as lifnim meshurat hadin or another similar variant) and the frequently used term for Jewish law, halakhah (which may be transliterated as halakha or halacha, and may or may not be italicized in different texts). In such cases, I maintain the original spelling in all quoted sources.

Manuscript Variations

Throughout this dissertation, I rely primarily on the text of the Talmud that is presented in all standard printed editions (known as the Vilna shas). For each sugya under discussion, however, I have consulted the available manuscripts. In some cases, the manuscripts appear to record a more reliable or earlier version of the text than the Vilna; in
those cases, I present a manuscript source in place of the Vilna and discuss the rationale behind my selection of this alternate source in the footnotes.

Three primary factors contribute to differences between the manuscripts and the printed edition, and to variations among the manuscripts themselves. The first factor, scribal errors and revisions, is common to all textual traditions with a long history of transmission. Scribes may unintentionally alter the text in the process of transcription, resulting in variant spellings or missing words. Scribes may also insert additional material to clarify or 'smooth out' a confusing text. For example, scribes may insert the words 'he asked' or 'he answered' into terse Talmudic dialogues to clarify who is speaking. Such amendments continue to happen after the primary editing and redaction of the Talmud has been completed. Second, outside forces sometimes required transmitters of the Talmud to either remove or encode problematic material. For example, pressures from the Catholic church led later editions of the Talmud to censor or alter references to Jesus that are preserved in earlier manuscripts. Third, and most importantly for the present dissertation, manuscript variations result from the fact that the Talmud persisted as a primarily oral text well into the Geonic period, long after the majority of scholars think that the primary editing or redaction of the text had been completed.

As Robert Brody, a scholar of the Geonic period, notes, "[w]ritten texts of talmudic tractates were certainly in existence well before the end of the geonic period...but the paradigmatic mode of transmission continued to be an oral one." He notes that the geonim typically refer to oral, not written, versions of the Talmud when resolving textual or interpretive problems. When written versions are referenced, these texts are only brought after discussing the oral sources, indicating their inferior status. As a result of this reliance on oral traditions, we should expect—and indeed, we find—significant fluidity in the textual tradition. As Brody notes, the geonim do not seem bothered by such variations, often citing multiple related traditions or sources. While such variations may be substantive, they frequently reflect only surface changes in wording without altering the content of the rulings or arguments discussed. In my discussion of the various sources for lifnim mi-shurat ha-din, I make reference to manuscript variations only when they reflect substantive changes to the structure or content of the sugya. When the manuscripts record only surface variations, I rely on the printed edition.

2. Ibid, 32.
**Introduction**

The relationship between Jewish law and Jewish ethics has become an ongoing topic of debate within the contemporary Jewish community. Although the investigation of these categories is not new, recent attempts to clarify this relationship represent a uniquely modern project. With the rise of Enlightenment philosophy, morality increasingly came to be prioritized as a constitutive dimension of religious life. In the wake of Jewish Emancipation in Europe, clarifying the relationship between ethics and Jewish law became a central component of philosophical attempts to situate Judaism as a religion like (or unlike) other religions. This, in turn, led to heightened debate over how to understand the categories themselves. In recent decades, scholars from across the fields of Jewish thought, ethics, law and philosophy have increasingly turned to rabbinic sources to help clarify this relationship, due to the ongoing normative and prescriptive power of these texts in the Jewish community.

Within the context of this turn to rabbinics, the Talmudic idea of *lifnim mi-shurat ha-din* emerged as a focal point for debate. The phrase itself is enigmatic. It literally translates to "within the line of the law" or "before the line of the law," but its conceptual meaning remains contested. Since the close of the Babylonian Talmud (hereafter simply 'the Talmud'), it has been invoked in different times and places as both a legal and an ethical principle. As a

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4. Louis Newman notes that many post-Talmudic sources seem to understand *lifnim mi-shurat ha-din* as 'beyond the line of the law,' and suggests that this translation of *lifnim* as 'beyond' has foundations in rabbinic sources, specifically m. Shevi’it 6:1 (Newman, "Law, Virtue and Supererogation," Journal of Jewish Studies, 40, 1 [1989]: 61-88, p. 61 n. 2). Although many later sources and scholars may adopt this conceptual understanding of the phrase, it is not a linguistically accurate translation of the term *lifnim*; as I discuss below, many scholars prefer the translation 'within', but I prefer to translate *lifnim* as 'in front of,' 'facing' or 'before.' Both are linguistically possible.

5. As I discuss in Chapter Two, the phrase first appears in tannic literature, and is then developed significantly by the editors of the Babylonian Talmud. The life of this idea, however, does not end when the classical rabbinic periods comes to a close. Instead, it is developed in two primary directions in medieval commentaries and responsa literature, and in modern Jewish thought. In the Ashkenazi legal tradition, *lifnim mi-shurat ha-din* develops into an actionable legal principle. Beginning with the Ravan (R. Eliezer b. Nathan, 1090-1170), Ashkenazi jurists began to rule that if a person has sufficient means, they can be compelled by a court to act *lifnim mi-shurat ha-din* and pay a less prosperous claimant, even if the law technically exempts them from having done so. In the Sephardi tradition, *lifnim mi-shurat ha-din* behavior remains optional. For a more complete discussion, see Shmuel Shilo, "On One Aspect of Law and Morals: Lifnim Meshurat Hadin," *Israel*
result, many scholars have presumed that if this rabbinic category could be definitively proved to be either ethical or legal in nature, it would clarify the broader relationship between Jewish law and ethics. For example, if scholars could demonstrate that the phrase *lifnim mi-shurat ha-din* denotes a moral principle or is used to describe ethical actions within the context of the Babylonian Talmud, it would prove that the rabbis acknowledged a division between ethics and law. The modern dichotomy between these categories could therefore be traced back to the foundational traditions of Judaism as we know it today. Alternatively, if scholars could demonstrate that this Talmudic phrase denotes a legal principle or acts as a descriptive legal term, despite scholarly agreement that many of the actions it describes appear to be ethically motivated, it would provide strong evidence that the rabbis viewed ethical reasoning as a subcategory of legal reflection. This, in turn, would demonstrate that the separation between ethics and law is a post-Talmudic (and possibly modern) development.

This debate is not only a scholarly one. The relationship between ethics and law is also religiously fraught for many contemporary Jews. As Alan Mittleman notes,

> In modern debates over the role of ethics in Judaism vis-à-vis halakha, what is at stake is more than traditionalist Jews continuing to assert the necessity of halakha. Some traditionalists, sensing the depth of the challenge, argue that halakha is not only necessary but sufficient; that halakha comprises all norms relevant to human conduct, at least for Jews. To assert that some other body of norms pertains, indeed, that some non-halakhic ways of thinking about norms are required is to detract from the omni-sufficiency of halakha.

Academic discussions over the relationship between ethics and law in the classical rabbinic period thus intersect with uniquely modern tensions over how to understand Judaism as a religious, legal, ethical and cultural tradition. And yet, perhaps due in part to the fraught nature of this inquiry, decades of investigation have failed to clarify the meaning of the

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6. Different segments of the modern Jewish community interact with the legal tradition in vastly different ways, but for each segment, the early rabbinic movement and rabbinic literature are constitutive of Judaism in a significant way. Thus, debates over how the rabbis understood the relationship between ethics and law, or the category of *lifnim mi-shurat ha-din* more specifically, are often implicitly debates over how contemporary Jews should understand this relationship. These tensions may account in large part both for why this debate became such a heated one, and also for why the positions within the debate have remained relatively constant, since they map roughly to contemporary religious orientations.

phrase *lifnim mi-shurat ha-din* or to illuminate the broader relationship between Jewish ethics and law in substantive ways. Instead, the core paradigms for understanding the idea of *lifnim mi-shurat ha-din* and the various positions scholars adopt within the broader debate remain much the same as they were over four decades ago.

In this dissertation, I seek to move beyond the current impasse by offering a comprehensive reading of the rabbinic sources for *lifnim mi-shurat ha-din*. To my knowledge, no previous study exists which offers a full source-critical, literary and legal analysis of the way this phrase is used in the classical rabbinic corpus. I adopt this approach precisely because it abandons the framing of the current debate and the modern dichotomy of ethics and law on which it relies. It therefore holds the potential to open new avenues for thinking about this complex and cryptic category.

Methodologically, this dissertation begins from two central observations. First, within the classical rabbinic corpus, the phrase *lifnim mi-shurat ha-din* appears primarily in the Talmud, and even there, it appears only rarely (in a total of seven passages). Second, when this phrase does appear, it occurs almost exclusively within the editorial layer of the Talmudic text known as the stam. Building on these textual observations, I seek to uncover the legal and hermeneutic assumptions which structure the usage of this phrase by tracing two interconnected trends in the way that it is developed and deployed in these seven Talmudic passages. I argue that, within the context of the Talmud, the phrase *lifnim mi-shurat ha-din* does not represent either an ethical or legal principle, as most contemporary scholars assume; instead, it signals the use of an alternative procedure of legal decision-making, which I call discretionary judgment. As I will show, the Talmudic editors use the phrase *lifnim mi-shurat ha-din* to categorize the legal standing of conclusions reached through discretionary judgment. While they do not reject the validity of such decisions when made on a case-by-

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8. Although it also appears briefly in tannaitic midrash, as I will discuss in Chapter Two, the phrase does not appear in the Mishnah, Tosefta, Palestinian Talmud or in any amoraic midrashim.

9. Scholars debate how to understand the stam from both a literary and historical perspective. I present my approach to this layer of the text in greater detail in the section below entitled "The Talmudic Sugya".
case basis, the editors clearly indicate that they are unable to set legal precedent. Only decisions reached through a rule-based procedure of judgment become normatively binding, and attain the status of precedent. In distinguishing between the legal consequences of each model of judgment, the editors both acknowledge the legitimacy of discretionary judgment but limit its scope and application, promoting rule-based judgment as the normative legal paradigm.

My approach to the Talmudic material differs from that of most contemporary scholars in several ways. First, the phrase *lifnim mi-shurat ha-din* typically appears in the Talmud as part of the editorial commentary on a rabbinic narrative. Although this phrase is also used to describe divine activity, the majority of inquiries into the idea of *lifnim mi-shurat ha-din* focus on narratives that describe rabbis whose conduct does not conform to standard norms of behavior. Although the rabbi's behavior is always permissible, it is also unexpected. Scholarly analysis of these passages usually centers on the actions recorded in the narrative itself, with particular emphasis on understanding the reasons the rabbi in question acted this way. And yet, rarely, if ever, does a rabbi use the phrase *lifnim mi-shurat ha-din* to explain the rationale for his actions; this categorization is not offered by the actor himself, but by the Talmudic editors. As a result, it tells us more about how the editors interpreted these stories than it does about the motivations of the actors in the stories themselves. In light of this source-critical observation, my analysis places greater emphasis on the activity of the Talmudic editors than have previous studies. Although the editors shape each Talmudic sugya (or passage) in a variety of ways, my analysis is primarily directed towards the layer of the text known as the stam, the anonymous editorial voice which comprises much of the dialectical argumentation and commentary within the Talmud. In Chapter One, I lay the foundations for this inquiry by unpacking core elements of the editors' hermeneutic and legal

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10. A possible exception to this is Ber. 24b. There is enough variation within the manuscript evidence to allow for the possibility that Mar Shmuel himself cites *lifnim mi-shurat ha-din* as the rationale for this ruling. The evidence for such a reading, however, is tenuous. For a full analysis, see my discussion of this passage in Chapter Four.
assumptions, in order to make sense of their decision to label certain actions as *lifnim mi-shurat ha-din*, but not others.

Second, since most scholars investigate the motivations of the recorded actors within these stories, most studies emphasize the content of the narratives themselves. In particular, scholars ask: how are the actions of Rabbi A (which are labeled *lifnim mi-shurat ha-din*) different from those of Rabbi B (which are not), and should this difference be explained by reference to moral or legal motivations? By way of contrast, the current study asks: how does the editorial assessment of the actions of Rabbi A differ from those of Rabbi B, and are there any formal features of the narratives in question that might account for these differences? I emphasize the activity of the Talmudic editors because the available evidence makes it possible to compare and contrast the editorial treatment of these and other rabbinic narratives; by way of contrast, the Talmudic passages that describe rabbis acting *lifnim mi-shurat ha-din* present little to no information about why they did so. This lack of textual data makes it impossible to adjudicate debates over the motivations of the rabbis in the stories themselves, as demonstrated by the myriad studies in which scholars interpret the motivations of the actors in these stories in diametrically opposing ways. This focus on motivation, given the corresponding lack of textual evidence, is one of the primary reasons that debates over how to interpret these sources have remained so intractable.

Finally, scholarly interest in determining what motivates rabbis to act *lifnim mi-shurat ha-din* has led to reliance on a contemporary philosophical framework that views ethics and law as distinct and, to a degree, oppositional categories. Scholars have articulated two primary models for understanding *lifnim mi-shurat ha-din* activity in Talmudic sources: the 'supererogation model,' which argues that these rabbis morally supersede their obligations and elect to act in a generous or compassionate manner, and the 'waiver of rights model,'

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11. As discussed below, scholarship on the idea of *lifnim mi-shurat ha-din* largely interprets these texts through one of two models—either the supererogation model or the waiver of rights model—which are generally presented as incompatible.
which argues that these rabbis waive an existing privilege or exemption under the law in preference for following the general rule. Each of these models describes the formal mechanism by which a rabbi acts *lifnim mi-shurat ha-din* differently: he either elects to morally supersede the law (the supererogation model) or he exercises an existing legal option, waiving a specific right or exemption under the law in favor of the general rule (the waiver of rights model).

Significantly, both of the dominant scholarly models assume that rabbis are motivated to act *lifnim mi-shurat ha-din* on the basis of morality, altruism or piety. As a result, both models also presume that the acts the Talmud describes as *lifnim mi-shurat ha-din* are morally praiseworthy. In this dissertation, I propose an alternative understanding of *lifnim mi-shurat ha-din* as discretionary judgment. I outline this model in the next section. Unlike the two dominant scholarly models, the discretionary judgment model does not begin from the assumption that the actions the Talmud labels as *lifnim mi-shurat ha-din* are either ethically motivated or morally praiseworthy. I refrain from such assumptions for two reasons. First, I argue that both the supererogation and waiver of rights models ascribe moral motivations to the rabbis who act *lifnim mi-shurat ha-din* without sufficient textual warrant. The Talmudic passages in question offer no clear explanation or account of why certain rabbis decide to act *lifnim mi-shurat ha-din*, or of why they elect to do so in some situations, but not in others. Second, bracketing the question of motivation reveals other significant avenues of inquiry, including the structure of such actions themselves, and the way in which they are classified by the editors. Why do the editors categorize the actions described in these seven passages as

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12. While more obvious in the case of the supererogation model, this assumption also characterizes the waiver of rights model. For example, Christine Hayes 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.” 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*. See Christine Hayes, *What's Divine About Divine Law? Early Perspectives* (Princeton: Princeton University Press, 2015), 178.

13. This may explain why later commentators, both medieval and modern, sought to provide an explanation for such behavior. The assumption of moral motivation became so deeply ingrained that the ethical dynamics of a passage from B.M. 83a prompted later commentators to view it as an example of *lifnim mi-shurat ha-din*, despite the fact that this phrase never appears in the passage itself. I discuss this case in some detail in the Conclusion.
lifnim mi-shurat ha-din, but not others? Why do they use the same phrase to describe both divine and rabbinic activity? Abandoning the presumption of moral motivation reanimates these questions.

Discretionary Judgment: A New Model

My proposed model of lifnim mi-shurat ha-din differs from the supererogation model and the waiver of rights model in numerous ways. First, my argument relocates this term in the terrain of formal decision-making. I argue that lifnim mi-shurat ha-din represents a specific type or model of judgment, one which can lead to both positive and negative outcomes. As a result, unlike the two dominant views, which present lifnim mi-shurat ha-din as an evaluative term, the discretionary judgment model presents it first and foremost as a descriptive term, one that indicates a specific approach to decision-making. As a formal category, I argue that the approach to decision-making itself is morally neutral, although engaging in such judgments may lead rabbis to act in morally praiseworthy or morally concerning ways. Furthermore, different structures of decision-making have different limitations, and are therefore likely to carry different risks and rewards. As I will show, the outcome of discretionary judgment is less predictable than that of rule-based judgment, and is more dependent on the character and capacities of the decision-maker. If the decision-maker is wise, thoughtful and morally upright, engaging in discretionary judgment is likely to yield a desirable outcome; if the decision-maker is incompetent, rash or morally flawed, engaging in discretionary judgment is likely to yield a problematic outcome.

The discretionary judgment model also offers a new way of understanding the enigmatic spatial metaphor encoded within the phrase lifnim mi-shurat ha-din itself. The phrase is comprised of two primary grammatical components: a preposition, lifnim, and a construct noun, shurat ha-din. While shurat ha-din has a fixed meaning and is widely translated as "the line of the law," scholars have proposed various ways of understanding the
usage of lifnim in this context. The most common translation is "within"; in this vein, Rachel Adelman has suggested that the lifnim mi-shurat ha-din "entails an opening up of the 'line' of the law to loving kindness (hesed)."\textsuperscript{14} Although such a reading is largely consonant with the supererogation model, Adelman rejects the binary upon which that model relies, arguing that the category of lifnim mi-shurat ha-din need not presume an opposition between "mercy or law, grace or legality, compassion or justice."\textsuperscript{15} Instead, she argues that the "geometric impossibility" of this spatial metaphor points towards the interpenetration of these different ideas.

How can a line have space within it? When law shifts, moved by the force of narrative to accommodate "the 'is,' the 'ought,' and the 'what might be'" of a contingent universe, a space within the line is created. The demands of the particular penetrate the line, opening its two dimensions into three by forging a fissure, an inner world, lifnim mishurat hadin, a space within the law for change. Redemption is precisely about the struggle to expand the line of the law to include the contingencies of life...\textsuperscript{16}

Adelman's view of lifnim mi-shurat ha-din has much in common with my discretionary judgment model. Like Adelman, I present lifnim mi-shurat ha-din as a mode of decision-making that is contingent and responsive to particularity. However, I would like to suggest that phrase (also) encodes a different vision of how such judgments operate, one which may help to illustrate my own view more clearly.

As noted above, the spatial imagery in this phrase situates the actor vis-a-vis shurat ha-din, the 'line of the law.' This reference to the 'line' of the law invokes a narrow path that the actor must follow, turning aside neither 'to the right nor to the left.'\textsuperscript{17} As I discuss in Chapter Two, the phrase shurat ha-din, as well as more generic term din, corresponds to a rule-based approach to legal decision-making. This approach presents decision-making as formulaic and largely scripted; when new situations arise, a person must isolate the relevant variables and apply the appropriate rule in order to determine the correct course of action to

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
\textsuperscript{17} Cf. Deut. 28:14, Josh. 1:7.
pursue. I argue that the prepositional phrase lifnim mi-shurat ha-din repositions the actor in relation to this scripted path. Rather than seeking to carve out space within (lifnim) the line of the law, as Adelman suggests, it positions the actor in front of it.

Like many Hebrew terms, the word lifnim has a cluster of possible (and closely related) meanings. In addition to 'within,' lifnim can also mean 'before' in both a spatial sense (in front of, facing) and a temporal sense (prior to, in the past). As a result, lifnim mi-shurat ha-din might also be translating as 'facing the line of the law,' a translation which highlights a shift in the actor's perspective. Legal rules remain at the center of his vision; none of the Talmudic stories that describe rabbis acting lifnim mi-shurat ha-din suggest that they ignore or disregard the law in doing so. And yet, such rules are no longer the only relevant data point for determining behavior. The agent's peripheral vision has been activated; standing before the line of the law, his frame of reference shifts.

In one sense, his perspective narrows. Standing on the line of the law connects the situation at hand to a series of past and future cases. This, I argue, is why rule-based judgments have the ability to set legal precedent; they are directly informed by past rulings and they inform future cases in turn. Shurat ha-din connects these past, present and future cases into an interlocking chain of legal decisions. When the agent steps off the line of the law and moves to stand before it, he no longer has the complete chain within his purview. Instead, he sees only one small segment of that larger path: the concrete case immediately in front of him.

While this narrows his perspective in one sense, in another sense, it broadens his field of vision. He no longer needs to reduce the case to a limited set of legally-relevant variables, but can consider a wider range of information including various 'extra-legal' factors, such as the social or economic status of the individuals involved, their family situation and so forth.

Rather than being set apart as an objective observer or impartial judge, the rabbi who acts *lifnim mi-shurat ha-din* is also embedded within the web of relationships that he analyzes. As we shall see, every rabbi who is described by the Talmud as acting this way is personally involved in the case under consideration. As a result, he is invested in the outcome and is directly impacted by it.\(^{19}\) Furthermore, in the majority of cases, rabbis act *lifnim mi-shurat ha-din* towards people with whom they have ongoing social relationships, including their children (Ber. 45b), neighbors (Ket. 97a) and business clients (B.K. 99b-100a). The inclusion of these 'extra-legal' considerations\(^{20}\) transforms the nature of the decision-making process into a complex balancing act. It is up to the discretion of the decision-maker to decide which factors should determine the outcome of the case, which is why I refer to *lifnim mi-shurat ha-din* as discretionary judgment.

As a result, unlike the modern ideal of 'blind justice,' discretionary judgment is not impartial. The sympathies of the decision-maker may be swayed by particular details of the case and by his own personal relationship with the other individuals involved. Significantly, this feature is presented not as a flaw, but rather as a potential strength of this type of judgment. The fact that the rabbi in question favors his son, his neighbor or his client is not interpreted as a sign of unfair bias but as a virtue. This lack of impartiality is especially evident in the passages that describe God behaving *lifnim mi-shurat ha-din,* which actively encourage God to show favoritism towards his treasured nation, Israel, and to judge them

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19. B.M. 24b may present an exception to this trend, since the editors describe Mar Shmuel's ruling on a *theoretical* case as *lifnim mi-shurat ha-din.* However, the sugya contains two illustrations of *lifnim mi-shurat ha-din* activity and in the second narrative, the actions of Mar Shmuel's father do have a direct impact on the outcome of the case. See Chapter Four for a more detailed discussion.

20. The question of what constitutes 'legal' or 'extra-legal' information depends largely on how one defines the scope of law. In this context, by 'extra-legal,' I mean to indicate factors that would not immediately impact a rule-based analysis of the case. For example, B.K. 99b-100a discusses the case of a banker who misidentifies a counterfeit coin as valid. Rabbinic law states that expert bankers bear no financial liability for these errors, while other bankers are held liable. In order to determine the legal liability of the banker in question, the rule identifies only two pieces of information as directly pertinent: 1) Does the mistake fall into the class of errors for which a banker can be held legally responsible? 2) Does the banker in question qualify as an 'expert banker' or not? As I discuss in Chapter Three, however, a host of other considerations may motivate the banker to repay his client regardless of legal liability, including: feelings of guilt over the error, his relationship with his client, concern to maintain his business reputation, and so forth. These types of considerations are what I mean when I refer to 'extra-legal' factors.
leniently as a result. While these passages are written from the perspective of those who would benefit from such favor, it is notable that even those passages that focus on rabbinic decision-makers do not necessarily view partiality as a negative feature, as long as such judgments occur in the course of daily life and not in a court of law. They do caution, however, that discretionary judgment may be difficult to execute well.

This dissertation focuses on the juxtaposition of two competing approaches to decision-making within the classical rabbinic literature that references lifnim mi-shurat ha-din: rule-based judgment (or din) and discretionary judgment (or lifnim mi-shruat ha-din). Building on the juxtaposition of these two models, it investigates the consequences of relying on different procedures of reasoning to establish normative commitments. I examine why the Talmudic editors uphold rule-based judgment as the dominant paradigm for rabbinic decision-making, as well as why they retain a space for discretionary judgment within that framework. As I will show, the discussions about normative decision-making that occur within these passages cannot be mapped neatly onto modern understandings of either ethics or law. Instead, they reveal tensions between ideals of rabbinic judgment and behavior and a pragmatic assessment of what legal rules can achieve.

The majority of this dissertation is composed of a detailed analysis of the sources from the classical rabbinic corpus that include the phrase lifnim mi-shurat ha-din. Before turning to those sources, however, it will be helpful to offer further background on how this rabbinic idea came to play such a central role in contemporary discussions of Jewish ethics and law, and to offer some background on the historical and literary composition of Talmudic

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21. Several tannaitic sources suggest that impartiality is a central feature of the formal judicial process. Multiple biblical verses are understood as prohibiting the judge from taking the socio-economic status of the plaintiffs into account in their judgments (cf. Sifra Kedoshim 2:4 on Lev. 19:15, Sifre Devarim on Deut. 1:17 etc.). The Mishnah also bars judges from presiding over cases which involve their family members (m. Sanh. 3:4) and from being paid for their services (m. Bekh. 4:6), both factors that might lead the judge to be unfairly biased towards a particular party. It is beyond the scope of the present study to examine whether or not the Talmudic editors emphasize impartiality as a defining feature of rule-based judgment in their analysis of these traditions, and others like them. It is, however, notable that impartiality is not presented as a feature of discretionary judgment. I am indebted to Chaya Halberstam for calling my attention to these sources, and to the question of impartiality in rabbinic discourses of judgment more broadly.
texts for the reader who may be unfamiliar with these sources. In the course of that presentation, I will also discuss aspects of my methodological approach in greater detail.

Law vs. Ethics: A Brief History of the Debate

Over four decades ago, Aharon Lichtenstein published a widely renowned essay entitled, “Does Jewish Tradition Recognize an Ethic Beyond Halakha?” The framing of this essay largely set the terms for the ensuing debate over the relationship between Jewish ethics and Jewish law, and for the role that the idea of lifnim mi-shurat ha-din would play within it. The title of Lichtenstein's article presents the question as an either/or proposition: either there is an identifiable tradition of Jewish ethics that operates outside of the Jewish legal system, or ethics is subsumed under the category of law in Jewish thought. In other words, either Jewish tradition suggests that law provides the appropriate framework for all forms of normative conversation and reflection, or alternative frameworks exist for thinking about right action and proper behavior through a Jewish lens.

Lichtenstein immediately notes that the question itself is "a studded minefield, every key term an ill-defined boobytrap. Who or what represents the tradition? Is the recognition de facto or de jure? How radical is the the independence? Above all, what are the references of ethic and Halakha? A qualified response is obviously required." His article then proceeds to unpack each of these terms and offer an nuanced explanation of his view. Despite this, subsequent scholarship has largely accepted the binary suggested by Lichtenstein's initial question. As a result, the scholarly discourse has encountered two core methodological problems. First, as Louis Newman notes, it has largely adopted the problematic assumption "that the tradition speaks with one voice on matters of law and ethics."

23. Lichtenstein, 62.
24. For example, Lichtenstein acknowledges that terms like halakhah are used differently in rabbinic sources than in contemporary Jewish parlance.
Given the prevailing view that there is some one normative, Jewish position concerning the relationship between law and ethics, the task at hand becomes to discern that view from among the sources, often by dismissing or harmonizing those texts which represent conflicting viewpoints. Seldom do we find a recognition that the tradition itself may encompass diverse and equally legitimate understandings of halakha and its relationship to ethical norms.\textsuperscript{26}

This presumption of a singular, unified tradition which speaks with one voice at all times and in all places not only encourages harmonization but also risks anachronism. Studies of lifnim mi-shurat ha-din tend to trace the usage of this phrase throughout history, beginning with the rabbinic period and ending with the present day. Such studies also frequently presuppose that linguistic continuity indicates conceptual continuity. In other words, they assume that the phrase lifnim mi-shurat ha-din has the same basic meaning and function in the classical rabbinic period as it has in later works, relying on later commentaries and legal literature to elucidate the Talmudic texts. While differences of opinion between medieval scholars such as Nachmanides and Maimonides are acknowledged, they are often attributed to disputes over the original meaning of the phrase, not to possible changes or developments in the usage of the term over time, or in different regions.\textsuperscript{27}

The present study begins from the opposite assumption. I argue that developments and divisions in the usage of the phrase lifnim mi-shurat ha-din can be observed within the classical rabbinic period, and I assume that these conceptual developments likely continued in the post-Talmudic period. Certainly, my own understanding of the way lifnim mi-shurat ha-din operates within the Talmudic texts differs significantly from prevailing modern conceptions, suggesting that substantive developments in the understanding of this phrase must have occurred at some point following the close of the Talmud. Furthermore, while I assume that the selection of the phrase lifnim mi-shurat ha-din in each textual passage is significant, since the editors had a wealth of related terms to choose from,\textsuperscript{28} I do not presume

\textsuperscript{26.} Ibid.
\textsuperscript{27.} See n. 5.
that the usage of the phrase must be identical in each occurrence. On the contrary, as I will
demonstrate, two distinct but overlapping uses of this phrase can be identified within the
editorial layer of the text. Although I confine my analysis exclusively to the classical rabbinic
period, these assumptions work to counter temptations to harmonize the source material with
later understandings of this phrase.

The presumption that Jewish tradition speaks with a unified voice throughout history
reveals a second methodological problem: the prevailing assumption that rabbinic sources
can be readily analyzed using modern philosophical categories. Lichtenstein's initial
framing of the matter as an either/or proposition—a framing that has been widely adopted by
subsequent scholarship—relies on a modern dichotomy that views ethics and law as separate
and distinct categories. Although Lichtenstein ultimately argues that the rabbis do not employ
this dichotomy themselves, he nevertheless relies upon it to advance his own view of
halakhah as the primary normative category within Judaism. By arguing that ethics is
ultimately a subcategory of halakhah, rather than proposing additional or alternative
categories for the analysis, Lichtenstein reinscribes the categories themselves.

Scholars frequently use modern theories to analyze rabbinic sources, often with
illuminating results. The stagnation of the debate over how to understand lifnim mi-shurat ha-
din, however, suggests that the utility of applying the ethics/law distinction has been
exhausted. The presumption of this binary obfuscates at least as much as it illuminates about

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30. To be fair, Lichtenstein draws a distinction between the modern idea of law and his own definition of
halakhah as a far more expansive term, but he never fully divorces this definition of halakhah from the
mechanisms and modes of reasoning that comprise Jewish law. As such, his argument that halakhah is the
normative category for the rabbis does not fully escape the implication that throughout history, Jewish ethics has
been part and parcel of the Jewish legal system.
the Talmudic sources. Furthermore, it can often lead to a distortion of the textual evidence. The work of Louis Newman, who is himself uniquely attentive to these methodological challenges, provides an apt illustration of these difficulties. In his article, "Law, Virtue and Supererogation in the Halakha: The Problem of Lifnim Meshurat Hadin Reconsidered," Newman subdivides the classical rabbinic sources that employ this phrase into 'legal' and 'non-legal' material.31 In order to make the textual evidence fit into this logical schematic, Newman is forced to subdivide a sugya from B. M. 30b into two 'legal' and 'non-legal' sections and to analyze these portions of the text independently from one another, despite the fact that these sections clearly constitute a singular textual unit. As a result, he is unable to explore how three different textual subunits that employ the phrase lifnim mi-shurat ha-din in this passage—a narrative, a midrash and an amoraic teaching—interact to create, challenge or nuance different meanings and uses of the phrase itself.

In tracing the framing of this debate over ethics and law, and some of the methodological challenges within it, I do not highlight the work of either Lichtenstein and Newman because they provide unusual or egregious examples, but rather because their writing on the topic has been so influential. Their work demonstrates how deeply the modern division between ethics and law has permeated scholarly investigation into the relationship between Jewish ethics and law more generally, as well as how scholars have come to rely on these distinctions in order to understand the term lifnim mi-shurat ha-din specifically.32 This

31. In choosing the terms 'legal' and 'non-legal' rather than 'legal' and 'ethical,' Newman may be trying to sidestep this methodological problems inherent in the ethics/law binary. However, by adopting another binary (the halakhic/aggadic binary, which I discuss below) he ends up replacing one problematic framework with another.

32. Although the tendency to impose modern philosophical categories onto the classical material may be exacerbated in the case of scholarship on lifnim mi-shurat ha-din, Nechama Hadari suggest that this trend permeates Talmudic scholarship, due to the widespread adoption of what is known as the 'Brisk' method. As Hadari notes, "[m]any yeshivot...no longer train their students to learn Talmud in the way that was considered traditional until the 19th and early 20th Century, bur rather train them to learn using the 'Brisk' method. Brisk is an analytical methodology which seeks to extrapolate from the concrete examples and decisions of Talmudic literature to discover abstract and generalisable principles which guide halakhic theory. This is a method of learning halakhah which is extremely appropriate to (and makes most sense viewed in the context of) a culture which tacitly accepts a Kantian, post-Enlightenment understanding of morality; one which privileges principles (which are by nature generalisable or universalisable) over context-dependent, particularistic expressions of moral value." See Nechama Hadari, The Kosher Get: A Halakhic Story of Divorce (Manchester UK: Deborah Charles Publications, 2012), 7.
turn towards abstract and modern theoretical frameworks is understandable; as noted above, the Talmudic sources themselves can be frustratingly enigmatic, while the works of scholars who are able to abstract legal or moral principles from such sources are comparatively clear. I argue, however, that in the case of lifnim mi-shurat ha-din, the utility of relying on these modern philosophical frameworks has proven to be minimal. By collapsing distinctions among the usages of this phrase in the Talmud, in the medieval period, and in modern thought, we risk flattening a rich and diverse tradition—one which might help us think our way out of the current stalemate in the debate over how to understand the relationship between Jewish ethics and Jewish law.

**Disrupting Conceptual Binaries**

Resisting the use of these modern analytic categories, however, poses its own host of methodological challenges. The ethics/law dichotomy is deeply entrenched, as are the two dominant models for understanding the idea of lifnim mi-shurat ha-din (i.e. the supererogation and the waiver of rights models). Furthermore, despite their respective limitations, these approaches have each illuminated important aspects of the source material. How does one build upon the insights of each approach, without reinscribing their limitations? I model my own approach after recent scholarship that has challenged another entrenched binary within the study of rabbinic texts: the classical genre distinction between halakhah and aggadah. While such studies do not reject these genre categories, they disrupt the binary between them, complicating our understanding of the categories themselves. They accomplish this disruption by applying a range of literary and theoretical techniques, thereby creating space for alternative paradigms to emerge from a close reading of the sources themselves. In what follows, I discuss how such techniques might be fruitfully adapted for the present study.
The first step in any study of rabbinic literature is often to determine the genre of the text at hand. Rabbinic sources are classically understood to be either halakhic or aggadic. Following a standard model of binary thinking, which classifies material as either 'A' or 'not-A', the source material is typically classified as either legal (halakhic) or non-legal (aggadic).

As the categories themselves indicate, within the halakah/aggadah binary, law is viewed as constitutive; it is the standard against which all texts are analyzed. Halakhic material has correspondingly been given higher priority and has been more widely studied historically.  

This system of classification also defines law quite narrowly: only those texts that have a clear judicial or legislative application are typically classified as halakhic. This includes texts which transmit legal rules, or which analyze and debate specific legal cases. All other texts, including the majority of rabbinic narratives, are classified as aggadic or 'non-legal.'

In recent years, however, scholars have begun to challenge these genre distinctions by highlighting a set of narratives in classical rabbinic literature that have clear halakhic implications. In Stories of the Law: Narrative Discourse and the Construction of Authority in the Mishnah, Moshe Simon-Shoshan explains how reliance on this binary has caused scholars to overlook important textual sites for understanding the rabbinic negotiation of legal questions.

[H]alakhah and narrative have been consistently viewed by scholars as being in some way opposed to one another. As a result, halakhic stories have been marginalized by scholars throughout history. In fact, halakhic stories are a central genre within the world of classical rabbinic literature. They serve as a primary tool for the transmission of halakhic rulings and principles. Yet they also serve as the bridge which unites the worlds of halakhah and aggadah. Finally, it is within the space of halakhic stories that the rabbis most energetically construct and critique their notions about halakhah as a wider process and system and their commitment and concerns regarding the necessity of an elite rabbinic class in order to insure the continued transmission and observance of the law.

33. As Barry Wimpfheimer writes, "Since the geonic period, the dichotomy of Halakhah and Aggadah has privileged halakhic discourse over aggadic. From that time, Halakha has been the central curricular activity of the vocational scholar, the centerpiece of a yeshiva education...With the rise of Wisenschaft des Judentums, the dichotomy between Halakha and Aggadah received an even more significant overlay of rational and irrational. The preference of the geonim was now ratified by rationalist Wissenschaft scholars who were often ashamed of the fanciful and unrigorous Aggadah." See Barry Wimpfheimer, Narrating the Law: A Poetics of Talmudic Legal Stories (Philadelphia: University of Pennsylvania Press, 2011), 37.

34. As a result, these texts generally adhere to the rule-based model of legal reasoning that I discuss in detail in the body of this dissertation.

Notably, Simon-Shoshan does not abandon *halakhah* and *aggadah* as useful analytical categories; what he rejects is the reification of these categories, which renders texts that might fit into both categories problematic, thereby requiring scholars to reduce those texts solely to their *halakhic* or *aggadic* elements. For Simon-Shoshan, such cases suggest the need to refine our systems of categorization, a process which enables him to note core features of rabbinic lawmaking that might otherwise have been overlooked.

Methodologically, Simon-Shoshan argues that,

in order to be fruitfully analyzed, these stories need to be considered both as halakhah and as aggadah, and they need to be approached using literary, historical, and other academic methods as necessary. The reader must always bear in mind that these stories purport to transmit not only moral and legal truths but historical truths as well. Furthermore, a full understanding of this phenomenon cannot be achieved by cherry-picking stories of interest and analyzing them independent of their contexts. Rather, rabbinic stories must be systematically studied as integral parts of the larger works in which they appear.\(^{36}\)

Following the model outlined by Simon-Shoshan, I rely on a mix of historical, literary and legal analysis in my study of the classical rabbinic sources for the idea of *lifnim mi-shurat ha-din*. I consider the broader literary and legal context in which these sources appear, and I define the corpus on the basis of historical and literary criteria, rather than thematic content. As I will show, this attention to literary and historical dimensions of the text highlights formal features of these passages that have previously been overlooked, and which ultimately have conceptual significance.

While Simon-Shoshan's work focuses primarily on the Mishnah, Barry Wimpfheimer investigates the role of *halakhic* narratives within the Babylonian Talmud. In *Narrating the Law: A Poetics of Talmudic Legal Stories*, Wimpfheimer argues that the classical *halakhah/aggadah* distinction relies upon an overly narrow view of law as legislation. Scholars classify Talmudic texts that cannot be easily translated into legal rules or statutes as 'non-legal'; as a result, this "mode of Talmudic reading must often work to surpress the basic legal message of a talmudic legal narrative because the very dramatic twist that makes the story interesting is often inconsistent with the cultural expectations preserved in normative statutes."\(^{37}\)

\(^{36}\) Ibid., emphasis mine.

\(^{37}\) Wimpfheimer, 2-3.
Uncovering and exploring these tensions, Wimpfheimer's work examines how rabbinic power is expressed in multiple literary layers within the Talmud, including "the depicted characters, the depicting authors, and the interpreting readers."38

This dissertation adopts Wimpfheimer's core observation that normative power is negotiated in different ways at different levels within the text, and it focuses on one level in particular: the contributions of what we might call, adapting Wimpfheimer's terminology, the 'interpreting editors.' I examine how rabbinic narratives are reframed and legally reinterpreted within the editorial layer of the Talmud, by tracing how the 'depicted characters' in the narratives I study are interpreted by a core set of readers—the Talmudic editors and redactors—who label the actions of those characters as lifnim mi-shurat ha-din. I then consider how the application of this editorial label impacts the way in which later (primarily modern) readers understand both these specific narratives and the broader category of lifnim mi-shurat ha-din. In focusing on the activity of the editors, and by differentiating that activity from the stories they comment on, this study seeks to be attentive to shifting literary and legal dynamics at all historical layers of the Talmudic text.

My approach also differs in crucial ways from that of Wimpfheimer. While Wimpfheimer promotes a view of law as "cultural discourse" over the reduction of law to its "statutory forms,"39 my approach maintains an emphasis on law as statute.40 While I agree with Wimpfheimer that this view of law can be reductive, I argue that this reduction is not performed by later readers. Instead, the equation of law and legal rules already begins to occur within the text of the Talmud itself, at the editorial level. As I will show, the editors develop and deploy the phrase lifnim mi-shurat ha-din for the specific purpose of ensuring that any

38. Wimpfheimer, 4.
40. Even when law is equated with statutes, these stories may have legal significance. Beth Berkowitz has argued that stories may provide the context for how and why a law was formulated, changing our understanding of the meaning and significance of a specific legal ruling. Beth Berkowitz, “Black Cats, Good Luck and Rabbinic Hierarchies: Exploring Rabbinic Lawmaking in the Babylonian Talmud.” Paper delivered at the annual meeting of the American Academy of Religion, Baltimore MD, November 23, 2013.
rabbinic action or narrative that falls under this label cannot set legal precedent. In pursuing clarity about the binding normative implications of these complex stories, the editors themselves often reduce these narratives to their statutory implications.

While I maintain that the equation of law with legal rules is one of the core interpretive strategies deployed by the Talmudic editors, the implications of these stories for thinking about Talmudic law and lawmaking are far more expansive. I argue that all seven of the Talmudic *lifnim mi-shurat ha-din* narratives should be read as legal stories for two reasons. First, the editorial treatment of these stories often has direct legislative significance, primarily in the negative sense of precluding specific actions or rulings from functioning as legal precedent. Second, these texts and the category of *lifnim mi-shurat ha-din* itself not only provide insight into specific rabbinic procedures of lawmaking, but also into how these procedures intersect with broader discourses of judgment, behavior and decision-making. This includes the two texts which describe God acting *lifnim mi-shurat ha-din*, which scholars have widely classified as *aggadic* (or non-legal) and which are often marginalized in contemporary studies of the term. Following the work of Robert Cover, I propose that these stories illustrate the attempts of specific rabbis to relate a normative system of codified law to their “social constructions of reality and to [their] visions of what the world might be.”

The work of scholars such as Wimpfheimer and Simon-Shoshan who challenge the classical genre categories of *halakhah* and *aggadah* is therefore important for the present study in multiple ways. They not only identify a new genre of rabbinic texts—the *halakhic* story—which appropriately categorizes the Talmudic texts I examine, but their work also provides a methodological model for thinking beyond or outside of inherited concepts and categories more broadly. The literary distinction between *halakhah* and *aggadah* was as firmly entrenched in the study of rabbinic literature as is the distinction between law and ethics in the literature on *lifnim mi-shurat ha-din*. And yet, Wimpfheimer and Simon-Shoshan

have been able to transcend this binary by building their theoretical framework from the texts themselves, rather than beginning with a conceptual model into which they tried to fit each source. Employing this same methodology highlights an essential observation about the Talmudic sources for *lifnim mi-shurat ha-din*, one which is notably absent from other scholarship on this idea: the fact that the use of this phrase is largely an editorial innovation.

**The Talmudic Sugya**

A significant portion of my analysis rests on the claim that, although the phrase *lifnim mi-shurat ha-din* predates the Talmud, it is primarily developed and deployed by the Talmudic editors. In order to understand the activity of these editors, I begin my study of *lifnim mi-shurat ha-din* as a category by looking at sources for this term in tannaitic midrash, a literature which predates the Talmud. Similarly, my analysis of each Talmudic passage, also known as a sugya, begins with an independent examination of the various sources contained within it. I assume that the editors inherit a set of relatively stable tannaitic and amoraic sources, which they then organize, interpret and manipulate in their construction of the sugya, often reframing the meaning of the original source significantly. Analyzing each constituent part of the sugya in isolation enables me to identify editorial interventions with regard to these earlier sources, and to trace how they deploy the phrase *lifnim mi-shurat ha-din* in order to resolve specific hermeneutic and legal concerns. Since my analysis focuses intensely on the activity of these editors, it may be helpful to offer some brief background on who they were and their role in shaping the text of the Talmud. A brief overview of how scholars analyze the Talmud as a literary and historical document is therefore in order.

Rabbinic Sources

There are actually two Talmuds: the Palestinian Talmud, also known as the 
Yerushalmi (redacted c. 400 CE), and the Babylonian Talmud, also known as the Bavli 
(redacted c. 600 CE). Both texts are encyclopedic works that have been divided into six 
primary 'orders' (or sedarim, sing. seder) and then further subdivided into tractates (or 
masekhtot, sing. masekhta). Both Talmuds are loosely constructed as a commentary on the 
Mishnah, which was compiled around the end of the tannaitic period (c. 10-200 CE) in 
Palestine. Although much of the following discussion might apply to both texts, I focus here 
on how scholars have understood the literary and historical features of the Babylonian 
Talmud, as the primary texts that I analyze come from that work. Analysis of the Talmud 
usually centers on textual units known as sugyot (sing. sugya). Scholars typically subdivide 
these units into three literary layers—tannaitic, amoraic and stammaitic/editorial—each of 
which corresponds roughly to a different period in rabbinic history. Tananitic teachings are 
usually introduced by technical vocabulary (תניא, תנן, מתניתין etc.) that indicate their historical 
provenance, although these designations are not always reliable. The specific term used also 
indicates whether the teaching comes from the Mishnah, or from a baraita (pl. baraitot); the 
latter term means an 'external teaching' and refers to a tannaitic teaching not included within 
the Mishnah. The origins of tannaitic teachings are usually indicated in translation by the 
phrase "it was taught" followed by the source (e.g. "it was taught in a baraita" or "it was 
taught in the Mishnah").

43. This dating is currently the topic of much dispute among scholars, which I discuss at greater length below.
44. Scholars will not always agree on how to subdivide specific Talmudic discussions into sugyot, just as 
literary scholars may not agree how to subdivide a poem into stanzas. The term sugya simply designates a 
literary unit or textual passage. See Elizabeth Shanks Alexander, Transmitting Mishnah: The Shaping Influence 
45. As Louis Jacobs has demonstrated, the editors sometimes present later teachings as tannaitic for rhetorical or 
pedagogical purposes. I discuss this issue in my analysis of B.K. 99b-100a in Chapter Three. See Louis Jacobs, 
46. Many of the baraitot recorded in the Talmud have extant parallels in the Tosefta, a collection of tannaitic 
teachings. The relationship between the Mishnah and the Tosefta is complex. Although many scholars assume that the Tosefta "preserves in a more original and rudimentary form material which appears in a revised and 
edited form in the Mishnah," they also frequently assume that the Tosefta was not compiled in its current form 
until after the redaction of the Mishnah (Robert Brody, Mishnah and Tosefta Studies [Jerusalem: The Hebrew
for example, the Talmud records that "R. Akiva taught X," it suggests that the teaching is tannaitic, since R. Akiva lived during that period.

The Talmud also includes a second layer of attributed statements, which date to the amoraic period (c. 200–450 CE). These teachings are primarily introduced by the formulation "Rabbi A said" (א רבא אמר) and are referred to as meimrot (sing. meimra). While the rabbis of the tannaitic period (known as the tannaim), lived primarily in Palestine, by the amoraic period the rabbinic movement had spread to Babylonia. The teachings of rabbis from this period (known as the amoraim) are collected in both the Palestinian and the Babylonian Talmuds, although, as one might expect from their names, the Palestinian Talmud contains a greater preponderance of teachings from Palestinian rabbis, while the Babylonian Talmud contains a greater percentage of teachings from Babylonian rabbis. Both texts include teachings from both regions, however, and contain significantly overlapping material. Each also contains teachings not found in the other and the Babylonian Talmud is significantly longer.

Both Talmuds also contain a third layer of unattributed or anonymous statements, known as the stam (lit. 'anonymous'), although this layer comprises a more substantial portion of the Babylonian Talmud. This final layer of the text is the product of the Talmudic editors, sometimes referred to as the stammaim. Although the editors of the Talmud present their contributions anonymously, their active presence within the text is difficult to ignore. The editors frequently interrupt, challenge and interrogate previous sources, and, at least in the case of the Babylonian Talmud, their statements form a surprisingly large percentage of the corpus as a whole. The contributions of the Talmudic editors are not limited to the stam, however, since the editors are also responsible for compiling the tannaitic and amoraic

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University Magnes Press, 2014], 141). Judith Hauptman, however, has proposed that the Tosefta precedes the Mishnah, although she suggests that the Tosefta itself comments on an earlier version of the Mishnah (or ur-Mishnah) which is no longer extant. See Judith Hauptman, Rereading the Mishnah (Tübingen, Germany: Mohr Siebeck, 2005). Robert Brody has objected to the attempt by Hauptman and others "to impose a single model on all Mishnah-Tosefta parallels," arguing instead that the relationship between parallel passages may vary between different sugyot and tractates (Brody, Mishnah and Tosefta, 141). Furthermore, some of the baraitot cited in the Talmud have no extant parallels in the Tosefta or other tannaitic works, nor are similar teachings cited in the Palestinian Talmud, making it difficult to determine their origins.
material, and for arranging those teachings into a unified literary work. This type of editorial activity can be harder to trace, since the editors may actively conceal their interventions from the reader. For example, they may arrange the sources to construct a dialogue between two sages who likely never met, or they may attach additional material to earlier teachings without signaling to the reader where the original teaching ends and their additions begin.\footnote{Richard Kalmin refers to this type of editorial activity as "implicit commentary" as opposed to the more explicit commentary recorded in the stam. See Richard Kalmin, \textit{The Redaction of the Babylonian Talmud: Amoraic or Saboraic?} (Cincinnati: Hebrew Union College, 1989): 70.} In this dissertation, I primarily analyze the editorial contributions and commentaries explicitly recorded within the stam, or anonymous layer of the text, since that is where the phrase \textit{lifnim mi-shurat ha-din} consistently appears, although I also pay attention to the 'implicit' editorial commentary that is revealed through the ordering and structure of the sugya itself.

\textit{Dating Source Material}

I have provided here a broad sketch of the ways in which scholars of the Talmud often subdivide the text into historical and literary layers: tannaitic, amoraic and stammaitic/editorial. While the factors I have outlined here, such as attribution and anonymity, are helpful for making broad classifications, it should be noted that they are not always reliable. As Moulie Vidas has shown, the editors will sometimes present the same statement as anonymous in one context and then attribute it in another context, suggesting that anonymity cannot be read naively as a historical marker but may be used consciously by the editors for literary purposes.\footnote{As Vidas writes, "The distinction between the dicta and the \textit{stam}...is not simply a reflection of their different provenances. Rather, it may also be the outcome of a particular pattern of organization and technique of differentiation that was maintained throughout the Talmud and even imposed on materials in which it did not exist." Moulie Vidas, \textit{Tradition and the Formation of the Babylonian Talmud} (Princeton: Princeton University Press, 2014): 45. For a more complete discussion, see also Vidas, 45-80.} Likewise, attributed statements cannot always be reliably dated to the periods their attributions suggest. In the body of the dissertation, I discuss multiple examples (e.g. Ber. 7a, B.K. 99b-100a and B.M. 24b) where editorial interventions make the dating of certain lines of the text suspect or difficult. In each case, I explore the implications of these
methodological difficulties for interpreting these stories or for drawing conclusions about how
the idea of lifnim mi-shurat ha-din developed within the classical rabbinic period.

Despite these challenges, determining the historical provenance of key lines of text
can also provide invaluable insight. As I argue throughout this dissertation, recognizing that
the phrase lifnim mi-shurat ha-din is deployed primarily (but not exclusively) by the
Talmudic editors enables us to trace how this idea develops and changes over time, and to
pinpoint more precisely the function it performs in each passage or source. Scholars have
developed substantive criteria for distinguishing between different layers of the text with
relative reliability. In "A Methodological Introduction to Yebamot X," Shamma Friedman
outlines two primary methods or categories that should be considered when dating a specific
text or line of text: form criticism and source criticism. While no singular criterion from
either category can definitively determine the provenance of a text, looking at a variety of
textual features in tandem often allows for a reasonable degree of reliability in dating,
especially in terms of comparative dating (determining when a word, phrase or line of text is
likely to be a later editorial insertion). It will be helpful to briefly outline each of these
approaches in turn.

Freidman identifies two types of features that the form-critical reader must address:
language and structure. Under linguistic criteria, Freidman includes both language shifts,
such as when the Talmudic text switches from Hebrew to Aramaic, as well as issues of
grammar and vocabulary. In particular, Friedman notes that the insertion of vocabulary or the
use of grammatical forms that are common to a later period may be signs of editorial
interventions or insertions into the text. Friedman also notes more generally that forced or
awkward syntax may be a sign of later editorial changes, since the addition of explanatory
clauses or literary devices aimed to help with clarity may yield awkward sentence structures.
The addition of such devices shapes the literary structure of the text. In addition to

49. For a full discussion of these criteria, see Shamma Friedman, "Pereq ha'isha ravva babavi," (Hebrew) in
explanatory comments, these devices include a technique known as "resumptive repetition," which involves repeating certain questions multiple times in the same passage, as well as references to material that will not be addressed until later in the passage. These literary features represent later additions to the text, which are designed to enable the reader to navigate the text more smoothly. For example, explanatory clauses elucidate confusing material, while resumptive repetition and references to later material enable the reader to keep track of where they are within the argument or passage. According to Friedman, the presences of these devices is a signal of editorial activity. Friedman also notes that the general length and clarity of the passage may provide clues to its dating. Like his claims about syntax, Friedman argues that if a certain phrase or clause can be removed to create a more coherent reading, the phrase in question is likely a later insertion; in other words, excessive length is a sign that the passage underwent substantial editing.

Form criticism relies on data internal to the passage in order to date specific lines of text. Source criticism, on the other hand, uses external data to date the passage in question. In particular, source criticism involves comparing the line of text under question to parallel passages in other rabbinic sources (if such parallels exist). For example, does the text also appear in the Tosefta, the Palestinian Talmud or in any midrashic sources? Is it in all existing manuscripts of the Babylonian Talmud, or does it only appear in some manuscript variants and not others? It should be noted that these parallels need not be identical copies of the line of text in question; the existence of traditions that closely parallel the source in both conceptual content and wording is sufficient. For example, as I discuss in Chapter Three, in tractate Bava Kamma, the Babylonian Talmud records a baraita that teaches,

[In 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...both the professional and the nonprofessional [banker] is liable (B.K. 99b).

Although the wording is slightly different, a similar statement is recorded in Tosefta Bava Kamma.
[In the case of] a person who shows a dinar to a banker [who judged it to be a good coin] and it was found to be bad, he [the banker] is required to pay because he is like someone who has been paid [κ'νοσὴ κκήρ] (t. B.K. 10:10).

The two statements are not identical. The Talmudic passage draws a distinction that is absent in the Toseftan passage, while the Tosefta offers a rationale for the ruling (namely, that the banker is analogous to a paid laborer) that is notably missing from the Talmud. Despite these differences, however, the parallels are close enough that one can reasonably assume that the Talmudic tradition about banker liability is related to the teaching found in the Tosefta. Both texts reflect similar legal ideas, although those ideas have been arranged in different configurations, with the result that each tradition highlights certain nuances and ignores others. Despite such differences, the existence of the Tosefta parallel lends credence to the Talmudic claim that the teaching is tannaitic in origin, while also enabling scholars to trace potential changes in rabbinic law over time or between different geographical regions.

Source criticism also relies on manuscript variations to determine the dating of specific lines of text in two primary ways. First, scholars look at surviving Talmudic manuscripts or manuscript fragments; if the line in question appears in some manuscripts but not in others, this suggests that it may be a later addition. Second, scholars look at Talmudic commentaries, such as Rashi, and try to reverse-engineer the line as it appeared in the manuscript upon which that commentator relied. Even if scholars cannot access the specific manuscript Rashi was reading, he may directly cite variant wording or refer to it in his comments. If so, this suggests that the line or passage in question remained in flux after the primary editing of the Talmud came to a close. While no singular form-critical or source-critical observation can definitively determine the historical provenance of any given passage

50. Yet another parallel appears, with slight variation, in the Yerushalmi (y. Kil. 7:3). For a full discussion, see my analysis of B.K. 99b-100a in Chapter Two.

51. In her analysis of oral transmission and the shaping of the Mishnah, Elizabeth Shanks Alexander argues that textual parallels should be viewed as different versions or attestations of fluid traditional materials. Although rabbis inherit the same stable stock elements of a legal tradition, they may elect to arrange those elements in different ways. Analyzing these different configurations of the same legal 'building blocks' enables us to both identify the core elements of the tradition, and also to see how those elements are manipulated in different sources. Although Alexander discusses tannaitic materials, a similar approach can be applied to Talmudic sources as well. See Alexander, Transmitting Mishnah, 35-76.
on its own, the presence of multiple criteria enables relatively reliable dating, especially comparative dating.\textsuperscript{52} For example, if a passage shifts abruptly from Hebrew to Aramaic, and the Aramaic line is an explanatory comment that includes Geonic vocabulary, these form-critical criteria would combine to suggest that the line is a later insertion. If that same line is absent from multiple manuscripts, this source critical information would reinforce the conclusion that it was a later addition.

Although Friedman's discussion of form-criticism and source-criticism centers on the analysis of \textit{halakhic} sugyot, Jeffrey Rubenstein has adapted his criteria for the analysis of \textit{aggadic} passages as well. He notes that, in many respects, the analysis of \textit{aggadic} material mirrors that of \textit{halakhic} sources, since "one can readily identify Stammaitic discussions and analysis of earlier aggadic sources formulated in the same anonymous Aramaic give-and-take characteristic of halakhic sugyot."\textsuperscript{53} Rubenstein offers multiple examples of how Friedman's criteria apply in a relatively straightforward manner to the analysis of narrative material. He also suggests, however, that there may be certain factors that are unique to \textit{aggadic} material and therefore require special attention. In particular, he notes the phenomenon of doubling, a phenomenon related to the tendency of the Stammaim to refer to proximate stories or traditions is the recycling of material within a story, which often produces a type of doubling. Motifs, dialogue and other elements of Bavli stories often appear elsewhere in the same story or complex of stories in a slightly modified fashion. These elements typically appear but once in the parallel versions in Palestinian sources. The redactors seem to have used this technique to expand and rework the briefer versions of the stories they received. This is technically not a form-critical criteria as the reduplicated elements can take many forms. It is closer to a source-critical tool with the sources being the Palestinian parallel and the Bavli story itself.\textsuperscript{54}

In other words, Rubenstein suggests that there may be additional literary features that characterize stammaitic storytelling, and which, when compared to parallel stories in other sources, may illuminate additional features of editorial intervention in earlier sources.

\textsuperscript{52} Although Friedman developed this methodology to study \textit{halakhic} literature, Jeffrey Rubenstein has demonstrated that it can be adapted and applied to \textit{aggadic} passages as well. See Jeffrey L. Rubenstein, "Criteria of Stammaitic Intervention in Aggada," in \textit{Creation and Composition: The Contribution of the Bavli Redactors (Stammaim) to the Aggada}, ed. Jeffrey L. Rubenstein, 417-440 (Tubingen: Mohr Siebeck, 2006).
\textsuperscript{53} Rubenstein, "Criteria of Stammaitic Intervention", 418.
\textsuperscript{54} Ibid, 438-439.
Since I classify the seven Talmudic passages that use the phrase *lifnim mi-shurat ha-din* as *halakhic* narratives, my analysis and approach is shaped both by Friedman's criteria and by Rubenstein's adaptation of those criteria for narrative material. My claim that the phrase *lifnim mi-shurat ha-din* appears primarily within the editorial layer of the text, and that it therefore post-dates the narratives themselves, is based on both form-critical and source-critical observations. In general, my discussion of the sources begins from the literary and form-critical assumption that commentary upon a story post-dates the story itself. I then rely on other form-critical information, such as shifts in language, vocabulary use and structure, to confirm or challenge these assumptions. Finally, I turn to source-critical analysis to either confirm or challenge my conclusions about how to date specific lines of text and to determine whether such lines can be reliably attributed to the editors.

While these methods influence my approach, they often hover in the background of my analysis. For example, I bring source-critical observations into the discussion in the body of the dissertation only when manuscript variations or the lack of extant parallels raises specific questions about the evolution or dating of the passage under consideration. If no reference to alternative manuscript evidence or textual parallels is made, the reader should assume that such evidence did not challenge or alter the conclusions suggested by a form-critical analysis.

*Situating the Editors or 'Stam'*

While Friedman's methodology enables scholars to determine whether specific portions of a sugya are comparatively early or late, the significance of those conclusions will depend on when and how one thinks the Talmud came to exist in its current form. The formation of the Talmud is a topic of ongoing scholarly debate. Three primary theories have been advanced, which Richard Kalmin has termed the theory of continuous redaction, the

theory of saboraic redaction,\textsuperscript{56} and the theory of stammaitic redaction.\textsuperscript{57} Although the details of each theory continue to be debated and revised, the basic claims are relatively straightforward. According to the theory of continuous redaction, the primary editing of the Talmud took place in the amoraic period, although the editorial process may have continued beyond it. Proponents of this theory argue that, for a variety of literary and pedagogical reasons, the amoraim sometimes chose to attribute their arguments and at other points elected to present a position anonymously.\textsuperscript{58} For example, Moulie Vidas suggests that "the gap between the two layers [i.e. the amoraic dicta and the stam] is not the mark of a historical gap that the Talmud's creator tried to overcome, but a literary gap that these scholars produced."\textsuperscript{59} On this view, the same community of sages that authored many of the attributed statements in the Talmud provided the anonymous commentary on those statements. Although they presented the rationale as well, they intentionally created a literary gap between the statements themselves and that rationale. While some editing of the Talmud likely continued after the amoriac period, according to the theory of continuous redaction, the dialectical argumentation that characterizes the Talmud was always part of how the text was constructed and would therefore have been in place early on.

The theories of saboraic and stammaitic redaction, on the other hand, presume that the primary editing of the Talmud took place after the amoraic period and that the characteristic argumentation presented in the anonymous layer of the Talmud was authored by post-amoraic sages. These sages are referred to as either the saboraim or the stammain (with some scholars viewing them as identical or overlapping groups).\textsuperscript{60} According to the theory of saboraic

\begin{itemize}
  \item \textsuperscript{56} According to Kalmin, the primary proponents of this view include Julius Kaplan and Hyman Klein (Kalmin, "The Post-Rav Ashi Amoraim," 160).
  \item \textsuperscript{58} For example, Moulie Vidas shows that amoraic dicta presented in the Palestinian Talmud are sometimes presented with attribution in the Babylonian Talmud, whereas at other times they are presented anonymously as part of the stam. For textual examples, see Vidas 65-67.
  \item \textsuperscript{59} Vidas, 45, emphasis mine.
  \item \textsuperscript{60} See Halivni, \textit{The Formation of the Babylonian Talmud}, 4-11 and Kalmin, \textit{The Redaction of the Babylonian Talmud}.
\end{itemize}
redaction, which is based in part on evidence from the writings of Sherira Gaon, the process of compiling and editing the Talmud began c. 500 CE, although how long this process continued is uncertain. The theory of stammaitic redaction has much in common with the theory of saboraic redaction, but it proposes that editorial activity flourished over a longer span of time, and may have gone through several phases. According to this view, the editing of the Talmud may have begun as early as 427 CE and continued into the Geonic period as late as 750 CE.

For the purposes of the current study, determining precisely when the primary editorial activity within the Talmud began and ended is less significant than is the basic presumption that this activity represents a distinct and later phase in the compilation and redaction of the Talmudic text. In this respect, I follow both Friedman and Rubenstein in focusing on the stam as a literary stratum within the text, although I also assume that this stratum reveals significant data about the legal and hermeneutic commitments of the sages who authored it.

What is important for the purposes of the present study is simply the identification of the Talmudic editors as a group of post-amoraic sages. Although I sidestep ongoing debates about the specific historical period in which the editors were active, I adopt Rubenstein's

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62. Some say 520 CE. For schematic guide to these different theories, see Kalmin, "The Post-Rav Ashi Amoraim," 187 (Table Two).

63. The year that the Talmud records the death of Rav Ashi, who tradition credits with beginning the process of compiling the Talmud. According to Talmudic tradition, Rav Ashi and Ravina "are the end of hora'ah (instruction)" (B.M. 86a). Similarly, Sherira Gaon writes that "in the year 811 [=499 CE], Ravina 'the end of hora'ah' passed away and the Talmud was completed" (Sherira Gaon as quoted in Halivni, Formation of the Babylonian Talmud, 86). Although Sherira Gaon interprets the Talmudic statement that Ravina's death marks the 'end of hora'ah' as a sign that the editing of the Talmud was completed, Halivni argues that this statement should be not be interpreted as indicating the conclusion of the Talmud, "but only the period of hora'ah, the period of practical law. The composition of the Talmud... did not cease in their days but continued thereafter, perhaps even mostly thereafter" (Halivni, 86).

64. The main proponent of this view, David Weiss Halivni, has repeatedly revised the details and dates of his theory. In The Formation of the Babylonian Talmud, his most recent work, Halivni essentially proposes a combined stammaitic/saboraic theory of redaction. He identifies the stammaitic period as stretching from 550-750 CE, with the saboraim, who are referred to in Geonic literature, comprising the late generations of stammaim who were active from roughly 700-750 CE.

basic assumption that the editing of the Talmud was completed by post-amoraic sages and took place at a relatively late date; in broad strokes, this means that I also adopt the theory of stammaitic redaction that has been championed by David Weiss Halivni. While I rely only on the broad historical conclusion that the editors represent a group of post-amoraic sages, this conclusion is significant because it means that the Talmudic editors flourished during a period when rabbinic learning was becoming centralized and institutionalized in the early yeshivot (academies), rather than during the more fluid discipleship circles which characterized much of the tannaitic and amoraic periods. While it is beyond the scope of the present study, it is quite possible that this move towards institutionalization impacted the Talmudic editors' interest in rules and in rule-based procedures of legal reasoning.

By adopting a theory of post-amoraic redaction, I do not mean to suggest that absolutely no editorial work occurred during the amoraic period. Rather, I propose that the type of commentary and argumentation that is characteristic of the stam—what Richard Kalmin describes as the "argumentational formulation" of the Talmud—did not take place until the after the close of the amoraic period. An important corollary of this conclusion is that the hermeneutic and legal worldview that I attribute to the Talmudic editors describes only this later collective, and can not be applied to the amoraim. Furthermore, as I discuss in Chapter Two, this means that the use of the phrase lifnim mi-shurat ha-din to describe divine activity is comparatively early, since this usage is attested in amoraic material, while the application of this phrase to rabbinic activity is exclusively editorial and therefore comparatively late.

66. This editorial activity can be subdivided into many different types of activity, including the compilation of various independent sources, the reconstruction of rationales/arguments for existing rabbinic statements and so forth. For the purposes of the current study, references to editorial activity focus primarily on the production of the anonymous layer of commentary within the broader Talmud text.
68. Although Halivni himself has revised the details of this view substantively over time. See n. 61 above and Table 1.1 in Jeffrey Rubenstein, "Translator's Introduction," in Halvini, Formation of the Babylonian Talmud, xxix.
Plan for the Dissertation

Having outlined the core literary and historical assumptions that inform my assessment of the source material, we are now in a position to examine the rabbinic sources that reference the idea lifnim mi-shurat ha-din in greater detail. In the body of the dissertation, I argue that neither of the two scholarly dominant paradigms for understanding this phrase—the supererogation model or the waiver of rights model—is able to satisfactorily account for the full range of textual evidence. The reasons for this are two-fold: 1) each model relies on the modern conceptual distinction between ethics and law, which cannot be easily transferred to the Talmudic material and 2) each model makes assumptions about the motivations of the rabbis who act lifnim mi-shurat ha-din that cannot be substantiated by textual evidence. In contrast to these two models, I argue that the Talmudic usage of the phrase lifnim mi-shurat ha-din is best understood to articulate an alternative model of rabbinic decision-making, which I call discretionary judgment. In other words, this phrase is used to label cases in which rabbis rely on a relative uncommon and alternative form of decision-making, rather than on the predominant procedures of rule-based decision-making. The editorial response to this alternative approach to decision-making is varied. At times, the editors appear to promote it, while at others, they appear critical. In the majority of cases, they offer no clear evaluative response. Despite this range of reactions, one feature of the editorial usage of the label lifnim mi-shurat ha-din remains consistent. Whenever this label is applied to rabbinic action, it is used to preclude that action from establishing a legal precedent. In most cases, such actions are contrasted with a decision reached through a procedure of rule-based judgment, which the editors accept and promote as the normative standard.

I begin my argument by outlining the hermeneutic and legal assumptions of the Talmudic editors. In particular, Chapter One explores how the editors mine rabbinic narratives for legal data. I argue that ambiguities in each of the narratives that are labeled
*lifnim mi-shurat ha-din* disrupt this process, signaling to the editors that the actions described must be interpreted through a different legal lens. Having outlined these assumptions, Chapter Two analyzes the earliest citation of the phrase *lifnim mi-shurat ha-din* in tannaitic midrash. Although the early usage of the phrase remains cryptic, it plants the seeds for two distinct but related applications of the phrase within the Talmud. Chapter Two then traces the first of these two applications by examining passages which use the phrase *lifnim mi-shurat ha-din* to describe divine action. These passages correlate *lifnim mi-shurat ha-din* with a particular divine disposition in judgment, one that encourages compassion and leniency. Chapter Three traces the second of these two applications by examining passages which use the phrase *lifnim mi-shurat ha-din* to categorize rabbinic actions. It examines how the editors deploy this phrase to resolve tensions between different sources, and to explain why the behavior of certain rabbis does not conform to expectations. Having established how the editors use this phrase to resolve a specific type of textual problem, Chapter Four explores the editorial reaction to such behavior. It focuses on two Talmudic sources that analyze the risks and rewards of both rule-based and discretionary judgment, arguing that each model presents different rewards and limitations. The final chapter concludes by examining the role of discretionary judgment in a rule-based system, and by establishing how the present study lays the groundwork for an analysis of how the idea of *lifnim mi-shurat ha-din* is developed in the post-Talmudic period.

Let us turn now to the sources.
Chapter 1

The Talmud's Legal Hermeneutic

This dissertation argues that a distinctive and identifiable legal hermeneutic emerges in the stam of the Talmud, the anonymous layer of the text that is primarily composed of argumentation and commentary. In particular, I argue that the editors of the Talmud seek to derive legal rules, which can then be generalized and applied to other cases, from sources that narrate the actions of earlier rabbis (either tannaim or amoraim). The basic claim that the editors draw legal inferences from narrative passages is widely accepted and well documented.70 The stam of the Talmud even uses unique vocabulary, such as the phrase שמע מינה, "learn from it," to indicate when such inferences are being drawn.71 In general, such inferences are successful, but on occasion, they yield problematic conclusions. An examination of the cases in which this hermeneutic fails to produce the desired results, accompanied by an exploration of the strategies used by the Talmudic editors to resolve such cases, provides insight into the assumptions that structure how the Talmudic editors interpreted and arranged their sources throughout the redactional process.

In this study, I focus on a specific type of source inherited by the Talmudic editors—narratives which recount the behavior of named rabbis—as well as on a particular class of inferences that are drawn from those sources. In particular, I examine cases in which ambiguities in the narrative make it difficult for the Talmudic editors to derive a rule from the source, or in which the actions described in the narrative appear to conflict with a clearly

70. Various scholars have questioned the process of deriving general rules on the basis of a limited data set or singular case. This is often referred to as the problem of 'underdetermination.' While this question is theoretically pertinent to the present study, it does not seem to trouble the Talmudic editors, who regularly infer rules on the basis of a very limited set of cases and who never explain or justify their ability to do so. For more on the problem of underdetermination in the philosophy of science, see a discussion of the theories of W. V. O. Quine and Pierre Duhem in Kyle Stanford, "Underdetermination of Scientific Theory", The Stanford Encyclopedia of Philosophy, ed. Edward N. Zalta, Spring 2016 Edition. For a discussion of this issue in the field of legal theory, see Frederick Schauer, "Do Cases Make Bad Law?," University of Chicago Law Review 73, (2006): 883-918.

stated legal rule. When applying their hermeneutic to the data presented in the source creates this type of problem, I argue that the editors resolve that problem by applying the label of lifnim mi-shurat ha-din to the source in question. Through this label, the editors indicate that the rabbinic behavior recorded in the source is an exception to standard practice. The behavior is marked as exceptional because the editors assume that the rabbi in question did not employ the standard form of legal reasoning, which I refer to as rule-based judgment, in order to determine how to act in the situation at hand. Instead, they assume that he employed an alternate form of reasoning, which I refer to as discretionary judgment. As I discuss below, the ability to draw legal inferences from narrative passages is based on the assumption that the rabbinic actions recorded in those passages are structured by rule-based judgments; in cases where a rabbi relies on discretionary judgments, no such inferences can be made.

The editorial act of labeling cases lifnim mi-shurat ha-din communicates two primary pieces of information to the reader. First and foremost, the phrase lifnim mi-shurat ha-din functions as an editorial shorthand; it is used to categorize narrative sources that depict rabbis reasoning in a way that is not oriented toward either the production or the application of a legal rule. As such, it signals to the reader that a different form of reasoning is being employed in these passages, and that the source must therefore be interpreted differently as well. In Chapter Two, I discuss why the editors select the phrase lifnim mi-shurat ha-din to perform this function. I highlight conceptual overlaps between the use of this phrase in earlier sources and its use by the Talmudic editors, while also noting how the editors develop and deploy the idea of lifnim mi-shurat ha-din in novel ways.

Second, in addition to classifying and categorizing a specific type of narrative source, the phrase lifnim mi-shurat ha-din also has a prescriptive legal function. The editors use this label to communicate to their readers that one cannot formulate a legal rule on the basis of the case at hand. I discuss the process of rule formulation, and what makes some cases eligible for rule formulation but not others, in detail below. For the moment, however, it is important
to note that if one cannot form a legal rule on the basis of a *lifnim mi-shurat ha-din* decision, then the case itself is not generalizable. As a result, it can neither challenge existing legal precedent nor can it generate a new precedent. Since no rule for behavior can be determined from the case, the behavior of the rabbi who acts *lifnim mi-shurat ha-din* cannot be used to decide other cases. I offer a detailed account of the legal implications of labeling a source *lifnim mi-shurat ha-din* in Chapters Three and Four.

Before looking in depth at the Talmudic sources that reference *lifnim mi-shurat ha-din*, however, it is first necessary to establish the basic legal and hermeneutic assumptions of the Talmudic editors. I begin here with an analysis of the process of rule formation and an exploration of rule-based judgments more broadly. I introduce the formal characteristics of rule-based judgment, and explain how this model of decision-making differs from that of discretionary judgment. A careful articulation of these two models of decision-making will enable us to understand the types of challenges that the editors encounter when they apply their hermeneutic to certain narrative sources, and to articulate with greater precision how and why they label such sources *lifnim mi-shurat ha-din*.

Having analyzed different models of legal decision-making more broadly, I then turn to a specific example from the Talmud that illustrates the hermeneutic assumptions that enable the editors to derive laws from narrative sources. The bulk of this dissertation focuses on cases to which this hermeneutic cannot be successfully applied, but because the editors widely employ this hermeneutic throughout the Talmud, establishing how it operates in the cases where it is successful may enable us to identify more precisely what is different or unique about the editorial activity in the passages that reference *lifnim mi-shurat ha-din*. Using a case from Ḥullin 106a as an example, I illustrate how the editors are able to derive three discrete legal rules from one brief narrative, highlighting the legal and hermeneutic assumptions that fund this process. Drawing on previous scholarship on similar cases, I articulate two central hermeneutic assumptions that the Talmudic editors employ in their
treatment of narrative sources: 1) that the narrative source is intentionally crafted to communicate legal information and 2) that rabbis act as self-conscious exemplars. I discuss the significance of each of these assumptions in detail below. Before turning to the specific details of the editorial hermeneutic, however, it will be helpful to consider how legal rules operate more generally and to explore the implications of different models of legal reasoning.

Rule-Based and Discretionary Judgment

In *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, Frederick Schauer draws a distinction between rule-based decision-making and what he calls 'particularistic decision-making,' two categories that map closely onto what I described above as rule-based judgment and discretionary judgment. In order to delineate these two types of decision-making, Schauer first distinguishes a rule from its justification, or the purpose that the rule is developed to serve. He offers the helpful example of a dog which behaves disruptively in a restaurant, barking and annoying the patrons. In order to avoid future such disruptions, the owner of the restaurant creates a rule: no dogs allowed.\(^{72}\) Such rules rely on what Schauer calls 'probabilistic causation',\(^ {73}\) based on the case of the disruptive dog, the owner infers that the presence of a dog in the restaurant is likely to cause disruptions, and therefore outlaws dogs. However, the rule also differs from its justification in important ways. While such a rule may help to achieve the owner's goal of avoiding patron disruption, it will inevitably fail to achieve that goal perfectly, for one of two reasons: the rule 'no dogs allowed' may prove to be overly inclusive (prohibiting dogs that are quiet, well-behaved and unlikely to actually annoy customers) or it may prove to be insufficiently inclusive (failing to prohibit other figures that are likely to annoy customers).\(^ {74}\)

The fact that such rules will fail to perfectly achieve the goals for which they were

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created is inevitable, Schauer argues, because of what he calls the 'open texture of rules': the idea that "even the least vague, the most precise, term will turn out to be vague as a consequence of our imperfect knowledge of the world and our limited ability to foresee the future." In other words, there is no way to formulate a rule that will avoid the problem of it being either insufficiently or overly inclusive. Inevitably, a situation will arise where enforcing the rule will fail to achieve its purpose. Schauer labels these situations 'recalcitrant experiences,' which he describes as “a situation in which application of the generalization [i.e. rule] to the current decision appears to frustrate rather than serve the justification lying behind the generalization.” This raises a challenge for those whose task it is to enforce rules. Take the example of the restaurant owner in the case above. What should the owner do if a blind person comes to the restaurant with a docile and well-behaved seeing-eye dog? According to Schauer, the restaurant owner has two options. He can either enforce the 'no dogs allowed' rule and prohibit the seeing-eye dog from entering the restaurant, or he can modify the rule in a way that permits the seeing-eye dog while still prohibiting disruptive dogs. The first option treats the rule itself as having primary importance; the owner will maintain his 'no dogs' policy even in cases where this does not achieve the goal he had when he first created the rule, namely to avoid disruption to his patrons. The second option treats the original rationale for the rule as having primary importance; in this case, the owner will seek to bring the rule in line with its justification by creating a modified rule, such as 'no dogs allowed except for service animals.' I propose that there is also a third option, which Schauer does not explicitly identify: the owner can make an exception to the rule in this specific case. He can maintain his blanket 'no dogs policy' but choose to admit specific dogs on a case-by-case basis. Since he is the author of the rule and the owner of the establishment, he may keep his 'no dogs' sign hanging in the window, but allow for the possibility of admitting specific

75. Schauer, Playing by the Rules, 36.
76. Schauer refers to this purpose or goal as the "background justification" for a rule (Schauer, Playing by the Rules, 54).
77. Schauer, Playing by the Rules, 78.
dogs at his discretion.

As I will show in the following chapters, the narrative sources that the Talmudic editors label *lifnim mi-shurat ha-din* depict rabbis encountering situations in which a standard application of the law would either 1) fail to achieve the immediate background justification for the law or 2) prohibit the achievement of another goal which takes precedence over the specific rule at hand. In the case of Schauer's restaurant owner, prohibiting the blind patron with the docile seeing-eye dog would not only fail to achieve the immediate goal of his 'no dogs allowed' rule, which was to avoid disrupting customers, but it might also impede his greater goal of increasing restaurant patronage. Not only would he lose the blind man as a potential customer, but other customers might be offended by a policy that inadvertently discriminates against the blind and choose to take their business elsewhere. Thus, the owner might have good reasons both for creating and maintaining the rule in general and for failing to apply it as expected in specific cases.

As I will demonstrate in the next three chapters, the rabbinic narratives that are labeled as *lifnim mi-shurat ha-din* all depict situations in which rabbis encounter something akin to the type of recalcitrant experiences to which Schauer refers. In each case, there is a disconnect between the rule that the Talmudic editors presume governs the situation encountered by the rabbi and the case itself. Furthermore, the rabbis in these narratives occupy a position similar to that of the restaurant owner, meaning that they have the power to act as both judge and legislator. They not only have the capacity to interpret and apply existing rules, but also to author new rules through their teachings and to instantiate new precedents through their actions. Like the restaurant owner in the case described above, the rabbi also has three primary options when facing a recalcitrant case: he can apply the rule, he can modify the rule or he can exercise his discretion and make an exception to the rule if he so wishes.78 In the cases they label as *lifnim mi-shurat ha-din*, I argue that the editors view the

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78. In recent years, a growing literature has emerged on the logic of legal exceptions and the idea of defeasibility. Although much of that discussion is beyond the scope of the present study, the fundamental questions it explores have direct bearing on my examination of *lifnim mi-shurat ha-din* as a type of reasoning or
rabi in question as having actualized the third option and treated the case as an exception.

Moreover, they assume that the rabbi has reached this conclusion in a very particular way: he has decided that the situation should be resolved through the exercise of his discretionary judgment, rather than by recourse to rule-based judgment. As a result, his behavior does not apply, break, challenge or modify existing rules; the case is evaluated by relying on an entirely different reasoning process.

This mode of decision-making, which I call discretionary judgment, has strong parallels to what Schauer describes as 'particularistic decision-making.' He writes,

> Particularistic decision-making focuses on the particular situation, case, or act, and thereby comprehends everything about the particular decision-prompting event that is relevant to the decision to be made...[In the case of recalcitrant experiences]
> particularistic decision-making adapts the generalization to the needs of the moment...Rule-based decision-making, however, rejects the continuous revisability of generalizations, and consequently imbues them with force even in those cases in which that force appears misplaced.  

The attention to particularity that Schauer highlights in his discussions of alternatives to rule-based decision-making also characterizes the reasoning process that the Babylonian Talmud labels as lifnim mi-shurat ha-din and that I call discretionary judgment. Although all legal judgment employed in exceptional cases. The central question is how to delineate between the exception and the rule itself. As Luis Duarte d’Almeida notes, this line is harder to draw than it might seem. He offers the example of a defendant who is being tried for murder, but who claims he killed in self-defense. There are two ways to analyze his claim. On the one hand, we might view self-defense as an exception to the rule 'do not murder.' On the other hand, Almeida asks, if the court acquits the defendant on this basis, "does that not show that the relevant 'rule' is not really the rule that wrongdoers ought to be convicted, but the rule that wrongdoers who do not act in self-defence [sic] ought to be convicted?" In other words, if the exception for self-defense is already indicated by an existing rule, it is not an exception at all. Instead, the self-defense exception would indicate that the rule was imprecisely formulated and simply needs to be 'spelled-out' more clearly. See Luis Duarte d’Almeida, Allowing for Exceptions: A Theory of Defences and Defeasibility in Law (Oxford: Oxford University Press, 2015), 1-2, emphasis in original. At least in the case of Talmudic law, I would argue that exceptions cannot be understood as implied by existing rules, and do not indicate that the rules in question must simply be spelled out more clearly. Such a view would suggest that, when one encounters a recalcitrant experience in the form of an exception, it signals the need to revise the existing rule, but this is not the option pursued by the Talmudic editors in the cases labeled as lifnim mi-shurat ha-din. By definition, to treat these cases as exception means that they cannot be adequately addressed by recourse to existing legal rules. This is why such cases do not prompt a legal change, in the form of new rules or revisions to current rules, but rather activate the alternate model of decision-making that I call discretionary judgment. In addition to the recent study by d’Almeida, I refer the reader interested in theoretical questions of defeasibility to The Logic of Legal Requirements: Essays on Defeasibility, eds. Jordi Ferrer Baltrán and Giovanni Battista Ratti (Oxford: Oxford University Press, 2012).

79. Schauer, Playing by the Rules, 77-78. Although she uses different terminology, Robin West describes a similar alternative to rule-based decision-making in her book Caring for Justice. West argues that judges should seek “to understand the particularizing details...[rather than to] universalize each case, each injury and each contract so as to fit within a more general rule.” See Robin West, Caring for Justice (New York: New York University Press, 1997), 57. Such an orientation will, West contends, better guarantee a just outcome to the case. Although West here is advocating for alternative models of justice and judicial judgment in the United States legal system, her description encapsulates the attention to particular contexts and details that defines what I am calling “discretionary judgment.”

80. I argue that the Talmudic editors use the label of lifnim mi-shurat ha-din to indicate that a rabbi in a
analysis attends to the particularity of a case to some degree, in the case of rule-based judgments, the particulars of the case are used to determine which legal rule best applies to the case at hand. By way of contrast, discretionary judgment does not engage in this type of abstraction from the particulars of the case to a legal rule; instead, it remains situational and conditional, adapting "to the needs of the moment." The sole task of the decision-maker is to identify the best course of action to pursue in the specific case at hand.

Because this process of discretionary judgment does not engage in the type of abstraction that characterizes rule-based judgment, the decisions it yields cannot be separated from the case which generated them. According to the Talmudic editors, one cannot abstract a rule or principle on the basis of a decision reached through discretionary judgment (lifnim mi-shurat ha-din). The formulation of new rules requires the ability and willingness to generalize on the basis of a particular case or set of cases. In the minds of the editors, the decision of a rabbi to engage in rule-based judgment signals that one can successfully generalize rules on the basis of the case at hand, while the decision to act lifnim mi-shurat ha-din signals that one cannot.

While the Talmudic model of discretionary judgment has much in common with Schauer's account of particularistic decision-making, these two models also differ in important ways. Schauer proposes that particularistic decision-making may lead a person to modify the rule in question "when and as it is unfaithful to the rule's underlying particular source is exercising discretionary judgment, as opposed to rule-based judgment. While there is therefore a close correlation between lifnim mi-shurat ha-din and discretionary judgment, the two terms are not necessarily identical. Discretionary judgment indicates a model of decision-making; as such, it is potentially broader than lifnim mi-shurat ha-din, since other talmudic terms may also point towards this mode of reasoning, although they may invoke it different ways. The phrase lifnim mi-shurat ha-din is also, in one sense, broader than the term 'discretionary judgment' since, as I will demonstrate, it not only indicates the mode of judgment employed, but also classifies the actions that result from such judgments. More specifically, it communicates the editors' conclusions about the legal consequences of such actions. Thus, the phrase lifnim mi-shurat ha-din simultaneously points the reader to this departure from rule-based judgment and claims that, as a result, the actions and statements of the rabbi in this case cannot be taken as legal precedent. Although it is beyond the scope of this dissertation to examine all of the potential Talmudic terms which may be used to indicate the exercise of discretionary judgment, such terms may not draw the same legal conclusions and will therefore differ in important ways from the narratives that are labeled lifnim mi-shurat ha-din. For a discussion of some of these conceptually related terms, see Aaron Kirschenbaum, Equity in Jewish Law (Hoboken NJ: Ktav Publishing House, 1991) and Dov Nelkin, "Jewish Virtue Ethics," Ph.D diss., University of Virginia, 2004.
In other words, the restaurant owner in our case above will bring the rule in line with its underlying justifications by replacing it with a new rule, e.g. 'no dogs allowed except for service animals.' Although he engages in particularistic decision-making to determine how to act in the case of the blind patron, the owner still engages in a process of generalization, which leads him to revise the existing rule. In this sense, since he engages in a form of rule-generation, he also participates in a rule-based reasoning.

Unlike Schauer's model of particularistic decision-making, the editors of the Talmud specifically prohibit the creation of new rules and precedents on the basis of the cases they mark as lifnim mi-shurat ha-din. On the Talmudic model, our restaurant owner may make an exception for a specific seeing-eye dog. He may even assert that he retains the right to make exceptions for other dogs in future cases at his discretion. If he acts lifnim mi-shurat ha-din, however, he will not use this case as a basis to modify his general rule that no dogs are allowed in his restaurant; although he may continue to make exceptions on a case-by-case basis, no exceptions will be specified within the policy itself. In the first example, which follows the model of particularistic decision-making, the case of the blind patron and his seeing-eye dog forces the owner to revisit his initial rule and to modify it, thereby bringing the rule in line with its justification. In the second example, which follows the Talmudic model of discretionary judgment (lifnim mi-shurat ha-din), the owner's decision about this specific blind patron and his dog do not lead to a reconsideration of the rule more generally, and the rule itself is not altered.

Although Schauer's categories do not map perfectly onto the Talmud's categories, his analysis of how rule-based judgments operate and how they differ from particularistic decision-making enables us to understand the Talmudic categories with greater precision and clarity. In the next three chapters, I offer a detailed analysis of how models of rule-based and discretionary judgment shape the editorial analysis of the actions and narratives that they

81. Schauer, Playing by the Rules, 51.
label lifnim mi-shurat ha-din. At this point, however, I hope to have clearly established the theoretical differences between rule-based and discretionary judgments. In order to understand how the editors use the category of discretionary judgment to resolve problems that arise in their legal analysis of narrative sources, however, we also need to establish the basic hermeneutic assumptions that they rely on and the primary interpretive strategies that they employ.

Narrative Sources, Legal Inferences

All of the sugyot that employ the phrase lifnim mi-shurat ha-din center on cases where the editors' standard legal and hermeneutic assumptions encounter difficulties. In order to pinpoint the nature of those difficulties more precisely, and to appreciate how and why their hermeneutic fails to achieve the desired results in these cases, it will be helpful to first consider how the editorial hermeneutic operates when it is successful. Consider the following case from Hull. 106a, which offers a classic illustration of how the editors legally engage narrative material. Lines A-B present the narrative source itself, which the editors inherit from earlier (amoraic) tradition. The narrative describes the actions of two rabbis, R. Ami and R. Asi, when they are offered a basket of fruit, and it is related by Rabbah bar bar Ḥana, who directly witnesses the events described. Lines C-F present the anonymous commentary of the Talmudic editors, who receive and interpret Rabbah bar bar Ḥana's narrative record of this event and who derive from it three general rules for behavior. In line G, the editors cite a baraita that provides additional support for one of the rules they derive.

[A] Rabbah bar bar Ḥana said:
It happened once that I was standing before R. Ami and R. Asi. A basket of fruit was brought before them. They ate without preparing [i.e. ritually washing] their hands. They did not give me any of it and each one blessed [i.e. recited the grace after meals] on his own.

Learn from this three [rules]:

Learn from it that there is no ritual washing of hands for fruit.

Learn from it that one does not invite [i.e. join in a zimmun or communal grace] for fruit.

And learn from it that two who eat together are required to separate [for the grace after meals].

This was also taught in a baraita: Two who eat together are required to separate [for the grace after meals].

In this passage, the editors read a narrative source and are able to successfully derive legal rules from the rabbinic actions or behaviors it describes. While the connection between the rules articulated in lines C-F and the narrative may appear obvious in this particular sugya, it will be helpful to outline the assumptions that enable the editors to draw their legal conclusions. Clearly outlining these assumptions will enable the reader to pinpoint where they create problems for the editors in other sources.

Assumption: The narrative record is perfect

In order to derive the three rules listed above from a story about two rabbis consuming a basket of fruit, the editors must assume that the narrative record is perfect. By this, I mean that the editors assume: 1) that Rabbah bar bar Ḥana accurately depicts the behavior of R. Ami and R. Asi on this occasion, 2) that any intermediaries in the chain of transmission between Rabbah bar bar Ḥana and the editor of this sugya transmitted the account accurately, with no omissions, additions or substitutions and 3) that all the details of the narrative have been intentionally preserved and transmitted for a reason. More specifically, since they approach the narrative as a legal source, the editors assume that said details have been preserved because they have legal significance and impact how the behavior of the rabbi(s) in question ought to be legally interpreted. On the same logic, any details that Rabbah bar bar Ḥana may have omitted can be presumed to be legally

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insignificant. For example, we know that R. Ami and R. Asi ate a basket of fruit, but the narrative does not say what type of fruit was consumed. Applying the legal hermeneutic of the editors, we can assume that the type of fruit is legally insignificant, and that the rules suggested by the behavior of R. Ami and R. Asi would apply to all fruit. According to the reasoning I attribute to the editors, if this were not the case, the source would have specified what type of fruit they ate.

The editors therefore approach this narrative with a clear set of assumptions, but also with a clear set of questions: they want to know what legal rules this narrative has to teach them. It is worth noting that there is nothing inevitable about the way in which the editors approach this text; other readers may bring different assumptions to bear on this text, or read it in pursuit of different questions. For example, like the editors, other readers might also focus on the narrative detail that R. Ami and R. Asi do not invite Rabbah bar bar Ḥana to share in their meal of fruit, but they may not assume this means that there is no zimmun over fruit, as the editors do. Instead, such readers might supply alternate reasons that this detail was included; perhaps, for example, Rabbah bar bar Ḥana mentions this detail because he felt excluded from the fellowship of R. Ami and R. Asi and was upset by it. This interpretation may appeal to the reader interested in rabbinic psychology or dynamics of inclusion and exclusion among the rabbis. While this may be a defensible interpretation of the textual evidence, such an account is based on a different set of assumptions than those held by the editors. Moreover, the editors cannot make these assumptions and still have their legal hermeneutic operate smoothly. In order to successfully derive laws from a narrative source, the editors must be able to presume that all of the details in that narrative are presented for the same reason and communicate the same thing: legal information.

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82. In other words, under this hermeneutic, details are not omitted or preserved out of a concern for rhetoric or narrative style, nor should one attribute their inclusion or omission to perspective of the storyteller. The relevant details are included because of their legal significance.
In his account, Rabbah bar bar Ḥana details three significant aspects of R. Ami and R. Asi's consumption of the fruit: 1) they do not wash their hands before eating the fruit, 2) they do not offer any fruit to Rabbah bar bar Ḥana, and 3) they separate after eating the fruit and each recites the grace independently. From these three data points, the editor of this passage derives three points of law. The first inference is the most straightforward. Since the rabbis do not wash their hands before consuming the fruit, and since the type of fruit consumed is not specified, one can infer that there is no need to ritually wash before consuming any type of fruit. The second inference is slightly more complex, and requires some knowledge of the laws pertaining to the recitation of *birkat ha-mazon*, the grace after meals. When three or more people dine together, they join together in a *zimmun*, an extra blessing that is added communally to the grace after meals. The opportunity to join in a *zimmun* is desirable, and there are several accounts of rabbis including unexpected figures in their meals, such as the waiter who is serving their meal, in order to reach the minimum quorum of three people so that they can join in a *zimmun*. On the basis of this logic, the editors assume that if it were possible to join in a *zimmun* over fruit, R. Ami and R. Asi would have seized the opportunity to do so by sharing the fruit with Rabbah bar bar Ḥana. Since they do not invite him to partake of the fruit, the editors infer that even if the quorum of three people dining together had been reached, no *zimmun* could have been performed.

The final inference from this narrative, namely that two people are required to separate and recite the grace after meals independently, is the weakest. The two diners, R. Ami and R. Asi, do separate for their recitation of the grace after eating. Since the editorial voice has already stated that there is no *zimmun* over fruit, however, it would seem that a rationale for their actions has already been provided. If there is no *zimmun* over fruit, the only

83. Rabbinic law here has in mind three adult men. Mishnah Ber. 7:2 specifies that women, slaves and minors cannot be included in the *zimmun* (משה ועבדים והנשים עליהם מзовמים אין וקטנים ונשים). According to b. Ber. 45b, women may join together with other women to form a *zimmun* and slaves may also join together with other slaves, but the two groups cannot join together for a *zimmun* (איך שתי נשים ועבד אחד וביתם עליהן מזמנין), nor can women count towards the quorum necessary for a *zimmun* if the two other diners are free, adult men.

84. Ber. 45a-b.
option is to recite the grace separately, regardless of whether or not a certain quorum of people has been reached. The legal inference that two are required to separate for the recitation of *birkat ha-mazon* therefore has little basis; in order to test this theory, one would need a case in which only two people ate together, but in which the food being consumed would warrant the *zimmun* if the requisite quorum of three diners had been present. The weak support for this legal inference in the narrative may be why a *baraita* that supports this conclusion is also cited in line G. As we shall see in the next chapter, the legal conclusion that two diners must recite *birkat ha-mazon* independently finds additional support elsewhere in the Talmud.  

Despite the weakness of this final inference, both the hermeneutic process of the editors and the interpretive assumptions on which that process rests are relatively clear from this passage. Narrative descriptions of rabbinic behavior are treated as highly stylized texts, which preserve only the data that is relevant for legal analysis. As a result, legal inferences can be drawn on the basis of the rabbinic actions described in these narratives; once these inferences are reformulated as rules (e.g. "one does/does not..." or "one is required/forbidden to..."), they can be uncoupled from the narrative and applied to other cases.

*Assumption: Rabbis act as self-conscious exemplars*

In addition to the assumption that the narrative record is perfect, an assumption which describes how the editors categorize and treat narrative sources, the editors rely on a second set of assumptions in order to draw these types of legal inferences. They assume that rabbinic actions are motivated by rules, and that they transparently reflect those rules. In other words, to adopt the terminology proposed by Moshe Simon-Shoshan, the editors presume that earlier rabbis act as "self-conscious exemplars." This presumption has three

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85. See Ber. 45b; I discuss this sugya in detail in Chapter Three.

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primary components. First, the editors assume that the rabbis whose actions are recounted in these narratives are aware that they are being watched by their students and that their actions are likely being recorded. The editors further assume that these rabbis act in a manner that is intended as a form of legal instruction to their students. Finally, these editorial assumptions rest on the basic presumption that the actions of the rabbis described in these narrative sources have legal motivations and justifications. According to this model of behavior, when a rabbi encounters a given situation, his task is to determine the appropriate rule that governs the situation and then to act in accordance with that rule. In so doing, he effectively communicates that rule to his disciples.

In other words, the Talmudic editors assume that rabbis exercise rule-based judgment when making decisions in the course of their daily lives, just as a judge might do within a courtroom. Each recorded rabbinic action is interpreted as the result of a rabbi first identifying, and then applying, the rule that he thinks appropriately governs the situation. Under this hermeneutic, the minutia of rabbinic behavior can become the basis for new legal precedents. If narrative anecdotes about rabbinic behavior can be deemed to indicate their legal opinions, then even mundane behaviors cannot be attributed to the personal preferences or desires of the rabbi in question. Whether a source describes a rabbi as choosing to sit or to stand, whether he hurries somewhere or walks sedately, whether he invites someone to join him at a meal or not—all of these seemingly innocuous behaviors intentionally communicate legal information on two levels. First, the rabbi shapes his actions so that his disciples will be able to decipher the legal rule which structures his behavior with ease. Second, the disciple records the actions of that rabbi in a way that clearly communicates the relevant legal details to a future reader. This, in turn, gives rise to two potential areas in which miscommunication could create a problem for the editors when they attempt to draw legal inferences from these sources. First, the behavior of the rabbi might fail to communicate a legal rule effectively to

his disciples. Second, even if that communication is successful, the disciples might fail to record the rabbi's behavior in a way that successfully communicates that rule to the reader.

Although I attribute this legal hermeneutic to the Talmud's editors, Moshe Simon-Shoshan has demonstrated that the seeds of this hermeneutic are already present within the Mishnah.

In citing an individual exemplum with regard to a specific case, the Mishnah asserts that the actions of a given rabbi at a specific time and place are of legal significance in deciding a broader case. The collective impact of the Mishnah repeatedly citing exempla about different rabbis in the context of different situations is to assert that rabbis are, at least in principle, embodiments of the law whose actions can be used to determine appropriate action in other situations. 87

Similarly, I argue that the Talmudic editors treat the rabbis depicted in their sources as 'embodiments of the law,' and presume that their actions communicate clear legal rules and requirements. This set of assumptions enables the editors to draw a one-to-one correlation between the rabbinic actions recorded in a narrative source and the legal rule which governs those actions, thereby permitting them to derive new laws from these accounts.

Such assumptions effectively preclude other models of legal reasoning, as well as other (non-legal) considerations that might motivate rabbinic behavior. This interpretive lens assumes that the law outlines a set course of behavior for every possible situation, and that the sage must follow it. Differences in rabbinic conduct can be attributed to conflicting legal positions. These conflicts may arise because individual rabbis follow different teachers or schools of thought, because they make different assumptions about which law properly governs behavior in a given situation, or because they interpret the same legal ruling in different ways. Under this hermeneutic, however, differences in conduct are unlikely to be attributed to the fact that multiple courses of action might be equally permissible in a given situation. It is assumed that these narrative accounts have been preserved because they communicate the (singular) correct course of action to pursue in a given situation, 88 and that


88. The question of whether there is a single 'right' decision within the framework of rabbinic law has been the subject of recent scholarly debate. Scholars disagree about the extent to which rabbinic law is pluralist or monist in either theory or in practice. This debate has direct bearing on the current study, since, as Christine Hayes notes, "pluralism is conceptually linked with judicial discretion" (Christine Hayes, "Legal Truth, Right Answers and Best Answers: Dworkin and the Rabbis," Diné Israel, 25 [2008]: 74). For a fuller understanding of this
these determinations are not made on the basis of personal preferences or other considerations, but rather through the application of clear legal rules.

The Self-Conscious Exemplar

In his article "People Talking Without Speaking," Moshe Simon-Shoshan examines a Talmudic narrative that explicitly reveals many of these unspoken editorial assumptions. Berakhot 11a recounts an occasion on which R. Ishmael and R. Elazar b. Azariah dine together. R. Ishmael eats while reclining, but R. Elazar eats standing up. When the time to recite the Shema arrives, the two rabbis switch positions: R. Elazar reclines while R. Ishmael stands up. R. Elazar is offended, and asks R. Ishmael why he insists on reclining while he stands, but then stands up as soon as R. Elazar reclines. R. Ishmael replies:

אני עשתי כדבריך ב"ה וה אתה עשית כדבריך ב"ש. ולא עוד אלא שמא יראו התלמודים והعكس הלכהلدורות.

I acted according to the rules of Beit Hillel, and you acted according to the rules of Beit Shammai. And not only that, but [I had to act this way], lest the disciples see and fix the law for future generations [based on my actions].

R. Ishmael’s statement discloses his awareness of an audience who will interpret his actions as legally significant. If he reclines while reciting the Shema, his disciples may incorrectly assume that R. Ishmael follows the ruling of Beit Shammai and believes that he is obligated to recline for the recitation of the evening Shema. In order to avoid this misconception, he stands up. As Simon-Shoshan observes, R. Ishmael’s reply “reveals himself as being not an accidental signifier but an intentional communicator. He is self-conscious of the fact that he is under constant observation and that his actions will be interpreted as legal teachings. As such, he calibrates his behavior so that it most clearly communicates his intended message.”

R. Ishmael’s awareness that he is always under the watchful eye of his students has a direct

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impact on his behavior. His choice to sit or stand for the Shema is based on his interpretation of the law, rather than on his personal preferences. Nor does he act out of politeness or deference towards his colleague, R. Elazar. (Quite the contrary, as his behavior leads him to offend R. Elazar.) In this text, R. Ishmael is presented as having a single-minded focus on ensuring that his behavior correctly communicates his understanding of the law, so that his students can derive his legal position on the basis of his actions. He calibrates his behavior to prevent the possibility of mistaken inferences; even though R. Ishmael believes one can sit or stand when reciting the evening Shema, following the ruling of Beit Hillel, a student might misinterpret his decision to sit and assume that he follows Beit Shaamai, who require a person to recline for the evening recitation. Only by standing can R. Ishmael clearly communicate that he follows the ruling of Beit Hillel.

R. Ishmael’s self-conscious behavior in this passage parallels the manner in which the editors expect all rabbis in their sources to act. They presume that the rabbis in these sources communicate intentionally with their disciples through their actions at all times. Rabbis expect that their disciples will establish legal rulings based on the precedent that their behavior sets. Although the Talmud rarely records rabbis reflecting on their behavior as self-consciously as R. Ishmael, he articulates the approach to which the editors assume all other rabbis subscribe.

This method of interpreting rabbinic behavior is not without its problems. Simon-Shoshan emphasizes that under such a hermeneutic “the exemplar risks being reduced to a living signifier who exists only to transmit legal teaching to his students.” Presuming that all rabbinic actions are transparent and motivated by legal rules flattens rabbinic behavior. This hermeneutic also leads the editors to analyze narrative sources about rabbinic behavior.

92. It is possible that modern scholars have been so intrigued by the idea of lifnim mi-shurat ha-din as an ethical principle because it counteracts this type of reading; by claiming that a rabbi's actions might have been ethically motivated, these scholars suggest that rabbinic behavior does not only teach specific legal principles, but also highlight a broader range of normative considerations.
in the same manner that they analyze tannaitic and amoraic statements; the rabbinic actions recorded in these sources are read as equivalent to legal pronouncements. As a result, the Talmud often presents the behavior of one rabbi as posing a challenge to the teaching of another rabbi, thereby generating new legal conflicts that must be resolved. As my analysis will show, this hermeneutic generates the textual problems that motivate much of the editorial commentary in the Talmud. The attempt to resolve these problems is what motivates the editors to label the actions of rabbis in certain sources as lifnim mi-shurat ha-din.

I have presented here an outline of the legal hermeneutic employed by the editors of the Talmud. As I have shown in the case of Hull. 106a, this hermeneutic has the potential to be astonishingly productive because it enables the editors to derive laws from narrative sources. I have also suggested, however, that this hermeneutic relies on two sets of assumptions which may prove to be faulty. In the next three chapters, I examine a set of sources in which these assumptions yield problematic conclusions and explore how the editors use the idea of lifnim mi-shurat ha-din to resolve these problems and restore their interpretive equilibrium. Let us turn now to those sources.
Chapter 2
Lifnim Mi-Shurat Ha-Din as Discretionary Judgment:
The Development of an Idea

In the previous chapter, I outlined the legal hermeneutic that the Talmudic editors use to interpret narrative sources about rabbinic action and to derive laws from those sources. I argued that the ability to derive laws in this manner rests on the assumption that the rabbis in those sources relied on a rule-based model of decision-making. This assumption also creates problems for the editors, however, who inherit a literary corpus containing narratives about rabbis who act in contradictory ways, or whose behavior appears to deviate from established rules for behavior. I argue that the editors resolve such contradictions by labeling the actions of such rabbis as \textit{lifnim mi-shurat ha-din}. In so doing, they indicate that the rabbi in question acted on the basis of his discretionary judgment, rather than relying on rule-based judgment. As a result, his actions do not provide a sound legal basis to modify existing laws or to derive new ones. In Chapters Three and Four, I analyze each of these narratives in detail, tracing how the editors' hermeneutic assumptions generate these challenges, as well as how they use the label \textit{lifnim mi-shurat ha-din} to solve them.

The phrase \textit{lifnim mi-shurat ha-din} itself, however, is not an invention of the Talmudic editors. In order to understand how the editors develop and deploy this phrase in novel ways, we must first understand how it is used the sources they inherit. The earliest appearance of the phrase \textit{lifnim mi-shurat ha-din} is in a tannaitic midrashic tradition that discusses of the establishment of the Israelite court system. This midrash is cited with minor variations in two early midrashic compilations, the \textit{Mekh. RI} and the \textit{Mekh. Rashbi}, as well as in two Talmudic passages (although these later citations provide little additional information about the meaning of the phrase in the tannaitic period). This chapter begins by exploring the early evidence for the idea of \textit{lifnim mi-shurat ha-din} in tannaitic tradition. Although contemporary studies have examined the moral implications of this phrase, it is notable that,
from its first appearance in rabbinic literature, \textit{lifnim mi-shurat ha-din} is closely linked with questions of law, judgment and decision-making. These connections are then expanded in new directions by the Talmudic editors.

As a result of that expansion, two clusters of traditions about \textit{lifnim mi-shurat ha-din} develop in later rabbinic tradition. In the second part of this chapter, I examine the first of these clusters, which has its roots in the amoraic period although it is also adopted by the editors. It presents \textit{lifnim mi-shurat ha-din} as a type of divine judgment that is closely connected to displays of divine compassion. These traditions, which are recorded in Berakhot 7a and Avodah Zarah 4b, situate this judicial approach within the context of God judging humanity during the Days of Awe, the ten-day period beginning with Rosh Hashanah and ending with Yom Kippur. Both the editors and the named tradents in these sugyot present this model of divine judgment as desirable, and actively seek ways to encourage God to judge Israel \textit{lifnim mi-shurat ha-din}.

This is not the case with the second cluster of traditions about \textit{lifnim mi-shurat ha-din}, which examines rabbinic behavior rather than divine judgment. This later strand of thought is both more prominent (appearing in five sugyot) and is solely the product of the Talmudic editors. Whereas both the midrashic tradition and the traditions about divine judgment depict \textit{lifnim mi-shurat ha-din} as part of courtroom decision-making, in this second set of traditions, the phrase is used to describe the activities undertaken by rabbis in the course of their daily lives. I explore this second set of traditions in detail in Chapters Three and Four. Despite notable differences, both sets of traditions present \textit{lifnim mi-shurat ha-din} as a type of decision-making that is particularistic, contingent and attentive to context. When read collectively, these traditions both promote discretionary judgment as an important complement to rule-based decision-making, though they situate its significance and desirability differently. Before we can analyze the role discretionary judgment plays in the legal worldview of the editors, however, we must establish how this phrase was used at
different points throughout the classical rabbinic period, beginning with its earliest occurrence in tannaitic tradition.

Tannaitic Traditions

The phrase *lifnim mi-shurat ha-din* is first attested in a tannaitic midrash that appears in both the *Mekh. Rashbi* and the *Mekh RI*. Although the presentation of this tradition in the *Mekh. Rashbi* is almost identical to that of the *Mekh. RI*, the two recorded versions of this midrash use different terms to refer to legal rulings. The *Mekh. Rashbi* uses the generic term *din*, while the *Mekh. RI* uses the less common phrase *shurat ha-din*, each of which carries a different nuance. Both texts then use these respective terms to juxtapose the activity of issuing legal rulings with the activity of *lifnim mi-shurat ha-din*. My analysis begins by interrogating the meaning of these two terms, *din* and *shurat ha-din*. Having established how these respective terms are used in tannaitic literature, I examine what can be learned from their juxtaposition with the more enigmatic phrase *lifnim mi-shurat ha-din*.

My analysis begins with the version of the midrash that is presented in the *Mekh. Rashbi*, which uses the more generic term *din* to refer to law or legal rulings. This is also the presentation of the midrash that more closely resembles the version cited in the Talmud. Having examined the midrashic juxtaposition of *din* and *lifnim mi-shurat ha-din*, I then examine what, if anything, changes when the term *shurat ha-din* is substituted for *din*.

Building on the work of Tzvi Novick, I argue that, unlike *din*, which simply denotes a legal rule, the use of the phrase *shurat ha-din* signals additional information about that rule to the reader. It suggests that while the rule to which it refers is technically correct, a straightforward application of that rule will imperfectly resolve the case at hand. In other

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93. Both texts are compilations of tannaitic midrash on the book of Exodus. The Talmud also cites this midrashic tradition (again, with minor variations) in both B.M. 30b and B.K. 99b-100a, but in this chapter, I confine my analysis to its appearance in tannaitic sources.

words, unlike the generic term din, the phrase shurat ha-din actively signals that reliance on rule-based judgment may be insufficient. I argue that this rhetorical function is incorporated into the Talmudic editors' usage of lifnim mi-shurat ha-din.

The Midrashic Juxtaposition of Din and Lifnim Mi-Shurat Ha-Din

The midrash comments on Ex. 18:20, in which Jethro (Moses' father-in-law) instructs Moses to set up a system of Israelite courts. Although this biblical passage marks the beginning of an official judicial system, the authors of the midrash (also known as darshanim, sing. darshan) largely collapse historical distinctions between the ancient Israelite judicial system and rabbinic courts of law. Their commentary, which focuses on the training of new judges, largely seems to have the rabbinic judiciary in mind. Whichever court the darshan has in mind, however, it is notable that from its very first appearance in rabbinic literature, the phrase lifnim mi-shurat ha-din is connected to the activities of the court and to questions of law and judgment.

The midrash comments on a verse in which Jethro instructs Moses about how to train Israel's future judges. Jethro specifies two parallel courses of instruction: Moses must teach certain content to the judges [A], but he must also teach them how to perform certain tasks [B].

The Mekh. Rashbi records two different interpretations of this verse, the first by R. Joshua (RJ) and the second by R. Elazar of Modi'in (RE). Each rabbi treats the verse in two parts, beginning with line A.
You shall instruct them in the statutes – these are the interpretations. And the teachings – these are the legal decisions. These are the words of R. Joshua.

R. Elazar of Modi’in says: Statutes – these are the laws against incestuous practices, as it says that you do not do any of these abominable customs (Lev. 18:30).

And the teachings – these are the legal decisions.

Jethro's instruction to Moses in line A establishes a judicial curriculum. In the context of the Torah itself, that curriculum is directed towards Moses' contemporaries, the first judges of ancient Israel, but both R. Joshua and R. Elazar interpret these words as applicable beyond that specific historical moment. As a result, in the context of the Mekh. Rashbi, these verses are interpreted as establishing the specific bodies of material that a rabbinic judge must learn in order to execute his office well. Both R. Joshua and R. Eleazar subdivide this body of material into two parts, although each does so in different ways.

The first part of line A establishes that Israel's judges must be taught the relevant statutes (חוקים). R. Joshua interprets this to mean that they must be taught rabbinic interpretations of the Torah (מדרשות) [A1 (RJ)], or possibly that they must learn to master the activity of Torah interpretation itself (midrash). In addition to interpreting the written Torah, the rabbinic judge must also learn the 'teachings' (תורות), which R. Joshua here understands as a reference to the canon of oral Torah. More specifically, he interprets this verse as establishing a second core component to the judicial curriculum: mastery of the legal decisions and precedents set by earlier Jewish courts (הוריות) [(A2 (RJ)].

Like R. Joshua, R. Elazar's interpretation of these verses focuses on the context of establishing a judicial system and curriculum, but he understands the bodies of knowledge contained in that curriculum differently. Rather than connecting the statutes (חוקים) to interpretations of the Torah in a broad sense (מדרשות), R. Elazar exploits a linguistic
connection between Ex. 18:20 and Lev. 18:30 to highlight a specific body of Torah laws.

The verbal root חקק appears in both verses (as statutes, or חוקים, in Ex. 18:20 and as customs, or מחוקות, in Lev. 18:30). R. Elazar infers that since the root is used to refer to 'abominable customs' in Lev. 18:30, which he glosses as forbidden sexual relations (עריות), it must refer to the same set of forbidden practices in Ex. 18:20 [A1 (RE)]. This leads R. Elazar to conclude that the judicial curriculum must include a special emphasis on the laws of forbidden sexual relationships. He agrees with R. Joshua, however, that reference to "teachings" (תורות) indicates that the judge must also learn the rules and precedents established by previous courts (והרויות) [A2 (RE)].

Despite disagreeing on the particular content included in this curriculum, both rabbis understand line A of Ex. 18:20 to establish a core body of knowledge that the judge must learn to master. Likewise, both rabbis interpret line B as detailing how the judge ought to conduct himself in the course of his daily life, although they disagree on which behaviors are indicated. The set of behaviors described by each rabbi highlights behaviors that are generally incumbent upon the sage as a righteous individual. R. Joshua articulates two general principles for such behavior, while R. Elazar elucidates six specific behaviors, four of which pertain to the sage more generally and two of which pertain to the specific office of the judge.

[B1-4 (RJ)] (1) You shall make known to them (2) the path (3) they are to walk (4) upon—this is the study of Torah.

[B1-4 (RJ)] (1) בָּאָם לְאִדְּמֵךְ הָעָם בָּאָם לְאִדְּמֵךְ הָעָם בָּאָם לְאִדְּמֵךְ הָעָם בָּאָם לְאִדְּמֵךְ הָעָם בָּאָם לְאִדְּמֵךְ הָעָם בָּאָם לְאִדְּמֵךְ הָעָם בָּאָם לְאִדְּמֵךְ הָעָם בָּאָם לְאִדְּמֵךְ הָעָם B1-4 (RJ) [B1-4 (RJ)] (1) You shall make known to them (2) the path (3) they are to walk (4) upon—this is the study of Torah.
And the deed[s] they are to do—this is [a reference to] good deeds. These are the words of R. Joshua.

R. Elazar of Modi’in says: you shall make known to them—make known to them their livelihood.

The path—this is visiting the sick.

They are to walk—this is burying the dead.

Upon—this is loving-kindness.

and the deed[s]—this is din. 95

they are to do—this is lifnim mi-shurat ha-din.

R. Joshua's interpretation of line B is relatively straightforward. As in line A, he distinguishes between two key elements outlined in the verse: the "path" and the "deed[s]." Whereas each element of the verse was correlated with a specific body of knowledge in line A, in line B, each element is correlated with a specific set of practices, habits or behaviors that the judge must cultivate. 96 This aspect of judicial education is therefore different in nature, and is oriented towards shaping the character of the judge, rather than towards transmitting information to him. The two actions that R. Joshua highlights, the study of Torah and the performance of good deeds, are commonly paired in early rabbinic literature. 97 His identification of this particular pair of actions may also be linguistically motivated, linking the "deed[s]" referred to in the verse to the performance of good deeds more generally.

Whereas R. Joshua interprets this verse as referring to two general classes of behavior, R. Elazar subdivides line B further. The first half of the line [B1-4] is interpreted as referring to four specific behaviors: maintaining one's livelihood, caring for the sick, burying the dead and performing acts of loving-kindness. These behaviors paradigmatically represent the behavior of a righteous individual. R. Elazar's interpretation of the second part of the line [B5-6], however, elucidates two activities

95. As discussed below, the Mekh. RI reads "this is shurat ha-din."


97. See, for example, Pirke Avot, 3:12 and 3:22. While the relative importance of Torah study and good deeds is often debated among the rabbis, R. Joshua’s interpretation highlights that both are central behaviors of the righteous individual.
that pertain to the rabbinic sage not in his general capacity as a righteous person, but in his specific capacity as a judge. The first of these two terms, *din* (law or judgment), highlights the responsibility of the judge to interpret, clarify and enforce the law through his rulings. By rhetorically juxtaposing that responsibility with the phrase *lifnim mi-shurat ha-din*, however, the midrash suggests a second responsibility that is particular to the occupation of the judge: to make judicial decisions not only through the lens of *din*, but also through that of *lifnim mi-shurat ha-din*.

How are we to understand the juxtaposition of *din* and *lifnim mi-shurat ha-din* in this midrash? Although the question is never addressed specifically, the rhetorical juxtaposition of these terms may enable us to draw inferences about the latter enigmatic phrase, *lifnim mi-shurat ha-din*, based on what we know about the former and much more familiar term, *din*. The semantic range of *din* in biblical and rabbinic Hebrew is expansive, but given that the midrash is focused on the establishment of the Israelite judicial system, its most likely meaning here is simply 'law' in the sense of a legal rule or decision. Since all the other terms in the verse are glossed midrashically as actions (burying the dead, visiting the sick etc.), we might here gloss *din* not simply as the law itself, but as the activity of issuing legal rulings.

The phrase *lifnim mi-shurat ha-din* is linguistically more difficult, as it is a prepositional phrase that translates literally as 'within the line of the law.' Since it is paired here with *din*, it appears to refer to some other activity in which the judge is engaged that is

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98. *Din* can be used as both a noun and a verb, and its possible meanings include a law or rule, the act of judgment or decision-making, or reason and logic. (Cf. Marcus Jastrow, *A Dictionary of the Targumim, Talmud Babli and Yerushalmi and the Midrashic Literature* [New York: G. P. Putnam's Sons, 1903], 300-302; Yitzchak Frank, *The Practical Talmud Dictionary*, 70-71; Brown, et al., *The Brown-Driver-Briggs Hebrew and English Lexicon* [Peabody MA: Hendrickson Publishers, 1994], 192; and Michael Sokoloff, *A Dictionary of Jewish Babylonian Aramaic of the Talmudic and Geonic Periods* [Baltimore MD: Johns Hopkins University Press, 2003], 332-334). Which meaning is activated in a given source is dependent on the context. For example, in her discussion of some of the same texts analyzed in this study, Christine Hayes defines *din* as "a formally or logically correct law" (Christine Hayes, *What's Divine About Divine Law?*, 172). In his analysis of midrashim from the school of Rabbi Ishmael, Azzan Yadin defines *din* as reason or logical inference. See Azzan Yadin, *Scripture as Logos: Rabbi Ishmael and the Origins of Midrash*, (Philadelphia: University of Pennsylvania Press, 2004), especially pp. 122-141.

99. As in "this is the rule/decision" (יְדֵי קָדוֹשׁ). This is supported by the fact that R. Elazar uses *din* as a gloss for 'the deed[es]' (נְשׂוֹטָה) referred to in the verse.
different from the activity of issuing legal rulings, although still connected to it. I will argue that, when this version of the midrash is read in tandem with the version presented in the Mekh. RI, this juxtaposition suggests that the terms *din* and *lifnim mi-shurat ha-din* point to two different approaches to rabbinic decision-making: rule-based judgment and discretionary judgment. On the basis of the Mekh. Rashbi alone, however, I contend that we should draw only two minimal conclusions. First, because the two terms are juxtaposed, we can assume that *lifnim mi-shurat ha-din* is both linguistically and conceptually related to *din* in the sense of 'legal rulings,' although the precise nature of that relationship remains unclear. Second, we can assume that the *darshan* (midrashic author) views *lifnim mi-shurat ha-din* as distinct or different from the activity of issuing legal rulings, although the nature of that distinction also remains unclear.

Some scholars have attempted to determine the meaning of this phrase in the midrash by looking at its later usage in the Babylonian Talmud. As Gregg Gardener has shown in his study of *gemilut hasadim*, however, such an approach "collapses historical and geographical distinctions between rabbinic texts." He argues that,

> in Tannaitic texts *gemilut hasadim* constitutes a broad category of unspecified interpersonal behaviors. Moreover, *gemilut hasadim* was neither a static, unchanging concept, nor was initially conceived as the highly developed and moral concept that it would later become. Like all of rabbinic law and ethics, *gemilut hasadim* would evolve and mature only with time.

Similar challenges arise in the study of *lifnim mi-shurat ha-din*. We cannot reliably assume that the usage of *lifnim mi-shurat ha-din* will parallel its usage in the Talmud. On the contrary, as I will show, two clusters of traditions about *lifnim mi-shurat ha-din* can be traced within the Talmud; each has its roots in the midrashic tradition, but each develops and concretizes aspects of that tradition in different ways.

I propose that it may be possible to gain greater clarity about the usage of this phrase in the midrash without relying on the Talmud, by examining a core difference between the


101. Ibid.
attestation of this midrashic tradition in the *Mekh. Rashbi* and in the *Mekh. RI*. As noted previously, the midrash is presented almost identically in both texts, with one notable difference. Whereas the *Mekh. Rashbi* juxtaposes *lifnim mi-shurat ha-din* with the term *din*, the *Mekh. RI* juxtaposes it with the less common phrase *shurat ha-din*. By examining the meaning and usage of this phrase in the tannaitic period, I argue that it is possible to clarify, or at least narrow, the linguistic and conceptual range of *lifnim mi-shurat ha-din* in this early material.

When the "Correct" Rule is Inadequate

The presentation of the midrash in the *Mekh. Rashbi* and the *Mekh. RI* is so similar that the two versions are best understood as textual reproductions of the same teaching or tradition. Since the only difference between these two attestations is the use of *shurat ha-din* instead of *din* in the *Mekh. RI*, we must determine whether this term—which is itself absorbed into the prepositional phrase *lifnim mi-shurat ha-din*—is functionally identical to *din*, or whether it carries some nuance that might enable us to clarify the juxtaposition of these terms and narrow the potential meaning of *lifnim mi-shurat ha-din*.

In his detailed philological study “Naming Normativity,” Tzvi Novick argues that although the phrase *shurat ha-din* is sometimes used interchangeably with *din*, this construct phrase often carries what he calls a “trumping implication.” When a legal rule is described as *shurat ha-din*, instead of simply as *din*, it frequently signals that the rule in question will (or should) be trumped by a different rule or consideration. In other words, the phrase *shurat ha-din* signals to the reader that although the rule in question is technically

102. The phrase *lifnim mi-shurat ha-din* also appears in *Midrash Tannaim*, but Tzvi Novick has convincingly argued that its dating to the tannaitic period is dubious as best (see Tzvi Novick, “Naming Normativity”, p. 393 n. 7), and 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 the reference to *lifnim mi-shurat ha-din* in this text pre-dates the Bavli. As a result, I do not include the reference from *Midrash Tannaim* in my analysis.
103. As the parallel use of these two terms in the *Mekh. RI* and the *Mekh. Rashbi* suggests.
correct, applying the rule to the case in question may lead to a problematic outcome. Strictly speaking, the rule itself is not flawed, but something about its formulation makes it unable to adequately respond to the context in which it will be applied.

Consider the following case from m. Git. 4:4. In this passage, the Mishnah discusses the case of a slave whose master has pledged him as collateral for a debt. The master then frees the slave before the debt has been paid. Now that the slave has been freed, can the person owed the debt still take ownership of the slave if his prior master fails to pay? While doing so would unfairly place the burden of the debt upon the slave, the Mishnah suggests that the present formulation of the rule will not prevent this problematic scenario. To address this issue, the Mishnah establishes an addendum to the rule in question: when the slave is freed, a new deed of debt must be written between the debtor and the lender, ensuring that the slave can no longer be seized as collateral.

The Mishnah begins by stating that "shurat ha-din, the slave is not held liable for anything." Since the debt is not his own, he bears no responsibility for it once he has been freed. In this sense, the existing law is unproblematic. The Mishnah exhibits concern, however, about the application and enforcement of this rule in line B. Does the rule sufficiently protect the interests of all involved? What if the person who is owed money attempts to seize the freed slave in payment? Or, as Novick points out, what if the original master uses this as a loophole

[A] [In the case of] a slave whose master made him collateral, and then freed him: shurat ha-din, the slave is not liable for anything.

[B] Mipnei tikkan ha-olam [for the sake of repairing the world], we compel his master to free him\(^\text{106}\) and to write a deed for his value [i.e. the price the slave would fetch if sold at the market].

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106. My translation here follows Novick’s own translation and analysis. However, the question of who writes the deed for the slave’s value is contested in the commentary tradition (see Bartenura on m. Gittin 4:4), as the language is not clear. It might be the original master, but it might also be the second master (to whom the slave was given as collateral) or even the slave himself.
to try and evade his debts? In its current formulation, the rule is unable to prevent the various problematic situations that may result if the master frees his slave before the debt is paid. The debt may be resolved or evaded in multiple ways that the rule fails to effectively anticipate or restrict.

In order to control these potential outcomes, the Mishnah asserts the power of the courts. Rather than modifying the existing rule or replacing it with a new one, the Mishnah maintains order by identifying the court itself as a powerful social actor. If a problematic scenario arises, the court is granted the authority to coerce (копין) the original master to write a new deed of debt in an equivalent amount, thus clarifying that he retains sole responsibility for paying that debt. Both the description of the original rule as shurat ha-din and the assertion that the court has the power to compel the writing of a new deed of debt "for the sake of repairing the world" (mipnei tikkun olam) indicate that the rule itself is insufficient to guarantee the correct outcome given the larger complex of circumstances.

In this sense, shurat ha-din functions as a rhetorical term, designed not only to refer to a specific rule, but to communicate the limitations of that rule to its audience. To adopt Schauer's terminology, we might say that the laws described as shurat ha-din are especially likely to produce a 'recalcitrant experience,' or a case in which the straightforward application of a rule will fail to achieve the justification for that rule. Recall, for example, the case of our patron with the seeing-eye dog from Chapter One; applying the 'no dogs allowed' rule in that case would fail to accomplish the goal that rule was initially designed to achieve (limited disruption to restaurant patrons) and might actually impede the restaurant's broader goal of increasing patronage. While any rule has the potential to lead to a recalcitrant experience, some may be more likely to lead to do so than others. In tannaitic literature, the phrase shurat ha-din often functions as a marker for those rules which are technically correct, but which are unusually likely to lead to recalcitrant experiences because they fail to take into account key

information about the broader contexts in which they will be applied. In m. Git. 4:4, for example, the rule is formulated specifically to address the issue of the slave who is used as collateral for a debt and then freed, but it fails to anticipate outcomes based on the social and economic realities of slavery and debt. By describing this rule not simply as din, but as shurat ha-din, the Mishnah signals to its reader that the rule is inadequate and that additional measures must be put into place in order to ensure that the master retains responsibility for his debts. Rather than modifying the existing rule, the Mishnah identifies a different type of legal mechanism: it endows the courts with coercive power, enabling them to address problematic scenarios if and when they arise by compelling the master to write a deed for the price that the slave would fetch when at the market, and to use that deed as collateral for the debt in place of the slave himself.

In later Talmudic passages, the phrase lifnim mi-shurat ha-din seems to absorb this rhetorical function of shurat ha-din. Although the two phrases have different referents, both signal to the reader that relying on rule-based judgment (simply applying the relevant rule to the case at hand) will prove inadequate for resolving the case at hand in some significant sense. In the case of shurat ha-din, relying on the rule so labeled may lead to a problematic outcome; in the case of lifnim mi-shurat ha-din, I argue that relying on the rule in question will lead to an a legally acceptable outcome, but one that is deemed to be suboptimal. The sugyot that depict rabbis acting lifnim mi-shurat ha-din all identify a set of formally correct legal rules that would apply to the situation at hand but all suggest that relying on such rules is undesirable in this particular case. While there is nothing wrong with the rule itself, the situation warrants a different kind of response. Furthermore, although the tannaitic sources that employ the phrase shurat ha-din do not dictate how to overcome the limitations of the rule in question, the Talmudic sources about lifnim mi-shurat ha-din do. When a rabbi determines that rule-based judgments are inadequate, he engages in discretionary judgment instead.
Identifying these connections between the usage of *shurat ha-din* in the Mishnah and *lifnim mi-shurat ha-din* in the Talmud enables us to further clarify how this latter phrase is likely used in tannaitic midrash. We have already established that the midrash rhetorically juxtaposes *din* and *lifnim mi-shurat ha-din*, both linking and differentiating these terms in some way. Our analysis of the juxtaposition between *shurat ha-din* and *lifnim mi-shurat ha-din* in the *Mekh. RI* enables us to determine the nature of this link more precisely. All three terms—*din*, *shurat ha-din* and *lifnim mi-shurat ha-din*—acknowledge the existence and importance of legal rules. The latter two terms, however, signal to the reader that in certain cases, such rules may be unable to address the full context of the case at hand. In such cases, some alternative form of legal response or judgment may be necessary. Although the tananitic sources provide no clear guidance as to what form such judgments should take, the Talmud concretizes and illustrates one possible approach in a set of narratives about God acting *lifnim mi-shurat ha-din*.

*Lifnim Mi-Shurat Ha-Din as a Form of Divine Judgment*

The two Talmudic sugyot that describe God acting *lifnim mi-shurat ha-din* and the five sugyot that describe rabbis acting *lifnim mi-shurat ha-din* both build upon the usage of this phrase in tannaitic midrash, but these two clusters of traditions differ from one another in several significant ways. First, the midrashic tradition focuses on the context of the biblical or rabbinic courtroom. In the two sugyot about divine judgment, the setting shifts from the human courtroom to the divine courtroom, while in the five sugyot about rabbis, this approach to decision-making is removed from the courtroom and resituated within the context of daily life. Second, the midrashic tradition highlights a classical judicial framework: the deciding of specific legal cases. While the two sugyot that depict God acting *lifnim mi-shurat ha-din* retain the courtroom setting, they do not focus on evaluating specific cases; instead, they highlight a specific moment in the liturgical calendar, during which God
judges all of humanity. Although the five sugyot that depict rabbis acting *lifnim mi-shurat ha-din* abandon the courtroom setting, they return to the midrashic focus on concrete cases, examining how rabbis respond to the various situations they encounter in the course of everyday rabbinic life. Third, the midrashic tradition focuses on the perspective of the judge, who must analyze, evaluate and decide the cases in question. This perspective carries through the five Talmud sugyot focused on rabbinic actors, but not those that describe God acting *lifnim mi-shurat ha-din*. In marked contrast to the rest of the corpus, these two passages do not explore discretionary judgment from the perspective of the judge (God), but rather from the perspective of those being *judged* (humanity).

This shift in perspective radically differentiates the nature of the questions, hopes and fears that are activated in the sugyot focused on divine action from the rest of the corpus. While both strands of Talmudic thought about *lifnim mi-shurat ha-din* are deeply concerned about the consequences of engaging in this approach to judgment, the nature of that concern differs. The primary concern of those being judged is to achieve a favorable outcome, and they are willing to employ a variety of means to pursue that end. As a result, these sugyot display a marked interest in analyzing God's judicial disposition, and in finding ways to curry divine favor. Rabbinic anthropology depicts human beings as flawed and imperfect creatures; as a result, these passages reflect anxieties about the likelihood of achieving a favorable judgment, and correspondingly stress the importance of divine compassion. In order to elicit such compassion, they seek to remind God of his covenantal relationship with Israel. Far from presenting impartiality as the judicial ideal, these passages encourage God to show indulgence and mercy towards his favored 'children.'

The two sugyot that describe God acting *lifnim mi-shurat ha-shurat* situate such

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109. Following the language of my sources, I use masculine pronouns to refer to God throughout. For similar reasons, I rely on masculine pronouns to refer to generic actors in rabbinic sources and to the implied audience for those sources, both of which the Talmudic editors likely envisioned as male.
judgments liturgically during the period known as the *Yamim Nora'im*, or the Days of Awe. During this ten-day period, which begins with Rosh Hashanah and ends with Yom Kippur, God judges the entire Jewish people or nation. By invoking this particular judicial context, the Talmud enacts a significant shift in perspective from that of the midrashic tradition. In the midrashic tradition, which focuses on the establishment of Israelite courts, the reader is rhetorically positioned as the rabbinic judge. It is the judge, for example, who is expected to respond to the signaling function of *shurat ha-din* and recognize that additional mechanisms must be put into place in order to ensure that the rule in question achieves its intended purpose. It also is the judge who must master the various curricula described, including learning how to make judgments according to both *din* and *lifnim mi-shurat ha-din*. By imaginatively catapulting the reader into the divine courtroom, both Ber. 7a and A.Z. 4b position the reader not as the (divine) judge, but as the (human) petitioner awaiting judgment. As a result, the reader's investment in the judicial encounter changes. Rather than seeking to master the activity of judgment, the reader now hopes to ensure a favorable outcome for himself on a specific occasion of judgment—an outcome which, as noted above, is far from guaranteed.

Both Ber. 7a and A.Z. 4b seek to mitigate the potential of a negative outcome by encouraging divine compassion, although each passage highlights different mechanisms for achieving this result. Ber. 7a contends that God himself wants to be compassionately disposed towards the people. It articulates this projected desire in two ways: first, it suggests that God prays to overcome his anger, to strengthen the divine attribute of mercy and to act *lifnim mi-shurat ha-din*. Second, it presents an imagined encounter between God and a high priest on Yom Kippur, during the days when the Temple still stood. In this encounter, the high priest offers a blessing that God will achieve these same desires: God's mercy will overwhelm his anger and his various other attributes, and he will act *lifnim mi-shurat ha-din*. Both of these images suggest that prayer—both divine and human—has the power to change
the outcome of God's judgment. While A.Z. 4b also examines the impact of prayer on divine judgment, it analyzes the broader context in which such prayers are offered and received. The sugya suggests that external factors, such as the time of day and whether or not the individual prays alongside a community, impact whether the prayer will be accepted or "pushed off." To ensure the best possible outcome, the individual should be careful to offer prayers at a time when God is predisposed to receive them compassionately, and to pray with the larger community, since their collective merit may compensate for his individual flaws. When read collectively, these two sugyot highlight the way in which a variety of contextual factors can influence the outcome of divine judgment by encouraging God to act lifnim mi-shurat ha-din.

Having presented a thematic overview of these sugyot, let us now consider each text in greater detail.

The Role of Compassion in Judgment

Ber. 7a opens with a discussion of divine prayer. It cites an amoraic teaching in the name of R. Yossi, which provides a prooftext from Is. 56:7 that supports the idea that God prays, just as humans do. Building upon that teaching, the editors then inquire: if we know that God prays, what does he pray for? An answer is provided by citing a teaching by Rav Zutra in the name of Rav: God prays that his compassion will overcome all of his other qualities, enabling him to act compassionately towards his children and to judge them lifnim mi-shurat ha-din. The editors then cite a narrative source that attributes the text of this prayer to a blessing that R. Ishmael b. Elisha, acting in the role of High Priest, is said to have bestowed upon God during their encounter in the Holy of Holies on Yom Kippur. The passage concludes with an editorial postscript about what the reader should learn from this interaction between R. Ishmael and God. Just as God accepts the blessing of R. Ishmael, his inferior, so too should the rabbis accept the blessings of their inferiors (the 'ignorant' person). This postscript underscores the idea that God presents an ideal of behavior that the sage
should strive to imitate. Although the sugya establishes now explicit connection between
divine judgment and rabbinic judgment, this editorial postscript lays the groundwork for their
later adoption of lifnim mi-shurat ha-din as a type of rabbinic judgment. If God engages in
discretionary judgment, then this is a model of decision-making that might potentially be
applied to the sage as well. I develop this connection in subsequent chapters, tracing how the
editors both adopt and adapt the paradigm of lifnim mi-shurat ha-din in their application of
this label to rabbinic behavior.

The sugya from Ber. 7a is comprised of three primary textual units. The first unit [A-
D] presents an amoraic teaching in the name of R. Yossi, which introduces the thematic focus
on divine prayer. In the second unit [E-G4], the editors connect R. Yossi's teaching to a
second amoraic tradition by introducing a question about the content of divine prayer [E].
The editors then cite an amoraic teaching attributed to Rav, which they present as a response
to their question. Rav's teaching outlines the content of divine prayer, listing four primary
components [G1-G4]. While each component focuses on orienting God towards compassion,
the prayer culminates in God acting lifnim mi-shurat ha-din. The third unit [lines H-L]
presents a purportedly tannaitic narrative¹¹⁰ that enumerates the same four components of
divine prayer. In the narrative, however, the text of God's prayer is placed in the mouth of R.
Ishmael, who offers a blessing to God in the Temple during Yom Kippur. By introducing this
narrative, the editors situate the actions outlined in God's prayer liturgically. Divine
compassion will lead God to act lifnim mi-shurat ha-din when he judges the people on Yom
Kippur. The third unit concludes with an editorial postscript, that depicts God's acceptance of
R. Ishmael's blessing [L] as a model for rabbinic behavior [M].

¹¹⁰. Although R. Ishmael's encounter with God is introduced with a term that usually indicates a tannaitic text
(תניא), several elements of narrative show signs of later editorial activity. First, although Ishmael b. Elisha is
presented as a High Priest officiating in the Temple, he is described with the honorific “rabbi.” Tannaitic
literature rarely applies this anachronistic title to sages who lived during the time of the Second Temple. Second,
the name used to describe the figure Rabbi Ishmael sees, “Akriel Yah,” is a name for God that is not attested
anywhere else in tannaitic literature but which appears in Geonic literature. As Shamma Friedman notes, the use
of Geonic vocabulary is a clear indicator of late editorial activity (Friedman, "Pereq ha'isha ravva babavli"). As
a result, the historical provenance of this narrative is unclear. It may originate with a tannaitic teaching, but the
final form of the narrative (as presented in the sugya) likely postdates the parallel teaching by Rav.
I present the sugya in its entirety here. Due to its length, however, my analysis subdivides the passage in two parts, focusing on the presentation of the parallel text of God's prayer/R. Ishmael's blessing [G1-4/K1-4] in the second and third units.

[A] Rabbi Yochanan said in the name of Rabbi Yossi: From where [do we learn] that the Holy One, Blessed be He, prays?

[B] As it is written, I will bring them to my holy mountain and I will gladden them in the house of my prayer (Is. 56:7).

[C] ‘Their prayer’ is not written, but rather ‘my prayer.’

[D] From here we learn that the Holy One, Blessed Be He, prays.

[E] For what does He pray?

[F] Rav Zutra son of Tovya taught in the name of Rav [that God prays the following prayer]:

[G1] “May it be my will that my compassion conquers my anger,

[G2] that my compassion prevails over my [other] attributes.

[G3] that I behave towards my children according to the quality of compassion,

[G4] And that I enter before them lifnim mi-shurat ha-din.111

111. The grammar of the phrase ה深い mi-shurat ha-din is awkward, making translation here more difficult. As I discuss below, the use of the verb ‘enter’ (לפני) activates the spatial metaphor inherent in lifnim mi-shurat ha-din more strongly than the verb ‘act’ (משרתו) that is used in all of the other sugyot. The Soncino edition of the Talmud (edited by Isidore Epstein) views this line as expressing the hope that God will "on their behalf [ предн]
It was taught [in a baraita]:

Rabbi Ishmael ben Elisha said: Once, I entered to offer incense in the innermost sanctuary and I saw Akatriel Yah, the Lord of Hosts, seated on an elevated and exalted throne.

He said to me, “Ishmael, my son, bless me.”

I said to him: “May it be your will that your compassion conquers your anger,

That your compassion prevails over your [other] attributes

That you behave with your children according to the quality of compassion

And that you enter before them lifnim mi-shurat ha-din.”

He nodded his head to me.

From this we learn that you should not take the blessings of an ignorant person lightly.

The sugya begins by citing an amoraic tradition about divine prayer. R. Yossi draws on a peculiarity in the wording of Is. 56:7 as scriptural proof that God also prays. One might expect the prophet, speaking in the voice of God, to say that he will gladden the people in the house of their prayer (בית תפילתם) instead, God refers to the house of my prayer (בית תפילתי), indicating that God himself prays.

The editors then draw a connection between this tradition and a statement attributed to Rav about the content of divine prayer. By interjecting the question "for what does God pray?", they connect two independent but thematically related traditions about divine prayer. According to Rav, God is said to pray for four things: 1) for his compassion to conquer his anger [G1]; 2) for his compassion to prevail over his other attributes [G2]; 3) to behave compassionately towards his children [G3] and 4) to enter before them lifnim mi-shurat ha-din [G4]. The articulation of this prayer raises two questions. First, what is the relationship between the four different actions listed within God's prayer? Second, what is meant by the stop short of the limit of strict justice (שהרדה הזרע). This translation successfully communicates this spatial metaphor, suggesting that in the moment of judgment, God faces shurat ha-din (often rendered as 'strict justice' instead of 'the line of the law' when discussing the context of divine judgment) but does not stand upon it.

112. Although it is not explicitly mentioned that this occurs on Yom Kippur, it can be inferred because the innermost sanctuary was never entered except on Yom Kippur.

113. A quirk of biblical Hebrew allows for the possessive to modify either the noun 'house' – i.e. their house – or the noun 'prayer' – i.e. their prayer – in this construct phrase. The midrash capitalizes on this grammatical structure. There is nothing particularly surprising about God referring to the Temple as 'my house of prayer,' since the Temple is devoted to the worship of God. Interpreting this a reference to 'the house of my prayer' instead creates an opportunity to explore the topic of divine prayer.
enigmatic statement that God will "enter before them [e.g. his children] lifnim mi-shurat ha-
din?"

Saul Berman has argued that the order of the prayer outlines different spheres of the
divine-human relationship.

The term lifnim mishurat hadin is used in this case in order to describe the fashion in
which man desires God to relate to him in His action... 1. That in the Godhead itself—
Mercy should conquer anger. 2. That in revelation—mercy should be preeminent over all
other qualities. 3. That in actions toward the Jewish people—mercy should be the guide.
4. That in the process of entering into intense relationship with the Jewish people—the
quality of mercy should govern. In Berman's view, God must begin by orienting himself towards compassion [G1]. Berman
then traces how that compassion will be expressed in different facets of God's interaction
with humanity, beginning with the most transcendent (revelation) and ending with the most
immanent (entering into 'intense relationship'). His interpretation highlights a central dynamic
of this passage: although the prayer is attributed to God, it expresses a human hope or desire.
This is underscored in the final unit of the sugya, which presents this movement towards
divine compassion as a blessing that R. Ishmael bestows upon God. By placing the blessing
in a human mouth, the narrative clarifies its aspirational nature: by offering this blessing to
God, R. Ishmael hopes to persuade God to act in this manner.

Although Berman presents a compelling vision of the relationship between God and
Israel, his conclusion that these different elements of the prayer correspond to different
relational spheres does not address the appearance of the phrase lifnim mi-shurat ha-din. On
the contrary, Berman glosses over the fact that although the first three lines of the prayer [G1-
G3] center on the term rachamim (compassion or mercy), this term is replaced by the phrase
lifnim mi-shurat ha-din in the final line [G4]. Instead, his interpretation presents rachamim
and lifnim mi-shurat ha-din interchangeably as 'mercy.' In order to understand this shift, I
propose (pace Berman) that the actions outlined in God's prayer are best understood as a
temporal sequence in which each subsequent action depends upon the one that precedes it. As

discussed above, the sugya explores divine judgment from the perspective of those being 
judged, who are disproportionately invested in achieving a good outcome. The sugya implies 
that such an outcome can only be guaranteed if God enters before them lifnim mi-shurat ha-
din. The first three activities in which God engages can therefore be seen as a way of 
convincing or compelling God to engage in discretionary judgment.

In order to be able to act lifnim mi-shurat ha-din, God must first must conquer his 
anger [G1]. The sugya begins from the presumption that human nature is flawed and that 
those being judged have failed to act as a perfectly righteous individual should. This failure, 
or sin, provokes divine anger. Such outrage may be just, but it is unlikely to lead to a 
favorable outcome for those being judged; first and foremost, God's anger must be overcome. 
Although the quenching of divine anger may help to facilitate a favorable outcome for the 
judged, it is insufficient to guarantee it. In order to ensure a good outcome, God's judgment 
must be structured by his compassion. Accordingly, the next line [G2] refers to God's 
compassion overcoming not only his anger, but all of God's other attributes or qualities 
(middot) as well. Rabbinic literature suggests that the divine persona contains multiple 
different dispositions or attributes, any of which might exert a controlling impact on God's 
behavior at a specific moment in time. Only the attribution of compassion, however, can be 
relied upon to prompt God to judge his 'children' favorably. As a result, in order to reach the 
desired outcome, compassion must dominate the divine persona. This will lead God to 
behave with compassion in his interactions with his children [G3]. In the sphere of judgment, 
such compassion will motivate God to act lifnim mi-shurat ha-din.

Ber. 7a relies on an unusual grammatical construction to describe the way in which 
God acts lifnim mi-shurat ha-din. While the remaining sugyot describe either God or a rabbi 
'acting' lifnim mi-shurat ha-din, using either the Aramaic verb עבד or its Hebrew equivalent 
עשה, Ber. 7a uses the Hebrew verb 'to enter' (כנס). Scholars debate how to understand the 
significance of this shift. Some have suggested that it is used to indicate God's disposition as
he enters into judgment. I argue that the use of the verb 'to enter' in this passage serves to activate the spatial metaphor encoded within the phrase lifnim mi-shurat ha-din: when God enters the divine courtroom, he positions himself lifnim (facing) shurat ha-din. This further explains the grammatical construction of the sentence, which inserts the indirect object הלל between the verb 'to enter' (אכנס) and the act of judging lifnim mi-shurat ha-din. The purview of divine judgment does not only include shurat ha-din, but also those being judged. God's 'children' enter directly into his field of vision, inclining his judgment towards compassion.

It should be noted that, in the context of divine judgment, shurat ha-din likely carries a different connotation than the one presented in my discussion of the midrashic tradition. The majority of scholars translate shurat ha-din in Ber. 7a as 'strict justice.' In other words, shurat ha-din refers to the judgment that might be reached if middat ha-din, the divine attribute of justice, ruled the divine persona during the period of judgment instead of rachamim, or compassion. In the context of Ber. 7a, this reference to strict justice has overtones with the rhetorical usage of shurat ha-din to indicate a rule that is technically correct, but somehow inadequate to the case at hand. Technically, there would be nothing incorrect or inappropriate if God judged the people in this way. From the perspective of strict justice, it would be appropriate to punish the people for their failings. From the perspective of the judge, however, when God stands on strict justice, it yields the same genre of problem as when a rabbinic judge stands on the line of the law: it is likely to result in an unfavorable or undesirable outcome. As a result, when compassion rules the divine persona, God withdraws from the requirements of strict justice. Whereas the limits or boundaries of justice would permit God to issue a harsh sentence, he stays 'well within' those possible extremes, instead offering a more lenient ruling. He focuses, instead, on the context of his covenantal relationship with Israel, exercises judicial discretion and acts lifnim mi-shurat ha-din. In so

115. Berman disagrees with such a reading, arguing that this root is not used in a figurative sense in the Mishnah or the Tosefta, except in reference to marriage (Berman, "Lifnim Mishurat Hadin II," 185). Berman does not discuss whether this root is used figuratively in amoraic sources, although he does note that m. Shabb. 1:2 uses the root כנס to describe physical entry into a courtroom (ibid, n. 95). I argue that the sugya plays on this usage of the root 'to enter,' thereby activating the spatial metaphor in the phrase lifnim mi-shurat ha-din.
doing, he secures a favorable outcome for those being judged. 116

Divine Prayer as Human Aspiration

The sugya introduces this process through which God proceeds from anger to compassion, leading him to act compassionately and judge his children favorably, as the manner in which God himself hopes to enter into judgment. As the second half of the sugya makes clear, however, the proposed text of God's prayer offers little insight into God's own perspective. Instead, it reflects the hopes of those who will be judged by God. The sugya cites a narrative which clarifies this perspective in two ways. First, the same procedure outlined in the first half of the sugya is now attributed not to God's own prayer, but to a blessing that R. Ishmael b. Elisha once offered to God. Placing the blessing in the mouth of a R. Ishmael clarifies that it expresses a human hope, rather than a divine wish. Second, the narrative situates the encounter between R. Ishmael b. Elisha and God both spatially and liturgically. It takes place in the innermost sanctuary of the Temple on Yom Kippur, the conclusion of the ten-day period of judgment known as the Days of Awe. As High Priest, R. Ishmael b. Elisha acts as an intercessor between God and the Jewish people, and the encounter occurs as the ten-day period of judgment comes to a close, before the final judgment is 'sealed' and cannot be altered. This context heightens the urgency of the encounter and underscores anxieties about the outcome of the impending judgment.

It is notable that, when R. Ishmael enters the innermost sanctuary of the Temple as a

116. In the Introduction, I offered a reading of the spatial metaphor of lifnim mi-shurat ha-din that focused on an understanding of shurat ha-din as the technically correct (but inadequate) legal rule, in order to demonstrate how rule-based reasoning differs from discretionary judgment. When thinking about the context of divine judgment, a slightly different model may be more resonant. Imagine a circle, with the laws of the Torah comprising the perimeter of the circle. These laws specify certain rewards for following them as well as specific punishments for transgressing them. Consider Deut. 11:13-17, which specifies that if Israel follows all of God's commandments, their harvest will be successful and the land will yield its bountiful produce, but if not, "there will be no rain, and the land will yield not fruit; then you will perish quickly..." These verses clearly state that, as a punishment for sin, God can withhold the rain, destroying the harvest and leading to famine. Recall, however, that there is space inside of the circle. If God wants, he can exact the full punishment, but he can also withdraw from the 'line of strict justice' and demand a lesser punishment, or perhaps none at all. When compassion rules the divine persona, the Talmud suggests that God will withdraw from the perimeter of the circle (shurat ha-din) into its interior, demanding far less repayment for sin than strict justice would allow or even require, thereby acting lifnim mi-shurat ha-din.
representative of the entire Jewish people on Yom Kippur, he does not necessarily anticipate a warm welcome. On the contrary, R. Ishmael expects the transgressions of the people to provoke divine anger, and seeks to elicit mercy on their behalf. His blessing prompts God to act in the way that the sugya, by citing the prayer Rav attributes to God, has already suggested that God himself wants to act. He reminds God of the covenant and of God's own compassionate nature, encouraging God to overcome his own anger and orient himself towards compassion [K1-2]. Doing so will then enable God to act compassionately [D3], which, in this specific liturgical context, will take the form of God judging the people of Israel lifnim mi-shurat ha-din [D4]. As the period of judgment draws to a close, the people can emerge with confidence that they have been assessed favorably.

As noted previously, the provenance of this narrative is difficult to determine, since the text displays significant signs of later editorial intervention. For example, the name R. Ishmael uses for God, Akatriel Yah, is found nowhere else in tannaitic literature but is commonly used in the Geonic period (spanning roughly the mid-sixth century to the mid-11th century). Similarly, the depiction of R. Ishmael b. Yossi as both a rabbi and a high priest is anachronistic. The rabbinic movement largely post-dates the Second Temple period, and even those rabbinic figures who were active during this period, such as Hillel and Shamai, are infrequently referred to by the title 'rabbi.' Furthermore, proto-rabbinic groups during this period were often in direct conflict with the Temple priesthood. The representation of the high priest as a rabbinic figure is likely the construction of the later editors. As a result, it is not clear whether the teaching attributed to Rav in the first part of the sugya represents the earliest use of the phrase lifnim mi-shurat ha-din to describe divine activity, or whether its usage in the narrative about R. Ishmael predates Rav's teaching.


118. The dominant scholarly consensus is that the Pharisees were the forerunners of the rabbis, or precursors to the rabbinic movement, although the precise nature of the relationship between the two groups remains unclear. For further discussion, see Shaye Cohen, "The Significance of Yavneh: Pharisees, Rabbis and the End of Jewish Sectarianism," HUCA 55 (1984): 27-53.
Although aspects of the dating remain unclear, it is significant that these traditions reflect a Talmudic usage of the phrase *lifnim mi-shurat ha-din* that predates its usage by the editors. This means that the editors inherit these sources alongside the midrashic tradition, and the use of *lifnim mi-shurat ha-din* in Rav's teaching and the narrative about R. Ishmael b. Elisha likely shape the ways in which the editors use the phrase themselves. It is therefore worth examining in some detail how the use of this phrase in Ber. 7a both builds upon, but also differentiates itself, from the midrashic tradition.

One of the most notable differences is that in Ber. 7a, unlike in the midrashic tradition, *lifnim mi-shurat ha-din* is not explicitly compared or opposed to *din*. It is not defined in relation to a different model of judgment; instead, *lifnim mi-shurat ha-din* is defined by its close connection to divine compassion. The rhetorical emphasis on compassion suggests that *lifnim mi-shurat ha-din* will lead to a more favorable outcome, but more favorable than what? Other possible modes of judgment (and other, less desirable outcomes) are never explored or defined. The midrashic juxtaposition between *din* and *lifnim mi-shurat ha-din* may be implied, but it is never invoked. In these two traditions—Rav's teaching and the narrative about R. Ishmael b. Elisha—*lifnim mi-shurat ha-din* appears as an independent category. As we shall see, the editors adopt this usage of *lifnim mi-shurat ha-din* as an independent term, but they also structure the sugyot in which they use this phrase to create an implied juxtaposition with *din*.

The editors primarily adopt this phrase to describe rabbinic actions, but they also use it to describe divine action on one occasion. As we shall see, although the editors creatively adapt the phrase when they apply it to rabbinic conduct, their description of God acting *lifnim mi-shurat ha-din* is consistent with the descriptions offered by Rav and found in the narrative about R. Ishmael. Like these earlier traditions, the editors use the phrase to describe God's judgment during the Days of Awe, and they closely correlate such judgment with the activity of prayer. Unlike these earlier traditions, however, the editors here define the activity of
judging _lifnim mi-shurat ha-din_ in opposition to a different model of judgment: a model focused on _emet_, or truth. Furthermore, while these earlier traditions seek to persuade God to act compassionately, A.Z. 4b focuses on how a rabbi can achieve this same effect by modifying his own behavior.

**Eliciting Compassion in Judgment**

Like Ber. 7a, A.Z. 4b assumes that most individuals do not have sufficient merit to withstand the exigencies of divine justice. As a result, when a person encounters the Divine Judge, he hopes to find God in a compassionate frame of mind. While Ber. 7a sets up the correlation between divine compassion and discretionary judgment, showing how these factors combine to produce a more favorable outcome, A.Z. 4b offers pragmatic counsel to the reader. It suggests strategies that a person can employ in order to maximize that chances that his prayers will be received compassionately, thereby avoiding harsh judgment.

While the question of how to elicit divine compassion through prayer fits well with the broader themes of Berakhot, it may appear to be a surprising topic for Avodah Zarah, a tractate focused primarily on Jewish interactions with non-Jews. The tractate arrives at this discussion of prayer and divine judgment through an exploration of Jewish competition with non-Jews. The first chapter includes an extended discussion of God’s anticipated judgment of the nations (i.e. non-Jews) in “the days to come,” a reference to the Messianic age (A.Z. 2b). Although this conversation begins as a way of disparaging the other nations, who will be chastised in this future judgment, it quickly moves to a discussion of how God will judge the people of Israel, activating similar anxieties about the outcome of this judgment as those observed in Ber. 7a. This dialectical movement, which compares the actions of idolaters to the actions of Israel and explores how God is likely to judge each, frames our sugya in A.Z. 4b.

The passage opens with a teaching by R. Meir that idolaters incur divine wrath when
they worship the sun at the beginning of the day [A]. The editors then cite a teaching by Rav Yosef, which explains how to avoid incurring divine anger when offering the appropriate rabbinic prayers at the same time of day [B-C]. Rav Yosef introduces two factors which may affect the reception of one's prayer: whether the prayer is offered alone or with the community, and the time of day. The editors then interrogate the impact of each of these factors in turn. They conclude that it is acceptable to pray the morning prayers alone during the first three hours of the day, since one can be assured that a congregation somewhere is praying at the same time. As a result, their prayers will be heard as part of the congregation, whose collective merits will help to compensate for the flaws of the individual and ensure a favorable reception. The editors caution, however, that the same is not true if one prays Musaf (an additional prayer service) alone during the first three hours of the day, since this prayer service is typically recited later in the morning. Finally, the editors examine why the first three hours of the day are an inauspicious time to pray alone, eventually concluding that God is occupied with activities that will not dispose him to act lifnim mi-shurat ha-din. As a result, a favorable reception cannot be guaranteed, and the person should avoid praying Musaf alone at this time.

Structurally, the sugya in A.Z. 4b is also composed of three primary units: the first unit [A-C], which cites two related amoraic traditions about early morning prayers, followed by two units of editorial commentary. The first unit of commentary [D-G] explores the issue of individual vs. communal prayer, while the second unit of commentary [H-N] examines why God is deemed to be less likely to act lifnim mi-shurat ha-din during the first three hours of the day. Thematically, the sugya shares various elements with Ber. 7a. Here, too, anxieties over the outcome of the judgment are heightened by emphasizing the theme of divine wrath, and by situating the prayers discussed as occurring on the morning of Rosh Hashannah, which marks the beginning of the Days of Awe.
It was taught in the name of R. Meir: When the kings place their crowns on their heads and bow down to the sun, the Holy One, Blessed Be He, immediately becomes angry.

Rav Yosef said: “A person should not pray Musaf alone in the first three hours of the day on the first day of the year [i.e. Rosh Hashanah].

Perhaps—since that is when God is visiting judgment [on the world]—he will scrutinize his actions and they will push it aside.”

If so, shouldn’t that also be the case if he prays with the congregation?

The congregation has more [collective] merits [making it more likely that they will be judged favorably and their prayers will be accepted].

If so, then should the Morning Prayer also be recited in the congregation?

No, since there is a congregation praying [at the same time] so his prayer will not be rejected.

But didn’t you say that in the first three hours of the day, the Holy One, Blessed Be He, sits and studies Torah?

Reverse it [and say that in the first three hours of the day he sits in judgment].

Or, if you want, say that it does not need to be reversed [on the following logic]:

Torah is described as truth, as it is written: Acquire truth and do not sell it (Prov. 23:23).

The Holy One, Blessed Be He, does not act lifnim mi-shurat ha-din [when studying Torah].

Judgment is not described as truth;

So the Holy One, Blessed Be He, acts lifnim mi-shurat ha-din [when sitting in judgment].

Alternatively, this could read “they will push him aside,” as the word ביה could refer to the prayer itself, or to the person praying.
The sugya begins by citing R. Meir's statement that non-Jewish kings typically begin the day by placing their crowns upon their heads and worshipping the sun. This action provokes divine wrath [A]. Although R. Meir depicts this wrath as directed against non-Jews, the sugya invokes anxieties that it might also be directed against the Jews by juxtaposing R. Meir's teaching with Rav Yosef's warning not to pray Musaf alone in the first three hours of the morning on Rosh Hashanah [B]. On the morning of Rosh Hashanah, the potential consequences of being the target of God's wrath are elevated. Rav Yosef warns that this is the time when God sits in judgment and the person praying wants to ensure that the outcome of that judgment is favorable. Since no person can be confident that he or she has sufficient merits to stand up to divine scrutiny, Rav Yosef therefore counsels people to avoid praying alone during this time. The implication is that a person should either pray Musaf with a congregation or wait to recite these prayers until later in the morning. Presumably, God will be occupied with different activities later in the day; while he may scrutinize a person’s actions while sitting in judgment, God will be more likely to compassionately accept that person’s prayer when he is occupied with other tasks.

The editors then raise two questions about Rav Yosef’s teaching [C-F]. First, they ask about the difference between praying alone and praying with the congregation [C]. How does this impact how God receives a person’s prayers? Second, the editors ask why Rav Yosef signals out the Musaf prayers; shouldn’t the same logic apply to all of the morning prayers [E]? As is often the case in the Talmud, these questions are a rhetorical device, providing an opportunity for the editors to articulate their own interpretation of Rav Yosef’s teaching and the rationale behind it. The editorial voice notes that if a person prays with the community, he or she stands before God’s judgment accompanied by the merits of others. The collective merits of the community are likely to incline God to judge the individuals within that community more favorably [D].

According to Judith Hauptman, this passage not only

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120. It is worth noting how the editors' envision divine judgment operating. They explain that a person should pray with the congregation because their collective merits will be greater, but wouldn’t the collective sins of the congregation also be greater? If we assume that God weighs the scale of human behavior, placing merits on one
suggests that God will be likely more likely to accept the prayers of the collective, but that "communal petitions cannot be ignored by God."\textsuperscript{121}

The importance of praying with the community is heightened if one prays \textit{Musaf} alone early in the day. Since this prayer service is often recited in the latter part of the morning, it is possible that the person is truly praying alone. No similar concerns apply if a person recites the first set of morning prayers alone and early in the day, however, since it can be safely assumed that a congregation somewhere is also reciting the early morning prayers at the same time [F]. Thus, even if one technically prays alone, his prayer ascends to God accompanied by the prayers of a congregation.

Having offered this explication of the rationale behind Rav Yosef’s statement, the editors then interrogate the idea that the first three hours of the day are a particularly inauspicious time to pray \textit{Musaf} alone. Rav Yosef claims that this because God sits in judgment during the first three hours of the day, but the editors propose an alternative schedule: “But didn’t you say that in the first three hours of the day, the Holy One, Blessed Be He, sits and studies Torah?” (A.Z. 4b). While the editors do not identify their interlocutor, this may be a reference to a discussion in A.Z. 3b, in which Rav outlines God’s activities throughout the day. That schedule presents God as studying Torah during the first three hours of the day, and sitting in judgement during the second portion of the day.\textsuperscript{122}

\textsuperscript{121} Emphasis mine. Hauptman argues that this idea is reiterated in several passages in Ber. 6a-8b. See Judith Hauptman, “Some Thoughts on Halakhic Adjudication” \textit{Judaism}, 42, 4 (1993): 396-413, p. 397.

\textsuperscript{122} In the full text of this discussion, Rav Yehudah offers the following teaching in the name of Rav: “The day has twelve hours. For the first three, the Holy One Blessed Be He sits and occupies himself with Torah. For the second [portion of the day], he sits and judges the entire world. When it appears that the whole world is liable [and merits punishment], he gets up from the seat of judgment [\textit{din}] and sits on the seat of mercy [\textit{rachamim}]. The third [portion of the day], he sits and feeds the whole world from the horned antelope to insect larvae. For the fourth [portion of the day], he sits and plays with Leviathan, as it says: \textit{This Leviathan, who you formed in order to sport with him} (Ps. 104:26).” (A.Z. 3b) It is notable that this schedule explicitly suggests that when God acts in his formal capacity as Judge, there is a greater possibility for divine compassion (when God moves from
Raising the possibility of this alternative schedule provides an opening for the editors to explore the rationale behind Rav Yosef's advice further. Two possible activities have been proposed as God's occupation during the first three hours of the day: judgment and Torah study. Why might these activities lead God to scrutinize a person's actions, making it an inauspicious time to pray Musaf alone? The editors examine the consequences of each activity in turn, although the way in which they outline each option is somewhat cryptic. The passage reads:

[H] But didn’t you say that in the first three hours of the day, the Holy One, Blessed Be He, sits and studies Torah?
[I] Reverse it!
[J] Or, if you want, say that it does not need to be reversed.

The editors begin with two schedules: the schedule proposed by Rav Yosef, in which God sits in judgment during the first three hours of the day, and the schedule proposed by their unnamed interlocutor, in which God studies Torah during the first three hours of the day. If we presume that the editors here have in mind the schedule outlined by Rav in A.Z. 3b, then immediately after studying Torah, God begins the portion of the day when he sits in judgment. The exhortation to "Reverse it!" [I] therefore seems to suggest that one should simply reverse the order of the activities outlined by Rav, to harmonize his teaching with that of Rav Yosef: God sits in judgment, and afterwards studies Torah. Since the act of sitting in judgment involves careful analysis and scrutiny, God is more likely to scrutinize everything during this period: not only the cases he judges, but also the prayers he hears during that time. As a result, there is a greater risk during the first three hours of the day that one's prayers will be scrutinized. If one prays alone, without the accompanying merits of the community, this leads to an increased risk that his prayer will be pushed aside instead of being immediately accepted.

Having proposed this resolution, the editors then offer a counter-resolution: assume

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the seat of justice to the seat of mercy), although it does not explicitly correlate such compassion with acting lifnim mi-shurat ha-din.
that God does, in fact, study Torah during the first three hours of the day, and only later sits in judgment. Even on this schedule, they argue, the first three hours of the day are an inauspicious time to pray alone. In order to reach this conclusion, the editors modify their previous assumptions about how divine judgment operates. While sitting in judgment, God may scrutinize a person's actions, but there is also the possibility that he will act lifnim mi-shurat ha-din. When God studies Torah, on the other hand, the possibility that God will act lifnim mi-shurat ha-din is erased.

[K] Torah is described as truth, as it is written: Acquire truth and do not sell it (Prov. 23:23).

[L] The Holy One, Blessed Be He, does not act lifnim mi-shurat ha-din when studying Torah.

[M] Judgment is not described as truth.

[N] So the Holy One, Blessed Be He, acts lifnim mi-shurat ha-din when sitting in judgment.

Here, the editors draw on a midrashic interpretation of a verse from Prov 23:23. They read the reference to truth ('emet) as a reference to the Torah itself [K]. The interpretation that word 'truth' in Prov. 23:23 is a reference to Torah is not an invention of the editors, but rather the citation of an established tradition. For example, Eikhah Rabbah (Petikhta 2) and the Pesikta de Rav Kahana (Piska 15), both state that "There is no truth except for Torah, as it says, Acquire truth and do not sell it (Prov. 23:23)," and statements to a similar effect can be found in a number of other midrashic compilations. The editors, however, draw a novel conclusion from this relatively standard interpretation: if the Torah is equated with truth, then when God studies Torah, he will not act lifnim mi-shurat ha-din [K]. The activity of judgment or din, however, is not textually correlated with truth [L]; unlike Torah study, the activity of judgment does not require a focus on 'truth' or strict justice, giving God the freedom to act lifnim mi-shurat ha-din if he so chooses. Paradoxically, on this view, when God occupies his

123. The passages are almost identical, with only one minor variation in wording. The passage from Eikhah Rabbah reads: תמכור ואל קנה אתמה שנאמר, while the passage from Pesikta de Rav Kahana reads: א"ל קנה אתמה דכי א"ל אמר, המ תמה אתמה א"ל קנה אתמה. Similar equations of Torah and truth can also be found in Esther Rabbah (Parsha 6), Midrash Tehilim (Ps. 110), Pesikta Zutra (Parshat Eikev), and the Yalkut Shimoni (Chapter 16). While many of these compilations are late works, they point to an established tradition that equates Torah and truth.
formal role as Judge, God is more likely to exercise discretionary judgment.

The juxtaposition of Torah study and judgment in this passage illustrates a new type of activity that is specifically differentiated from the activity of lifnim mi-shurat ha-din; in so doing, it nuances our emerging understanding of lifnim mi-shurat ha-din itself. Although the passage linguistically juxtaposes lifnim mi-shurat ha-din with 'emet, rather than with din, I argue that it invokes the same basic opposition between rule-based and discretionary judgment that we observed in the midrash, an opposition which the editors will continue to invoke (without necessarily using the explicit terminology of din) in the sugyot to be discussed in Chapters Three and Four. The editors claim that when God is engaged in Torah study, God is focused on truth. I propose that this focus on truth requires God to engage in the same type of binary thinking that is required by rule-based judgment. Just as something is either true or false, a person either follows a rule or fails to follow a rule. When God studies Torah, the immediate or primary object of his concern are the principles and rules articulated in the Torah; the case itself is an indirect object of concern, which only becomes primary when God applies the rules of the Torah to that case. When God sits in judgment, however, he is concerned with the case directly and with the rules themselves indirectly. As discussed above, a direct focus on the rules and strict adherence to them is unlikely to yield a favorable ruling for the petitioner. Therefore when God studies Torah, God is likely to be stricter or harsher in judgment. To use Schauer's terminology, when God studies Torah, he is more likely to treat a rule as 'entrenched.' The rule itself, and not the original justification for the rule, will be his primary focus.\(^{124}\)

When God sits in judgment, however, he will be occupied with the particularities of the case and the individual(s) standing before him. His judgment will not ignore the requirements of strict justice, but it will be informed by a series of contextual factors, including his relationship to the individual he judges. Reminded of the covenantal

\(^{124}\) Schauer, Playing by the Rules, 51.
relationship, God will be inclined to judge the individual on a parental model (cf. Ber. 7a), chastising out of love but also avoiding unnecessary harshness or punishment. The effect of this shift in perspective will be to align the goals of the Judge with those being judged: all parties will now seek to resolve the judicial encounter in a favorable manner. On this rationale, God is more likely to rule leniently when he is occupied with judgment than when he studies Torah.

It should be noted that, by offering the rationale that God is more inclined to act *lifnim mi-shurat ha-din* when he sits in judgment, the editors have dislocated Rav Yosef’s conclusion about when to pray Musaf from his proposed rationale. Rav Yosef counsels his audience to avoid praying alone during the first three hours of the day because he assumes that God’s judgment will be most severe when God acts in his official capacity as Judge. While the editors suggest a competing interpretation of divine judgment, one that suggests God is most lenient when acting in his official capacity as Judge, they nonetheless uphold Rav Yosef’s practical conclusion. One should avoid praying Musaf alone during the early hours of the morning on Rosh Hashanah, because during that time period God is occupied with activities that will incline him to be severe in his judgments.

Structurally, A.Z. 4b has significant similarities with Ber. 7a, but the usage of *lifnim mi-shurat ha-din* also foreshadows the editorial usage of this phrase to describe rabbinic actions. Like Ber. 7a, the passage from A.Z. 4b intertwines amoraic teachings with the dialectical argumentation, analysis and commentary of the Talmudic editors. Unlike Ber. 7a, however, in A.Z. 4b, the phrase *lifnim mi-shurat ha-din* never appears in the amoraic strata of the passage but instead is employed exclusively by the editors. Furthermore, while the thematics of A.Z. 4b are similar to Ber. 7a—both passages emphasize the context of divine judgment during the Days of Awe, and both seek strategies for encouraging God to act compassionately and to show favor towards the person being judged—A. Z. 4b juxtaposes *lifnim mi-shurat ha-din* with a judicial approach that mirrors rule-based judgment. This
juxtaposition is absent from Ber. 7a, where lifnim mi-shurat ha-din is presented as an independent category and is not defined in relation to some alternative activity. As a result, although the cluster of traditions about lifnim mi-shurat ha-din as a particular form of divine judgment appear to be relatively stable, the editorial adoption of this phrase in A. Z. 4b prefigures, to some extent, the way they will adapt this label in other sugyot.

Conclusions

Although we cannot definitively determine the meaning of lifnim mi-shurat ha-din in the midrashic tradition, the juxtaposition of din and lifnim mi-shurat ha-din in those texts is consonant with the conclusion that each term represents a different model of judicial decision-making. Din (and shurat ha-din) invoke a model of rule-based judgment, while lifnim mi-shurat ha-din invokes a model of discretionary judgment. When the phrase lifnim mi-shurat ha-din is associated with divine judgment, this juxtaposition is less prominent, although it still present in A. Z. 4b. Instead, these texts highlight a strong correlation between discretionary judgment and judicial compassion. Lifnim mi-shurat ha-din is depicted as an approach to judgment that focuses not on rules, but on relationships–especially the covenantal relationship between God and Israel. Both Ber. 7a and A.Z. 4b suggest that this emphasis will encourage God to judge Israel more leniently.

The depiction of divine judgment in these sugyot presents a framework for analyzing the actions and decisions of rabbinic judges. As the concluding line of Ber. 7a suggests, divine behavior provides a model for (ideal) human conduct. Here, God provides a model for engaging in compassionate, context-driven decision-making. While one can never guarantee, or even expect, that God will act lifnim mi-shurat ha-din, this approach to judgment is depicted as highly desirable and is actively sought by those facing judgment.

The Talmudic sugyot that discuss rabbis acting lifnim mi-shurat ha-din revert from the perspective of those being judged back to the midrashic focus on the activities of the judge. Furthermore, while the editors continue to use the term lifnim mi-shurat ha-din to refer
to discretionary judgment, this model of decision-making is no longer presented as appropriate to the activity of the judge in the courtroom; in fact, the editors indicate that such decisions cannot set precedent, thereby divorcing this model of decision-making from formal judicial activity completely. Discretionary judgment is relocated, instead, to acts of decision-making in everyday life.

This relocation does not, however, expand the realm in which discretionary judgment is presented as desirable or appropriate. When this judge is not God, but a potentially flawed individual, the desirability of discretionary judgment becomes less clear. Instead, these sugyot depict such judgments as leading to a variety of possible outcomes, some of which are desirable, some of which are presented as neither good nor bad, and others of which are presented as actively concerning. In each case, however, the narratives in which rabbis are described as acting lifnim mi-shurat ha-din present a new type of problem for the editors, who must explain why the behavior of the rabbis in these sources does not conform to expectations and clarify what consequences (if any) their actions have from a legal standpoint. In what follows, I explore the five sugyot that describe rabbis acting lifnim mi-shurat ha-din in depth and examine what prompts the editors to use this label in each case. In Chapter Three, I examine lifnim mi-shurat ha-din as a label that the editors use to resolve textual problems, confusions or contradictions between their inherited sources. In Chapter Four, I argue that although the editors promote rule-based judgment as the normative paradigm for rabbinic decision-making, they also invoke lifnim mi-shurat ha-din as an alternative paradigm, one which highlights the relative strengths and weaknesses of rule-based judgment.
Chapter Three

Everyday Decision-Making

Chapter Two began by surveying the earliest rabbinic usage of the phrase *lifnim mi-shurat ha-din*, which appears in parallel traditions in the *Mekh. RI* and the *Mekh. Rashbi*. Although the meaning of this phrase in the midrashic tradition remains underdetermined, I argued that the juxtaposition of *din* and *lifnim mi-shurat ha-din* suggests that each term indicates a different approach to making judgments. Furthermore, I proposed that the juxtaposition of *lifnim mi-shurat ha-din* with *shurat ha-din* in the *Mekh. RI* narrows and defines the scope of each approach. If the usage of the term *shurat ha-din*, the technically or formally correct rule, signals to the reader the limited utility of relying on rule-based judgments in a given situation, then *lifnim mi-shurat ha-din*–its rhetorical counterpart–likely indicates an approach that is better able to respond to the particularity and complexity of that case. Rather than relying on a wooden application of the relevant rules, *lifnim mi-shurat ha-din* represents a mode of judgment that is both responsive to and driven by a broader context, which I refer to as discretionary judgment.

Building on that midrashic tradition, two later strands of rabbinic thought about *lifnim mi-shurat ha-din* can be identified within the Talmud. Both understand *lifnim mi-shurat ha-din* as this type of discretionary or context-driven judgment, although they envision such judgment being activated in very different arenas. The second part of Chapter Two examined the first of these clusters of traditions, which uses *lifnim mi-shurat ha-din* to describe a particular mode of divine judgment. The second cluster of traditions uses the same phrase to describe a particular mode of rabbinic judgment, and the activities which result from such judgments. Both the present chapter and the next one analyze this second cluster.

In the previous chapter, I argued that that the Talmudic depiction of divine *lifnim mi-shurat ha-din* activity begins from the perspective of those being judged. As a result, such accounts are invested in ensuring a favorable outcome to the judicial encounter, and they
pursue this goal by seeking ways to influence God's disposition as Judge (Ber. 7a) and by trying to ensure that this judgment takes place in circumstances that are favorable to the individual (A.Z. 4b). Unlike these passages, the sugyot that describe rabbis acting lifnim mi-shurat ha-din highlight the perspective of the judge. In contrast to the midrashic tradition, which envisions the judge operating within the formal context of the rabbinic court, these sugyot examine rabbinic decision-making in the course of everyday life. Like the passages examined in Chapter Two, these sugyot are invested in the outcome of such decisions, but the nature of that investment is different. In particular, they display a new and marked interest in the legal evaluation of decisions that do not follow a rule-based approach to judgment.

A total of five sugyot use the phrase lifnim mi-shurat ha-din to describe rabbinic action. Notably, while each of these sugyot discusses a rabbinic narrative, the rabbis within those narratives never use the phrase lifnim mi-shurat ha-din to describe or explain their own behavior; rather, it is the editors who categorize their actions in this way. This means that, within these passages, the phrase lifnim mi-shurat ha-din occurs exclusively within the stammitic strata of the text. Furthermore, although the editors continue to use this phrase to refer to discretionary judgment, their usage of this phrase differs from the Talmudic passages considered thus far in another significant way. Although the Talmud consistently uses lifnim mi-shurat ha-din as a descriptive phrase, its usage in the second cluster of traditions also has a clear prescriptive effect: the rabbinic decisions and actions labeled as lifnim mi-shurat ha-din are precluded from setting new legal precedents or challenging existing norms. As noted in Chapter One, this means that the editors cannot derive a rule from these narratives that could be used to determine proper behavior in other cases. This results in the exclusion of discretionary judgment from the rabbinic courtroom in two ways.

125. There is one possible exception to this general rule in B.M. 24b, where some manuscript evidence suggests it is Mar Shmuel himself who cites lifnim mi-shurat ha-din as the legal rationale for a ruling he gives. However, the evidence varies widely as to whether this statement is part of the discourse between Mar Shmuel and his disciple or a later addition by the Talmudic editors. This variation among the manuscripts, combined with the fact that the label is employed exclusively by the editors in all other sugyot about rabbis acting lifnim mi-shurat ha-din, suggests that a conservative approach would attribute the phrase to the editors in this case as well. I offer a more complete discussion of these source-critical issues in my analysis of B.M. 24b in Chapter Four.

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First, it indicates that legal rulings must be based on a rule-based procedure of decision-making; judges cannot rely on discretionary judgment to determine the outcome of cases presented in court. Second, by disqualifying such judgments from setting precedent, the editors prohibit judges from taking cases in which a rabbi acted *lifnim mi-shurat ha-din* into account as part of their rule-based reasoning in court.

This new and exclusionary function of the label *lifnim mi-shurat ha-din* indicates a significant conceptual shift in its usage. In this chapter, I argue that this change occurs in response to textual ambiguities that raise two types of interpretive challenges for the editors: either the narrative source omits crucial legal information, making it impossible for the editors to reliably derive a legal rule from that narrative using their standard hermeneutic (Ket. 97a) or ambiguities in the narrative source present a possible contradiction between the recorded behavior of the rabbi in question and an explicit legal ruling by another rabbi (Ber. 45b and B.K. 99b-100a). In each case, the editors respond to these narrative ambiguities by labeling the conduct of the rabbi in question as *lifnim mi-shurat ha-din*, thereby disqualifying it from setting normative precedent and neutralizing any potential conflict between the legal narrative and other legal sources.

In addition to showing how the editors use the label *lifnim mi-shurat ha-din* to resolve specific textual or interpretive problems, tracing this process also demonstrates why the two dominant paradigms for explaining *lifnim mi-shurat ha-din* are unsuccessful. As noted in the Introduction, scholars have proposed two primary frameworks for understanding *lifnim mi-shurat ha-din*, which I have termed the 'supererogation model' and the 'waiver of rights model.' In the context of the contemporary debate over the relationship between Jewish ethics and Jewish law, these two models have been presented as oppositional. Proponents of the supererogation model argue that *lifnim mi-shurat ha-din* represents the existence of a rabbinic ethical principle that operates independently of halakhah, while proponents of the waiver of rights model argue that *lifnim mi-shurat ha-din* is a legal principle, thereby demonstrating
that ethical considerations were part and parcel of rabbinic legal thought. In this chapter, I propose that these two models are not as different as scholars have suggested. I contend that advocates of both models rely on a central but flawed assumption that leads them to make the same category error. Both models assume that the rabbis who act *lifnim mi-shurat ha-din* are motivated by morality, altruism or piety. As a result, they conclude that the phrase identifies the principle that motivated such actions, although they disagree about whether that principle should be classified as ethical or legal.

There is, however, no textual data to warrant the assumption that the rabbis whose actions are described as *lifnim mi-shurat ha-din* were motivated by altruism or piety. None of the five sugyot in question offer any explanation of why these rabbis chose to act in this manner; the rabbi does not explain his own reasoning within the narrative, nor do the editors offer an explanation of his motive. Furthermore, although the editors often express their surprise over such conduct, they never explicitly praise the decision of a rabbi to act *lifnim mi-shurat ha-din*. The assumption that the editors understood such actions to have been motivated by piety or ethics, and that this is the reason they employed the label *lifnim mi-shurat ha-din*, has no clear textual basis.

Proponents of the two dominant models would likely object that the phrase *lifnim mi-shurat ha-din* itself constitutes a form of editorial praise. If so, however, these scholars must first show how the behavior described in each legal narrative conforms to their assumptions and expectations (e.g. how it is supererogatory, or waives a specific legal right). Second, they must offer a warrant for their assumption that such behaviors are praiseworthy, or at least motivated by good intentions. As I will show, the majority of the narratives that describe rabbis acting *lifnim mi-shurat ha-din* fail on both counts. Only one of the legal narratives in the three sugyot that I analyze in this chapter (B.K. 99b-100a) describes behavior that might reasonably be explained under either the supererogation model or the

126. See, for example, Newman, "Law, Virtue and Supererogation," 66.
waiver of rights model, and even in that case, the actions of the rabbi in question might easily be explained by selfish motivations. Furthermore, as I discuss in detail in the next chapter, the editors sometimes critique the behaviors they classify as *lifnim mi-shurat ha-din*, a reaction for which neither of the two dominant models can account. The preponderance of textual evidence therefore suggests that neither model can fully explain both how and why the Talmudic editors use the label *lifnim mi-shurat ha-din* to describe rabbinic actions.

I argue that my proposed model of *lifnim mi-shurat ha-din* as discretionary judgement succeeds where other models fail for two reasons. First, it does not attempt to fill in textual silences by supplying a motivation for the rabbinic actions that are labeled *lifnim mi-shurat ha-din*. Second, by sidestepping the question of motivation, it avoids the category error that plagues the two dominant models. The discretionary judgment model begins from the observation that the editors use this phrase to describe and categorize certain rabbinic actions. Rather than representing a principle that motivates action, the model therefore assumes that *lifnim mi-shurat ha-din* is a descriptive label, albeit one with a prescriptive effect: actions described as *lifnim mi-shurat ha-din* are disqualified from instantiating new legal rules. On the basis of these observations, the model proposes that such actions are disqualified from setting precedent because they were undertaken on the basis of discretionary judgment, instead of relying on approved procedures of rule-based decision-making.

In this chapter, I offer a detailed analysis of three sugyot that label rabbinic actions as *lifnim mi-shurat ha-din*: Ketubot 97a, Berakhot 45b and Bava Kamma 99b-100a. In each case, I demonstrate how the editors use this label to respond to problems raised by textual ambiguities in a narrative source. I also analyze each passage through the lens of the supererogation and waiver of rights models, demonstrating how and why these models fail to explain the use of *lifnim mi-shurat ha-din* in the first two sugyot (Ket. 97a and Ber. 45b). Although they are better able to explain the use of this phrase in the B.K. 99b, I show that the discretionary judgment model is equally able to account for the textual data in this passage.
Before considering each sugya in turn, it may be helpful to reiterate certain core similarities and differences between the usage of *lifnim mi-shurat ha-din* in these sugyot and those considered in the previous chapter. Like the sugyot examined in Chapter Two, these passages also present *lifnim mi-shurat ha-din* as a type of judgment that is sensitive to contextual factors and individual relationships. The nature of the relationships in question, however, is different. While Ber. 7a and A.Z. 4b establish a clear hierarchical relationship between God and humanity, the sugyot that describe rabbinic actors include more lateral relationships, such as the relationship between two neighbors (Ket. 97a) or between a businessman and his client (B.K. 99b). Furthermore, while Ber. 7a and A.Z. 4b depict divine judgment as infallible, the possibility of error hovers in the background of the sugyot that depict rabbinic decision-making. I discuss this risk of error in Chapter Four. Finally, the phrase *lifnim mi-shurat ha-din* is consistently used to describe a particular type of decision-making. Proceeding from the perspective of those being judged, the sugyot discussed in Chapter Two displayed a particular interest in the outcome of this type of decision-making. Conversely, the sugyot that use *lifnim mi-shurat ha-din* to describe rabbinic actions proceed from the perspective of the judge, and therefore reveal a stronger investment in the decision-making process itself. How does a judge arrive at a legal decision? What factors does he take into account? What precedents (if any) does he apply? While these sugyot present a strong interest in legal outcomes, since the editors take pains to prevent certain rabbinic actions from setting precedent, they are equally invested in examining the mode of decision-making that leads to that outcome.

In order to trace both these conceptual continuities and developments in greater detail, I turn now to the Talmudic sources themselves. I begin with a passage from Ketubot 97a that deals with a complex question of property law, showing how the editors' activate the midrashic juxtaposition of *din* and *lifnim mi-shurat ha-din* in their juxtaposition of two sources, a legal narrative about Rav Pappa and a ruling by Rav Nachman on a property case
at Nehardea. I then turn to a short passage from Berakhot 45b, which examines a potential contradiction between a legal narrative about Rav Pappa and a ruling by Rava over how to recite *birkat ha-mazon*, the grace after a meal. This sugya offers a clear illustration of how the editors use the phrase *lifnim mi-shurat ha-din* to neutralize potential legal conflicts between their sources; it also demonstrates how the supererogation and waiver of rights models import assumptions about motivation that cannot be supported by the textual data, while failing to account for core aspects of the sugya itself. Finally, I examine a case from B.K. 99b-100a, which examines the professional liability of bankers. While this sugya illustrates the respective strengths of the two dominant models, I show that the model of *lifnim mi-shurat ha-din* as discretionary judgment is equally able to explain the facts of the case and better able to explain the literary dynamics of the sugya. On the basis of these three case studies, I argue that the proposed model of *lifnim mi-shurat ha-din* as discretionary judgment is best able to explain how the editors use this phrase to describe and categorize rabbinic actions.

**Ketubot 97a**

Our first case, from Ket. 97a, addresses a complicated issue in rabbinic property law. The sugya opens with a question: if a person sells goods with the intention to use the proceeds for a specific purpose, and then later discovers he no longer needs the money for that purpose, can he retroactively withdraw the sale? The question assumes that, in the mind of the editors of this sugya, property is generally preferable to liquid assets; a person would rather maintain ownership over a parcel of land than have its equivalent monetary value, unless he needs that money for a specific reason.¹²⁷

The question initially arises in the context of a broader debate over inheritance law and the provisions for widows. M. Ket. 11:1 establishes that a widow is to be maintained from the estate of the orphans (염נות יתומים ממכסה נזונת אלמנה), since she does not inherit her

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¹²⁷. The commentaries of both Rashi and the Tosafot on Ket. 97a reflect this assumption.
deceased husband's lands directly. On the basis of this mishnah, the Talmud rules that a widow can sell portions of her deceased husband's land, now technically the property of his descendants (the "orphans" to whom the Mishnah refers), at regular intervals in order to provide for her basic needs, such as food, clothing and shelter. The Talmud then considers a potentially thorny case: what if the widow has sold the entirety of the orphans' estate, but now wishes to collect land that was promised to her in her ketubah, or marriage contract? The Talmud has previously established that the widow can collect the value promised in her ketubah from land that has been sold, in which case the buyer must return the land to her and then seek compensation from the orphans. But what if the widow sold the land herself? Can she still go to the buyer and seize the land for her ketubah, effectively retracting a sale that she herself made? Although the Talmud ultimately concludes that she cannot do so, these questions surrounding the potential right of the widow to retract her sale raise a broader set of questions about the circumstances under which a sale can be withdrawn or retroactively invalidated.

The question was raised: If a person makes a sale, but then he no longer needs the money [and wants to withdraw the sale], must the sold items be returned to him or not? In order to resolve this question, the editors examine their collection of sources. Are there any

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128. The mishnah refers to the deceased's descendants as "orphans," despite the fact that this designation includes children of the current widow, who is still alive.

129. The Bavli records a debate over how often the widow can sell such land. Rav Huna says she can sell land only once every twelve months, while R. Yehudah says she may sell once every six months. Both agree, however, that she is not paid by the buyer outright, but rather in monthly installments. According to Rashi, this arrangement is to protect the interests of the orphans, since the land she sells is technically their property. If the widow in question remarries, then her husband will take over responsibility for her care from the orphans. Since the buyer pays for the land in question monthly installments, should the widow remarry before the land has been repaid in full, the remaining monies owed can be paid to the land's true owners: the orphans. (Cf. Rashi on Ket. 97a.)

130. See the preceding discussions in Ket. 95b-97a.

131. The decision is based on a baraita which only permits her to sell land from the orphan's estate only up until the value of her ketubah remains (מונכסה וולסף א מונכסה וולסף הל שמה להולכים דק וולסף הל שמה להולכים דק). The mishnah continues that if she sells the land to a third party, the orphans have no right to the land.

132. Although it is not made explicit in the text, Rashi and the Tosafot both suggest that the question pertains only to sales in which the buyer has specified that he intends to use the money from the sale for a specific purpose, but not in a way that places legal stipulations or conditions upon the sale. Rashi offers the following example to illustrate the type of situations included in the question: Person A sells land to Person B, in order to have sufficient money to buy oxen from Person C. Once the sale is completed, Person A discovers that Person C is no longer selling his oxen. Since person A sold the land for this express purpose, can he withdraw the sale?
existing rulings or cases that suggest the person in question might be able to withdraw the sale? Or is the seller's position similar to that of the widow, in which case the sale cannot be withdrawn? Our sugya explores two cases as possible precedents. Both mirror the conditions described in the question closely, but only the second one is accepted as establishing a broader legal precedent. An examination of how the editors juxtapose the ideas of \textit{din} and \textit{lifnim mi-shurat ha-din}, using these categories to respond to literary ambiguities within their sources, reveals how their hermeneutic assumptions structure their legal conclusions in this sugya.

The first case recounts an instance in which Rav Pappa purchases a tract of land from an unnamed man, who intends to use the proceeds from the sale to purchase livestock. When it turns out that the man no longer needs the money for that purpose, Rav Pappa returns the land to him. The second case recounts an instance of a grain shortage in the Babylonian city of Nehardea, which artificially elevates the price of grain. Several people in the city sell their mansions, intending to use the money from the sale to purchase grain at the elevated price. Shortly thereafter, a shipment of grain comes to city, lowering the price of grain to normal levels. Rav Nachman rules that the sales can be retroactively invalidated in this case and that the mansions must be returned to their original owners.

There are numerous similarities between these two cases. In both cases, after an individual or group of individuals sells property to gain money for a specific purpose, their circumstances change and they no longer need the money for the originally intended purpose. Furthermore, both cases conclude with the goods being returned to their original owners. Given these parallels, why do the editors accept Rav Nachman's ruling in the second case as precedent, using it to resolve the overarching question about when (if ever) a sale can be retroactively withdrawn, but label Rav Pappa's decision to return the land he purchased in the first case \textit{lifnim mi-shurat ha-din}? Despite prominent similarities between the two cases,
there are also several notable differences. My analysis focuses on two central points. First, Rav Pappa is personally and directly involved with the sale in the first case, while in the second case, Rav Nachman acts as an outside observer and judge. Second, the first narrative never establishes whether or not Rav Pappa returns the land on the basis of a perceived legal obligation, while in the second case, Rav Nachman's language makes it clear that his decision constitutes a binding legal rule. In order to develop the significance of these differences, let us examine the sources more closely. I begin by presenting the entirety of the sugya, before considering each case in turn.

[A] The question was raised: If a person makes a sale, but then he no longer needs the money [and wants to withdraw the sale], must the sold items be returned to him or not?
[B] Come and hear:
[C] There was a certain man who sold land to Rav Pappa because he needed money to buy some bulls.
[D] In the end, he didn’t need the money, and Rav Pappa returned the land to him.

[E] Rav Pappa acted lifnim mi-shurat ha-din.

[F] Come and hear:

[G] There was once a shortage at Nehardea and all the people sold their mansions.

[H] In the end, wheat arrived. Rav Nachman said to them: the law is (dina hu) that the mansions must be returned to their original owners.

133. For example, the sales at Nehardea took place under financial duress, whereas the man in the first narrative sold because he wished to acquire a new asset (the oxen). The case at Nehardea discusses a group of people who all choose to sell their property under the same circumstances, while the first case focuses on an interaction between two individuals. Furthermore, the case at Nehardea is formally arbitrated by a judge (Rav Nachman), while the case involving Rav Pappa is resolved privately.
There too they sold in error, since it became known that a ship [carrying grain] was waiting in the bays [at the time of the sale].

If so, then why did Rami b. Samuel say to him, "If [you decide] thus, it will cause difficulties in the future"?

He [Rav Nachman] replied, "Does a shortage happen at Nehardea every day?!"

He said, "Yes, a shortage often occurs in Nehardea!"

The law is (v'hilkheta) that if a person sold [an item] and then was no longer in need of money, the sale may be withdrawn.

The sugya begins with the question discussed above: if a person sells a piece of land and then discovers he no longer needs the money from the sale, can the sale be retroactively withdrawn or not? In response to this question, the editors examine two cases, each of which is prefaced by the introduction "come and hear" (שמעתא). In order to distinguish between the legal features of each case and the literary features of the different sources, my analysis will subdivide the sugya into two primary literary units. Unit 1 presents and discusses the legal narrative about Rav Pappa and comprises lines B-E. Unit 2 presents and discusses the case of the shortage at Nehardea and comprises lines F-L. Line M presents the legal conclusion of the sugya. In analyzing this material, I will pursue one central question: what textual difference(s) between the sources in Unit 1 and Unit 2 warrant the editors' decision to label Rav Pappa's behavior lifnim mi-shurat ha-din, but to draw a broad legal conclusion on the basis of the case at Nehardea?

On an initial read, the details of the legal narrative about Rav Pappa in Unit 1 seem to parallel the hypothetical case presented in line A quite closely: a seller wishes to retract his sale when it becomes clear that he no longer needs the money from the sale. Although the narrative specifies that his initial intention was to use the money to purchase bulls, the reason for the change in the seller's circumstances are unclear. The medieval commentator Rashi speculates that the bulls the seller wished to purchase were no longer available, perhaps having been sold to another buyer, but this is only one of many possible explanations. No clear information is supplied in the narrative source, nor do the editors

134. Rashi, Ket. 97a.
offer an explanation for this the change in circumstance. Whatever the reason for the change, however, the end of the narrative clearly establishes that it results in the sale being retroactively cancelled. Rav Pappa returns the land he bought to its original owner.

While the narrative establishes the primary legal facts of the sale and its later cancellation, its language is quite terse. As a result, the source fails to provide information that might prove legally relevant. For example, on whose initiative is the sale canceled? The narrative simply states:

[C] There was a certain man who sold land to Rav Pappa because he needed money to buy some bulls.
[D] In the end, he didn’t need the money, and Rav Pappa returned the land to him.

The language of the source suggests that Rav Pappa was the active party, stating that he returned the land rather than that the seller invalidated the sale. This is surprising, as one should expect that the cancellation would be initiated by the seller. How else would Rav Pappa know that the seller was unable to use the money for his intended purpose and wished to withdraw the sale? As a result of this phrasing, the procedure through which the sale was withdrawn remains ambiguous. Similarly, the narrative does not record Rav Pappa's reason for returning the land. While one could infer that he does so because he believes that it is required by law, one could also argue that he returns the land as a gesture of kindness or generosity. The narrative provides no information that would enable the reader to adjudicate between these (or other) possibilities.

Despite these omissions, the situation described in the narrative closely matches the hypothetical situation outlined at the beginning of the sugya. One might therefore expect the editors to accept Rav Pappa's behavior as precedent and to conclude that, in such cases, the sale may be withdrawn. Instead, they label his behavior as lifnim mishurat ha-din. As I will show throughout this chapter, the editors consistently use this label to communicate that the rabbi in question does not act as a legal exemplar because he relies on his discretionary judgment instead of employing a procedure of rule-based
judgment. As a result, Rav Pappa's decision to return the land does not instantiate a new rule or standard of conduct, and cannot be used to resolve the legal question at hand in a definitive manner.

When read in the broader context of the sugya, however, the editors' decision to label Rav Pappa's behavior lifnim mi-shurat ha-din provides further insight into their understanding of this phrase. The editors arrange the sugya in a way that juxtaposes Rav Pappa's behavior, which they label lifnim mi-shurat ha-din, with Rav Nachman's explicit legal ruling at Nehardea, which invokes the language of din. By presenting these two cases together, the editors implicitly activate the midrashic juxtaposition between din and lifnim mi-shurat ha-din in the Mekhilta. In order to better understand the editors' classification of Rav Pappa's behavior as lifnim mi-shurat ha-din, it will therefore be helpful to examine how the legal narrative in Unit 1 differs from the presentation of the case at Nehardea in Unit 2.

Unit 2 begins by presenting the details of the case (lines F-G). Like the narrative about Rav Pappa, the source itself is terse and omits information that might be legally relevant. The editors' initial commentary highlights similarities between the two sources, raising the possibility both will prove inadequate to establish a precedent that can resolve the broader legal question at hand [H]. On the basis of an additional dialogue between Rami b. Shmuel and Rav Nachman [lines I-L], however, the editors differentiate between the legal status of the two cases. Whereas they label Rav Pappa's actions as lifnim mi-shurat ha-din, they accept Rav Nachman's ruling as din. His ruling establishes a valid legal precedent. On the basis of that precedent, the editors conclude that if a person sells an item and then no longer needs the money from the sale for its intended purpose, he may withdraw the sale [M].

Since Unit 2 is more complex than Unit 1, I will examine it in stages, beginning with the description of the case itself.

[G] There was once a shortage at Nehardea and all the people sold their
mansions.
[H] In the end, wheat arrived. Rav Nachman said to them: the law is (dina hu) that the mansions must be returned to their original owners.

The lack of narrative detail in this source raises questions similar to those raised by the legal narrative in Unit 1. For example, how does Rav Nachman become involved in the case? Unlike the case of Rav Pappa, there is no indication that he was personally involved in any of the sales mentioned. Instead, his use of formal legal language (dina hu) suggests that when the wheat arrives, a dispute arises. The owners now wish to invalidate the sales, while the buyers wish to keep the property they purchased. Presumably, the case is brought to court for arbitration and that is where Rav Nachman issues his ruling. The narrative itself, however, does not explicitly state this to be the case. As in Unit 1, the narrative source itself does not provide sufficient information to answer this question.

The editors are keenly aware that key data is missing from this source. Although they provide no information about how Rav Nachman becomes involved in the dispute, they do clarify another point of narrative ambiguity: how much time elapses between the sale of the mansions and the arrival of wheat? This detail also has potential legal relevance. For the sale to be withdrawn, is there a time limit within which the seller must realize that they no longer need the money from the sale for its intended purpose? The editors’ explanation addresses the issue of duration; in so doing, it also strengthens existing parallels between the narratives in Unit 1 and Unit 2.

[I] There too ('נמי הכה) they sold in error, since it became known that a ship [carrying grain] was waiting in the bays [at the time of the sale].

The comment establishes that grain arrived shortly after the sales where made. Notably, however, the editors introduce this comment by stating that "there too ('נמי הכה) they sold in error." This comment suggests that the basis for withdrawing the sale is the same in this case as in the narrative from Unit 1. In both cases, the seller did not have access to crucial information that would have prevented them from making the sale.135 Only after the

135. The fact that the editors point to this parallel may explain why Rashi speculates that the bulls the man intended to buy were no longer available at the time of the sale, thus strengthening the conclusion that the
transaction is concluded do they become aware of this information, and seek to invalidate the
sale.

It is worth noting that, in strengthening the parallels between these two cases, the
editors raise the possibility that neither case can resolve the legal question at hand. If the
cases are so similar, and the case of Rav Pappa provided an insufficient basis on which to
decide the legal question, it seems probable that the case at Nehardea would also be
disqualified. The editors reject this conclusion, however, in the next lines of the unit.

[J] If so, then why did Rami b. Samuel say to him, "If [you decide] thus, it
will cause difficulties in the future"?
[K] He [Rav Nachman] replied, "does a shortage happen at Nehardea
every day?!"
[L] He said, "Yes, a shortage often occurs in Nehardea!"

Notice that the editors introduce the dialogue between Rami b. Samuel and Rav Nachman
with the words "If so, then why did Rami b. Samuel say..." They present this additional
source as a response to an unstated challenge, assumption, or question.

I argue that this unstated challenge is precisely the possibility raised above–namely,
the possibility that the case at Nehardea provides an insufficient basis to resolve the broader
legal question. Given the strong parallels between the two cases, the reader might conclude
that Rav Nachman's ruling, like Rav Pappa's actions, does not establish a broader legal
precedent. If this is the case, the editors ask, then why does Rami b. Samuel object to his
ruling on the basis that it establishes a problematic precedent? Rami b. Samuel clearly
understands Rav Nachman's ruling to establish a new normative standard and he is concerned
that this precedent will lead to future problems, since grain shortages are a common
occurrence at Nehardea and the same scenario is likely to repeat. If people repeatedly sell
their goods when a shortage occurs, and then retract the sale when grain appears, it could
erode faith in the system and lead to a breakdown in commerce.

The editors appear unconcerned with the fate of the residents of Nehardea and the

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nature of the man's error in Unit 1 is identical to the nature of the error outlined in Unit 2.
potential problems that may result from Rav Nachman's ruling, as they do not pursue Rami b. Samuel's objection. What is significant for them about his objection is that it offers clear textual evidence that Rav Nachman's ruling was perceived by others as establishing a normative precedent. As a result, his ruling also provides a solid legal basis for the editors to resolve the broader question at hand. Imitating Rav Nachman's own legal formulation when he states "the law is (dina hu) that the mansions must be returned to their original owners" [H], the editors conclude that "the law is (v’hilkheta) that if a person sold [his property] and then was no longer in need of money, the sale may be withdrawn" [M].

As the conclusion to the sugya demonstrates, the editors' assessment of the legal narrative about Rav Pappa differs substantially from their assessment of Rav Nachman's ruling at Nehardea. I argue that this difference should not be attributed to differences between the cases themselves, which are quite similar, but rather to the fact that the legal narrative in Unit 1 contains greater ambiguities about how the matter in question was resolved. As noted above, the narrative provides no information about why Rav Pappa returns the land to its original owner. It is possible that he did so because he believed himself legally obligated to do so, but it is equally possible that he acted out of kindness or generosity. Since his rationale cannot be established reliably, the editors cannot assume that Rav Pappa acts as a legal exemplar whose behavior instantiates a normative rule for conduct. Responding to these ambiguities in their narrative source, the editors instead label his behavior lifnim mishurat ha-din. In so doing, they establish that Rav Pappa's behavior is not analogous to that of a judge in a courtroom. He exercises his private, discretionary judgment in the course of

136. It is notable that Rami b. Samuel's statement is entirely in Hebrew while the rest of the passage is in Aramaic. This raises the possibility that the conversation between Rami b. Samuel and Rav Nachman is constructed from separate sources by the editors, but in this case, it seems unlikely. All of the extant manuscripts for Ket. 97a (Munich 95, Vatican 113 and 130, St. Petersburg RNL Evr. I 187, and the Soncino Print edition from 1487) record the same conversation with only minor variations in wording. The figure of Rami b. Samuel appears on only one other occasion in classical rabbinic sources (in Niddah 17). On that occasion, he does not speak directly, although he is depicted as studying and reciting from a Hebrew-language source. Thus, although the language shift is notable, I argue that the editors receive this source which records the conversation between these two sages in the same manner that they present it in the sugya. There is insufficient form-critical or source-critical evidence to suggest otherwise.
his everyday life. While his actions were legally permissible, and perhaps even laudable, they
cannot be taken as a basis for normative conduct.

Although the description of the case at Nehardea contains many of the same
ambiguities as the legal narrative about Rav Pappa, those ambiguities do not extend to Rav
Nachman's ruling on the case. Not only does the language of his ruling make it clear that Rav
Nachman intends to instantiate a binding legal rule, but the dialogue between Rami b. Samuel
and Rav Nachman clearly establishes that others in the community accepted his ruling as
normative. If this were not the case, Rami b. Samuel would not object that the ruling
establishes a dangerous precedent. Thus, despite other ambiguities in the narrative, Rav
Nachman's ruling carries the weight of *din*, and serves as an example of affirmed procedures
of rabbinic law-making. Rav Nachman acts as an official representative of the rabbinic
judiciary. As such, his decision in the case at Nehardea establishes a firm basis upon which to
decide future cases.

Proponents of the two dominant models for *lifnim mi-shurat ha-din* will likely object
to my analysis of this sugya, arguing that editors' decision to label Rav Pappa's actions *lifnim
mi-shurat ha-din* itself clarifies the ambiguities in the original narrative and establishes why
Rav Pappa returned the land in question. Consider the following analysis by Louis Newman.
Newman begins by analyzing the sugya through the lens of the supererogation model. He
claims that the legal narrative about Rav Pappa initially implies that in such cases, the buyer
is obligated to return the property. He argues, however, that "this claim is defeated...by the
statement that, in returning the property, R. Papa [sic] did more than the law required [e.g.
acted *lifnim mi-shurat ha-din*]." As his translation makes evident, Newman begins from the
assumption that the phrase *lifnim mi-shurat ha-din* is synonymous with supererogation. On
this reading, the phrase itself provides the rationale for Rav Pappa's actions that is otherwise
missing from the sugya.

Newman then offers a reading of the same passage, this time from the perspective of the waiver of rights model. He argues that "R. Papa is said to act lifnim meshurat hadin when he voluntarily forgoes a legal right (in this case, to keep the land which has been legitimately sold to him) for the purpose of helping another individual (who wishes that he had not entered into this transaction)."\textsuperscript{138} Note that Newman here contradicts his claim above that the narrative about Rav Pappa initially suggests he has a legal obligation to return the land he purchased; now Newman argues that Rav Pappa has a legal claim to keep the land in question. Motivated by generosity, however, Rav Pappa waives this claim and returns the land to its original owner.

Newman's application of the supererogation and the waiver of rights models produces two contradictory interpretations of the same source material. While this is likely unintentional, I argue that Newman is here responding to the same ambiguities in the original narrative that motivate the editors to label Rav Pappa's actions as lifnim mi-shurat ha-din. The source does not establish whether or not Rav Pappa has a legal right to the land or a legal obligation to return it. Both of the two readings Newman poses are possible.\textsuperscript{139} Furthermore, there is no textual information that would allow the reader to argue that one reading is preferable to the other. As I have argued above, this ambiguity leads the editors to label Rav Pappa's decision to return the land as lifnim mi-shurat ha-din, rather than interpreting them to establish a clear legal precedent.

Significantly, Newman's final analysis of the sugya indicates that he is aware of these textual omissions and ambiguities. He concludes, "The motivation to act this way [i.e. to act lifnim mi-shurat ha-din], though not stated in any of these texts, can only be an altruistic one. Acting lifnim meshurat hadin begins to emerge here as a demonstration of generosity, both

\textsuperscript{138} Ibid.
\textsuperscript{139} This ambiguity is clarified in the conclusion of the sugya [M], which clearly establishes that Rav Pappa does not have a legal claim to the land in question. In the end, there is no legal right or claim for Rav Pappa to waive; by returning the land, Rav Pappa simply performs what the law dictates.
financial and personal." As I have argued above, however, this conclusion is far from inevitable. Rav Pappa may decide to return the land to the original seller for a variety of reasons. He may believe it is his legal obligation to do so, as the conclusion of the sugya suggests. He may be motivated by altruism, as Newman suggests. Or he may be motivated by a desire to maintain good relationships with his neighbors. It is therefore misleading to suggest that Rav Pappa's "motivation to act this way... can only be an altruistic one." Such a conclusion only appears inevitable if one begins from the assumption that lifnim mi-shurat ha-din is used to label altruistic behavior. The logic is circular.

On the basis of the readings that Newman offers, I have argued that the supererogation and the waiver of rights models fail to reliably explain the usage of lifnim mi-shurat ha-din in Ket. 97a because they both share a fundamental and flawed assumption. Both models assume that when a rabbi acts lifnim mi-shurat ha-din, he does so on the basis of an ethical or pious motivation. Such an assumption finds no textual grounding in the case of Ket. 97a. Furthermore, even if we bracket the question of motivation, neither model offers a plausible account of why the editors use this label to describe Rav Pappa's actions as lifnim mi-shurat ha-din. Let us consider the supererogation model first. While there is no textual evidence that Rav Pappa's actions were motivated by altruism, there is also nothing in the text which precludes this possibility. Rav Pappa might well have been motivated by generosity or kindness to return the land, rather than by a sense of legal obligation. It would seem, therefore, that the supererogation model could plausibly describe Rav Pappa's actions. It cannot, however, plausibly describe why the editors label his actions as lifnim mi-shurat ha-din, since the editors know that the sugya concludes by establishing a legal obligation for the buyer to return the property in this case if the seller wishes to retract the sale. From their perspective, therefore, Rav Pappa does have a legal obligation to return the land in question and his behavior cannot be deemed supererogatory. 141

141. The editors' assumption that Rav Pappa would be aware of this rule is admittedly anachronistic. As I argue...
It is also difficult to explain Rav Pappa's behavior under the traditional waiver of rights model. According to Newman's account, the right or claim that Rav Pappa waives—namely, the claim to the land that he purchased—is a general right or claim that would be shared by all buyers. By way of contrast, the waiver of rights model assumes that the rabbi in question enjoys a special legal privilege, right or exemption that is not generally available to others. He then waives this privilege in preference for following the general rule. On this model, the claim or right that Rav Pappa waives would need to be unique to him, or to a certain category of people. It could not be the general legal rights possessed by all buyers. Newman's identification of the legal claim that Rav Pappa waives, therefore, does not actually conform to the model as generally understood. The sugya articulates no special right or status that would explain Rav Pappa's actions under this model. As a result, neither model is able to accurately explain why the Talmud editors label Rav Pappa's actions lifnim mishurat ha-din. As I will show, the difficulties facing these models are exacerbated in the next sugya from Berakhot 45b.

Berakhot 45b

Like Ket. 97a, our sugya in Ber. 45b is situated within a broader legal discussion. In this case, that discussion is not one of property law but of mealtime etiquette. In particular, the sugya analyzes the rules of birkat ha-mazon, the grace after meals. The discussion begins with a teaching from the Mishnah that three people who dine together are required to form a zimmun (שלאשת שלשה לא wählt manches zu machen), an invitation to birkat ha-mazon that is recited collectively. Two sets of questions are then posed. First, the sugya asks about the

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142. See my discussion of this model on p. 6. BK 99b-100a, discussed at the end of this chapter, provides a helpful illustration of the more classical application of this model, since it centers on a case in which a banker (R. Hiyya) is exempt from the general obligation to repay his clients for his errors, because of his status as an 'expert,' a status not shared by the majority of bankers.

143. The Mishnah goes on to elucidate how the quorum of three people is established and who does, or does not, count towards that quorum. Adult Jewish males establish the quorum, with the exception of those who eat improperly tithed food and those who eat less than an olive’s bulk worth of food at the meal. Gentiles, women,
rules of *birkat ha-mazon* when only two people eat together, rather than three. Are they permitted to join in a *zimmun* if they want to? The editors resolve this question by citing a ruling of Abbaye, which is itself based on a tannaitic tradition that two people are not permitted to join in a *zimmun* but must instead separate and recite the grace after meals independently (כששה שאכלו כאותו נוהג ליחלק). The reader may recall that the question of whether two people recite the grace after meals collectively or separately was also raised in Hull. 106a. In that sugya, the editors attempt to derive the rule that two people who dine together must separate for the recitation of the grace after meals from a narrative source but, as I argued in Chapter One, the narrative evidence for this inference was weak. As a result, that discussion also cited a *baraita*–the same text cited here in Ber. 45b–to further substantiate the editors' legal conclusion. In Ber. 45b, this ruling finds additional grounding in Abbaye's statement to the same effect.

Having resolved the question of how two people who dine together should recite the grace after meals, the sugya returns to the question of proper conduct when a quorum of three or more people dine together. Since the minimum quorum has been established, the diners ought to join together in a *zimmun*. But what if those three diners begin their meal together, but do not finish eating at the same time? Are they still required to join in the *zimmun*?

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[A] 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:

[B] 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.

[C] No?! But didn’t Rav Pappa interrupt his meal for his son Abba Mar, [both] himself and another person?

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

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children and slaves do not count towards the quorum of three (m. Ber. 7:1-5).
This textual unit consists of two separate sources that have been woven together by the Talmudic editors: a legal ruling by Rava [A-B] and a legal narrative about Rav Pappa [C].  

The ruling itself has two components. First, it establishes that when three people dine together and two of the diners finish eating before the third, the third person must interrupt his meal to join them in a zimmun. If he wishes to continue eating, he can resume his meal afterwards.  

Second, the rule states that when three people dine together and one person completes his meal before the others, the remaining two do not interrupt their meals on behalf of that person. In this case, the three diners will not join together in a zimmun; instead, each diner will recite birkat ha-mazon independently whenever he completes his meal.

This raises a potential contradiction between sources, since the behavior recorded in the legal narrative about Rav Pappa does not conform to this rule. Instead, the narrative recounts an occasion on which two diners—Rav Pappa and his unnamed companion—did interrupt their meals on behalf of a third diner, Abba Mar. Having just learned Rava's teaching, the reader should expect all three men in the narrative to recite birkat ha-mazon independently. The fact that Rav Pappa and his companion interrupt their meals to join Abba Mar in a zimmun poses a potential legal problem that the editors must now resolve.

In order to understand why this presents a problem, recall the legal assumptions that guide the hermeneutic of the Talmudic editors. In most cases, the editors treat legal narratives as stories about self-conscious exemplars. The assume that the rabbi in the narrative—in this case, Rav Pappa—acts on the basis of an identifiable rule and that he is aware his actions are

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144. It is noteworthy that Rav Pappa is the central rabbinic actor in both Ber. 45b and Ket. 97a. Out of only five sugyot about rabbis acting lifnim mi-shurat ha-din, Rav Pappa is described as acting this way in two of them. It is possible that there was something unique about Rav Pappa's rabbinate that made him a paradigm for the type of judgement and behavior that came to be described as lifnim mi-shurat ha-din. As David Kraemer points out, however, Rav Pappa is also the most frequently cited Babylonian amora of his generation, enough so that Kraemer views the statements attributed to him as representative of both him and his contemporaries. See David Kramer, The Mind of the Talmud: An Intellectual History of the Talmud (New York: Oxford University Press, 1990), 39-50. Since the narratives labeled lifnim mi-shurat ha-din do not center on Rav Pappa exclusively, I am therefore disinclined to read too much significance into the fact that he features prominently within the source material.

145. Although this will technically constitute beginning a new meal, as he will need to recite the blessings over the meal anew and also recite birkat ha-mazon independently once he finishes eating the second time.
being observed. As a result, he modifies his behavior to ensure that it clearly and transparently communicates his legal position. The editors further assume that the narrative about Rav Pappa accurately preserves any necessary details, and that the details provided are sufficient to communicate the relevant legal information. Applying this set of assumptions to the narrative source in question, however, would lead to the problematic conclusion that Rav Pappa and his companion interrupt their meals to join in a zimmun with Abba Mar because they believe themselves legally required to do so. This would mean that Rav Pappa thinks that two people are required to interrupt their meals on behalf of one, which directly contradicts Rava's ruling.146

Such a conclusion contradicts another central editorial assumption; the editors assume that Rav Pappa is aware of the law as they have received it, and that he would not act in contradiction to a known legal ruling without good reason.147 As many scholars have noted, the activity of the Talmudic editors is characterized by a drive towards coherency. Barry Wimpfheimer describes the Talmud's rhetoric as "charged by a dynamism that is...driving toward a code."148

When the Talmud introduces divergent positions and midrashic texts, it regularly does so within a framework that seeks to make all of these materials cohere. The Talmud will, for example, introduce an alternative position by positing it as a contradiction to the Mishnah. Then the Talmud will resolve the contradiction—by aligning the deviant text with a known canonical outlier or by distinguishing the cases. Though the Talmud is famous for refusing to be driven by a desire for final rulings, its discussions are animated by a drive toward resolving contradictions.149

146. I argue that Rav Pappa's conduct raises the possibility that two are required to interrupt their meals, rather than that they are simply permitted to do so, based on the logic of the self-conscious exemplar. Recall the story of R. Ishmael and R. Elazar b. Azariah discussed in the Introduction. R. Ishmael says that he stands up for the Shema, lest his disciples see him sitting and infer that he believes that one is obligated to sit for the Shema, following the House of Shamai, when he actually follows the House of Hillel. To avoid any misinterpretation, R. Ishmael stands. Similarly, the editors are concerned that the reader may conclude that Rav Pappa interrupts his meal and recites the zimmun because he thinks that two diners are required to interrupt their meal on behalf of a third companion. Such a reader would therefore conclude that Rav Pappa holds a different position from Rava.

147. Barry Wimpfheimer describes the effects of this assumption when he notes that "many of the Talmud's legal pericopes are structured around questions of canonical contradiction. The rules for such contradiction are somewhat idiosyncratic since the Talmud is comfortable with flat-footed disagreements among hierarchical equals, but uncomfortable with the possibility that a later authority can disagree with an earlier one or that an attributed position will be contested by an unattributed one, even of the same weight" (Wimpfheimer, 23).

148. Wimpfheimer, 11.

149. Ibid.
In the case of Ber. 45b, the editors resolve the apparent contradiction between Rava's ruling and Rav Pappa's actions by drawing a distinction between the two. Notably, however, the distinction they draw is not a legal distinction between cases, but a literary distinction between sources. As in the case of Ket. 97a, the editors exploit an ambiguity or silence within their narrative source; while Rava clearly states his legal position, the reasons for Rav Pappa's actions in the narrative are unclear. Instead of applying their standard hermeneutic, the editors instead suggest that one cannot assume that Rav Pappa acts as an exemplar and therefore no rules can be derived from his behavior. A different set of hermeneutic and legal assumptions must be applied instead.

This interpretive shift can be observed in the final two lines of the sugya [C-D]. The editors first articulate the apparent contradiction between the two sources [C], exclaiming that Rav Pappa's behavior appears to be in defiance of Rava's ruling. In the final line [D], however, they neutralize this potential conflict through the use of two different labels. First, they mark the case of Rav Pappa as "different" (שאני), suggesting that it must be interpreted using different strategies. Second, they label his behavior as lifnim mi-shurat ha-din. In so doing, they explain that because Rav Pappa acted on the basis of his discretionary judgment, the narrative should not be read as an exemplar story. Rav Pappa's actions do not instantiate a new legal rule and therefore do not conflict with the existing legal precedent set by Rava.

The decision to classify Rav Pappa's behavior as lifnim mi-shurat ha-din simultaneously resolves two potential interpretive problems. First, it explains that two of the editors' standard hermeneutic assumptions do not apply to this case: Rav Pappa's actions are not guided by a legal rule, and he therefore does not act as a self-conscious exemplar. In deploying this label, the editors acknowledge that in a small set of cases, rabbis may act in ways that do not conform to the basic assumptions that allow their hermeneutic to operate. Significantly, however, this is not taken as a sign that their overall hermeneutic must be revised. Instead, the editors treat these legal narratives as exceptions to the rule, a strategy
that allows them to maintain the assumptions and reading practices outlined in Chapter One in the majority of cases. Second, classifying Rav Pappa’s actions as *lifnim mi-shurat ha-din* enables the editors to neutralize any apparent conflict between their sources. While Rav Pappa’s behavior remains surprising, it does not instantiate a new legal rule in opposition to Rava. Although Rav Pappa himself diverges from the normative standards of conduct, his actions do not suggest that others should follow suit. His case is presented as exceptional, rather than as exemplary.

As in the case of Ket. 97a, I argue that the editors are prompted to label Rav Pappa’s action *lifnim mi-shurat ha-din* because the legal narrative in Ber. 45b provides no information about why Rav Pappa decides to act in this manner. In order for the editors to derive a legal rule from a narrative, the source must provide enough details for the editors to be able to reliably infer the rationale that motivated the actions of the rabbi(s) in question. Recall the case from Ḥull. 160a discussed in Chapter One. While R. Ami and R. Assi never explicitly state that they do not join in a *zimmun* because one does not have a *zimmun* over fruit, the editors infer this from a key narrative detail: R. Ami and R. Assi did not offer any fruit to Rabbah bar bar Ḥana even though he was present. If possible, one would expect them to invite Rabbah bar bar Ḥana to join them, in order to establish the requisite quorum for the *zimmun*; since they do not do so, the editors infer that no *zimmun* is possible. No comparable narrative details exist in the case of Rav Pappa’s meal that would offer a rationale for his actions, or that could differentiate his meal of three diners from the types of cases governed by Rava’s ruling. Presumably, there is a reason that Rav Pappa acts in this unusual manner, but the editors have no textual basis from which to derive it. As a result, they conclude that Rav Pappa must have engaged in a different model of decision-making. Rather than basing his conduct on the rule supplied by Rava, he relies on his discretionary judgment.

I have argued that the editors use the label *lifnim mi-shurat ha-din* not only to describe the actions of rabbis whose behavior diverges from the normative standard but, more
specifically, to disqualify their behavior from setting legal precedent. Why do they select this particular enigmatic phrase to perform this function? In the case of Ber. 45b, I propose that the editors must not only find a way to neutralize the apparent conflict between Rava's ruling and Rav Pappa's actions, but they must also find a way of explaining how such an apparent conflict could occur. Although they cannot provide a definitive rationale for Rav Pappa's actions, the ideas and sources that the editors have inherited about lifnim mi-shurat ha-din provide them with the means to contextualize his behavior.

The editors generally assume that rabbinic behavior is guided by rule-based judgments, but the textual traditions discussed in Chapter Two collectively suggest that models of decision-making exist that may be more appropriate to apply in certain cases. In particular, those sources point towards discretionary judgment as a model of decision-making that prioritizes contextual roles and relationships, one that might be especially appropriate in the context of a private family meal. Perhaps Rav Pappa wished to honor his son in front of his guest, to offer him ritual instruction or to simply provide him with the opportunity to join in the zimmun, an opportunity rabbinic sources depict as desirable.¹⁵⁰ Rav Pappa may have viewed the achievement of these goals as trumping the need to adhere to standard ritual practice in this particular case. If so, his actions would not reveal anything about his general understanding of the law or standard rabbinic practice; his decision would have been based entirely on contextual factors and relationships particular to that situation,¹⁵¹ and no broader precedent or rule could be abstracted from his behavior. It is important to note that although Rav Pappa's actions are classified as unusual, his behavior is never presented as transgressive. At no point do the editors suggest that Rav Pappa breaks the law when he

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¹⁵⁰. Cf. Ber. 45a-b.

¹⁵¹. This in turn clarifies the difference between the signaling effect of shurat ha-din in tannaitic literature and that of lifnim mi-shurat ha-din in the Bavli. As noted in Chapter One, the tannaitic phrase shurat ha-din was often used to signal that an existing law should be supplanted by a different one. By way of contrast, the stammaitic use of lifnim mi-shurat ha-din carries a different implication, one that has no long-term consequences for the existing body of law. In the cases described as lifnim mi-shurat ha-din, the existing law is not supplanted; rather, the standard application of the law is momentarily displaced by the independent judgement of the sage.
elects to join in a zimmun with his son; he simply acts in a non-standard and non-normative manner.

Despite the fact that the editors clearly mark Rav Pappa's actions as unusual, it would be difficult to argue that they do so because they see his behavior as supererogatory, or because they view Rav Pappa as having waived a special privilege or right under the law. As in the case of Ket. 97a, neither model accurately describes Rav Pappa's actions. Supererogation is typically used to described notable cases of moral behavior that exceed any expectations set by a framework of law or duty, but Rav Pappa's actions hardly fit this paradigm. 152 While his decision to interrupt his meal may be motivated by affection for his son, the moral valence of his conduct is unclear. Furthermore although the editors present his behavior as surprising, they do not offer a moral evaluation of his actions. 153 One might argue that his behavior is a matter of etiquette more than a matter of ethics. 154

If the supererogation model fails to adequately describe Rav Pappa's actions in the legal narrative in Ber. 45b, what about the waiver of rights model? One might argue that Rav Pappa waives his 'right' to continue eating by interrupting his meal and joining his son in the zimmun, but that description does not correspond with the typical articulation of the model. First, as noted in the discussion of Ket. 97a, this model assumes that Rav Pappa waives a special right or privilege under the law; no such right or privilege has been stated. Second, even if such a right were mentioned, the model assumes that he then waives that right in preference for following the general rule. In this case, however, the general rule is that Rav Pappa should not interrupt his meal. Rather than waiving a special right, we would have to say that Rav Pappa waives the general rule itself. Like the supererogation model, the waiver


153. This is significant since, as discussed above, the editors have access to a wealth of labels to that do connote a moral evaluation. The fact that they choose the label lifnim mi-shurat ha-din in this case, rather than a conceptually related label with a clearer evaluative connotation, suggests that their aim here is to evaluate how or why Rav Pappa decided to act in this manner, not to communicate whether or not his choice was a good one.

of rights moel also fails in this case. Nothing in the sugya from Ber. 45b would suggest that 
Rav Pappa possesses a special status that exempts him from the standard practices of zimmun 
and birkat ha-mazon, nor does the sugya ever suggest that he waives such a right in choosing 
to join his son in the zimmun. As the next sugya from B.K. 99b-100a will demonstrate, the 
waiver of rights model is intended to describe cases in which a rabbi has a special status that 
makes his obligations under the law different from those of his compatriots.

I argue that the discretionary judgment model is better able to account for the editors'
decision to label Rav Pappa's actions as lifnim mi-shurat ha-din. The Talmudic editors 
assume that the majority of rabbinic actions are governed by rule-based judgments. In a small 
set of cases, however, a rabbi does not act in accordance with the expectations set by known 
rabbinic rules and the available source(s) provide insufficient information for the editors to 
derive a new rule that could account for such behavior. In these cases, the editors seek 
alternative explanations for such actions. They speculate that the rabbi in question engaged in 
an different mode of decision-making, namely, discretionary judgment. While the editors do 
not indicate why the rabbi chose to engage an alternative form of decision-making, nor do 
they elucidate the specific reasoning that led that rabbi to act in a specific way, labeling these 
cases as lifnim mi-shurat ha-din allows the editors' to contain potentially problematic sources 
by neutralizing the legal impact of such behavior.

Bava Kamma 99b -100a

My analysis of both Ket. 97a and Ber. 45b has pursued two primary claims. First, I 
have argued that the editors are prompted by textual omissions or ambiguities to label the 
behavior of a specific rabbi as lifnim mi-shurat ha-din. This label has the prescriptive effect 
of disqualifying that behavior from establishing a legal precedent. Second, I have argued that 
these textual omissions and ambiguities make it impossible to definitively explain the 
rationale for the behavior that the Talmud labels lifnim mi-shurat ha-din. I have critiqued
both the supererogation and waiver of rights models for assuming that such behavior is altruistically motivated without sufficient textual warrant. I have also argued that these models fail, in varying degrees, to accurately describe the behaviors recounted in these narratives.

As in the previous two sugyot, my analysis of Bava Kamma 99b-100a demonstrates how the editors use the label *lifnim mi-shurat ha-din* to explain or respond to ambiguities within their source material. Unlike the previous two cases, however, I argue that both the supererogation model and the waiver of rights model offer helpful explanations of the behavior marked as *lifnim mi-shurat ha-din* in this case, although the assumption that such behavior is altruistically motivated remains unwarranted. Despite the utility of these models, I argue that the discretionary judgment model is equally able to describe such behavior without relying on problematic assumptions about the motivation for this type of action.

Like the previous two sugyot, B.K. 99b-100a also opens with a legal discussion. The sugya examines the legal responsibilities of a banker who misidentifies a coin, proclaiming a valid coin to be counterfeit or vice versa. The passage introduces three potential classes of bankers: nonprofessionals, professionals and expert professionals. It establishes that both nonprofessional and professional bankers are liable for their errors, while expert bankers are exempt from liability. This conclusion may initially seem counterintuitive. Since expert bankers are the most highly trained members of their profession, one might expect them to bear a higher degree of responsibility than their less educated counterparts. The passage suggests, however, that expert bankers represent a class of professionals who are so highly trained that any errors they make must be attributed to circumstances beyond their control. As an illustration of this type of error, the editors describe a case in which two expert bankers, Dancho and Issur, became confused when a new coin came into circulation without being announced. Unaware of the new mint, they declared the new coin to be counterfeit when it was, in fact, valid. While they do not state so explicitly, the editors use this example to imply
that no degree of expertise or training could prevent such an error and therefore the bankers in question could not be held liable. Since this is the only type of error expert bankers are expected to make, they are declared exempt from liability. Having established the exemption for expert bankers, the passage then examines a case in which an expert banker, R. Hiyya, chooses to repay his client for a financial error. The editors resolve the apparent contradiction between R. Hiyya's conduct and the rule that creates an exemption for expert bankers by declaring that R. Hiyya acted *lifnim mi-shurat ha-din*.

Although it is longer and more complex, the sugya from BK 99b-100a structurally resembles the previous sugya from Ber. 45b. It begins with a set of statements about the liability of different classes of bankers. As I will show, the editors weave together multiple independent tannaitic and amoraic sources that appear to contradict one another on the question of a professional banker's liability in order to manipulate a statement by Rav Pappa. Although the statement originally provides an explanatory gloss on a tannaitic teaching, the editors reposition it within the sugya, using it to construct the three-tiered classification system for bankers discussed above. The development of this system resolves the apparent disagreement between the sources about the liability of professional bankers by creating a new class of 'expert bankers.'

In creating this new category, however, the editors generate a different problem. The editors are aware of a legal narrative that claims that R. Hiyya, an expert banker, offered to financially compensate his client after misidentifying her counterfeit coin as valid currency. As in Ber. 45b, this narrative does not fit with the legal rules that have just been articulated. Since the passage has now established that expert bankers are not liable for their errors, the editors must account for R. Hiyya's behavior. In order to effectively illustrate how the editors use the label *lifnim mi-shurat ha-din* to neutralize this potential conflict between their sources, I begin by presenting the passage in full. I will then divide the passage into three primary subunits, and examine each unit in turn.
A It was stated:
B [Regarding the case of] a person [who] showed a dinar\(^\text{156}\) to a banker [who declared it a good coin] and it was later found to be bad–
C One baraita states: a professional is exempt but a nonprofessional is liable.
D But another baraita states: both the professional and the nonprofessional are liable.
E Rav Pappa said: the baraita which teaches that a professional is exempt [i.e. the first baraita] refers specifically to experts like Dancho and Issur who do not require any further instruction.
F In what case did they [Dancho and Issur] err?
G 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].
H 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.”
I 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?
J We must say that R. Hiyya acted lifnim mi-shurat ha-din,
K As Rav Yosef taught:
L 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

\(^{155}\) This is an editorial term used to introduce the statement of an amora, or a discussion between two amoraim (Frank, The Practical Talmud Dictionary, 24).

\(^{156}\) A type of Roman coin.
As noted previously, the passage begins with a section in which the editors weave together different tannaitic and amoraic teachings (the two 'baraitot' and the teaching by Rav Pappa) in order to generate a three-tiered classification system for bankers. I will refer to this subsection, which comprises lines A-E, as Unit 1. Other than the first line, in which the editors introduce the discussion with the phrase *itmar* (איתמר, "it was stated"), the editorial voice does not appear explicitly in this unit. Instead, the editors' activity takes the form of implicit commentary. In the second unit, which comprises lines E-I, the editors' activity is more explicit. They provide a further illustration of the category of expert bankers introduced in Unit 1 before citing a new source which problematizes the construction of that category: the legal narrative about R. Hiyya. In line I, the editors clarify the potential issue the narrative raises. Since R. Hiyya is an expert banker, he should be exempt from liability for his mistake, and yet he offers to repay his client for his error. How should his conduct be understood? In the third and final unit, which comprises lines J-L, the editors neutralize these tensions by classifying R. Hiyya's actions as *lifnim mi-shurat ha-din*. In this case, however, they also cite the original midrashic tradition which references *lifnim mi-shurat ha-din*. Their citation of the midrashic source in this context provides further clues as to how they understand this category. Let us now examine each unit in turn.

**Unit 1: Reconstructing the Contradictory 'Baraitot'**

The passage opens with the discussion of two purportedly tannaitic teachings. In order to be clear about the segment of text to which I refer, I will adopt the language of the sugya and refer to these two teachings as *baraitot*; as I will demonstrate, however, these two statements likely represent later divergent interpretations of a singular tannaitic part.

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source. The editors introduce the discussion with the word *itmar* ( איתמר), a term that is typically used to introduce an amoraic statement or discussion. They then present three sources: two *baraitot* and a teaching by Rav Pappa. It is notable that although Rav Pappa's statement is presented after the second *baraita*, he only comments on the first *baraita*. This suggests that the editors inserted the second *baraita* in between the first *baraita* and Rav Pappa's commentary on it. As a result, in the final construction of the passage, Rav Pappa appears to the reader to be commenting on both *baraitot*, and this changes the implication of his statement. Because the passage shows clear signs of editorial intervention, I analyze the three sources in a different order than they are presented in the sugya. In so doing, I seek to reconstruct the ways in which the editors manipulated their sources to resolve potential contradictions and to promote the construction of a three-tiered classification system for bankers.

Although neither of the purported *baraitot* cited at the beginning of BK 99b have direct parallels elsewhere in rabbinic literature, both appear to be based on the same source from the Tosefta. The first line in Tosefta records a logic similar to that of the first *baraita*, but uses it to determine the liability of a butcher or *shochet* (ritual slaughterer), rather than that of a banker. The Tosefta then proceeds to analyze the liability of bankers, reaching a conclusion that substantively parallels the legal conclusion in the second *baraita*. Since these two statements, which are found in t. BK 10:10, prove essential to understanding the logic recorded in the both of the *baraitot* in BK 99b, I quote the relevant passage from the Tosefta here in full.

[A] הפוסר החמתי לשבה ו whore compartir ישים אותו. ורשע שפר בר לו

[B] ובר ימי טוב

הפרואה ינור לשלוחה וะ חיות לשלוחה מפנות שהר קוסש שער.

[A] [In the case of] the person who hands over his cattle to be slaughtered and it is rendered *neveilah* [i.e. it is improperly slaughtered, and cannot be eaten] 158: a professional is exempt, a nonprofessional is liable and the paid

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158. Although it is less relevant to the immediate legal discussion, the carcass of such an animal also transmits ritual impurity.
laborer, whether he is a professional or a nonprofessional, is liable.

[B] [In the case of] the person who shows a dinar to a banker and it was found to be bad, he [the banker] is required to pay because he is like a paid laborer.

In order to understand how these teachings from the Tosefta shaped the baraitot cited in the Talmud, it will be helpful to note several key similarities and differences between the three sources (e.g. t. BK 10:10 and the two baraitot from BK 99b). First, the Tosefta's statement about the liability of bankers does not differentiate between the liability of a professional (אומן) and a nonprofessional (הדיוט). Those categories are introduced when discussing the liability of the shochet (line A) but are never mentioned in the discussion of a banker's liability (line B). Second, the Tosefta's discussion of banker liability centers on the idea that the position of the banker is analogous to that of a paid guardian (כנושה שכר); as a result, the banker, like the paid guardian, is always liable for his mistakes, regardless of his professional training. Notably, this rationale is not mentioned in either of the reconstructed baraitot in BK 99b. Instead, both of the baraitot adopt the categories of the professional and nonprofessional from line A and investigate whether or not professional status impacts the liability of a banker.

I propose that the two baraitot presented in BK 99b represent divergent interpretations of the tradition about banker liability recorded in t. BK 10:10. The reader of the Tosefta knows that, in at least some cases, the liability of the actor in question is determined by whether or not he is professionally trained. The fact that the Tosefta does not invoke the categories of the professional (אומן) and nonprofessional (הדיוט) in its discussion of bankers introduces a degree of ambiguity. Should this absence be read to indicate that the professional and nonprofessional are equally liable, as the second baraita suggests? Or does this absence indicate that the liability of the banker parallels the liability of the shochet and therefore, as the first baraita suggests, professional bankers are exempt while nonprofessionals are liable?

These questions are exacerbated by the fact that the rationale proposed by the
Tosefta for determining banker liability appears to have become separated from the ruling itself, at least within the Babylonian sources. When read in full, the plain sense of t. BK 10:10 suggests that since all paid laborers are liable regardless of whether or not they are professionals (t. BK 10:10a), and since all bankers are deemed to be like paid laborers (t. BK 10:10b), then all bankers are liable for their errors regardless of professional status. If this rationale were omitted, however, it would be quite reasonable to assume that the liability of the banker is similar to that of the shochet and therefore is dependent upon his professional status. This, I argue, leads to the generation of two separate interpretive traditions which are presented in BK 99b as the two contradictory baraitot. The tradition recorded in the second baraita becomes prominent among the Palestinian amoraim, while the tradition recorded in the first baraita becomes prominent among the Babylonian amoraim. I will consider the Palestinian legal tradition first.

According the presentation of the sugya, both baraitot define banker liability in a case that is identical to the one outlined in the Tosefta: "a person shows a dinar to a banker [who judges it to be a valid coin], but it is [later] found to be bad [i.e. counterfeit]." In such a case, the second baraita states that "both the professional and the nonprofessional are liable." A parallel tradition from the Palestinian Talmud, in y. Kilayim 7:3, reaches the same legal conclusion. Notably, however, the Palestinian Talmud retains the rationale that the banker is liable because his position is analogous to that of the paid guardian, a rationale that is missing from the baraita cited in BK 99b.

In the case of a person who shows a dinar to a banker [who judged it to be a good coin] and it was later found to be bad, he [the banker] is required to pay because he is paid...He is treated analogously to one who has been paid [k'no'eh skhar].

The wording of the first line in the Palestinian Talmud is almost identical to that of t. BK 10:10b, but the Palestinian Talmud develops the rationale that the banker is like the paid laborer in greater detail. It clarifies the banker is treated like a paid guardian regardless of
whether or not he receives payment for his services. This clarification underscores the fact that all bankers are liable for their errors, regardless of their professional status, because their liability is equivalent to that of the paid guardian.\footnote{159 A person who is paid to guard someone else’s property holds a higher degree of liability if that property is damaged than a person who does it for free. See the discussion of the paid guardian (שכר נושא) in m. Shevu'ot 8:1 for a further elucidation of this category and the varying degrees of liability for different types of guardians.}

Although the second baraita, like the Palestinian Talmud, also concludes that all bankers are liable, the wording of the baraita has been reformulated to explicitly address the issue of professional status. In so doing, however, the legal rationale for why all bankers hold the same degree of liability has disappeared. The baraita does not explain that bankers are treated like paid laborers; it simply asserts that both professional and nonprofessional bankers are liable. As a result, while the reformulation of this tradition clarifies a potential ambiguity in the Tosefta, it also creates new interpretive possibilities. As I will show, the editors capitalize upon this change in formulation to engineer a reconciliation between this tradition and the first baraita.

I have argued that, despite the substantive shifts in language, the legal conclusion of the second baraita parallels the legal conclusions of the Palestinian Talmud about banker liability. As such, it reflects the way in which t. BK 10:10 was legally interpreted by the Palestinian amoraim. In a similar vein, I propose that the first baraita reflects how this same statement from the Tosefta was interpreted by the Babylonian amoraim, who reached a substantively different legal conclusion. Like the second baraita, the first baraita also adopts the categories of the professional (אמן) and nonprofessional (רביון) from t. BK 10:10a, which applies those categories to the shochet. Unlike the second baraita, however, the first baraita applies this distinction to bankers in the same way that the Tosefta applied them to ritual slaughterers, thereby concluding that "a professional is exempt but a nonprofessional is liable." As noted previously, this conclusion is initially counterintuitive. One might expect that the professional would bear a greater degree of
liability than the nonprofessional, since he is presumably a master of his craft. The client of the nonprofessional banker must be aware that the risk of error is high, and be willing to undertake that risk; the client of professional banker, however, turns to him expressly because he wants to avoid any risk of error. We might therefore expect the professional to bear a higher degree of liability for his mistakes.

These expectations appear to motivate Rav Pappa's own interpretation of the first baraita. Rav Pappa states that "The baraita which teaches that a professional is exempt refers specifically to experts like Dancho and Issur who do not require any further instruction." Although the editors' construction of the sugya makes it appear as if Rav Pappa is familiar with both baraitot, nothing in his statement suggests that this is the case. Rather, his teaching offers a straightforward gloss on the first baraita that declares professionals exempt from liability by drawing on the case of two Babylonian bankers–Dancho and Issur–who were presumably known to his audience. Rav Pappa suggests that when the baraita refers to professional bankers, it does not simply refer to anyone with professional training, but only to those whom we might call 'expert bankers.' He therefore narrows the scope of the exemption, and provides a rationale for it. These expert professionals "require no further instruction"; they have the highest degree of training, making it extremely unlikely that they will make a mistake. The few bankers who have achieved this status are declared exempt from liability because they are in a different category or class from normal bankers. Their reputation is a sufficient guarantee for clients to want to engage their services. Making all other bankers liable for their errors under rabbinic law offers their potential clients a different type of guarantee: although they cannot promise to avoid all errors, in the event that a mistake is made, the client will be fully compensated. Thus, although it may initially appear counterintuitive, Rav Pappa's interpretation of the law makes pragmatic sense and establishes a system that supports commerce.
Thus far, I have traced the origins of the two baraitot cited at the outset of BK 99b. I have argued that the baraitot represent divergent interpretations of the same source from the Tosefta. In Palestine, t. BK 10:10 is interpreted as establishing equal liability for all bankers, regardless of their professional status. This legal view is recorded in the Palestinian Talmud in y. Kil. 7:3 and in the second baraita in BK 99b, although it is formulated quite differently in each source. The Palestinian Talmud foregrounds the rationale that the banker is analogous to a paid laborer, while the second baraita foregrounds the fact that the professional status of the banker does not affect his liability. In Babylon, by way of contrast, t. BK 10:10 is interpreted as establishing parallel exemptions for both ritual slaughterers and bankers; in each profession, the professional is exempt while the nonprofessional is liable. This view is reflected in the amoraic strata of the Babylonian Talmud through the comments of Rav Pappa, who responds directly to the first baraita but appears to be unaware of the tradition recorded in the second baraita.

The reconstruction I have provided suggests that the Palestinian and Babylonian amoraim developed independent and contradictory positions on the issue of banker liability. In the case, the difference does not appear to be the result of cultural differences or external historical processes, but is rather due to an ambiguity in the Tosefta that was exacerbated through the process of transmission. Christine Hayes describes such differences as the result of "internal (textual, exegetical/hermeneutical, dialectical, redactorial) processes, the natural evolution of a complex and fertile core tradition". At some point in its transmission in Babylon, the legal conclusion about banker liability appears to have come uncoupled from the rationale that bankers are like paid laborers. This led Babylonian rabbis to interrogate an ambiguity in the Toseftan tradition as they received it: did the Tosefta fail to mention professional status in its discussion of bankers because that status did not affect the issue of liability, or because it presumed its audience

160. Hayes, *Between the Babylonian and Palestinian Talmuds*, 4, emphasis in the original.
would apply the rules about ritual slaughterers to bankers as well? The Babylonian community concluded that the latter interpretation was correct, and declared that professional bankers were not liable for their mistakes, just as professional slaughterers were exempt from liability.

While this explanation may satisfy modern scholars, such a conclusion would be unacceptable to the Talmudic editors, who assume a fundamental unity to the rabbinic legal tradition. In my discussion of Ber. 45b, I argued that the editors are confused by Rav Pappa's decision to join in the zimmun because they assume that Rav Pappa is aware of the law as they have received it, and that he would not act in contradiction to a known legal ruling. A similar assumption leads the editors to conclude that the contradiction between the three sources presented in Unit 1 of BK 99b cannot be substantive. In order to reconcile this apparent contradiction, the editors rely on a strategy that they employ frequently throughout the Talmud: they redefine the scope of the first baraita, using the interpretive gloss by Rav Pappa. They accomplish this by uncoupling Rav Pappa's statement from the baraita on which he comments, and inserting the second baraita between them, as follows:

[A] It was stated:
[B] [In the case of] a person who showed a dinar to a banker [who declared it to be a good coin] and it was later found to be bad–
[C] One baraita states: a professional is exempt but a nonprofessional is liable.
[D] But another baraita states: both the professional and the nonprofessional are liable.
[E] Rav Pappa said: the baraita which teaches that a professional is exempt [i.e. the first baraita] refers specifically to experts like Dancho and Isur who do not require any further instruction.

By organizing their source material in this manner, the editors present Rav Pappa as commenting on both baraitot. Rather than providing a straightforward gloss on the first baraita, Rav Pappa's statement now appears to reconcile the two baraitot by constructing a three-tiered system in which bankers are classified as nonprofessionals (liable), professionals (liable) or expert professionals (exempt).

It is important to note, however, that the editors' activity in this unit is not limited
to the way in which they organize earlier sources; they also likely author the second
baraita in its current form. As noted previously, this baraita is based on the Palestinian
legal tradition, of which the editors were likely aware, but the legal position that all
bankers are equally liable is is presented quite differently in BK 99b than it is in
Palestinian sources. It is likely that the editors change the wording of the Palestinian
tradition to more closely parallel the wording of the first baraita, thereby highlighting and
sharpening the apparent contradiction between the two traditions. The creation of this
direct parallel between the two sources is what makes placing Rav Pappa's statement at
the end of the unit so effective. The editors use his interpretation of the first baraita to
suggest that the conflict between the two baraitot is formal rather than substantive. The
two baraitot use the term 'professional' (אומן) to refer to two different classes of bankers;
the first baraita uses the term in the specialized sense of an expert banker, while the
second baraita uses it in the general sense of a person with professional training. Using
Rav Pappa's statement to suggest that the apparent contradiction results from a linguistic
confusion, rather than a legal conflict, the editors are able to reframe the two baraitot as
compatible. Expert bankers are exempt but all other bankers are liable, regardless of
whether or not they have some degree of professional training.

Unit 2: The Legal Narrative

161. Based on a detailed study of parallels in both structure and content between y. A. Z. and b. A. Z., Alyssa
Gray has convincingly argued that the Talmudic editors likely had in their possession some version of the
Palestinian Talmud. See Alyssa Gray, A Talmud in Exile: The Influence of Yerushalmi Avodah Zarah on the

162. In his discussion of what he calls 'fictitious baraitot', Louis Jacobs argues that the Talmudic editors
sometimes author new teachings, which they position as baraitot and which are "are introduced as a pedagogical
aid, i.e. in order to qualify the statement or law under consideration." (Louis Jacobs, "Are There Fictitious
Baraitot in the Babylonian Talmud?", 49). While the baraita in question is not 'fictitious' in the sense Jacobs
means, since it is based in a verifiable tannaitic teaching rather than cut from whole cloth by the editors, it seems
likely that the editors significantly modified the form and phrasing of their source for a specific pedagogical or
interpretive purpose. By increasing these formal similarities, the editors not only highlight points of
disagreement but point to a possible resolution: each baraita uses the term 'professional' (אומן) to a refer to a
different class of bankers. As a result, the disagreement between the two is not substantive, but formal, and can
be resolved by promoting the threefold classification system for bankers.
Having carefully reconstructed and arranged their sources in a way that allows them to preserve their ideal of halakhic unity, the editors move from implicit commentary to explicit commentary. They begin by investigating the category of expert bankers introduced in Unit 1 by returning to the example of Dancho and Issur and offering an illustration of the type of errors that an expert banker might make. Using the example of Dancho and Issur's mistake when a new coin is minted without their knowledge, the editors suggest that no one could reasonably hold a banker accountable for this type of error, thereby providing additional support for Rav Pappa's statement that expert bankers are not liable for their mistakes.

Having provided support for Rav Pappa's statement, thereby strengthening the creation of the new three-tiered system for classifying bankers, the editors examine a new problem. They are also in possession of a legal narrative about R. Hiyya, in which he mistakenly identifies a counterfeit coin as valid and offers his client financial compensation for his error. While this narrative may initially appear to provide support for the conclusion that the majority of bankers are liable for their errors, the editors point out that R. Hiyya is an expert banker [line I]. Under the system just outlined, the reader should not expect him to repay his client. As a result, the editors are confronted by a narrative in which a rabbi's behavior fails to conform to the expected standard of conduct established by law. As we will see in Unit 3, the editors once again resolve the problem by labeling the behavior of the rabbi in question lifnim mi-shurat ha-din. Before moving to the resolution, however, it will be helpful to examine the type of challenge raised by this legal narrative in greater depth. I begin by presenting the full English text of Unit 2 again here.

[F] In what case did they [Dancho and Issur] err?
[G] A new coin stamp was issued. When the first coin with that stamp came into circulation, they made a mistake [and identified the coin as counterfeit]
[H] 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.

I] 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?

The case described in the legal narrative [line H] is identical to the hypothetical case outlined at the beginning of Unit 1 [line B]. A person, in this case an unnamed woman, comes to a banker, R. Hiyya, and shows him a coin. He declares the coin to be valid, but it is later discovered to be "bad" or counterfeit. At this point, however, the resolution to the hypothetical case outlined in Unit 1 and the legal narrative diverge. R. Hiyya offers to repay his client for the error. Initially, this offer may not be surprising; the reader may assume that R. Hiyya is a normal banker, and is therefore liable for the error. If so, his behavior would conform perfectly to legal dictates. However, the editors quickly clarify that R. Hiyya is not a normal banker; he falls into the same class of expert professionals as Dancho and Issur [line I]. It is therefore surprising that R. Hiyya offers to compensate his client, since he is not legally required to do so. In order to explain his behavior, the editors employ a tactic that should be familiar to the reader. They seek to establish that the case of R. Hiyya is somehow different from the case of Dancho and Issur. The task of the editors, therefore, is descriptive rather than prescriptive. In line G, the editors provided the details of a case facing Dancho and Issur, which they used to establish the standard conduct of expert bankers. Now, they must identify something which differentiates R. Hiyya's case from that case, thereby enabling them to explain why his behavior diverges from the expected norm.

Before moving to their resolution of this challenge in Unit 3, it should be noted that, just as in the case of Ket. 97a and Ber. 45b, the legal narrative about R. Hiyya only becomes problematic if one adheres to certain key assumptions that drive the editors' hermeneutic. Recall, for example, that in Ber. 45b, Rav Pappa's behavior was only problematic if one assumed, as the editors often do, that he acted as an exemplar. Using
the label of lifnim mi-shurat ha-din to establish that his actions did not instantiate a rule or set a new standard for conduct, the editors were able to classify his behavior as merely unusual instead of troubling. Similarly, in the case of BK 99b, R. Hiyya's behavior only appears problematic if one assumes, as the editors do, that R. Hiyya is familiar with the rules about banker liability established at the outset of this passage.

Historically, it is unlikely that R. Hiyya would have been familiar with this system. Despite his Babylonian name, the fact that he is referred to by the title of 'Rabbi' rather than 'Rav' indicates that R. Hiyya was ordained in Palestine, and textual evidence suggests that he spent a good portion of his life in Palestine. The narrative also mentions a dinar, a Roman coin, a detail which further supports the possibility that the interaction recounted either took place in Palestine or between R. Hiyya and a Palestinian Jewish client. I have argued above that the two baraitot presented in Unit 1 represent two different interpretations of the tradition recorded in the Tosefta, resulting in a difference in halakhic practice between the Palestinian and Babylonian amoraim. If this analysis is correct, and R. Hiyya is an expert Palestinian banker, than his conduct in the narrative makes perfect sense. Palestinian legal tradition holds all bankers liable for their mistakes, regardless of their professional status. When his client comes with the offending coin and presents her case to R. Hiyya, he applies the rule found in the both the Tosefta and the Yerushalmi that "he [the banker] is required to pay," and he substitutes her counterfeit coin with a valid coin of equal value from his own coffers, taking the financial loss upon himself.

While this account of R. Hiyya's behavior is grounded in historical and textual evidence, such an explanation is unavailable to the editors, since it contradicts one of their fundamental legal and hermeneutic assumptions. It suggests the existence of halakhic difference where the editors want to maintain halakhic unity. Instead, the editors must find an alternative method of accounting for R. Hiyya's behavior, which they
achieve by labeling his conduct *lifnim mi-shurat ha-din*.

*Unit 3: Invoking the Midrashic Tradition*

Just as the editors demonstrated that the contradiction between the two *baraitot* in Unit 1 was the result of interpretive confusion, rather than a genuine legal conflict, so too must the editors demonstrate that although R. Hiyya's behavior does not conform to normative conduct, neither does it contradict the rule established in Unit 1 that exempts expert bankers from liability for their mistakes. As in the case of Rav Pappa at the meal (Ber. 45b), R. Hiyya's actions pose a direct problem only if one assumes that he acts as an exemplar, which would mean his behavior instantiates a rule for conduct. In this case, however, the details of the problem are somewhat different. Whereas Rav Pappa's actions appeared to directly contradict Rava's ruling, there is no obligation for a person to exercise a legal exemption. Even if one assumes that R. Hiyya is aware of the exemption for expert bankers, as the editors do, he has the option to waive that exemption and compensate his client. And yet, while exercising this exemption is legally permissible, R. Hiyya's behavior remains problematic for the editors because it suggests the *possibility* of halakhic difference. The reader might mistakenly infer that, rather than waiving his exemption, R. Hiyya compensates his client because he believes himself legally required to do so. In order to prevent this potential misreading, the editors employ the same strategy they used in Ket. 97a and Ber 45b: they label his actions *lifnim mi-shurat ha-din*. In so doing, they disqualify his behavior from establishing a new rule or norm for conduct. The possibility of halakhic difference is neutralized.

The sugya does not end there, however, but goes on to cite the midrashic tradition about *lifnim mi-shurat ha-din*. In so doing, the editors again engage in a form of implicit commentary. Although they cite the source without emendation or explanation, with the minor exception that they attribute it to Rav Yosef instead of to R. Elazar of Modi'in, their
insertion of the midrash at this point in the sugya has an interpretive impact. For reference, I cite here again the presentation of the midrash in the context of BK 99b-100a.

[J] We must say that R. Hiyya acted lifnim mi-shurat ha-din

[K] As it was taught, according to Rav Yosef:

[L] You shall make know 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 mi-shurat ha-din.

As discussed in the previous chapter, the meaning of the phrase lifnim mi-shurat ha-din in the midrash (line L) remains underdetermined in the context of the Mekhilta. The midrash suggests that lifnim mi-shurat ha-din both parallels din and is differentiated from it, but the precise relationship between the two is unclear. By weaving the midrash into the broader context of the sugya, however, the editors sharpen the respective domains of din and lifnim mi-shurat ha-din to which the midrash refers.

My subdivision of the sugya into different subunits reflects this demarcation. Although it does not expressly use the term, Unit 1 is occupied with din. The central concern of the editors in that unit is to reconcile apparently conflicting sources in order to clarify the legal rules that govern banker liability. The conclusion of that unit, which creates the three-tiered classification system, establishes the normative standards for conduct: both professional and nonprofessional bankers must repay their clients for any mistakes, while expert professionals are not expected or required to do so. The creation of these normative rules or standards of conduct is the activity of din. Unit 2 and the opening line [J] of Unit 3, however, are occupied with lifnim mi-shurat ha-din activity. If the domain of din is the construction of rules, the legal narrative about R. Hiyya illustrates the type of behavior that the editors place within the domain of lifnim mi-shurat ha-din. In one sense, this behavior is the opposite of din, since it cannot establish legal rules or normative conduct. And yet, it is closely tied to din; the editors assume that R. Hiyya is aware of the exemption for expert bankers, and that his behavior is constructed in relation
to that rule (he acts 'within the line of the law'), even if his actions do not conform to the editors' expectations.

The citation of the midrash in this broader context of the sugya suggests that, for the editors, din and lifnim mi-shurat ha-din are connected terms because they each describe a type of decision-making or judgment. Din describes the normative activity of Unit 1, which generates, defines and clarifies rabbinic legal obligations. I have referred to this activity previously as rule-based judgment. This is the model of decision-making that is appropriate to the rabbinic courtroom and other formal legislative contexts. Lifnim mi-shurat ha-din describes the activity of Unit 2, in which individual rabbis make decisions in the course of their everyday lives. Such decisions are deeply informed by rabbinic law, but they may also be influenced by personal preferences or contextual factors. While never transgressive, these decisions are also not normative; they do not instantiate new rules or standards of rabbinic conduct. I have referred to this type of decision-making previously as discretionary judgment. This is a model of rabbinic decision-making that is inappropriate in the courtroom or any formal legislative body, but can be exercised outside of a rabbi’s formal capacity as judge, in the course of his everyday life.

If Unit 1 illustrates the activity of din, and Unit 2 illustrates the activity of lifnim mi-shurat ha-din, the citation of the midrashic tradition in Unit 3 clarifies the relationship between the two. Functionally, the inclusion of this source plays a similar role within the sugya as did the labeling of the narrative about Rav Pappa as 'different' (שאני) in Ber. 45b. It communicates to the reader that while there are multiple models of judgment that a rabbi might employ, only decisions that are clearly based on din, or rule-based judgment, are normative. In the context of the sugya, the rhetorical opposition of din and lifnim mi-shurat ha-din in the midrash reinforces the idea that each model of judgment is appropriate to different contexts and has a different effect on the broader community. Decisions that are made on the basis of discretionary judgment are personal; they cannot
instantiate new legal rules or standards of conduct. By way of contrast, although decisions made on the basis of rule-based judgment are made by an individual, their effect is communal; they reinforce, modify or instantiate standards that become binding upon others.

I have explained the editors' decision to label R. Hiyya's conduct as *lifnim mi-shurat ha-din* on the basis of my proposed discretionary judgment model, but it should be noted that, in this case, both the supererogation model and the waiver of rights model also offer satisfactory explanations. If R. Hiyya is under no obligation to compensate his client, but decides to repay her anyway, one could easily argue that he is motivated by generosity rather than duty, and that his actions are therefore supererogatory. Similarly, the sugya clearly establishes that the general rule requires bankers to repay clients for their mistakes, but that expert bankers are exempt from this obligation. One might therefore argue that when R. Hiyya decides to compensate his client, he is waiving a special privilege or right under the law that derives from his status as an expert bankers, choosing instead to follow the general rule. Although both models have strong explanatory power in this case, I argue that the the discretionary judgment model I have proposed offers an equally compelling account. The primary difference is that, unlike the two dominant models, the discretionary judgment model does not offer any explanation for why R. Hiyya decides to compensate his client.

As noted previously, the supererogation and the waiver of rights model are often presented as oppositional; the former claims to offer an ethical account, while the latter offers a legal explanation. In practice, however, these models have more in common than it might appear. Both assume that the label *lifnim mi-shurat ha-din* explains the motivation for a rabbi's actions, and both typically assume that this motivation is an ethical or pious one, even if proponents of the waiver of rights model argue that this motivation is expressed through decidedly legal actions. As a result, both models also
assume that lifnim mi-shurat ha-din is used to label positive or praiseworthy behavior. As I have argued throughout this chapter, however, these assumptions are not textually warranted. Of all of the sugyot examined thus far, these models are best able to account for why R. Hiyya's behavior is labeled as lifnim mi-shurat ha-din in BK 99b-100a. And yet, it remains notable that neither the legal narrative itself nor the editors' analysis of it offers a clear explanation of why R. Hiyya chooses to compensate his client, and at no point do the editors explicitly indicate that they view his behavior as praiseworthy. The explanation that R. Hiyya was motivated by generosity or piety to supersede his legal obligation and/or to waive his exemption under the law and repay his client makes sense. There is, however, no textual reason to prefer such an account over other possible explanations, including the more self-interested possibility that R. Hiyya decided to compensate his client in order to maintain a good reputation for his business.

It is precisely because the sugya offers no textual basis upon which to adjudicate between these and other possible interpretations that I argue that the model of discretionary judgment is preferable to either of the two dominant models. The model of lifnim mi-shurat ha-din as discretionary judgment assumes that it is a descriptive term that categorizes the type of judgment employed by the rabbi in question. In so doing, it also classifies the normative legal impact of his actions (or lack thereof). It does not, however, offer an explanation of why that rabbi chose to exercise his discretionary judgment, nor does it assume his actions should be assessed either positively or negatively. As a result, it is able to account for a wider range of editorial responses to these narratives. As we shall see in the next chapter, the editors may sometimes respond to cases of rabbis acting lifnim mi-shurat ha-din with implicit praise, but at times, they also respond with criticism.

Conclusions
In this chapter, I hope to have accomplished three things. First, my analysis of Ber. 45b and Ket. 97a has established the limits of both the supererogation model and the waiver of rights model to account for the entire corpus of Talmudic sugyot that employ the language of *lifnim mi-shurat ha-din*. Second, having demonstrated that another model is needed, my analysis has illustrated the explanatory power of the model of *lifnim mi-shurat ha-din* as discretionary judgment. I have argued that this model succeeds where other models fail because it treats *lifnim mi-shurat ha-din* as a descriptive term, rather than as an evaluative term. This label indicates that the rabbi in question based his actions on discretionary judgment, but it does not explain why he chose to do so, nor does it evaluate whether or not that choice was a good one. Third, my analysis of B.K. 99b-100a has shown that, even in those cases where the supererogation and waiver of rights models do offer convincing accounts of the evidence, the discretionary judgment model has similar explanatory power. In the next chapter, I demonstrate another strength of the discretionary judgment model: by highlighting the way in which these sugyot center on questions of rabbinic decision-making, it is able to explain why such narratives sometimes provoke editorial anxiety.
Chapter 4

The Risks and Rewards of Discretionary Judgment

In the preceding chapter, I argued that the editors deploy the phrase *lifnim mi-shurat ha-din* in order to both explain and legally contain narratives that depict rabbis deviating from expected norms of rabbinic behavior. While these cases of unusual or unexpected rabbinic behavior are never depicted as transgressions, they present a problem for the Talmudic editors, who seek to extract a coherent and unified vision of rabbinic law from their inherited sources. The editors must therefore find a way to resolve discrepancies between narratives of rabbinic behavior and stated rabbinic norms. They accomplish this by stating that when rabbinic behavior does not conform to normative rules and standards, it is because the rabbi(s) in question acted on the basis of their discretionary judgment. The particularities of the situation or case they faced required an unusual response. As a result, no general rule or principle can be extracted from their actions. When rabbis act *lifnim mi-shurat ha-din*, their behavior must be interpreted through a different hermeneutic and legal paradigm.

Acknowledging that rabbis do not always engage in rule-based judgment solves the initial problems presented by these narratives, but it also activates certain anxieties. In this chapter, I explore the source of these anxieties and their articulation through an analysis of the two remaining sugyot that characterize rabbis as acting *lifnim mi-shurat ha-din*. Both passages are from Bava Metzi'a, but they highlight very different concerns. The first passage, from B.M. 24b, reveals editorial anxieties about the ability of rule-based judgments to respond to the full range and complexity of human experience. If the application of the relevant rule to a given case would yield an undesirable outcome, what does this signal about the rule itself? Should the rabbi modify the rule in question, or treat it as entrenched?

While the editorial activity in B.M. 24b highlights the limitations of rule-based judgment, their activity in the second passage, B.M 30b, reveals a conflicted stance on the rabbinic decision to engage in discretionary judgment. The majority of the passage centers on
a case of discretionary judgment gone awry, highlighting anxieties about rabbinic fallibility. When the exercise of discretionary judgment is unsuccessful, the rabbi in question not only fails to achieve a good outcome, but he makes a mockery of the rabbinic enterprise. Given the risk of error, should a rabbi still engage in discretionary judgment?

In this chapter, I present B.M. 24b and 30b as sites for exploring how the editors assess the risks and rewards associated with both models of judgment. I argue that the editors present rule-based judgment and discretionary judgment as complementary approaches to decision-making that are appropriate to different contexts. While the ideal sage is able to engage in each of these modalities, the editors caution that each also has the potential to be destructive when exercised inappropriately.

*Bava Metzi’a 24b*

In the sugyot examined in the previous chapter, the Talmudic editors sought to resolve a series of textual problems generated by discrepancies between the sources they inherited, as well as by their core hermeneutic assumptions. They deployed the label *lifnim mi-shurat ha-din* as a way of resolving these problems by reclassifying the legal significance and scope of specific rabbinic actions. A similar type of editorial activity can be observed in B.M. 24b. In the passage under discussion, the editors explore two narratives in which Mar Shmuel and Rav Nachman present contradictory rulings on the same hypothetical case. As in the cases previously considered, they resolve this apparent conflict by labeling the actions of the first rabbi (Mar Shmuel) as *lifnim mi-shurat ha-din* while accepting the ruling of the second rabbi (Rav Nachman).  

Despite these similarities, the passage from B.M. 24b differs notably from the sugyot analyzed in Chapter Three. In the passages considered thus far, the editors' engagement with

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163. It is worth noting that, in each case, the editors present the action or decision that they will qualify as *lifnim mi-shurat ha-din* first, before presenting the action or decision they will uphold as instantiating the legal rule. This follows the basic structure of argumentation in other sugyot, in which the opinions or proofs that will be rejected are presented prior to the opinion, proof or decision that the editors accept and promote.
legal questions has been prompted primarily by literary features in their sources, such as narrative ambiguities, and by conflicts between those sources. In both B.M. 24b and B.M. 30b, however, the editors not only legally categorize the behaviors they describe as lifnim mi-shurat ha-din, but they also evaluate the merits of such conduct. Furthermore, in previous passages the editors use this label to contain surprising or problematic rabbinic actions, often promoting rule-based judgment as the correct course of action. In B.M. 24b, however, they express the expected surprise over Mar Shmuel's decision, which they label as lifnim mi-shurat ha-din, but they also express surprise over Rav Nachman's decision, which they accept as the formally correct rule. This shift suggests that, in at least some cases, the editors may view discretionary judgment as preferable to rule-based judgment. In addition to deploying the label of lifnim mi-shurat ha-din as a solution to a problem, the editors use it to construct an alternative—and potentially positive—approach to rabbinic decision-making, even if such an approach is still precluded from establishing new laws or normative obligations.

Structurally, B.M. 24b juxtaposes two narratives in which different disciples ask their respective teachers about the same hypothetical legal case about a lost purse. I begin by presenting the sugya in its entirety below, followed by a discussion of the relevant legal principles that shape the ensuing analysis. Once the legal issues have been clarified, I examine the interactions and decisions presented in each narrative [A1-E1 and A2-E2]. I then consider the editorial response to each source, beginning with their critique of Rav Nachman's ruling, the position they uphold as the legally correct one [J-K]. I argue that the editors' response highlights the fact that rule-based judgment is unable to satisfactorily address the hypothetical case of the lost purse. Having interrogated the critique the editors direct toward relying on rule-based judgments in this case, I then examine how the editors respond to Mar Shmuel's ruling, which they label as lifnim mi-shurat ha-din. Through their integration of yet a third narrative about Mar Shmuel's father, I argue that the editors situate Mar Shmuel's conclusion that the purse must be returned as the best available response to the case at hand.
Ironically, however, they accomplish this by reducing the status of Mar Shmuel's statement from a binding obligation to one (preferred) course of action among multiple (permissible) options.

Instantiating a Paradigm of Judgment

[A1] Rav Yehuda was following after Mar Shmuel in the grain-pounder's market.
[B1] He [Rav Yehuda] said to him [Mar Shmuel]: “If a person found a purse here, what is the ruling?”
[C1] He [Mar Shmuel] replied: “It is his [it belongs to the finder].”
[D1] “And if a Jew came and showed him an identifying mark [thereby proving the purse was his], what is the ruling?”
[E1] He replied, “He is obligated to return it.”
[F] Both?!
[G] Lifnim mi-shurat ha-din
[H] Mar Shmuel reasons thus [because the father of [Mar] Shmuel had once found donkeys in the desert and had returned them to their owner after twelve months had already passed.
[I] [The father of Mar Shmuel acted] lifnim mi-shurat ha-din.

[Lifnim mi-shurat ha-din 164]

164. There are several manuscript variations that significantly impact the interpretation of this passage. My decision to read lines F and G as part of the editorial commentary, rather than as part of the dialogue between Mar Shmuel and Rav Yehuda, is based on the manuscript evidence. I discuss this decision in greater detail below. The Hebrew text presented here is the one preserved in Hamburg 165.
Rava was following after Rav Nachman in the leatherworker’s market—and there are those who say [they were in] the marketplace of the rabbis.

He said to him: “If a person found a purse here, what is the ruling?”

He said to him, “It is his.”

“And if a Jew came and showed him an identifying mark, what is the ruling?”

He said to him, “It is his.”

Wouldn’t he stand and shout in protest?

Such behavior is like one who protests against his house falling, or his ship sinking at sea.

As the above presentation of the paired narratives about Mar Shmuel and Rav Nachman shows, the exchange between each disciple and his master is almost identical until line E. Rav Yehuda and Rava each ask the same question about a purse found in a Gentile marketplace,165 and they initially receive the same reply: the purse belongs to the finder. Both students then inquire if the law would be different were a Jew to appear who was able to show an identifying mark on the purse and prove that it was originally his. This time, they receive contradictory answers. Mar Shmuel says that in this case the finder must return the purse to its original owner, whereas Rav Nachman maintains that the finder can keep it.

As in the cases considered in Chapter Three, certain ambiguities within their sources prompt the editors to resolve this contradiction by labeling Mar Shmuel's decision as *lifnim mi-shurat ha-din*. In the passage under discussion, however, these ambiguities are not only literary but also legal in nature. Existing Talmudic precedents suggest that the hypothetical case of the lost purse might be resolved in two different ways. In order to understand why Mar Shmuel and Rav Nachman rule differently on this case, therefore, it will be necessary to identify some basic precepts that govern the discussion of lost property cases in Bava Metzi'a, as well as to elucidate two legal principles that apply directly to the hypothetical case of the lost purse.

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165. Although the Bavli records a variant tradition that they were in the marketplace of the rabbis, the tradition placing them in the leatherworker’s market is likely the original one. If the purse had been lost in a majority Jewish space (i.e. the marketplace of the rabbis), the legal reasoning in the case would change significantly. In such a scenario, both Mar Shmuel and Rav Nachman should agree that the finder would be obligated to return the purse if a fellow Jew came and indicated a *siman*, proving that the item was his. See my discussion of the relevant legal principles below.
Prior to this sugya, the Talmud has established the basic assumption that a person who find a lost item can claim it only if it has been abandoned by its original owner, thereby rendering it ownerless. The Talmud uses the term ye'ush (despair) to describe this process, in which the owner realizes that the item has been lost, despairs over his ability to recover it, and therefore abandons it. The finder can only take possession of the item in question if he has reason to believe that ye'ush has occurred; if not, he must attempt to locate the original owner and return the object by announcing what he has found. This approach to lost property quickly encounters a fundamental epistemological problem: how is the finder supposed to determine whether or not the owner has despaired over reclaiming the item in question? Without tracking down the original owner, is there any way for the finder to reliably determine if the item in question has been abandoned? As Chaya Halberstam notes, the Talmud addresses this problem by elucidating objective criteria that the finder can use to assess the status of the item in question. Two of these criteria are especially pertinent to our sugya from B.M. 24b. First, the Talmud distinguishes between generic items and unique items. If the item is generic and cannot be distinguished from other similar items, then the finder can safely assume that the owner has despaired over recovering his loss.

The Talmud's rationale for establishing ye'ush in the case of generic items relies on a commonsense observation. Imagine that woman purchases a loaf of bread from a bakery that produces dozens of similar loaves, each of which is interchangeable and indistinguishable from one another. On her way home from the bakery, she drops the loaf of bread. When she realizes her loss, she decides to retrace her route in the hopes of recovering the item. As she does so, she sees a man picking up a loaf of bread from the side of the road. While she may believe this is the same loaf that she initially dropped, she would have no method of proving this to be the case, since the baker's loaves are indistinguishable from one another. As a

166. B.M. 21a-22b.
168. See m. BM 2:1 and B.M. 21a-22b.
result, she cannot compel the man to give the loaf to her. A similar problem of proof holds true for any generic item (i.e. any item that cannot be distinguished from other similar items), leading the Talmud to conclude that a person may keep any such items which he or she finds.

The same rule does not apply, however, to items which have some type of distinguishing mark, or siman. Imagine that the woman had wrapped her loaf of bread in paper and tied it with a red ribbon, making it identifiably different from the other loaves at the bakery. If she seems the man pick up a loaf of bread that is wrapped in paper and tied with red ribbon, she has a firm basis to claim that the loaf he found was hers, and the man must return the item to her. The Talmud therefore assumes that when a person loses an item with a siman, he will not despair of recovering it. The logic is similar to that of stitching one's initials into an item of clothing or writing a child's name on his lunchbox. If lost, there is a much greater possibility that such items will be recovered, especially if the item is lost in an area where social norms dictate that finders should make an effort to return lost items to their owners. As a result, the owner does not abandon the item in question, and it cannot be acquired by the finder.

Note that, in order for this process to work, the item must be lost in an area where prevailing social norms dictate that finders make an effort to return lost items that have a siman. This leads to the second set of criteria that have direct bearing on our sugya: the question of where the item was lost, which the Talmud generally assumes is the same location as where the item is found, unless there are clear indications to the contrary (e.g. the item was washed ashore by the tide). This is significant because the social customs that prevail in the area in which the item was found may have direct bearing on whether or not the owner experiences ye'ush (despair) and abandons his property. If the item bears a siman and it was lost in a Jewish area, the owner will not despair, because he assumes that he will be able to reclaim as soon as it is found and the finder makes an announcement. But what if the item was lost in a majority Gentile area, where the inhabitants cannot be expected to follow the
rabbinic regulations on lost property? In such a case, the Talmud assumes that the owner will despair of regaining the item. Since a Gentile cannot be expected to announce the find, he has no hope of reclaiming the item and he will abandon it. Since the item is now ownerless, the finder can keep it. In such a case, it is legally irrelevant whether or not the item in question is in fact found by a Jew or by a non-Jew because the owner can still be presumed to have abandoned it. Even if a Jew finds the item, he can take it.

Having established these fundamental legal principles, we are now in a position to analyze the two parallel narratives which structure our sugya. Both narratives begin with a disciple following his master through a Gentile marketplace. Rav Yehudah follows Mar Shmuel through the grain-pounder's market while Rava follows Rav Nachman through the leatherworker's market [A1/A2]. Both disciples then ask their teachers, "If a person found a purse here, what is the ruling?" [B1/B2].169 Both rabbis reply that the purse belongs to the finder [C1/C2]. At this point, the only detail that has been specified about the purse is the location in which it was found, namely a Gentile marketplace. It is therefore logical to conclude that both rabbis base their positions on the same principle: items found in a Gentile marketplace are considered abandoned and can be acquired by the finder.

The two disciples then add an addendum to the case. What if a fellow Jew came and showed the finder a siman, identifying the lost purse as his own? Is the finder still permitted to keep the purse, or must he return it to the claimant? [D1/D2] Here, the replies of the two rabbis differ. Mar Shmuel replies that the finder is legally obligated to return the purse [E1], while Rav Nachman says that the finder is legally permitted to keep the purse [E2].170

Why do Mar Shmuel and Rav Nachman agree on the first case, but disagree once the information that the purse has a siman is added? Their disagreement may rest on legal

169. The discussions which precede this sugya make it clear that there are two possible rulings: either the purse belongs to the finder, or he must attempt to locate the original owner and return the item by announcing the find.
170. It is worth noting at this juncture that, while these two positions conflict, Rav Nachman's ruling that the finder is legally permitted to keep the purse does not preclude him from returning it of his own volition; it does, however, establish keeping the purse as the standard course of action. From this viewpoint, if the finder chooses to return the purse, he would need to be prompted to do so by something other than a legal obligation.
ambiguities that emerge from the second iteration of the case. On the one hand, the principle of the siman might be invoked. When the owner realizes he has lost his purse, he will not despair of recovering it because it has an identifying mark. Instead, he will wait for it to be found and announced, so that he can claim it. On this logic, the purse has not been abandoned, and the finder cannot keep it; he must return it to the claimant. On the other hand, the principle of the Gentile marketplace might be invoked. When the owner realizes he has lost his purse in a majority Gentile area, he will assume that the purse will be found by a non-Jew, who is not bound by the rabbinic rules of lost property and who will therefore be unlikely to announce the find. In this case, the siman will not help the original owner reclaim his purse; he will assume the item is lost to him forever, and abandon it. Since the purse is now ownerless, the finder can keep it. The difference in Mar Shmuel and Rav Nachman's rulings can be attributed to a different assessment of which factor determines the case. Mar Shmuel sees the presence of the siman as the determining factor; the purse was never abandoned and therefore it must be returned now that an owner has been identified. Rav Nachman views the Gentile marketplace as the determining factor; since the owner can be assumed to have abandoned the purse, the fact that he has now chanced upon it does not change the fact that the purse was ownerless when it was found, making it the property of the finder.

The editors, who seek halakhic unity and conformity among their sources, reframe this disagreement between Mar Shmuel and Rav Nachman. The relevant question is not which factor determines the case, the Gentile marketplace or the siman, but rather the fact that presumption of ye'ush (the despair which leads to abandonment) has not been borne out in this particular case. The legal system assumes that a person who loses an item in a majority Gentile space will experience despair (ye'ush) and abandon his property, but the evidence strongly indicates that this owner has not done so. The dispute between Mar Shmuel and Rav Nachman, according to the editors' reframing, is over how to respond to a case in which the
Law asserts that *ye'ush* has occurred, despite evidence to the contrary. Rav Nachman claims that the legal rule still applies. From the standpoint of the law, as soon as the item was lost in the Gentile marketplace it is considered to have been abandoned, regardless of whether or not the owner actually gave up hope of recovering it. Mar Shmuel, on the other hand, acknowledges that although the finder still technically owns the item, there is a disconnect between the constructed legal world and the world of lived experience. Rather than woodenly applying the relevant legal rule, the finder should respond to the hopes and expectations of the claimant standing before him and return the purse.

Legally, the editors support the conclusion of Rav Nachman: the finder is not obligated to return the purse. And yet, they also emphasize the limitations of relying on rule-based judgment in this situation. Their interrogation of Rav Nachman's ruling, combined with their response to the narrative about Mar Shmuel, suggests that although the finder retains his legal rights to the purse, he should ideally return the lost item to its original owner. In tracing the editors' construction of *lifnim mi-shurat ha-din* as the *ideal* course of action, I begin by examining their response to Rav Nachman's ruling. Although this narrative is presented second, this portion of the editors' commentary highlights the gap between the legal fiction of *ye'ush* and the actual experience of despair, a gap which I argue structures their activity throughout the sugya. I then explore how the editors' response to Mar Shmuel communicates the idea that it would be preferable to act *lifnim mi-shurat ha-din* in this case.

**Legal Fictions, Lived Experiences and the Force of Law**

Although the editors present Rav Nachman's ruling as the legally correct one, they immediately question his conclusion that the finder may keep the purse, asking "wouldn't he [the original owner] stand and shout in protest?" [J]. In so doing, the editors acknowledge that the formal rules which govern rabbinic property law do not always correspond to how individuals understand their own relationship to their property and how they experience its
loss. Regardless of what the law assumes about the process of *ye'ush*, when the owner in question sees a Jew carrying his purse, he may think to himself, "What luck! A Jew has recovered my purse. When I show him my *siman*, he will surely give it back to me." If the finder resists, the original owner may become upset and protest.

Chaya Halberstam argues that this gap between the individual experience of *ye'ush* as the despair that leads to abandonment and the legal fiction of *ye'ush* as abandonment corresponds to different views of ownership put forth in the Hebrew Bible and in rabbinic literature. She claims that the biblical view of property "assumes a stable relationship between an original owner and his or her property in the absence of any documentation or other evidence—affirming and relying upon people's lived realities of the relationships between themselves and their possessions." 171 In other words, the Bible suggests that property is, in some sense, an extension of the person who owns it. My shoe is still my shoe, whether it is on my foot, in my closet or accidentally dropped by the side of the road. It only ceases to be my shoe once I intentionally discard it or give it away. Notably, this view of property is formulated from the perspective of the owner. I know which shoes are mine, and other people are expected to be aware of this relationship and to respect my property as such. On this view, lost items are generally assumed to have been displaced or to have otherwise become momentarily separated from their owners, not abandoned by them.

As noted previously, however, the rabbinic view of property does not begin from the perspective of the owner, but from that of the finder. Having stumbled across a purse in the marketplace, one cannot reasonably expect the finder to know whose item it is. And yet, the Torah (as interpreted by the rabbis) also mandates that the finder cannot simply ignore the item. 172 He has an obligation to return it to its owner, if it still has one. He must therefore determine whether or not the item in question has been abandoned or not. In order to do so, he must rely on whatever information about the item can be readily observed, such as

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172. See the interpretation of Deut. 22:3 and resultant legal conclusion in B.M. 22b.
whether or not it has a siman and the location in which it was found.

While the rabbinic idea of ye'ush is based on an understanding of lived experience—people do, in fact, give up hope of recovering lost items under certain circumstances—it is not dependent on the subjective experiences of each individual. Instead, it relies on the construction of what Mira Balberg refers to as a "standardized subjectivity." She observes that, in their discussions of bodily purity,

the rabbis by no means maintain that the question of what parts of the body are susceptible to impurity is given to the discretion of every single individual and is dependent upon each individual's attitude toward his or her body. Rather, the rabbis put forth principles that accord with what they consider to be reasonable states of mind and mental dispositions that are common (in their view) to most people, and they apply these principles to all persons, whether their individual states of mind and attitudes are commensurate with the rabbinic standard or not. Obviously, there could be individuals whose approaches towards their own body parts are different from the ones assumed by the rabbis...174

The same dynamic that Balberg observes in rabbinic sources on bodily purity can be observed in rabbinic discussions of lost property as well. In both cases, subjective experience is central to the discussion, but there may be gaps between the rabbinic projection of what the 'standardized' subject will experience and the subjective experience of any given individual. These gaps create a problem, which the editors highlight in their response to Rav Nachman.

No matter how carefully the rabbinic rules of lost property are formulated, a case will inevitably arise where applying the rule as written will not achieve the justifications of that rule.175 Such gaps between the rule and the case, or between the rule and lived experience, raise the question: if Rav Nachman's ruling is based on the assumption that owner will abandon any item lost in a Gentile marketplace, an assumption which is undermined by the appearance of the owner demanding his purse, should the rule still apply? Rav Nachman's response indicates that it should. Even though the rule applies imperfectly to the case at hand, it applies nonetheless. Notably, the editors affirm this basic intuition, even as they highlight the limitations of Rav Nachman's conclusion. They never suggest that the rule in question

174. Ibid.
175. See Schauer's discussion of the open texture of rules in Playing by the Rules, 26-37, 54 and 78, and my own discussion in Chapter One.
ought to be revised, despite the fact that the owner may "stand and shout in protest" [K]. His objections merely highlight limitations that are inherent to any rule-based system. As discussed in Chapter One, while the problems that result from the open texture of rules can be addressed on a case-by-case basis, the open texture itself is part of the nature of all rules and cannot be overcome by revising any particular rule. Rather, one must accept that, in some cases, strict adherence to the rule will yield an undesirable outcome.

The editors communicate this idea by presenting the case in B.M. 24b as analogous to a force of nature or an 'act of God.' They liken the person who protests Rav Nachman's ruling to "one who protests against his house falling, or his ship sinking at sea." What do the editors hope to communicate by this analogy? I argue that, while the editors make several arguments for rule-based judgment in the various sugyot considered in this dissertation, here they acknowledge the limitations of such an approach. There are some cases that the law will only be able to resolve imperfectly. On such occasions, it is as fruitless to protest against the law as it is to protest against the winds that sink one's ship. While a person may experience the loss as calamitous, it is an unavoidable consequence of a necessary system. A ship cannot sail at all without winds, even if those winds may sometimes become dangerous; so too the law could not function without relying on rules, even if in a small set of cases that reliance will yield unintended or undesirable outcomes. Furthermore, by drawing an analogy to forces of nature, the editors highlight the fact that in such cases there is no entity which can be held legally responsible in court. Although the original owner may be upset at the circumstances, he has no legal recourse. No active agent caused the destruction, so there is no one to sue for damages. It is not the finder who is responsible for his loss nor, in the view of the editors, is it the finder who prevents the return of the purse to him. It is the law that dictates that the finder now owns the purse, and protest against the law as such is futile.

The editors' recognition of the limitations of rule-based judgment promotes the view that different types of decision-making may be more appropriate to different contexts or
cases. In the case of B.M. 24b and the lost purse, the editors suggest that the undesirable outcomes of rule-based judgment might be mitigated by engaging in discretionary judgment instead. In so doing, they offer an implicit critique of exclusive reliance on rule-based judgment. In order to trace how and why they promote discretionary judgment in this particular case, let us now examine the editors' response to Mar Shmuel's ruling in the first half of the sugya.

Constructing an Alternative Paradigm of Judgment

As noted previously, the editors resolve the conflict between their two narrative sources by promoting Rav Nachman's legal position and by labeling Mar Shmuel's ruling as lifnim mi-shurat ha-din. In addition to using this label to prevent Mar Shmuel's statement from establishing a legal obligation, as we have seen them do elsewhere, the editors also draw on a third narrative to demonstrate both how and why a rabbi might act lifnim mi-shurat ha-din. This is the first and only time the editors actively represent an case in which a rabbi acts lifnim mi-shurat ha-din as paradigmatic of the broader approach to decision-making that I call discretionary judgment.

The editors' commentary begins by responding to an internal tension between Mar Shmuel's two rulings. If the finder can keep the purse in the first iteration of the case, why not in the second iteration? I present the editors' reaction and comments to Mar Shmuel's decisions below.

[F] Both?!

[G] Lifnim mi-shurat ha-din.

[H] [Mar Shmuel reasons thus] because the father of [Mar] Shmuel once found donkeys in the desert and returned them to their owner after twelve months had already passed.

[I] [The father of Mar Shmuel acted] lifnim mi-shurat ha-din.

Notably, the editors do not resolve the tension between Mar Shmuel's two statements by pointing out that, in the second iteration of the case, the purse is specified as having a siman.
For the editors, such a resolution is of limited utility, since it does not resolve contradiction between Mar Shmuel's ruling and that of Rav Nachman. Moreover, as I suggested above, the editors view the appearance of the owner to claim his purse as the crucial distinction between the two versions of the case, not the presence of the siman. Ignoring the legal language of obligation (חייב) in Mar Shmuel's response, the editors claim that his 'ruling' here is no ruling at all. Instead, Mar Shmuel relies on his discretionary judgment to determine the best course of action in this particular case. Like all conclusions based on discretionary judgment, his response is localized, responsive and context-specific. It is not merely the presence of the siman on the purse, but rather the appearance of the owner to claim the purse, that prompts Mar Shmuel to conclude that the purse should be returned. While his decision establishes no legal obligation for others to do the same, in this case, the editors suggest that the conclusion Mar Shmuel reaches on the basis of his discretionary judgment is preferable to the conclusion Rav Nachman reaches by employing rule-based judgment.

The editors further suggest that Mar Shmuel's decision was influenced by the example of his father, who also exercised discretionary judgment in a lost property case. According to the narrative presented by the editors, Mar Shmuel's father once returned lost donkeys to their original owner despite the fact that he was not legally obligated to do so. Although his legal obligation concerning the donkeys is not specified in the narrative, the text explicitly mentions that he returned the donkeys "after twelve months had passed," a period of time which the Talmud later specifies as the length of time a finder must "keep an animal which can earn its keep,"

176. This interpretation is reflected in the writings of R. Hananel (Hananel b. Hushiel, c. 990-c. 1055) and the Ritva (Yom Tov b. Avraham Asevilli, 1250-1330), both of whom interpret Mar Shmuel as establishing a legal option, despite the fact that he uses the language of obligation (חייב). When Mar Shmuel is asked if one is required to return a lost purse found in the market place, R. Hananel glosses his response to read “If he wants to act lifnim mi-shurat ha-din, he returns it”; the original response simply reads “he returns it – lifnim mi-shurat ha-din.” This likely reflects disagreements by later commentators and poskim over whether lifnim mi-shurat ha-din behavior is fully voluntary, or whether it can be compelled by a court. (For a discussion of the various legal positions on this issue, see Shilo, "On One Aspect of Law and Morals", pp. 366ff). On the level of the amoraic source itself, however, Mar Shmuel's use of explicit legal language indicates his view that such conduct is obligatory, not merely optional.

177. B.M. 28b.
twelve months passing communicates two core pieces of legal data. First, when Mar Shmuel's father initially found the donkeys in the desert, he was obligated to try to return them to their original owner. Second, the statute of limitations for the owner to reclaim the donkeys had expired. Mar Shmuel was unable to locate the owner within the requisite amount of time outlined by rabbinic law, making him their new rightful owner.\footnote{178}

Although Mar Shmuel's father had an obligation to try to return the donkeys, the fact that this obligation only pertained for a set period of time suggests an attempt by the authors of these laws to balance the burdens that losing property places on both the owner and the finder.\footnote{179} On the one hand, to the extent feasible, rabbinic law tries to make it possible for the owner to regain his property, thereby mitigating the prospect of financial loss. On the other hand, the task of locating the owner and returning the property may place undue burdens upon the finder, who cannot be expected to feed and care for the lost donkeys indefinitely.\footnote{180} As a result, the law dictates a course of action that balances between these two concerns: Mar Shmuel's father is supposed to follow a set procedure for announcing the find. If the owner does not turn up to claim the donkeys within a specified period of time, he can keep them.

Just as in the case of the lost purse, however, these laws rely on certain assumptions about both the original owner and the finder that may not correspond perfectly to lived experience. While Mar Shmuel's father is under no obligation to return the donkeys when the owner appears after the statute of limitations has passed, it is his prerogative to decide that this would be the best course of action in this particular case. The reasoning which leads him

\footnote{178. Notably, B.M. 28b specifies that the finder must keep the animal itself for twelve months, after which time he should sell the animal and set aside the money for the original owner, if he can ever be located. As a result, it is not clear if the action here described as \textit{lifnim mi-shurat ha-din} consists of returning the donkeys after a period of twelve months, instead of keeping them, or simply the fact that he \textit{kept} the donkeys after twelve months, rather than selling them. The parallels to the case of Mar Shmuel and the lost purse suggest that it is the former. Other passages suggest that the finder is obligated to announce found items over the course of three pilgrimage festivals, after which time he has fulfilled his obligation. Since each festival occurs over the course of a year, this further suggests that ownership of the lost items (or, in this case, livestock) might be understood to revert to the finder after a one year period (cf. B.M. 28a).

179. This attempt to balance the various needs and burdens of the finder and the owner can be observed throughout this chapter of Bava Metzi'\'a.

180. For a more complete discussion of this rationale, see B.M. 28b.}
to this conclusion is not rule-based, since the rules state that he can keep the donkeys, but context-driven. The father of Mar Shmuel elects to return the donkeys *lifnim mi-shurat ha-din*.

The decision of Mar Shmuel's father differs in one important respect from the case of Mar Shmuel himself, and from the other cases of rabbis acting *lifnim mi-shurat ha-din*. Neither his behavior nor the narrative source which records it is ever presented as problematic. The editors never indicate that his actions conflict with any stated norms, rulings or other narratives of rabbinic behavior. Their decision to label his behavior as *lifnim mi-shurat ha-din* cannot, therefore, be understood as a way of resolving the hermeneutic or legal challenges presented by the sources they inherit. Instead, I argue that the editors present Mar Shmuel's father as a paradigmatic case that illustrates the types of actions that will ideally result from engaging in discretionary judgment.\(^\text{181}\)

It should be noted that the discussion in B.M. 24b juxtaposes two different types of data. First, the passage juxtaposes two different models of decision-making: discretionary judgment and rule-based judgment. Second, it juxtaposes two different actions or decisions: the ruling of Mar Shmuel and the ruling of Rav Nachman. Although those decisions present the *results* of engaging in discretionary judgment and rule-based judgment, respectively, they should not be conflated with the decision-making process itself. Similarly, in this passage the editors present discretionary judgment as a viable alternative to rule-based decision-making. They also appear to prefer the conclusion that is reached through discretionary judgment in this case. Although they uphold the legal validity of Rav Nachman's ruling, the editors subtly position Mar Shmuel's decision as the better course of action. This does not, however, mean that the editors think that discretionary judgment will always lead to a superior outcome. On

\(^{181}\) In a sense, we might say that the editors view Mar Shmuel's father as an exemplar, although in a very different sense than the self-conscious exemplars discussed in Chapter One. Although they present Mar Shmuel as having been influenced by his father's actions, he does not imitate those actions directly but rather applies the same approach to a new context. For a helpful discussion of the differences between imitation and influence in the context of exemplar narratives, see Cheryl Cottine, "Role Modeling in an Early Confucian Context," *The Journal of Values Inquiry* (forthcoming).
the contrary, the next passage suggests that when discretionary judgment is poorly executed, it makes a mockery of the sage.

_Bava Metzi'a 30b_

In B.M. 24b, we saw the editors interrogate the limitations of an exclusive reliance on rule-based judgments. In B.M. 30b, they examine the flip side of this coin and interrogate the risks of engaging in discretionary judgment, raising the concern that many rabbis may not have the capacity to engage in such judgments successfully. These concerns are illustrated by citing a narrative about R. Ishmael b. Yossi and his encounter with a man on the road. The encounter quickly devolves into farce, with R. Ishmael bearing the brunt of the joke. Here, the editors present R. Ishmael as trying to rely on discretionary judgment in a situation that called for rule-based decision-making, leading to multiple problems.

The editors' critique of R. Ishmael is softened by the continuation of the sugya. The editors go on to cite a teaching by R. Yochanan, which they interpret as a strident defense of discretionary judgment. Although the conclusion of the sugya presents both rule-based and discretionary judgment as necessary components of the rabbinic project, it also suggests that failing to employ the correct model of judgment can have problematic consequences. As a result, this passage foregrounds a central question that has been hovering in the background of all of these sugyot: if different judicial approaches are appropriate to different situations, how can a rabbi reliably determine which mode of judgment to employ?

_Bava Metzi'a 30b_ is a long and complex sugya, which can be subdivided into four primary textual units: a narrative about R. Ishmael b. Yossi, the editorial analysis of that narrative, a discussion of the midrashic tradition about _lifnim mi-shurat ha-din_, and an analysis of a teaching by R. Yochanan. Since the reader is already familiar with the midrashic tradition, and its citation does not fundamentally alter or influence my interpretation of this passage, I focus my attention on the narrative about R. Ishmael, the editors' commentary on
that narrative and the teaching of R. Yochanan. For the interested reader, I reproduce the text of midrashic tradition, and the brief editorial commentary on that tradition, in the footnotes.

Rabbi Ishmael's Encounter on the Road

Structurally, the opening of the sugya in B.M. 30b parallels our sugya from Chapter Three about R. Hyya and banking practices (B.K. 99b). It begins by establishing a general obligation—in this case, the requirement to assist others in loading or unloading their property—and by identifying a category of individuals who are exempt from that obligation. The editors then cite a narrative counterfactual which appears to challenge the general rule about loading and unloading, before resolving that challenge by labeling the actions of the rabbi in question as lifnim mi-shurat ha-din.

The discussion in B.M. 30b begins by establishing that a specific class of elder or communal leader, which it refers to as the zaken v'aino lefi kevodo, is exempt from the obligation to assist others with the loading or unloading of their property if they deem such actions to be personally undignified. Because this status features prominently in the narrative about R. Ishmael, it will be helpful to examine how the Talmud establishes the category. The discussion of the zaken v'aino lefi kevodo (hereafter zaken) begins by interrogating a baraita that interprets a verse from Deut. 22:1. The verse states that "You shall not watch your brother's oxen or sheep going astray and ignore them," but the baraita teaches that in three specific cases, a person may ignore them.

It was taught in a baraita: And ignore (Deut. 22:1)–sometimes you can ignore [wandering livestock], and other times you cannot ignore [them]. How so? If one is a cohen [priest] and it [the lost animal] is in a graveyard, or if one is an elder and it is inconsistent with his honor (zaken v'aino lefi kevodo), or if he is presently engaged in work that is

182. An area that a cohen, or priest, is generally prohibited from entering.

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more valuable than that of his neighbor. Concerning these cases, it is written, Ignore them.\(^{183}\)

Although this passage elucidates three different types of people who are permitted to ignore the wandering animal, only the discussion of the *zaken* is significant for our purposes, so I will address only that case here. The Talmud proceeds to interrogate the category of the *zaken*, and to establish the various legal exemptions that pertain to a person with this status. Notably, exemptions for the *zaken* work differently from those for the expert banker in B.K. 99b. When the editors establish the exemption for expert bankers, it is clear that it applies equally to all expert bankers. 'Expert banker' is constructed as an objective status, applied to certain individuals on the basis of their qualifications and unrelated to their subjective understanding of their own expertise. In the case of *zaken*, however, the nature of the exemption is entirely dependent upon the subjective experience of the elder in question, and may therefore vary widely.\(^{184}\) The *zaken* is only declared to be exempt from those actions which he himself perceives to be undignified.\(^{185}\) For example, one might assume on the basis of the *baraita* cited above that any *zaken* would be exempt from returning a lost animal, since it would be undignified for him to have to physically lead the livestock back to its owner. However, a teaching from Rabbah quickly establishes that this is not the case.

Rabbah said: If he hits it, he obligates himself with respect to it. Abbaye was sitting before Rabbah. He saw some [lost] goats standing still. He took a clod of dirt and threw it at them. He [Rabbah] said to him: You have obligated yourself concerning them. Get up and return them [to their owner].\(^{186}\)

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\(^{183}\) B.M. 30b.

\(^{184}\) It should be noted that although *zaken* literally means elder, in this case it seems to indicate that the person is a respected communal leader, rather than that they are advanced in age (although this may be true as well).

\(^{185}\) Although discussions elsewhere in the Bavli suggest that the honor or dignity due to the *zaken* is actually not his own honor, but the honor of the Torah, and therefore it is not the right of the *zaken* to subjectively decide to forgo his honor (*mochel al kevodo*) and do something which is beneath his dignity (cf. Kidd. 32b)

\(^{186}\) B.M. 30b.
In this passage, Rabbah articulates a general rule, which is then illustrated through the citation of a narrative about Abbaye. Although the narrative does not state so explicitly, its citation immediately following Rabbah's statement indicates that Abbaye is a *zaken*. As such, he is theoretically exempt from the obligation to return the lost goats to their owner. By throwing the clod of dirt at the goats in question, however, Abbaye demonstrates that he personally does not deem it to be undignified to physically engage with livestock. As a result, the potential exemption from returning lost livestock does not apply to him, and Rabbah orders him to get up and lead the lost goats back to their owner. As this brief narrative illustrates, the obligations of the *zaken* vary from individual to individual. Furthermore, these obligations are not determined solely by his subjective preferences, but also by the way in which those preference are made manifest to others through his conduct.

A similar logic pertains to the *zaken* who is asked to engage in another form of manual labor: the unloading and loading of property. While most people are obligated to assist others with this task, the *zaken* is generally assumed to be exempt, but this exemption only holds if the *zaken* would not typically load or unload his own possessions. Rava states that "in any situation where he would load and unload his own property, he must also load and unload that which belongs to somebody else" (נמי חבירו בשל וטוען פורק וטוען פורק וטוען פורק וטוען). Although Rava's statement concludes the explicit discussion of the exemptions pertaining to the *zaken* in B.M. 30b, the editors then cite a narrative which complicates the depiction of this status. The narrative recounts an interaction between R. Ishmael b. Yossi, who the editors later identify as a *zaken*, and an anonymous man on the road, who asks R. Ishmael b. Yossi for help picking up a bundle of sticks.

R. Ishmael's response to the man on the road is initially puzzling. He neither helps the man lift his bundle, as most people would be legally obligated to do, nor does he refuse the man's request by explaining his exemption as a *zaken*. Instead, he offers to purchase the sticks

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187. B.M. 30b.
from the man, thereby relieving him of the need to pick them up again in the first place.\textsuperscript{188}

While this may initially appear to be a generous offer, it is quickly revealed to be short-sighted when R. Ishmael leaves the sticks by the side of the road. Seeing that the sticks have been abandoned, the man takes them back and repeats his request to R. Ishmael to help him pick them up. What begins as a straightforward interaction quickly devolves into farce, as R. Ishmael repeatedly buys the bundle of sticks and declares them \textit{hefker} (ownerless), only to have the man on the road reclaim possession of them. In order to extricate himself from a trap of his own making, R. Ishmael resorts to questionable tactics, using his status as an educated rabbi to mislead the man into thinking he can no longer continue to reclaim the bundle. In the end, it is R. Ishmael who emerges from the interaction the worse for wear, while the man on the road gets paid for his bundle of sticks twice over.

In order to fully explore the dynamics of this passage, I present here the text of both the narrative [A] and the editorial commentary on it [B].

[A] R. Ishmael, son of R. Yossi, was walking on the road when he came upon a man who was carrying bundles of sticks. The man put them down, [B] and R. Ishmael picked them up. What begins as a straightforward interaction quickly devolves into farce, as R. Ishmael avoids declaring them as ownerless, only to have the man on the road reclaim possession of them. In order to extricate himself from a trap of his own making, R. Ishmael resorts to questionable tactics, using his status as an educated rabbi to mislead the man into thinking he can no longer continue to reclaim the bundle. In the end, it is R. Ishmael who emerges from the interaction the worse for wear, while the man on the road gets paid for his bundle of sticks twice over.

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\textsuperscript{188} Many scholars have pointed to B.M. 30b as another case in which the phrase \textit{lifnim mi-shurat ha-din} is used to describe a situation in which an individual waives a special right or exemption in preference for the general rule (e.g. the 'waiver of rights' model). I argue, however, that R. Ishmael's behavior in this passage contradicts such a reading. If he intended to waive his exemption, the general rule dictates that he should assist the man physically with this sticks (just as R. Hiyya appears to waive his exemption and compensate his client, following the general rule, in \textit{B.K.} 99b-100a). Throughout the story, however, R. Ishmael studiously avoids handling the sticks. His decision to declare the sticks \textit{hefker} twice, combined with the information provided by the editors about his status as a \textit{zaken}, suggest that he never waives his exemption but, in fact, upholds it despite the financial loss to himself. Indeed, it is this \textit{unwillingness} to waive his exemption and assist the man to physically lift the bundle of sticks that leads R. Ishmael to make his invalid declaration that the sticks are ownerless and available to anyone except the man in question.
and rested. Then he said to R. Ishmael, “Help me pick them up.” He asked him, “How much are they worth?” He said to him, “Half a zuz.” So R. Ishmael gave him half a zuz, and declared the bundle of sticks ownerless [i.e. legally permissible for anyone to take]. The man reclaimed possession of the sticks for himself. R. Ishmael again paid him half a zuz, and declared the sticks ownerless. Seeing that the man intended to acquire them for himself again, he said to him: “With respect to the rest of the world, these sticks are ownerless. But with respect to you, they are not ownerless.”

[B] Can an item really be declared ownerless in this manner? As it has been taught: “According to the House of Shammai, items declared ownerless can only be acquired by the poor. According to the House of Hillel, an item only qualifies as ownerless if it can be acquired by rich and poor alike, as in [the case of the rules pertaining to] the sabbatical year.” So R. Ishmael the son of R. Yossi did, in fact, declare it ownerless and therefore it was available to anyone to take! It was by words alone that he stopped him. But wasn't R. Ishmael an elder, for whom it was not in accordance with his station [to help the man]? R. Ishmael, son of R. Yossi, acted lifnim mi-shurat ha-din.

Both the narrative and the editorial commentary on it follow the pattern observed in other sugyot that conclude a rabbi has acted lifnim mi-shurat ha-din. R. Ishmael's actions initially present a problem for the editors because they do not conform to the behavioral expectations set by the rule that a person must help others to load or unload their property. While the editors resolve this contradiction by noting that R. Ishmael is a zaken v'aino lefi kevodo, this explanation raises a different problem: R. Ishmael does not follow the normative script for the zaken either. He does not assert his exemption and reject the man's request, nor does he override his exemption and offer to help the man lift his bundle anyway. Instead, he pursues an unexpected course of action, offering to purchase the sticks from the man in question. The editors explain this unusual and unexpected decision by stating that R. Ishmael relied on his discretionary judgment. And yet, unlike the case of Mar Shmuel or his father in B.M. 24b, in this case, R. Ishmael's decision to exercise his discretionary judgment does not lead to a desirable outcome in this case. On the contrary, it gives rise to several distinct problems. While these problems are eventually resolved, the solutions found are not presented as desirable. Let us consider each problem in turn.
As noted above, R. Ishmael's offer to purchase the sticks from the man on the road might initially seem like a generous one, especially if he is not obligated to assist the man at all, but his conduct displays little regard for the other man's situation or experience. After purchasing the sticks, he treats them as worthless, abandoning them by the side of the road. Presumably, R. Ishmael expects the man to take the money and continue on his way; if so, he is sorely mistaken. He fails to take into account how the other man will respond to his decision to discard the sticks. When R. Ishmael declares the sticks to be *hefker* (ownerless), the man capitalizes on an unexpected opportunity and reclaims them for himself. One could argue that R. Ishmael ought to have been able to anticipate this response: if the man has been laboring to carry these sticks for some distance, why would he leave them by the side of the road once R. Ishmael has abandoned them? They are clearly valuable to him.

Caught in the same situation, R. Ishmael repeats his initial offer. He again purchases the bundle of sticks and again declares them *hefker*. His dogged pursuit of the same (failed) strategy provides an initial warning to the reader that R. Ishmael's reliance on his discretionary judgment will prove to be unsuccessful. Such judgment is supposed to be responsive and context-specific, but R. Ishmael's judgment appears to be just the opposite. He does not alter his strategy in response to changing circumstances; instead, he treats his initial decision to purchase the sticks much like an entrenched rule, from which he now refuses to deviate.

At this point, R. Ishmael's reliance on his discretionary judgment has not only failed to produce a desirable outcome, but it has failed to resolve the situation at all. After repeating the exchange with man, paying him for the sticks and again declaring the bundle *hefker*, R. Ishmael's decision to buy the bundle of sticks, only to declare them *hefker* and leave them by the side of the road, must strike the other man as truly bizarre. After toiling over this bundle of sticks, why would he simply leave them by the side of the road? If R. Ishmael is going to purchase them only to abandon them, why not take them back for himself? From R. Ishmael’s perspective, the behavior of the man on the road must seem increasingly rude. Even though he had no obligation to help the man, R. Ishmael generously tried to ease his burden by offering to purchase the sticks. The man’s repeated decision to take the money, and then take the sticks back at the first opportunity, must seem ungrateful and inappropriate.

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189. While the narrative quickly veers into the absurd, it is worth noting that the actions of both men make sense from a certain perspective. R. Ishmael’s decision to buy the bundle of sticks, only to declare them *hefker* and leave them by the side of the road, must strike the other man as truly bizarre. After toiling over this bundle of sticks, why would he simply leave them by the side of the road? If R. Ishmael is going to purchase them only to abandon them, why not take them back for himself? From R. Ishmael’s perspective, the behavior of the man on the road must seem increasingly rude. Even though he had no obligation to help the man, R. Ishmael generously tried to ease his burden by offering to purchase the sticks. The man’s repeated decision to take the money, and then take the sticks back at the first opportunity, must seem ungrateful and inappropriate.
Ishmael decides to pursue a different strategy, one which raises a new host of problems. R. Ishmael asserts that he has declared the sticks *hefker* in a special manner that prevents the other man from acquiring them: “With respect to the rest of the world, these sticks are ownerless. But with respect to you, they are not ownerless.”

The narrative does not record the man's response, but the editors' suggest that R. Ishmael convinced the other man to desist, when they state that with these words, R. Ishmael "stopped him." And yet, even if R. Ishmael effectively dissuades the man from reclaiming the sticks a third time, this achievement hardly constitutes a victory.

The editors pounce on R. Ishmael's statement that he has declared the sticks ownerless and available to everyone except for the main in question, quickly establishing that it has no legal validity. They cite a *baraita* that records a dispute between the Beit Shammai and Beit Hillel over the manner in which items may be declared *hefker*. While the two sides disagree, neither side offers a ruling that supports the possibility of declaring something *hefker* in a way that excludes specific individuals. According to the *baraita*, Beit Hillel strongly repudiates the idea that items declared *hefker* can be made available to certain people and not others, arguing that an item only counts as *hefker* if it is made available to "rich and poor alike." Beit Shammai counters that items can be declared *hefker* exclusively for the poor. While this suggests that it is possible to restrict the availability of a *hefker* item to certain class of people, it offers no support for R. Ishmael's attempt to exclude the other man alone.

As a result, the editors conclude that R. Ishmael's statement has no legal standing. When he declared the bundle of sticks to *hefker*, he legally made them available to anyone to take—including the man in question. If R. Ishmael was successful in preventing the man from reclaiming his bundle, as the editors suggest he was, then he stopped him through the power of his words alone. The other man believed his statement, even though it had no actual legal force.

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190. B.M. 30b.
It is not clear from the narrative whether or not R. Ishmael thought his own *hefker* declaration was legally valid. Was he simply misguided? Or did he intentionally manipulate the other man, who was presumably less educated and therefore would not understand the legal nuances of *hefker* declarations? While both of these options are possible, neither presents R. Ishmael in a flattering light. If he thinks his declaration is valid, R. Ishmael comes across as bumbling and foolish, hopelessly misguided in every step of his interaction with the man. If he knows his declaration is invalid, R. Ishmael comes across as manipulative, using his elevated status and education to wiggle himself out of a bind of his own making. However one reads the figure of R. Ishmael in this narrative, his actions cast the next editorial comment in a new light: "But wasn't R. Ishmael a *zaken v'ai no lefi kevodo*?" While the editors may make this statement to clarify that R. Ishmael has not actually transgressed the law, since as a *zaken* he was not obligated to help the man pick up his bundle, the comment is tinged with irony. The *zaken* is supposed to be the paradigm of sagely dignity. In light of such conduct, does R. Ishmael deserve this title?

Rather than addressing this question, the editors conclude their commentary by stating that "R. Ishmael acted *lifnim mi-shurat ha-din.*" If one follows the dominant scholarship and assumes that this label is only applied to morally positive actions, undertaken with altruistic or pious intentions, this final comment may appear to be something of a rescue effort. Even if R. Ishmael's actions seem questionable, they were warranted by his good intentions. Such a reading, however, is strained. At no point do the editors praise any aspect of R. Ishmael's behavior, and the majority of their comments are critical. By abandoning the assumption of moral motivation and applying the model of discretionary judgment, however, a new reading of the editors' interaction with this narrative emerges. Just as they used the narrative of Mar Shmuel's father to promote the benefits of discretionary judgment in B.M. 24b, so too they use the narrative of R. Ishmael in B.M 30b to highlight the potential risks. As noted at the beginning of this dissertation, my proposed interpretation of *lifnim mi-shurat ha-din* as...
discretionary judgment is intended to highlight a specific approach to decision-making. The approach itself is morally neutral, but as the contrast between the examples of Mar Shmuel's father and R. Ishmael demonstrate, it can lead to both positive and negative outcomes. I suggest that, while these outcomes cannot be fully predetermined, the likelihood of a positive outcome depends on the character of the decision-maker. When God acts lifnim mi-shurat ha-din, the outcome is guaranteed to be positive. When a righteous individual acts lifnim mi-shurat ha-din, a positive outcome is possible, though not guaranteed. When a foolish or flawed individual, like R. Ishmael, acts lifnim mi-shurat ha-din, a negative outcome is likely.

The case of R. Ishmael therefore raises broader questions about the ability of any rabbi to successfully engage in discretionary judgment. One might have thought that R. Ishmael, who is not only a rabbinic sage but also a zaken, a person possessing an especially honored or elevated status, would represent the sagely ideal. His extensive education, training and recognition as a communal leader ought to have prepared him to successfully engage in discretionary judgment. And yet, when considered in light of the broader corpus, I argue that the example of R. Ishmael raises concerns that many rabbis will be unable to act lifnim mi-shurat ha-din in a way that makes a good outcome likely. In the entirety of the Talmud, the editors label the actions of only five rabbis as lifnim mi-shurat ha-din, and of these five figures, only two (Mar Shmuel and his father) are actively promoted as positive examples. R. Hiyya's conduct in B.K. 99b and Rav Pappa's conduct in Ket. 97a could be read either as positive or as morally neutral, and Rav Pappa's behavior in Ber. 45b is had little clear moral valence. If these examples are read as morally neutral, it is not clear what is gained by engaging in discretionary judgment rather than rule-based judgment. Furthermore, the presence of such a small sample suggests that the majority of rabbis were either incapable of exercising discretionary judgment or were disinclined to do so.

191. Rav Pappa (Ber. 45b, Ket. 97a), R. Hiyya (B.K. 99b), Mar Shmuel (B.M. 24b), the father of Mar Shmuel (B.M. 24b) and R. Ishmael (B.M. 30b).
If discretionary judgment were presented as a neutral alternative to rule-based judgment, there would be no reason not to act lifnim mi-shurat ha-din, even if most rabbis chose not to do so. But the example of R. Ishmael raises the concern that engaging in discretionary judgment also carries potential downsides. B.M. 30b suggests that when a rabbi attempts to engage in discretionary judgment and fails, it makes a mockery of the sage.\(^{192}\)

Even more disturbing, it potentially makes a mockery not only of the individual, but of the Torah and institutions he represents.\(^{193}\) Given these risks, is one model of judgment to be preferred over the other?

**When Rules Are Destructive**

While the narrative about R. Ishmael might seem to discourage the exercise of discretionary judgment, the final unit of the sugya suggests otherwise. After citing and briefly discussing the familiar midrashic tradition about lifnim mi-shurat ha-din,\(^ {194}\) the editors conclude their discussion of such behavior with a teaching attributed to R. Yochanan.

Although they present their comments on R. Yochanan's teaching as an explanatory gloss, the editors radically reframe his message, positioning lifnim mi-shurat ha-din as an essential counterbalance to din Torah. As with the previous sources considered, I first examine the

192. For a discussion of the resonances this might have within rabbinic culture, see "Shame" in Jeffrey L. Rubenstein, *The Culture of the Babylonian Talmud*, (Baltimore: The Johns Hopkins University Press, 2003), 67-79.

193. See n. 185, above.

194. Cf. the *Mekh. Rashbi*, the *Mekh. RI* and B.K. 99b-100a. For the interested reader, the citation and discussion of this tradition in B.M. 30b is reproduced below:

> דני בר יוחנן (שמריה, כ) ויהיו לולכת בארץ仿真 TeMerk_RGB\(\) אל מי וה業務 סדרי שאר ילדם בעיבר והנה מברחת את הסעדה היא עצמו ת⼯יר צורינו מפרים מותרות היה ויאמר: אין ליילך תһוור תודית זהו? מברחתו: אלא לא בגר יבאו רחמים.FLAG: אלא נוטל יליה למזל אוספים אוספים אלו זוライフ למזל להיל יבאו ת͡ו למברחת.ה, והכתרו. ויינו גמולים ת業務

As Rav Yosef taught [expounding upon Ex. 18:20]: *You shall make known to them* - this refers to their livelihood; *The path* - this refers to acts of loving-kindness; *They are to walk* - this refers to visiting the sick; *Upon* - this refers to burial; *The deeds* - this refers to the law (din), *They are to perform* - this refers to lifnim mi-shurat ha-din. The master [i.e. R. Yosef] said: "They are to walk - this refers to visiting the sick." If so, then the prooftext for deeds of loving-kindness would appear to be redundant. However, it is necessary in order to include the case of someone visiting a sick person with whom he shares a particular affinity. The master reasoned that one who visits a sick person with whom he shares a particular affinity takes one-sixtieth of his illness upon himself, but he must visit him nevertheless. *Upon* – this refers to burial. We still would not need to mention [a prooftext for] deeds of loving-kindness, except for the case of an elder, where [the task] is not in accordance with his station.

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amoraic teaching on its own terms, before exploring how the editors reframe it as a teaching about *lifnim mi-shurat ha-din*.

In its original formulation, R. Yochanan's teaching is puzzling. Did God not articulate the laws of the Torah with the expectation that the Jews would follow them? If so, how could adherence to such laws merit divine punishment, as embodied in the fall of Jerusalem? The editors' initial incredulous response highlights the impossibility of such a reading. R. Yochanan cannot be counseling the Jews to reject the laws of the Torah and follow the rules of another religion or society; they conclude that he must therefore be using the term *din Torah* to indicate something other than the content of Torah law.

Without further context, it is difficult to determine what R. Yochanan may have intended to communicate through this teaching. The editors reformulate his statement ("rather, let him say...") to suggest that *din Torah* refers not to a specific body of rules (e.g. the laws of the Torah), but rather to *din*, or rule-based judgment, that is based on Torah law.

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195. The manuscript traditions record alternate versions of this rhetoric. Both Florence II-I-8 and Hamburg 165 read המלמה של תורה שלום? מפרישם ב' ו' מחרת ("Why was Jerusalem destroyed? Because its inhabitants judged according to *din Torah*"), but the substantive meaning is the same. This rhetoric also appears in a series of statements in Shab. 199b which alternately claim that the only reason Jerusalem was destroyed was because people did not observe Shabbat, because they neglected the reading of the Shema, because they neglected the education of children, because they had no shame, because they made everyone equal in status, because they failed to rebuke one another or because they despised scholars. As the passage in Shab. 199b demonstrates, the hyperbolic claim that "Jerusalem was only destroyed because of X" is used in the Talmud to describe a variety of social and ritual ills. This exclamation highlights the activities that a specific rabbi views as most essential to the establishment of a flourishing rabbinic society. According to the editors, for R. Yochanan the most essential thing is that people continue to engage in discretionary judgment.

196. The translation of this particular phrase is disputed. It seems most likely to be a reference to Zoroastrian law, but some view it as a reference to the practices of legal arbitrators. For the view that references Zoroastrian or Magian law, see Shai Secunda, *The Iranian Talmud: Reading the Bavli in its Sasanian Context* (Philadelphia: University of Pennsylvania Press, 2014), 82. For the view that this term refers to arbitration, see Marcus Jastrow, *Dictionary of the Talmud Babli*, 727. Sokoloff states that the meaning cannot be reliably determined (Michael Sokoloff, *Dictionary of Jewish Babylonian Aramaic*, 640).

197. While the Talmud records other statements that "Jerusalem was only destroyed because of X" (see n. 195), no parallels to this particular statement exist that might offer some clue as to the original context in which it was offered or possible alternative meanings.

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This reformulated version of the teaching proposes that the decision to rely exclusively on rule-based judgments and the refusal to act lifnim mi-shurat ha-din had catastrophic consequences for Jewish society, leading to the fall of Jerusalem, the destruction of the Second Temple and the end of Jewish self-rule. According to the editors' interpretation of R. Yochanan's teaching, it was not adherence to Torah law that was problematic per se; it was the decision to treat the rules of the Torah as entrenched, implementing the formally correct law without regard for the context in which it was being implemented. In order for society to flourish, judges must be able to rely on alternative approaches when it seems clear that a wooden application of the rule would not lead to a desirable or just outcome. In other words, although R. Yochanan himself never uses the phrase lifnim mi-shurat ha-din, the editors understand his teaching as valorizing lifnim mi-shurat ha-din behavior and as highlighting the not only the importance but also the necessity of employing discretionary judgment.

As Christine Hayes notes, the editorial reformulation of R. Yochanan's teaching constitutes an acknowledgement that a "theoretically correct law can be destructive when applied in practice." In a sense, this passage mirrors the editorial critique of rule-based judgment in B.M. 24b, although the critique in the passage under discussion is far more severe. B.M. 24b merely suggests that rule-based judgment has its limits. The hyperbolic nature of R. Yochanan's teaching suggests that strict adherence to legal rules can be catastrophic. While the narrative of R. Ishmael in the first section of B.M. 30b presents discretionary judgment as risky, those risks are limited and apply mostly to the actor himself. The narrative may not portray R. Ishmael in an flattering light, but nothing terrible happens. R. Yochanan's teaching at the conclusion of B.M. 30b, however, depicts the categorical refusal to engage in discretionary judgment as nothing short of calamitous!

When read in its entirety, B.M. 30b offers the most serious critique of both rule-based and discretionary judgment found in this corpus of seven sugyot. The editors seem to

conclude, however, that when taken to their potential extremes, strict reliance on the formal procedures of rule-based decision-making has the potential to be far more destructive than does the willingness to make discretionary judgments. Both models of judgment are presented as essential components of a flourishing rabbinic society. Although rule-based judgment may be more commonplace and may be employed more frequently, that renders discretionary judgment no less important. Instead, the editors suggest that each model of judgment is appropriate to a specific context. When acting as a judge or legislator, rabbis should rely upon rule-based judgments. This is the model of reasoning that enables rabbis to draw generalizations from specific cases, to instantiate universal normative obligations and to establish legal precedent. When acting outside of the courtroom, however, rabbis may engage in either rule-based or discretionary judgment, depending on the situation at hand. In situations where the rabbi is personally involved in a case, or has close relationships with those impacted by it, relying on discretionary judgment may be more appropriate.

Unlike the cases where God acts lifnim mi-shurat ha-din, the decision of a rabbi to act in this manner does not guarantee a favorable outcome in the case at hand. As the case of R. Ishmael at the beginning of B.M. 30b clearly demonstrates, such judgments may go awry. Although the decision to act lifnim mi-shurat ha-din has the potential to yield a better outcome, but it also has a potential to create unforseen problems and may yield poor outcomes. And yet, while the editors never discuss how to determine if one should act lifnim mi-shurat ha-din in a specific case, the conclusion to B.M. 30b makes it clear that acting lifnim mi-shurat ha-din is a necessary component of their vision for a flourishing rabbinic society. In their reformulation of R. Yochanan's teaching, the editors state that the refusal to act lifnim mi-shurat ha-din was directly responsible for the catastrophic fall of Jerusalem. If this is the case, then acting lifnim mi-shurat ha-din in at least some cases is necessary for rabbinic society to flourish. While such action may not lead to an improved outcome in every case, it does ensure a better outcome for society as a whole. Rule-based judgments may
predominate, but they are insufficient on their own. Discretionary judgment provides a necessary complement to din, and is an essential component of the editors' legal project.
Conclusion

We have now surveyed the full range of sources for lifnim mi-shurat ha-din in classical rabbinic literature. I have identified two primary uses of this phrase within the Babylonian Talmud, both of which build upon the midrashic tradition found in the Mekh. RI and Mekh. Rashbi. In the first cluster of traditions, discussed in Chapter Two, this phrase is used to describe divine judgment. In the second cluster of traditions, discussed in Chapters Three and Four, this phrase is used to describe rabbinic judgments. Although it carries different nuances in each cluster, I have argued that the Talmudic editors consistently use this phrase to describe a specific approach to decision-making, one that is contextual, particularistic and informed by the relationship between the judge and the other actors involved. I have referred to this type of decision-making as 'discretionary judgment.'

There are notable differences between the ways in which the phrase lifnim mi-shurat ha-din appears in each of these two clusters of traditions. For example, the sugyot that center on divine judgment strongly correlate lifnim mi-shurat ha-din with divine compassion, while the sugyot that center on rabbinic decision-making investigate the normative and legal implications of this type of judgment. Furthermore, while the editors primarily use lifnim mi-shurat ha-din as a descriptive label, I have argued that it also carries a prescriptive connotation in the sugyot that center on rabbinic actors, establishing that such actions cannot set legal precedent. While these differences should not be ignored, they do not indicate a fundamental division between the use of lifnim mi-shurat ha-din to describe rabbinic activity and its application to the divine realm, as some previous studies have suggested.199 The fact

199. Louis Newman and Saul Berman both differentiate between the 'theological' and 'legal' uses of the term (cf. Newman, "Law, Virtue and Supererogation" and Berman, "Lifnim Mishurat Hadin II"). In a similar vein, Shmuel Shilo argues that "in Talmudic literature there is more than one sense to this phrase, and the aggadic passages describing God's behavior use the term in a different sense than do those that refer to man's acting lifnim mishurat hadin (Shilo, "On One Aspect of Law and Morals," 361). While such scholars are responding to important literary and conceptual differences between the sugyot that discuss divine activity and those that center around rabbinic action, I contend that there is greater conceptual continuity between these usages than is typically assumed. As the discretionary judgment model demonstrates, there are core features of lifnim mi-shurat ha-din that remain consistent across all seven sugyot, even if the impact of engaging in this type of decision-making or the manner in which one does so change significantly, depending on whether the actor in question is divine or human.
that the core features of this type of decision-making remain constant throughout all seven sugyot therefore bears emphasizing. In what follows, I revisit the central characteristics that unite the actions or decisions described in the Talmud as lifnim mi-shurat ha-din and discuss why these features are best explained through the paradigm of discretionary judgment.

Having established how this model accounts for the historical and literary construction of these seven sugyot, and how it clarifies some of the ethical and legal questions they raise, I conclude by addressing a well-known but puzzling case in the history of scholarship on lifnim mi-shurat ha-din. Numerous scholars and Talmudic commentators identify a narrative from B.M. 83a as a paradigmatic example of lifnim mi-shurat ha-din activity. This trend is noteworthy, as the phrase lifnim mi-shurat ha-din never appears within the sugya itself. I argue that the discretionary judgment model can explain this absence. As I will show, the narrative in question lacks many of the key characteristics that prompt the editors to label other cases as lifnim mi-shurat ha-din. The fact that later interpreters view this narrative as constitutive of the category therefore likely signals a point of conceptual discontinuity between the Talmudic editors' understanding of lifnim mi-shurat ha-din and the way this idea developed in post-Talmudic scholarship. Before examining this final case, however, let us revisit the core features of the type of decision-making indicated by the editors' use of the label lifnim mi-shurat ha-din.

Core Features of Lifnim Mi-Shurat Ha-Din

As noted previously, there are two clusters of Talmudic traditions that use the phrase lifnim mi-shurat ha-din, and each uses the phrase in somewhat different ways. The first cluster uses lifnim mi-shurat ha-din to describe God's judgment of the people during the liturgical period known as the Days of Awe. It presents lifnim mi-shurat ha-din as a type of decision-making that is deeply influenced by the relationship between the judge and those whom he judges. The sugyot within this first cluster depict lifnim mi-shurat ha-din as a
highly desirable mode of divine judgment. This approach is closely correlated with divine compassion, and is presented as securing a more favorable outcome for those being judged. By way of contrast, the second cluster of traditions uses the phrase *lifnim mi-shurat ha-din* to describe rabbinic decision-making in the course of daily life. In so doing, it dissociates *lifnim mi-shurat ha-din* from the judicial context of the courtroom, presenting it as a potential alternative to the rule-based procedures of decision-making that provide the foundation of the rabbinic legal project. Unlike the first cluster, the second cluster does not suggest that engaging in discretionary judgment will guarantee a favorable outcome in the specific case at hand. Instead, as discussed in Chapter Four, it presents *lifnim mi-shurat ha-din* as a necessary complement to the activity of rule-based decision-making (*din*) and explores the legal consequences of engaging in each approach.

Despite these differences, the two clusters of traditions share much in common. Both highlight the web of relationships that connect the figure who acts *lifnim mi-shurat ha-din* to those around him, whether that is the convenantal relationship between God and Israel (Ber. 7a and A.Z. 4b) or the various social relationships that connect rabbis to their families (Ber. 45b), neighbors (Ket. 97a), business partners (B.K. 99b-100a) and to the broader Jewish community (B.M. 24b and BM. 30b). The particularity of these relationships drives the decision-making process. As a result, these seven sugyot present discretionary judgment as a form of *embedded* decision-making. The embedded nature of this approach to decision-making is communicated throughout the corpus in a variety of ways.

First, the spatial metaphor encoded in the phrase *lifnim mi-shurat ha-din* underscores the fact that the judge himself is embedded within a web of relationships. When the judge acts according to *din* or *shurat ha-din*, he stands upon the line of the law. The primary factors that enter the judicial reasoning process are prior cases and precedents, as well as the ways in which his decision in this case may impact future cases. When the judge acts *lifnim mi-shurat ha-din*, however, he repositions himself in front of the line of the law. In so doing, he
recognizes his own position within a web of religious, social and economic relationships. While legal rules remain within his sphere of vision, and will therefore continue to structure the decision-making process (a rabbi who acts \( \textit{lifnim mi-shurat ha-din} \) will never transgress the law), they are no longer the primary determinants of that process.

In order to illustrate how this spatial metaphor is activated in practice, recall the case of R. Hyya in B.K. 99b-100a. The rule states that expert bankers are not held liable for their mistakes. A rule-based approach would therefore consider two main factors as relevant to the case: whether or not a mistake was made, and whether the banker who made it was an expert or not. These are the factors that the rule identifies as relevant to the decision-making process. And yet, when R. Hyya makes a mistake as an expert banker, he decides to repay his client anyway. His actions indicate that some other factor, one which is not identified by the rule itself, shaped his decision. As a result, the editors label his actions as \( \textit{lifnim mi-shurat ha-din} \). Notably, the editors never clarify which other factors motivate R. Hyya's actions. As discussed in Chapter Three, he could be motivated by morality or piety to act generously towards his client, but he might also be motivated by his personal relationship with the client, by the desire to appear generous before his assistant Rav or by a concern for his business reputation, among other possibilities. Neither the narrative source itself nor the editorial gloss clarify R. Hyya's motivations. What the editors do make clear, however, is that it is not the rule itself but some consideration not identified in the rule that prompts R. Hyya to repay his client. As a result, the editors conclude that his actions are not based on rule-based judgment, but rather on R. Hyya's own discretionary judgment.

This juxtaposition between a judicial approach that is shaped by predetermined criteria, or \( \textit{din} \), and one that allows the judge to determine which contextual factors are relevant, or \( \textit{lifnim mi-shurat ha-din} \), is also reflected in the cluster of traditions that discuss divine activity. For example, A.Z. 4b suggests that when God studies Torah, he is occupied with truth and that this 'truth' structures the way in which he will make judgements. As a
result, when God studies Torah, he will not act *lifnim mi-shurat ha-din*. When God sits in judgment, however, he is not occupied with truth in the same way. As a result, he has greater flexibility as a judge to step back from those criteria, to position himself *lifnim mi-shurat ha-din* and to consider other contextual factors, such as his covenantal relationship with the people he is judging. In other words, when God is occupied with 'truth' or 'strict justice,' there is little latitude for exercising judicial discretion, much like when human judges are constrained by the criteria outlined in legal rules. When God acts *lifnim mi-shurat ha-din*, however, other relational and contextual factors enter into his judicial purview.

While the sugyot that center on divine activity do not juxtapose *lifnim mi-shurat ha-din* with rule-based judgment in the same manner as the sugyot that center on rabbinic actors, a similar logic runs throughout both clusters of Talmudic tradition. Both clusters identify an approach to decision-making in which the relevant factors are predetermined by some criteria outside of the judge himself, whether those criteria are set by the Torah, by 'truth' (*emet*) or by the existing corpus of rabbinic laws and precedents. Similarly, both clusters use the phrase *lifnim mi-shurat ha-din* to describe an approach to decision-making where the judge not only acknowledges that he is embedded in a web of relationships but also allows them to directly influence his judgment. As a result, the outcome of this type of decision-making is more difficult to anticipate. Despite the unpredictability of such judgments, both clusters present *lifnim mi-shurat ha-din* activity as important and valuable, albeit in different ways. God's decision to act *lifnim mi-shurat ha-din* is presented as desirable because it will yield a more favorable outcome for the individual being judged, while the rabbinic decision to act *lifnim mi-shurat ha-din* is presented as an essential component of a flourishing rabbinic society, even if the consequences of engaging in this type of judgment may vary from case to case.

It should be noted, however, that the fact that the relationship between the judge and those involved in the case he judges differs significantly between the sugyot that center on divine judgment and those that center on rabbis. While the first cluster of traditions may
highlight the relationship between God and those he judges, they also maintain a clear sense of distinction. Not only is there an ontological difference between God and humanity, but there is also a clear differentiation between the judge and those being judged. Those differences are largely collapsed in the sugyot that center on rabbinic actors, in which the rabbi who acts *lifnim mi-shurat ha-din* is often a central participant in the case being judged. This lack of impartiality may explain why the phrase *lifnim mi-shurat ha-din* also carries a prescriptive legal connotation in the sugyot that center on rabbinic actors. The rabbis in question are intimately involved and invested in these cases. Furthermore, these narratives are often vague, ambiguous or fail to supply relevant legal information; as a result, it is difficult to determine the criteria upon which the rabbis in question base their decision to act *lifnim mi-shurat ha-din*. The editors therefore conclude that no general rules for behavior can be extrapolated from such cases. As a result, when the editors label the actions of a rabbi as *lifnim mi-shurat ha-din*, they not only indicate that the rabbi acted on the basis of his discretionary judgment but they also preclude those actions from establishing new legal obligations or precedents.

**Why Discretionary Judgment?**

I have argued that both clusters of Talmudic traditions about *lifnim mi-shurat ha-din* point to a model of decision-making that is particularistic and context-driven. I have not, however, proposed a model of *lifnim mi-shurat ha-din* as particularistic decision-making per se. Instead, I have argued for a model of *lifnim mi-shurat ha-din* as 'discretionary judgment,' a paradigm which intentionally invokes the idea of judicial discretion. While it is beyond the scope of the present study to engage in a full discussion of the literature on judicial discretion here, it may be helpful to briefly explain why the idea of judicial discretion provides a helpful paradigm for understanding the actions described as *lifnim mi-shurat ha-

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din in the talmud. For the purposes of the present discussion, I rely on Ronald Dworkin's presentation of the role that judicial discretion plays in theories of legal positivism to illustrate similarities between at least some understandings of judicial discretion and the model of discretionary judgement that I propose here.

In the opening to Taking Rights Seriously, Ronald Dworkin outlines three central tenets of legal positivism. Although Dworkin is not a positivist, his discussion offers a brief and helpful explanation of what judicial discretion is, and what it accomplishes in a legal system that is largely oriented towards the application of legal rules. Dworkin describes the "key tenets" of positivism as follows:

(a) The law of a community is a set of special rules used by the community directly or indirectly for the purpose of determining which behavior will be punished or coerced by the public power. These special rules can be identified and distinguished by specific criteria, by tests having to do not with their content but with the pedigree or the manner in which they were adopted or developed...²⁰¹

(b) The set of these valid legal rules is exhaustive of 'the law', so that if someone's case is not clearly covered by such a rule (because there is none that seems appropriate, or those that seem appropriate are vague, or for some other reason) then that case cannot be decided by 'applying the law.' It must be decided by some official, like a judge, 'exercising his discretion', which means reaching beyond the law for some other sort of standard to guide him in manufacturing a fresh legal rule or supplementing an old one.

(c) To say that someone has a 'legal obligation' is to say that his case falls under a valid legal rule that requires him to do or to forbear from doing something. (To say he has a legal right, or has a legal power of some sort, or a legal privilege or immunity, is to assert, in a shorthand way, that others have actual or hypothetical legal obligations to act or not to act in certain ways touching him.) In the absence of such a valid legal rule there is no legal obligation; it follows that when the judge decides an issue by exercising his discretion, he is not enforcing a legal right as to that issue.²⁰²

While only the second two tenets address the idea of judicial discretion directly, it is worth noting the close correlation between the positivist understanding of law (according to Dworkin) as a set of legal rules established by authoritative powers and/or procedures within a given community, and the editors' understanding of rabbinic law as a system of rules that are established by authoritative powers (i.e. rabbis) through a set of authoritative procedures. Primary among those procedures is the activity of rule-based decision-making.

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²⁰² Ibid, emphasis mine.
As noted in Chapter One, any system that conceives of law primarily as a system of rules will inevitably encounter cases that do not clearly fall under the purview of an existing rule. Dworkin argues that, according to legal positivists, such cases cannot be decided through rule-based reasoning but must instead be resolved through the exercise of judicial discretion.\textsuperscript{203} In so doing, the judge must reach "beyond the law for some other sort of standard to guide him."\textsuperscript{204} Although the judge who acts \textit{lifnim mi-shurat ha-din} does not reach 'beyond' the line of the law per se (a common mistranslation of \textit{lifnim mi-shurat ha-din}), Dworkin's description highlights intriguing parallels with the Talmudic accounts, in part because his language highlights the vagueness inherent in this model of decision-making. In his account of judicial discretion, it is not clear which alternative standards the judge will rely on, just as it remains unclear in the Talmudic texts exactly why the rabbis in question decide to act \textit{lifnim mi-shurat ha-din} or how they determine which precise actions to undertake as a result.

The vagueness inherent in Dworkin's description of judicial discretion also helps to explain the unpredictable nature of \textit{lifnim mi-shurat ha-din} activity. It is up to the discretion of the decision-maker to determine which information is relevant to the case, and how those factors should impact the outcome of the case. Because such decisions are left to the discretion of the judge, the outcome of the case will be harder to predict than in cases where the relevant factors are determined by an established legal rule. Multiple judges presented with the same case may decide it in different ways; one may decide that the socioeconomic status of a plaintiff is legally relevant, while another may decide that the plaintiff's criminal history (or lack thereof) is the most relevant factor and so forth. The unpredictable nature of this approach to decision-making is also underscored in the Talmudic sugyot. The actions described as \textit{lifnim mi-shurat ha-din} are depicted as surprising, and in need of explanation.

\textsuperscript{203} For a more complete discussion of the similarities between Dworkin's legal theory and rabbinic law, see Christine Hayes, "Legal Truth, Right Answers and Best Answers."
\textsuperscript{204} Dworkin, \textit{Taking Rights Seriously}, 17.
The editors' failure to clarify the specific rationale behind such actions reinforces the idea that the rabbis in these narratives exercise something akin to judicial discretion—hence, I refer to this type of decision-making as 'discretionary judgment.'

Dworkin further argues that, on the positivist view, "when the judge decides an issue by exercising his discretion, he is not enforcing a legal right as to that issue." By this, Dworkin means that the 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. For example, if I have a right to free speech, that right legally prohibits others from impeding my speech (and requires certain actors, like the police or the courts, to forcibly intervene if they try to do so). When a judge relies on judicial discretion to decide a case, however, it indicates that no rule exists that is directly applicable to the case at hand. While not identical, this observation parallels the editors' conclusion that actions undertaken lifnim mi-shurat ha-din cannot instantiate new legal rules or precedents. Just as the judge does not enforce a right or obligation when he or she exercises judicial discretion in deciding a case, so too a rabbi does not instantiate a new rule or obligation when he reaches a decision lifnim mi-shurat ha-din. Despite these similarities, this approach to decision-making differs from judicial discretion in one key respect: rabbis never act lifnim mi-shurat ha-din within a courtroom context. To the extent that rabbis exercise discretion in their formal roles or capacities as judge, the editors do not describe such activity as lifnim mi-shurat ha-din. That label is only used to designate an type of decision-making that is activated outside of the courtroom, in the context of daily rabbinic life.

Throughout the course of my analysis, I have demonstrated that the discretionary judgment model is better able to account of the editorial usage of the phrase lifnim mi-shurat ha-din than other existing models. Despite differences between the two clusters of Talmudic

205. Ibid.
traditions that use this phrase, I have shown that the editors consistently use the label lifnim mi-shurat ha-din to point toward a particular type of decision-making, and I have explained why I categorize this type of decision-making as discretionary judgment. While the primary purpose of this model is to explain how the Talmudic editors use this phrase, I argue that it can also illuminate a puzzling case in post-Talmudic scholarship on the idea of lifnim mi-shurat ha-din. Although the phrase itself only appears in the seven sugyot analyzed above, many Talmudic commentaries have suggested that another sugya from B.M. 83a also provides an example of such behavior. The idea has become so prevalent that modern scholars often cite this sugya in their discussions of the category. I argue that adopting the model of lifnim mi-shurat ha-din as discretionary judgement can explain why the editors fail to use this phrase to describe the narrative in B.M. 83a. A close reading of the sugya reveals that it lacks several of the core literary and legal features that characterize the other cases where the editors employ this label. Instead, the rabbinic decision described in the commentaries as lifnim mi-shurat ha-din is presented in the sugya itself as a formal legal ruling, one that is reached through a process of rule-based decision-making.

The Puzzling Case of Rabbah bar bar Hanan

The sugya in B.M 83a centers on a discussion about the liability of a worker or guardian (שומר) when property is destroyed while in his care. The case in question concerns a

206. See, for example, Rashi on B.M. 83a, s.v. לַפְסֵס מַשָּׂאְרוֹת הַדָּרִין and the Tosafot on B.M. 24b, s.v. לַפְסֵס מַשָּׂאְרוֹת הַדָּרִין. As Shmuel Shilo notes, numerous later commentators and halakhic thinkers also identify this narrative as an example of lifnim mi-shurat ha-din. For a more complete discussion and further examples, see Shilo, "On One Aspect of Law and Morals," 382. It should be noted that although the Tosafot include B.M. 83a in their discussion of lifnim mi-shurat ha-din, they also clearly differentiate it from the other Talmudic cases. They emphasize the fact that Rav cites Prov. 2:20 as his prooftext, rather than Ex. 18:20 (the text from the midrashic tradition, which is cited in B.M. 30b and B.K. 100a), and conclude that the prooftext is different in this case because Rabbah bar bar Hanan has suffered a significant financial loss. Because of this, Rav cannot legally require him to act lifnim mi-shurat ha-din by returning the garments or paying his workers.

207. See, for example, James Diamond, "Talmudic Jurisprudence, Equity and the Concept of Lifnim Meshurat Hadin," Osgoode Hall Law Journal, 17, 3 (1979): 629 and Lichtenstein, "Does Jewish Tradition Recognize an Ethic Independent of Halakha?", 74. While they acknowledge that the phrase lifnim mi-shurat ha-din does not appear in the original source, both Shmuel Shilo and Aaron Kirschenbaum include this sugya in their discussion of lifnim mi-shurat ha-din as a legal concept, based on the way in which it was interpreted by Rashi and later commentators (see Shmuel Shilo, "On One Aspect of Law and Morals," 377ff and Kirschenbaum, Equity in Jewish Law, 122-123.)
property dispute between Rabbah bar bar Ḥanan and a group of porters who break some of his barrels of wine while transporting them. The narrative is presented as the final one in a series of four cases in which barrels of wine are destroyed while being transported from one location to another. In general, paid workers bear a high degree of liability for damage to property within their care. As a result, Rabbah bar bar Ḥanan assumes the workers are required to repay him for the financial loss when they destroy one of his barrels of wine in transport, and he withholds their garments as a form of compensation. As we shall see, however, the burden of liability on the worker is not absolute. In several of the preceding cases, the worker is deemed to be exempt from liability for a variety of reasons, and Rav reaches the same conclusion in this case. He instructs Rabbah bar bar Ḥanan to return the workers’ garments and to pay their wages. I cite here the narrative in full.

רבְּהוּ דָעֵר לַעֲנֵי יָמָנוֹ אַלּוֹ הַנְּמוֹ שָׂכְלָא הַבִּיסַא דְּחָפָרָא שֶׁקֶל לָנוֹםיוּהוּ.[A]
אָמַר לְךָ לָרְבָּא.[B]
אָמַר לְחָנָה: הַבּוֹ לַעֲרֵמָיווֹת.[C]
אָמַר לְחָנָה: יַלְעַת בֵּית בָּדָרָה שָׂכַל בֵּית בָּדָרָה (מַשָּׁל בֵּית בָּדָרָה).[D]
יִבְיֶר לַעֲרֵמָיווֹת.[E]
אָמַר לְחָנָה: לַעֲנֵי אָנוּוֹ, וּפְרָדוּנָת בְּכֵלָדָיו, וְפְרָדוּנָת, וֹלְחַת לָדוֹ.[F]
אוֹמַר לְחָנָה: לְדָוֶהוֹ לְבָרְאָיווֹ.[H]

As the reader may recall from the discussion of B.K. 99b-100a in Chapter Three, both t. B.K. 10:10 and y. Kil 7:3 reason that because a banker is like a noseh skhar, a paid worker, he is therefore held liable for his mistakes. This suggests that paid workers tend to bear a high degree of liability, a suggestion that is supported by m. Shevu’ot 8, which discusses the liability of different types bailees or guardians.

208. Different editions have this name as Rabbah b. Hanina and Rabbah b. Rav Huna, among others. Historically, it is unlikely that this exchange occurred between Rav, a first-generation Babylonian Amora, and Rabbah b. Bar Hanina, a third-generation Babylonian Amora. Scholars have corrected for this in different ways. As Shilo notes, Albeck argues that the exchange occurred between Rav and Rabbah b. Hanina, Rav’s contemporary and kin, while Silberg argues that it occurred between Rav and Rabbah b. Rav Huna, one of Rav’s disciples. Other scholars have argued that it is Rav’s name that has been incorrectly recorded, and the exchange actually occurred between Rava and Rabbah b. Bar Hanan (see Shilo, p. 377 n. 77). Since the historical facticity of this exchange is not significant for the present conversation, I present here the version of the text from the standard printed edition of the Talmud. It is worth noting that the Palestinian Talmud also records a substantively different version of this story in y. B.M. 27a-b. I cite the text here for those interested in tracing the parallel accounts: "R. Nechemia taught: A potter handed over his pots to a certain worker. They broke. He [the potter] took his garments [in payment for the broken merchandise]. He [the worker] came before R. Yossi b. Hanina. He said to him, “Go and tell him: ‘In order that you walk on good paths’ (Prov. 2:20)’.” He went and told him, and he returned his garments. He [R. Yossi b. Hanina] said to him, “Will he pay your wages?” He replied, “No.” He [R. Yossi b. Hanina] said to him, “Go and tell him [the completion of the verse] ‘and keep the ways of the righteous.’” He went and told him so, and he [the potter] gave him his wages.” While the stories have many strong similarities, it is notable that the formal judicial exchange present in the narrative from the Babylonian Talmud is absent in the version from the Palestinian Talmud. Rather than being compelled by a judge, the potter is prompted by the citation of Prov. 2:20 to return the worker’s garments and pay his wages on his own.

209. As the reader may recall from the discussion of B.K. 99b-100a in Chapter Three, both t. B.K. 10:10 and y. Kil 7:3 reason that because a banker is like a noseh skhar, a paid worker, he is therefore held liable for his mistakes. This suggests that paid workers tend to bear a high degree of liability, a suggestion that is supported by m. Shevu’ot 8, which discusses the liability of different types bailees or guardians.
Some porters broke a barrel of wine belonging to Rabbah bar bar Ḥanan. He took their garments [as payment for his financial loss].

They went and told Rav.

He [Rav] said to him [Rabbah b. Bar Ḥanan], “Give them back their garments.”

He asked, “Is this the law [dinah]?”

He replied, “Yes, So that you walk on good paths (Proverbs 2:20).”

He returned their clothes to them.

They said to him, “We are poor. We worked all day, and are hungry. Will you not give us anything?”

He [Rav] said to him [Rabbah b. bar Ḥanan] “Go and give them their wages.”

He asked, “Is this the law [dinah]?”

He said to him “Yes, [because you should] keep the ways of the righteous (Proverbs 2:20).”

It is clear from the narrative that Rabbah bar bar Ḥanan, the owner of the wine, assumes that the porters are financially liable when one of his barrels of wine is broken under their care.

As a form of financial compensation, he seizes their garments [A] and withholds their wages [G]. The workers, on the other hand, do not think they should be held financially liable for the loss and seek assistance from Rav [B].

By turning to Rav, the workers elect to resolve the dispute by seeking a ruling on the matter from a rabbinic judge. In this case, Rav rules in their favor. He instructs Rabbah bar bar Ḥanan to return their garments [C] and to pay the workers their wages [H], but his instructions do not include the technical language commonly used to signal a legal obligation (חייב). Rabbah bar bar Ḥanan therefore asks him to clarify: is Rav counseling him on proper behavior, or is he legally required by law (دينא) to return the garments [D] and pay their wages [I]? Rav affirms that he is legal obligated to do so, citing the verse from Prov. 2:20 as
a proofertext [E, J]. Only once Rav affirms\(^\text{210}\) that his ruling constitutes a binding legal
obligation does Rabbah bar bar Hanan comply and return the workers' garments [F].\(^\text{211}\)

Multiple features of the narrative combine to present Rav's instruction as a binding legal rule. First, acting in his role as judge, Rav not only issues a decision but also provides a clear rationale for it. Second, Rabbah bar bar Hanan questions the decision twice, and each time it is affirmed to be law. Third, although the ruling is not in his favor, Rabbah bar bar Hanan accepts Rav's authority in the matter and complies with his instructions. And yet, the majority of later commentators have argued that the sugya establishes no legal requirement for Rabbah bar bar Hanan to return the workers' garments or to pay their wages. Instead, they contend that Rav's statement constitutes a moral exhortation to Rabbah bar bar Hanan to waive his right to financial compensation and thereby act lifnim mi-shurat ha-din. Despite this assertion, few commentators address the fact that the phrase lifnim mi-shurat ha-din itself appears nowhere within this sugya.\(^\text{212}\) If this narrative offers a classical illustration of a rabbi deciding a case lifnim mi-shurat ha-din, why do the editors fail to label it as such?

I argue that this absence can be easily explained if one adopts the model of lifnim mi-
shurat ha-din as discretionary judgment. The editors do not use the language of lifnim mi-
shurat ha-din to describe Rav's decision because, unlike the later commentators, they understand Rav as having established a legal requirement. Not only do his statements bear all the hallmarks of rule-based legal reasoning, but the narrative lacks key features that are present in the other sugyot that characterize rabbinic behavior as lifnim mi-shurat ha-din.

Consider, as an illustration, our sugya from Ket. 97a (discussed in Chapter Three). As the reader may recall, the editors cite two narratives that might potentially clarify or resolve a

\(^{210}\) As Shmuel Shilo notes, the affirmative response (י"ן) to Rabbah bar bar Hanan's question "Is this the law?" is missing in some of the manuscripts but is preserved in the printed version (Shilo, "On One Aspect of Law and Morals," 380). Even if the affirmative response is not original, however, multiple other textual factors combine to present Rav's statement as a formal legal ruling. Although Shilo may be correct that the majority of later halakhists understand Rav to offer moral, rather than legal, instruction to Rabbah bar bar Hanan, I argue that this was not the conclusion of the Talmudic editors. Rather, the absence of the phrase lifnim mi-shurat ha-din within the sugya itself indicates that they viewed Rav's statement as establishing a legal obligation.

\(^{211}\) Presumably, he also agrees to pay their wages, although this is not explicitly stated in the narrative.

\(^{212}\) See n. 207.
specific legal question: if a person sells their property for a particular purpose, and then can
no longer use the proceeds from the sale for that intended purpose, can the sale be
withdrawn? In the first narrative, Rav Pappa purchases a parcel of land from a neighbor, who
hopes to use the proceeds to purchase bulls. When the neighbor is unable to use the money
for its intended purpose, Rav Pappa returns the land to him. In the second narrative, several
inhabitants of Nehardea sell their mansions during a grain shortage, intending to use the
proceeds to purchase grain at an unusually elevated price. When the shortage ends shortly
thereafter, the owners wish to retract the sale and Rav Nachman rules that the mansions must
be returned to them. In the first case, the editors conclude that the narrative about Rav Pappa
cannot help decide this question, and they label his conduct as *lifnim mi-shurat ha-din*. In the
second case, they accept the Rav Nachman's ruling at Nehardea and therefore conclude that it
is possible to invalidate this type of sale.

As noted in my discussion of this sugya in Chapter Three, there are two crucial
differences between the narrative about Rav Pappa and the case at Nehardea. First, Rav
Pappa is directly involved with the sale in question in the first case, while Rav Nachman acts
as an outside observer and judge in the second case. Second, the narrative about Rav Pappa
never establishes whether or not he had a legal obligation to return the land in question; in
fact, it never provides any clear rationale for his actions. By way of contrast, in the case at
Nehardea, Rav Nachman establishes a binding legal obligation for the buyers to return the
mansions to their original owners. He engages in the type of rule-based reasoning that
characterizes rabbinic judicial decisions, which the narrative highlights by expressly
describing his conclusion as *dina* (law) and by noting that others accepted his ruling as
establishing a valid precedent.

If we were to classify Rav's instruction to Rabbah bar bar Ḥanan as *lifnim mi-shurat
ha-din* using the discretionary judgment model, then we should expect his conduct to mirror
that of Rav Pappa in Ket. 97a in some significant way. On the contrary, a close reading shows
that the person in Ket. 97a whose behavior most closely parallels that of Rav is not Rav Pappa, but rather Rav Nachman. Unlike Rav Pappa, Rav has no personal investment or involvement in the case of the broken wine barrel; instead, like Rav Nachman, he acts as an outside observer and judge for the case. Furthermore, unlike Rav Pappa, Rav offers an explicit rationale for his conclusion that Rabban bar bar Ḥanan must return the garments and pay the workers their wages by citing Prov. 2:20. As in the case of Rav Nachman, his ruling is expressly characterized as law (dina). Finally, the behavior of other rabbinic figures in both narratives makes it clear that the rulings issued by Rav and Rav Nachman are accepted as legally binding. In Ket. 97a, Rami b. Shmuel accepts Rav Nachman's ruling, even though he objects that it establishes a problematic precedent; in B.M. 83a, Rabban bar bar Ḥanan also questions Rav's ruling, but eventually accepts it as authoritative and returns the garments he had confiscated from the workers. These multiple parallels reinforce the conclusion that the Talmudic editors interpreted Rav's statement in B.M. 83a as establishing a valid and binding legal rule. As a result, they do not label his decision as lifnim mi-shurat ha-din.

As this brief analysis of the case of B.M. 83a shows, the idea of lifnim mi-shurat ha-din has a long and complex history in Jewish thought. Understandings of this category continued to develop and evolve after the close of the Babylonian Talmud. The phrase appears in medieval commentaries on both the Tanakh and the Talmud, as well as in legal codes and responsa, and debates over how to understand this idea continue into the modern period. Just as I have argued that it is necessary to examine the meaning of lifnim mi-shurat ha-din in tannaitic literature in order to understand how it is both adopted and adapted by the Talmudic editors, so too it is necessary to understand how this phrase was deployed in the Talmud in order to identify how this idea has continued to evolve in post-Talmudic works.

The model of lifnim mi-shurat ha-din as discretionary judgment that I have proposed here offers a paradigm for understanding how and why the Talmudic editors used this phrase to categorize only a small selection of narratives. It clarifies literary and source-critical
features of these sugyot, and explains the ways in which the actions labeled as *lifnim mi-shurat ha-din* are juxtaposed with various other legal activities or behaviors. By tracing the evolution of this idea from the midrashic tradition through the close of the Talmud, it also explains why the same phrase is applied to both rabbinic and divine activity, and how issues of judgment take on different nuances in each of those contexts. Precisely because the discretionary judgment model differs from modern assumptions about *lifnim mi-shurat ha-din*, I argue that it can enable scholars to pinpoint with greater accuracy how and when this idea undergoes significant changes and developments. The narrative from B.M. 83a offers an illustrative example by identifying a case in which the later commentary tradition appears to disagree with the editors over whether or not the label *lifnim mi-shurat ha-din* applies. These points of discontinuity highlight avenues for future investigation and study.
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