

Above and Beyond the Law: Applying Moral Standards in the Sphere of Private Law in the Jewish Babylonian, East Syrian Christian, and Iranian Legal Traditions

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Introduction

It is a great privilege to participate in this volume in honor of my teacher and friend, Hanina Ben-Menahem. The present article builds on one of his most influential contributions to the theoretical framing of Jewish law, namely the issue of legal formalism (as a theory of adjudication) and judicial deviation from the law. In this framework, I hope to illuminate aspects of the broader cultural and legal-historical context of some of the most basic jurisprudential features of the Jewish legal tradition that took shape in the Babylonian Talmud.

- * I would like to thank Benny Porat, David Flatto, Hanina Ben-Menahem, Shaul Shaked, Reem Segev, Amit Gvaryahu and Avishai Bar-Asher for their insightful comments and suggestions. When the present volume was in its final stages of editing, Nima Jamali completed his dissertation, which contains a critical edition, English translation, and extensive commentary on *Īšō`bōxt`*'s legal compendium. Our overlapping discussions of certain passages from *Īšō`bōxt`* work are similar in some details, but differ in many others. See Nima Jamali, *A Study of the Interactions among Zoroastrian, Jewish and Roman Legal Systems during the 7th and 8th Centuries CE Based on a Critical Edition of Īšō`bokt`'s Corpus Juris with Commentary and an English Translation* (Ph.D. diss., University of Toronto, 2021). I would like to thank Nima Jamali for graciously sharing his work with me.

In line with the Dworkinian model of the law as an amalgam of rules and moral principles,¹ the rabbinic legal tradition incorporates, alongside detailed rules, moral principles and values, which are regularly employed to modify and correct the strict law, on the interpretive-hermeneutic, legislative and adjudicatory levels.² Not unlike the Greco-Roman notion of equity (Latin *aequitas*; Greek *epieikeia*) and its appeal to moral principles, the rabbinic mechanism for the modification and correction of the strict law on the basis of moral principles and values is part of a broader sphere of equity characteristic of the rabbinic legal tradition at large.³ While the Greek and Latin terms are absent from rabbinic literature,⁴ the modification

- 1 See Ronald M. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), 29–64. Cf. H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 238–76.
- 2 See, e.g., Boaz Cohen, *Jewish and Roman Law: A Comparative Study in Two Volumes*, 2 vols. (New York: The Jewish Theological Seminary, 1966), vol. 1, 31–57; Moshe Silberg, *Kakh darko shel talmud* (Jerusalem: Magnes, 1984), 66–138; Aaron Kirschenbaum, *Equity in Jewish Law, Halakhic Perspectives in Law: Formalism and Flexibility in Jewish Civil Law* (Hoboken, NJ: Ktav, 1991); idem, *Equity in Jewish Law, Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (Hoboken, NJ: Ktav, 1991); Menachem Elon, *Jewish Law: History, Sources, Principles* (Jerusalem: Magnes, 1997), 125–71 (Hebrew); Moshe Halbertal, *Interpretive Revolutions in the Making: Values as Interpretive Considerations in Midrashei Halakhah* (Jerusalem: Magnes, 1997) (Hebrew); Hanina Ben-Menahem, “Equity,” in *Windows Onto Jewish Legal Culture: Fourteen Exploratory Essays*, ed. Hanina Ben-Menahem, Arye Edrei, and Neil Hecht (London: Routledge, 2011), vol. 2, 3–42; Christine Hayes, *What’s Divine About Divine Law? Early Perspectives* (Princeton: Princeton University Press, 2015), 288–306.
- 3 For a comparison of Jewish and Greco-Roman notions of equity see, e.g., Eliezer S. Rosenthal, “For the Most Part,” *Peraqim* 1 (1967–68): 189–98 (Hebrew); Cohen, *Jewish and Roman Law*, vol. 1, 31–57; Kirschenbaum, *Equity*, 17–19. However, in contrast to Roman (and English) law, which exhibits institutional separation of law and equity, Jewish law does not maintain a parallel set of courts for law and equity. See Ben-Menahem, “Equity,” 7. Christine Hayes pointed out in this regard the structural and functional affinity between the praetorian edicts and rabbinic *taqqanot* (enactments), which seem to have developed along similar lines. See Hayes, *Divine Law*, 306–7. For possible echoes of Aristotelian *epieikeia* in Maimonides’ writings see the debate in Hanina Ben-Menahem and Berachyahu Lifshitz, eds., *On Law and Equity in Maimonidean Jurisprudence: Reading the Guide for the Perplexed 3:34* (Jerusalem: The Institute for Research in Jewish Law, 1994) (Hebrew).
- 4 Kirschenbaum, *Equity*, 7–9.

and adjustment of the law on the basis of moral principles and values is a ubiquitous feature of the rabbinic legal tradition.

Beyond affecting the law at its interpretive-hermeneutic core,⁵ the rabbinic principles and values intervene with the law in several ways: via *legislation*, introducing/enacting new rules to correct or supplant the existing norms; via *adjudication*, adjusting the norms through equitable intervention of the judiciary; and via *aspiration*, leaving the moral principles and values to exist as general guidelines alongside the system's rules.⁶ In the first type of intervention, effecting legislative change, an explicit or implicit principle is employed to justify the correction or modification of an existing norm. Some semantic markers of this type of intervention include the terms *barishonah* ("at first"), which follows the pattern, "at first the law was x, but now the law is y, due to such and such policy considerations"; *taqqanah* ("enactment"), which represents legislative innovation and the introduction of novel practices and regulations justified by a pragmatic or moral rationale; and *gezerah* ("decree"), which represents legal innovation in service of conserving and upholding the existing norms.⁷ In the second type of intervention, via adjudication, moral principles and values are employed by the courts to correct the system's rules along the lines of equity and function as 'decision rules' guiding the judiciary. In the third type of intervention, via aspiration, the moral principles and values are left to exist alongside the norms as general guidelines which ought to be upheld and maintained by the individual.

In the present paper, I will home in on a set of rabbinic principles which establish a heightened standard of moral behavior in the sphere of private law that exceeds the strict law: *ve'asita ha-yashar ve-ha-tov* ("you shall perform that which is upright and good"), *kofin 'al middat sedom* ("[the court] may compel [one to cease] the ways [characteristic] of Sodom"), *le-ma'an telekh be-derekh tovim* ("so that you shall walk in the way of the virtuous"), and *lifnim mi-shurat ha-din* ("within the line of the law"). The moral standard upheld by the various principles, to be sure, is not cut from the same cloth. The first two principles establish a more basic standard of moral behavior—only slightly more demanding than contemporary standards of good faith, fair dealing, and avoidance of unconscionable behavior and the abuse of rights—which

5 For which see esp. Halbertal, *Interpretive Revolutions*; Kirschenbaum, *Equity*, 57–184.

6 For this classification see Kirschenbaum, *Equity*; Ben-Menahem, "Equity," 9.

7 See Hayes, *Divine Law*, 288–306.

requires taking the interests of others into account. The last two principles establish a “super-heightened” standard of altruistic behavior to the extent of incurring financial loss. All four principles, however, facilitate a heightened standard of moral behavior in the sphere of private law exceeding the demands of the strict law.

I argue that the four principles—and the heightened moral standard they facilitate—were developed and systematized mainly in the framework of the Babylonian (rather than Palestinian) branch of the rabbinic legal tradition and are reflective, moreover, of the distinctive cultural and jurisprudential environment of the Syro-Mesopotamian Near East in the late Sasanian period, in which context the Babylonian Talmud took shape. The first two principles (*ve’asita ha-yashar ve-ha-tov* and *kofin ‘al middat sedom*) appear for the first time in the Babylonian Talmud and are completely absent from Palestinian rabbinic literature.⁸ The last two principles (*le-ma’an telekh be-derekh tovim* and *lifnim mi-shurat ha-din*) are attested in Palestinian rabbinic literature, but do not function there as fully-normative, justiciable and enforceable standards. Only in the Babylonian Talmud are these heightened moral standards transformed into justiciable and enforceable standards.

This is not to say that the existence of heightened moral standards, in excess of the strict law, are limited to the Babylonian Talmud. The rabbinic legal tradition recognizes a graded scale of normativity—ranging from a deontological sphere of obligatory and prohibited behavior, through a non-deontological sphere of recommended and discouraged activity, to various forms of supererogation—which is attested already in tannaitic literature.⁹

8 See, e.g., Benjamin Porat, “*Tom Lev: A Conceptual Comparative Investigation*,” *Mishpatim* 45 (2016): 626 n. 114 (Hebrew); Gideon Libson, “Chapters from ‘Sefer Ha-Matzranut’ of Rav Shmuel ben Hofni Gaon,” *Tarbiz* 56 (1986): 87 n. 67 (Hebrew).

9 See, e.g., Tzvi Novick, *What Is Good, and What God Demands: Normative Structures in Tannaitic Literature* (Leiden: Brill, 2010). Notably, while a range of normativity can be found already in tannaitic literature, a systematic taxonomy of the grades of normativity emerges only in rabbinic writings produced in the Islamic world, probably in connection with the fivefold model of Islamic normativity, known as *al-ahkām al-khamsa*, classifying acts as either required (*wājib* or *fard*), recommended (*mandūb*), permissible (*mubāh*), discouraged (*makrūh*), or prohibited (*ḥarām*). For the Islamic doctrine of *al-ahkām al-khamsa* see, e.g., Ignaz Goldzieher, *The Zāhirīs: Their Doctrine and their History*, trans. W. Behn (Leiden: Brill, 1971), 63–80; Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1964), 121–22; Frederick S. Carney, “Some Aspects of Islamic Ethics,” *Journal of Religion*

There are in fact several tannaitic categories that establish a heightened moral standard of behavior extending to the sphere of private law. These include, for example, *patur mi-dine adam ve-ḥayyav be-dine shamayim* (=matters for which one is exempt according to human laws, but is liable according to the laws of heaven),¹⁰ *latset yede shamayim* (=fulfilling one's heavenly obligation),¹¹ and (*ein*) *ruaḥ ḥakhamim nuḥa himeno* ("The spirit of the sages is pleased/displeased by him").¹² The exact normative weight attached to these ethical-religious categories remains, however, ambiguous at best, as they generally seem to promote an aspirational standard addressed to the individual. They rarely effect legislative change,¹³ are of little concern to the courts (=non-justiciability), and are certainly not seen as enforceable.¹⁴ It is

63 (1983): 160–68. For the impact of the five-fold Islamic doctrine on Maimonides, see Joel Kraemer, "The Influence of Islamic Law on Maimonides – *al-aḥkām al-khamsa*," *Te'udah* 10 (1996): 225–44 (Hebrew); Gideon Libson, "Maimonides' Halakhic Writing against the Background of Muslim Law and Jurisprudence of the Period," in *Maimonides: Conservatism, Originality, Revolution*, ed. Aviezer Ravitzky (Jerusalem: Shazar, 2008), vol. 1, 265–66 (Hebrew). In fact, already Rav Sherira Gaon, in a responsum devoted to the legal status of the evening prayer (*arvit*), distinguishes between mandatory behavior (*hovah*), optional behavior constituting a mitsvah (*reshut u-mitsvah*) and optional behavior constituting supererogation (*reshut u-middat ḥasidut*). And, in another responsum concerning practices that circumvent procreation, he distinguishes between a punishable prohibition, one that does not result in penalty, and simply 'disgusting' behavior (*mekho'ar*). See discussion and sources in Yishai Kiel, *A Jurisprudential Reading of Rav Sherira's Epistle and Legal Responsa in the Light of Rabbinic, Islamic and Zoroastrian Legal Culture* (Ph.D. diss., The Hebrew University of Jerusalem, 2019), 75–76 (Hebrew).

- 10 *m. B. Qam.* 6:4; *t. B. Qam.* 6:16–17 (ed. Lieberman, 23–24 [*dino masur la-shamayim*]); *b. B. Qam.* 55b–56a. See in general Elon, *Jewish Law*, 129–31.
- 11 *m. Yeb.* 15:7; *b. Yeb.* 118b; *m. B. Mets.* 3:3; *b. B. Mets.* 37a–b. See in general Elon, *Jewish Law*, 132.
- 12 *m. B. Bat.* 8:5; *b. B. Bat.* 133b; *m. Shev.* 10:9; *t. B. Mets.* 3:14 (ed. Lieberman, 76). See in general Elon, *Jewish Law*, 133–37; Ben-Menahem, "Equity," 13–23.
- 13 Compare *t. Shev.* 8:11 and *b. B. Qam.* 94b.
- 14 A more complicated issue is the rabbinic curse of *mi she-para'* (=“He who exacted punishment from the generation of the Flood and the generation of Dispersion [and the inhabitants of Sodom and Gomorrah, and the Egyptians who were drowned in the Sea], he will exact punishment from a person who does not stand by his word”), which applies to a person who retracts from a sale transaction after the payment has already been made, but before the item had been legally acquired. See *m. B. Mets.* 4:2; *t. B. Mets.* 3:14 [ed. Lieberman, 76]; *y. Shev.* 10:9 (39d); *y. B.*

in the context of the Babylonian rabbinic legal tradition that moral principles and values establish fully-normative, justiciable and enforceable standards of moral behavior in excess of the strict law.

Menachem Elon has argued that the non-enforceable norms included in the Jewish legal tradition are generally perceived as integral to the legal system and fully subject to judicial application, rather than extra-legal educational/religious guidelines. He further argues that even norms that are technically non-enforceable are often treated by rabbinical courts as enforceable to varying degrees.¹⁵ Adopting a legal historical perspective on this matter, I contend that the process by which heightened moral standards in the sphere of private law came to be regarded as fully-normative, justiciable and enforceable is in fact a product of Babylonian rabbinic legal culture, which developed in a particular historical and jurisprudential context. While Palestinian rabbis certainly recognized normative categories facilitating a standard of heightened moral behavior in excess of the strict law, they largely perceived these categories as educational, religious and moral guidelines addressed to the individual and subject to his/her personal discretion.

We will see that similar legal (and semantic) categories pertaining to a heightened moral standard in the sphere of private law are attested in adjacent legal cultures in the Syro-Mesopotamian Near East, particularly in the East Syrian Christian and Iranian legal traditions. I will center on the writings of Īšō 'bōxt of Rev Ardashir, an eighth-century East Syrian Christian metropolitan and jurist, who played a major role in the consolidation and codification of civil and family law in the East Syrian Church, and whose

Mets. 4:2 (9c); *b. B. Mets.* 48b. The tannaitic sources do not construe the curse of *mi she-para'* as a judicial procedure, but as a moral-religious indication of divine wrath addressed to the individual, much in line with other tannaitic categories of recommended/reprehensible behavior. The Talmuds, by contrast, perceive the curse of *mi she-para'* as a judicial procedure, although there is some doubt as to its precise nature ('cursing' vs. 'informing' the litigant). See Ron Kleinman, "The Curse 'He Who Punished' (Mi She-para): Religion, Law and Society," *Mehqere Mishpat* 26 (2010): 181–89 (Hebrew); Itamar Warhaftig, *Undertaking in Jewish Law: Its Validity, Character and Types* (Jerusalem: The Jewish Legal Heritage Society, 2001), 410–11 (Hebrew).

15 See Elon, *Jewish Law*, 137–48. For the debate over the justiciability and enforceability of heightened moral standards, see also Ron Kleinman, "Coercion of Public Authorities to Adopt Norms of 'Beyond the Strict Letter of the Law' (*lifnim mi-shurat ha-din*)," *Sefer Shamgar*, 5 vols. (Tel-Aviv: Israeli Bar Association, 2003), vol. 1, 469 (Hebrew).

work constitutes an important source for reconstructing the legal system practiced in Syro-Mesopotamia and Iran from the late Sasanian to the early Abbasid period.

In the theoretical introduction to his legal compendium—which was composed in Middle Persian, but survived only in Syriac translation—Īšō 'bōxt discusses the intersection of different spheres of law: religious canon law (*nāmūsā*), moral law or “uprightness” (*triṣūtā*) and civil law (*dinā*). He further classifies a dimension of moral behavior within the sphere of civil law, which he terms *ḥasīrūt dinā* (lit. “less than, or short of, the law”) and *yatīrūt dinā* (lit. “more than, or in excess of, the law”). The Syriac terms are accompanied by the transliterated Middle Persian terms *passand* and *behdādestanīh*, which similarly refer to a heightened moral standard in excess of the law. The latter originated in Zoroastrian religious law, but were adapted to the sphere of (Iranian) civil law, probably as early as the late Sasanian period.

I posit that the emergence of the abovementioned rabbinic principles in the Babylonian Talmud can be illuminated by recourse to Īšō 'bōxt's novel legal taxonomy. The Syriac category of “uprightness” (*triṣūtā*) is legally reminiscent of the talmudic categories of “upright and good” conduct (*ha-yashar ve-ha-tov*) and avoidance of the “ways of Sodom” (*middat sedom*), all of which facilitate a standard of good faith and fair dealing devoid of unconscionable behavior and abuse of rights. The Syriac category of acting “in excess of the law” or “short of the law” (*yatīrūt / ḥasīrūt dinā*) is legally reminiscent of the talmudic category of going “within the line of the law” (*lifnim mi-shurat ha-din*), connected with the “way of the virtuous” (*derekh tovīm*), all of which establish a ‘super-heightened’ standard of altruistic and supererogatory behavior that goes as far as demanding substantial financial loss in the name of social justice.

The justiciable and enforceable status of heightened moral standards in the sphere of private law is connected with the generally non-formalistic nature of rabbinic jurisprudence.¹⁶ Deconstructing a pervasive ‘myth’

16 I use the term “formalistic” in the sense of a theory of adjudication, which limits moral agency and discretion in the judicial process and confines the judge’s role to the identification and application of the system’s rules in a strict and ‘mechanical’ manner. On legal formalism and Jewish law see, e.g., Benjamin Brown, “Formalism and Values: Three Models,” in *New Streams in Philosophy of Halakhah*, ed. Aviezer Ravitzky and Avinoam Rosenak (Jerusalem: Magnes, 2008), 236–40 (Hebrew); Yair Lorberbaum and Haim Shapira, “Maimonides’ Epistle on Martyrdom in the Light of Legal Philosophy,” *Diné Israel* 25 (2008):

concerning Jewish law's inherent formalism, Hanina Ben-Menahem¹⁷ has argued that Jewish law is in fact far from being formalistic, if by that is meant mechanical adherence to the letter of the law, at the expense of its spirit and intent. In contrast to Jewish law's image as "mechanical, rule-governed, and oblivious to the personal and moral dimensions of the matters being adjudicated," he posits that it is "inherently flexible, context-dependent, and self-transcending," while facilitating a model of judicial activity that is "by design, individualistic, dynamic, and sensitive both to pragmatic contingencies and moral dilemmas."

He further demonstrates that the non-formalistic and dynamic nature of Jewish law is rooted in the intricacies of Babylonian (rather than Palestinian) rabbinic legal culture and its flagship literary expression, the Babylonian Talmud. In fact, the Palestinian and Babylonian Talmuds systematically differ with regard to the power of the judiciary to deviate from the letter of the law: whereas the Babylonian Talmud exhibits adjudicatory flexibility and embraces the power of the judiciary to exceed the limits of the law, the Palestinian Talmud generally reflects stricter conformity to the law and denies the ability of judges to deviate from the law.¹⁸ It should not come as a surprise, therefore, that the justiciability and enforceability of moral standards exceeding the strict law are similarly a product of Babylonian, rather than Palestinian, rabbinic culture.

Ben-Menahem speculated that the difference between the two Talmuds, insofar as judicial deviation from the law is concerned, hinges on the respective exposure of Palestinian and Babylonian rabbis to Christian

123–69; Hanina Ben-Menahem, "The Myth of Formalism: (Mis)Readings of Jewish Law from Paul to the Present" (November 9, 2010), Hebrew University of Jerusalem Legal Research Paper No. 17–5; available at SSRN: <https://ssrn.com/abstract=2520968>.

- 17 Ben-Menahem, "Myth of Formalism" (demonstrating the non-formalistic nature of Jewish law by pointing out the internal critique of the law in rabbinic sources, the essential distinction between law and law-to-be-applied, and the fact of judicial deviation from the law). For the distinction between law and law-to-be-applied see Hanina Ben-Menahem, "The Second Canonization of the Talmud," *Cardozo Law Review* 28 (2006): 46–47. For judicial deviation see Hanina Ben-Menahem, *Judicial Deviation in Talmudic Law: Governed by Men, Not by Rules* (New York: Harwood Academic Publishers, 1991).
- 18 Ben-Menahem, *Judicial Deviation*, 86–98; idem, "The Respective Attitudes of the Babylonian and Jerusalem Talmuds to Judicial Deviation from the Law," *Shenaton Ha-mishpat Ha-ivri* 8 (1981): 113–34 (Hebrew).

doctrine, and especially to the claim that the gospel had supplanted Mosaic law. The rabbis of Roman Palestine, who were supposedly more exposed to such Christian claims, reacted by insisting on strict conformity to the law, whereas Babylonian rabbis maintained a more dynamic and flexible approach.¹⁹ However, since Christianity had in fact considerable impact on Babylonian rabbinic culture—the extent of which has become clearer in recent years²⁰—I suggest viewing the non-formalistic tendency of the Babylonian rabbis, and particularly their approach to judicial appeal to heightened moral standards in excess of the strict law, in the context of local currents manifest in the East Syrian Christian Church and the Syro-Mesopotamian and Iranian cultures at large.

“You shall perform that which is upright and good”

Deuteronomy 6:18 (“You shall perform that which is upright and good in the eyes of the Lord”) establishes, according to the Babylonian Talmud, a standard of moral behavior in the sphere of private law,²¹ loosely connected to—although somewhat more stringent than—contemporary standards of good faith, fair dealing, and refraining from unconscionable behavior and abuse of rights.²² The only tannaitic reference to the notion of “upright and good” conduct concerns good governance and the need for transparency in the actions of public officials, but has nothing to do with a heightened

19 Ben-Menahem, “Respective Attitudes,” 132–34.

20 For some recent surveys of the literature see, e.g., Michal Bar-Asher Siegal, *Early Christian Monastic Literature and the Babylonian Talmud* (Cambridge: Cambridge University Press, 2013), 1–34; eadem, “Judaism and Syriac Christianity,” in *The Syriac World*, ed. Daniel King (New York: Routledge, 2018), 146–56; Aaron Michael Butts and Simcha Gross, “Introduction,” in *Jews and Syriac Christians: Intersections across the First Millennium*, ed. Aaron Michael Butts and Simcha Gross (Tübingen: Mohr Siebeck, 2020), 1–26; Geoffrey Herman and Jeffrey L. Rubenstein, “Introduction,” in *Aggadah of the Bavli and Its Cultural World*, ed. Geoffrey Herman and Jeffrey L. Rubenstein (Providence, RI: Brown Judaic Studies, 2018), xi–xxxv.

21 Silberg, *Darko shel talmud*, 97–138; Kirschenbaum, *Equity*, 253–87.

22 For the overlap between the rabbinic principle and the categories of *bona fides*, good faith, *Treu und Glauben*, and *tom lev* see, e.g., Elon, *Jewish Law*, 164–71; Shmuel Shilo, “Equity as a Bridge Between Jewish and Secular Law,” *Cardozo Law Review* 12 (1991): 737–51; Porat, “*Tom Lev*,” 627–32.

standard of moral behavior transcending the strict law.²³ It is only in the anonymous stratum of the Babylonian Talmud that Deut 6:18 is transformed into such a standard.

Not unlike the Roman standard of *aequum et bonum*, the rabbinic standard of “upright and good” behavior is somewhat difficult to define.²⁴ While it is tied in the Babylonian Talmud to specific legislative enactments (see below), the notion of “upright and good” behavior is not reduced to particular norms, but rather seems to function as a general principle facilitating a heightened standard of moral behavior that can, and should, be applied in the broader sphere of private law. Thus, although there are only a few talmudic references to “upright and good” conduct, the Babylonian Talmud contains the germ for the ubiquitous application of this standard by post-talmudic jurists and commentators.²⁵

The Babylonian Talmud derives two particular norms from the requirement to perform that which is “upright and good.” The first concerns an abutter’s right of first refusal in the purchase of real estate adjacent to his own. This norm, known as *dina de-bar mitsra* (the law of the abutter), overrides the owner’s freedom of contract and his right to dispose of his property as he sees fit. If the estate was sold to a third party, the abutter retains the right to purchase the estate from said party for the original price paid. Although, according to Jewish law, a person may dispose of her property in any manner she wishes, the standard of “upright and good” behavior intervenes with this right by protecting the abutter’s interest in maintaining the integrity and coherence of her estate.²⁶

We can infer from the talmudic discussion that the principle of “upright and good” behavior is directed, not only at the individual (à la conduct rule)—be it the owner of the land or the third party who purchased it from him²⁷—but also at the court (à la decision rule), as the notion of *mesalqinan*

23 *t. Sheqal*. 2:2 (ed. Lieberman, 205); Lieberman, *Tosefta Kifshuta*, vol. 4, 676; Elon, *Jewish Law*, 512–13; Porat, “*Tom Lev*,” 627 n. 116.

24 For a comparison of the two standards, see Kirschenbaum, *Equity*, 277–81.

25 See, e.g., *Maggid Mishneh* on Maimonides, *Laws Concerning Neighbors*, 14:5; Nahmanides on Deut 6:18.

26 For the law of the abutter see *b. B. Mets.* 108b; Talmudic Encyclopedia, s.v. *bar mitsra*; Elon, *Jewish Law*, 513–14; Kirschenbaum, *Equity*, 259–68; Amichai Cohen, *Sugyat bar mitsra: ben mishpat le-musar* (Ph.D. diss., Bar-Ilan University, 2001).

27 See *Talmudic Encyclopedia*, s.v. *bar mitsra*, nn. 276–83.

leh (“we remove him”) clearly indicates that the standard is both justiciable and enforceable.²⁸

The second talmudic norm derived from the principle of “upright and good” conduct concerns a debtor, whose land was seized by the court as collateral for the payment of a debt. According to this principle, the debtor retains the right to redeem his land for the original valuation price, even if the land was sold to a third party (“a valuation is forever redeemable”). While, according to the strict law, the collateral seized by the court belongs to the creditor, who can sell it to a third party, the principle of performing that which is “upright and good” protects the interest of the debtor to redeem his land over and against the interests of the creditor and said third party.²⁹

Like “the law of the abutter,” the norm of *shuma hadar le- 'olam* (“a valuation is forever redeemable”) is directed not only at the creditor who received the debtor’s land in collateral and the third party who purchased it from him (à la conduct rule), but also at the court (à la decision rule), indicating once again the justiciability and enforceability of the principle of “upright and good” conduct from which the norms are said to derive.

The Babylonian Talmud thus appeals to the principle of “upright and good” conduct in two cases: *dina de-bar mitsra* (“the law of the abutter”) and *shuma hadar le- 'olam* (“a valuation is forever redeemable”).³⁰ In both contexts, the moral standard intervenes with the strict law via legislation.³¹ While the formal language introducing legislative enactment in rabbinic literature is absent from the discussion in these instances, the law of the abutter and that concerning the redemption of the debtor’s land certainly represent legislative interventions. It would seem, however, that the talmudic editors understood the appeal to the principle of “upright and good” behavior in these two instances as a mere example of its possible application, which should in fact guide the activity of exegetes, judges, and jurists and extended to other spheres of law by manner of legislative, judicial and interpretive intervention.³²

28 Porat, “*Tom Lev*,” 631.

29 See *b. B. Mets.* 35a; Elon, *Jewish Law*, 514–15; Kirschenbaum, *Equity*, 255–59.

30 *b. B. Mets.* 35a; *b. B. Mets.* 108b.

31 See Ben-Menahem, “*Equity*,” 10–13; Elon, *Jewish Law*, 163 n. 360; cf. Silberg, *Darko shel talmud*, 99.

32 This is certainly the way most post-talmudic commentators treated the principle of “upright and good” behavior. See, e.g., Nahmanides on Lev 19:2 and Deut 6:18 and Rashi on Deut 6:18. See also Porat, “*Tom Lev*,” 629 n. 123.

The Ways of Sodom

Another principle related to that of “upright and good” behavior, which was similarly developed exclusively in the Babylonian Talmud,³³ is that “(the court) may compel [one to cease] the ways [characteristic] of Sodom” (*kofin 'al middat sedom*).³⁴ While Christian exegesis often connects Sodom to sexual abominations, in rabbinic literature the notion of the “ways of Sodom” pertains mainly to egocentric behavior and abuse of one’s rights in the sphere of private law, e.g., by insisting on petty details or disregarding the interests of others.³⁵ Unlike the principle of “upright and good” conduct, which is formulated as a conduct rule (although, as we have seen, functions as a decision rule as well), the principle of coercing “the ways of Sodom” is formulated as a decision rule establishing an adjudicatory standard. Needless to say, the principle of coercing “the ways of Sodom” is not only justiciable, but also enforceable, as clearly indicated by its very formulation.

The Babylonian Talmud appeals to this principle in four different contexts.³⁶ In all four contexts, the notion of coercing the “ways of Sodom” facilitates a heightened moral standard in excess of the strict law, according to which a person should be prevented from abusing his/her rights and forced to take the interests of others into account. While the principle of coercing the “ways of Sodom” introduces new particular norms and thus intervenes with the law via legislation, it also seems to facilitate a judicial standard that should be applied and enforced by the court in other cases and in other branches of law.³⁷

A related rule, which does not explicitly mention the “ways of Sodom,” but exhibits a similar (perhaps even more stringent) moral standard, is the exemption of “one who benefits (from a certain act) while the other endures

33 See, however, *m. Avot* 5:10. The meaning of *middat sedom* in this Mishnah comes indeed very close to the meaning of the phrase in the Babylonian Talmud. That said, unlike the Babylonian Talmud, the Mishnah merely provides an abstract taxonomy of moral characteristics, while making no reference to courts, legal enforcement, or coercive measures.

34 See Porat, “*Tom Lev*,” 632–36; Kirschenbaum, *Equity*, 185–252.

35 Porat, “*Tom Lev*,” 632 n. 139.

36 *b. Eruv.* 49a; *b. Ketub.* 103a; *b. B. Bat.* 12b; *b. B. Bat.* 59a.

37 Porat, “*Tom Lev*,” 635. This is certainly the way many post-talmudic commentators and jurists understood the principle of *kofin 'al middat sedom*, which they applied to other cases beyond those mentioned in the Babylonian Talmud.

no loss" (*zeh neheneh ve-zeh lo haser*). According to rabbinic law, if a person occupies an empty space owned by another without permission (say he parks his car in his neighbor's empty space while the latter is away), the invader is exempt from compensating the owner for unjust enrichment, as long as no financial loss was incurred by the owner due to the invasion (e.g., he was not planning on leasing the property to a third party).³⁸

It is not entirely clear how the positive formulation of *ve'asita ha-yashar ve-ha-tov* relates to the negative formulation of *kofin 'al middat sedom*.³⁹ In any event, the two principles facilitate together a fully-normative, justiciable, and enforceable standard of moral behavior in excess of the law, which empowers rabbinic jurists and judges to prevent unconscionable behavior and abuse of legal rights in the sphere of private law, while encouraging individual actors to take the interests of others into account, at least when no significant financial loss is involved. In the next two sections, we will see that the Babylonian Talmud goes even farther, in establishing a justiciable and enforceable standard of moral behavior in the sphere of private law, which requires altruistic behavior to the extent of incurring substantial financial loss in the interest of social justice.

"So that you shall walk in the way of the virtuous"

According to rabbinic law, an employee who negligently caused damage to his employer in the course of his employment is liable for the damages. The employer is authorized, moreover, to set-off the employee's wages against the amount of the damage.⁴⁰ After presenting the strict law, however, the Babylonian Talmud reports the following anecdote.

רבה בר בר חנה תברו ליה הנהו שקולאי חביתא דחמרא שקל גלימיהו אתא
 לקמיה דרב אמ' ליה זיל הב להו גלימיהו אמ' ליה דינא הכי אמ' ליה למען
 תלך בדרך טובים אזל יהב להו גלימיהו אמרי ליה עניי אנן וטרחנא כולי יומא
 ולית לן מידי למיכל אמ' ליה זיל הב להו אגריהו אמ' ליה דינא הכי אמ' ליה
 אין וארחות צדיקים תשמר

38 This norm is largely at odds with the contemporary notion of unjust enrichment and broader constructions of ownership in the Western legal tradition. See, e.g., Benjamin Porat, "Ownership and Exclusivity: Two Visions, Two Traditions," *American Journal of Comparative Law* 64 (2016): 147–90.

39 See the discussion in Porat, "Tom Lev," 638–39.

40 See in general *b. B. Mets.* 82b–83a; Shillem Warhaftig, *Jewish Labor Law*, 2 vols. (Tel Aviv: Moresmeth, 1969), vol. 2, 864.

Certain porters broke a barrel of wine belonging to Rabbah b. Bar Hannah (in the course of their employment). He (=Rabbah) seized their garments and was summoned before Rav. He (=Rav) said to him: Return their garments. He (=Rabbah) retorted: Is that the law? Rav said, (It says,) "So that you shall walk in the way of the virtuous" (Prov 2:20). He returned their garments. They said to him (=Rav): we are poor and have exerted ourselves all day and have nothing to eat. He (=Rav) said to him: Give them their wages. He (=Rabbah) retorted: is that the law? He (=Rav) answered, Yes, (as it says,) "and keep the paths of the righteous" (Prov 2:20).⁴¹

As is often the case with legal narratives, certainly rabbinic legal narratives, this story complicates, problematizes, and even subverts the normative discussion immediately preceding it.⁴² In contrast to the strict law, Rav decides not to enforce the norms of tort liability on the negligent porters, but instead orders the employer, who suffered the loss of his wine barrel, to return the porters' garments and pay them their wages, quoting to that effect Prov 2:20 ("so that you shall walk in the way of the virtuous and keep the paths of the righteous").

Moshe Silberg suggested that Rav's utterance should not be construed as a legally binding judicial pronouncement, but rather as an extra-judicial

41 *b. B. Mets.* 83a (Hamburg 165).

42 Robert Cover describes the normative sphere as a universe containing not only rules but also narratives, which provide meaning to the law. In this thickly-defined legal space, rules interact with narratives and the broader cultural meanings they signify, and statutes are constantly recontextualized, and even breached, violated, and subverted, by narratives. See Robert Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983): 4–68. For Cover and rabbinics see, e.g., Steven Fraade, "Nomos and Narrative Before Nomos and Narrative," *Yale Journal of Law & the Humanities* 17 (2005): 81–96; Suzanne L. Stone, "In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory," *Harvard Law Review* 106 (1993): 813–94. For the interaction of law and narrative in the Babylonian Talmud see, e.g., Barry S. Wimpfheimer, *Narrating the Law: A Poetics of Talmudic Legal Stories* (Philadelphia: University of Pennsylvania Press, 2011), 9–24; idem, "The Dialogical Talmud: Daniel Boyarin and Rabbinics," *JQR* 101 (2011): 245–54; Yishai Kiel, *Sexuality in the Babylonian Talmud: Christian and Sasanian Contexts in Late Antiquity* (Cambridge: Cambridge University Press, 2016), 11–14; Yehudah Brandes, *Aggadah le-ma'aseh*, 2 vols. (Jerusalem: Elinar, 2005–11).

instruction given by Rav to his disciple, Rabbah b. Bar Ḥannah, by manner of moral admonition and educational guidance.⁴³ He bases his interpretation on the fact that Rav quotes a verse from Proverbs, rather than the Pentateuch, and on the association of Rav's decision with the notion of *lifnim mi-shurat ha-din* according to several post-talmudic commentators. It has been correctly pointed out, however, that this interpretation of the story is unlikely.⁴⁴ Beyond the fact that binding norms are not infrequently derived in rabbinic literature from non-Pentateuchal verses, it is clear that the norm in question—even if it is based on the notion of *lifnim mi-shurat ha-din*—is both justiciable and enforceable.⁴⁵ The encounter is formulated as a typical court case, not one of religious/educational guidance, as evident from the formula *'ata le-qame* ("he came before him") which is characteristic of judicial settings,⁴⁶ the fact that both the defendant and the plaintiffs are present before Rav, and the adjudicatory language attributed to Rav ("go and give them"). If this were an educational encounter, we would have expected to find a more intimate conference between Rav and his disciple, Rabbah b. Bar Ḥannah, which would warrant a different vocabulary.⁴⁷

That the talmudic story depicts an enforceable legal pronouncement in the context of a court procedure can be further supported by way of comparison with the parallel version found in the Palestinian Talmud:

(תני) ר' נחמיה קדר מסר קדרוי לבר נש. תברין. ארים גולתיה. אתא גבי ר' יוסי בר חנינה. אמ' ליה איזיל אמור ליה למען תלך בדרך טובים. אזל ואמ' ליה ויהב גולתיה. אמ' ליה יהב לך אגרך. אמ' ליה לא. אמ' ליה זיל ואמור ליה וארחות צדיקים תשמור. אזל ואמ' ליה ויהב ליה אגריה.

It was taught in the name of R. Nehemiah: a potter gave his pots to someone (=a porter) who broke them. He (=the potter) seized his garment. He came before R. Yose b. Ḥanina. He (=R.

43 Silberg, *Darko shel talmud*, 122–30.

44 See Ben-Menahem, *Judicial Deviation*, 78.

45 As we shall see below, the principle of *lifnim mi-shurat ha-din* is also understood in the Babylonian Talmud as a justiciable, and probably even enforceable, standard.

46 See Ben-Menahem, *Judicial Deviation*, 36, 77.

47 For the enforceability of "walking in the way of the virtuous" according to the Babylonian Talmud see Shamma Friedman, *Talmud Arukh: BT Bava Metzi'a VI, Text: Critical Edition with Comprehensive Commentary* (Jerusalem: The Jewish Theological Seminary, 1990), 418–20.

Yose) said to him (=the porter): Go and tell him (=the potter), “so that you shall walk in the way of the virtuous” (Prov 2:20). He went and told him; thereupon he (=the potter) returned his garment. He (=R. Yose) asked (the porter), Did he pay you your wages? No, he answered. He (=R. Yose) said, Go and tell him (=the potter), “and keep the paths of the righteous” (Prov 2:20). He went and told him; thereupon he paid him his wages.⁴⁸

In contrast to the Babylonian Talmud’s version of this story, the Palestinian Talmud’s version is cast in a non-judicial setting, in which the presiding authority, R. Yose, appears to be conversing *ex parte* with the plaintiff, whereas a judicial procedure requires the presence of both litigants according to rabbinic laws of procedure. The absence of the defendant is clearly conveyed by the fact that the porter must leave the court in order to inform the potter about R. Yose’s instruction. In the Babylonian Talmud, moreover, the initiative throughout the procedure remains with the plaintiff, as should be expected in an (adversarial) court setting. In the Palestinian Talmud, by contrast, R. Yose initiates the second part of the exchange (“did he pay your wages?”).⁴⁹ The contrast suggests that, whereas in the Palestinian Talmud the presiding rabbi (R. Yose) functions as a religious authority providing moral guidance, in the Babylonian Talmud the presiding rabbi (Rav) acts in a judicial capacity.⁵⁰

The differences between the Babylonian and Palestinian versions of this story are reflective of a broader and more systematic difference between the Palestinian and Babylonian branches of rabbinic legal culture concerning the ability of judges to deviate from the strict law based on moral considerations⁵¹ as well as the relative normative status attached to supererogatory measures.⁵² While the Palestinian Talmud tends to insist on strict judicial conformity to the letter of the law, the Babylonian Talmud is more flexible and accepting of the power of judges to exceed the limits of the law. So, where the Babylonian Talmud exhibits judicial deviation from the law, the parallel discussion in the Palestinian Talmud typically situates the encounter in a non-judicial context

48 *y. B. Mets.* 6:6 (11a) (Leiden).

49 On the adversarial vs. inquisitorial dimensions of Jewish law, see Yuval Sinai, *The Judge and the Judicial Process in Jewish Law* (Jerusalem: Magnes, 2010) (Hebrew).

50 For the comparison of the two versions see Ben-Menahem, *Judicial Deviation*, 74–79; idem, “Respective Attitudes,” 124–25; Friedman, *Talmud Arukh*, 413–22.

51 Ben-Menahem, “Respective Attitudes.”

52 Friedman, *Talmud Arukh*, 418–19.

or else aligns the verdict with the strict law, thus circumventing the need for judicial deviation.⁵³ In this context, the standard of “walking in the way of the virtuous” is perceived in the Babylonian Talmud as fully-normative, justiciable, and enforceable, whereas the Palestinian Talmud portrays it as a recommended measure left to the individual’s discretion.

The standard of “walking in the way of the virtuous” is more demanding than that established by the principles of “upright and good” conduct and avoiding “the ways of Sodom.” While the latter facilitate a standard of behavior in excess of the strict law, which prevents unconscionable behavior and abuse of rights and requires taking the interests of others into account, it demands at best minor inconvenience and only minimal financial loss. The principle of “walking in the way of the virtuous,” by contrast, establishes a “super-heightened” standard of moral behavior in excess of the strict law, which requires altruistic behavior and the waiving of rights in fulfillment of social justice ends, even when significant financial loss is incurred.⁵⁴

Another difference is that the principle of “walking in the way of the virtuous” intervenes with the law mainly via adjudication, i.e., by setting a judicial standard alongside the strict law to be applied at the discretion of the court, while the principle of performing that which is “upright and good” intervenes with the law mainly via legislation, by effecting legislative change (although, as we have seen, it is meant to be used by judges, jurists, and exegetes more broadly).⁵⁵

Notably, in contrast to the Babylonian Talmud—which sets the case of the porters in a judicial context and portrays Rav’s invocation of Prov 2:20 as a judicially enforceable pronouncement correcting the strict law by way

53 A similar difference between the two Talmuds can be discerned by juxtaposing *y. Ket.* 6:6 (30d) (= *y. Git.* 5:3 [46d]) and *b. Ket.* 50b. See Ben-Menahem, *Judicial Deviation*, 70–74.

54 The principle of performing that which is “upright and good” and that of coercing “the ways of Sodom” establish a standard of moral behavior in the sphere of private law that is more pervasive (it does not depend on the socio-economic circumstances of the litigating parties), but also less demanding. The principle of “walking in the way of the virtuous,” by contrast, establishes a moral standard that is more demanding, but is limited to particular socio-economic circumstances.

55 As we have seen, the principle of performing that which is “upright and good” is presented in the Babylonian Talmud as the force behind the particular enactment of *dina de-bar mitsra* (the law of the abutter) and *shuma hadar le-olam* (a valuation is forever redeemable).

of equitable intervention—Rav Sa'adya Gaon suggests that Rav's instruction should not be construed as a binding and enforceable verdict, but rather as a form of religious and educational guidance. According to Sa'adya, the notion of “walking in the way of the virtuous” sets a moral standard for the litigants, but not an adjudicatory tool empowering judicial implementation of distributive justice by means of private law.⁵⁶ This, however, is a post-talmudic development.

Lifnim mi-shurat ha-din

The realm of supererogation⁵⁷ is associated, in the rabbinic legal tradition (as in contemporary Israeli law and culture), with the idiom *lifnim mi-shurat ha-din* (lit. “within the line of the law”),⁵⁸ although other related idioms are similarly attested in rabbinic literature to express dimensions of supererogation, such as *middat ḥasidut* (מידת חסידות) and *qedoshim tihyu* (קדושים תהיו).⁵⁹

56 See, e.g., Rav Sa'adya's statement to that effect in *Sefer Ha-piqqadon* (כתאב אלודיעה), lines 621–31, in Robert Brody, ed., *Legal Works by Rav Sa'adya Gaon* (Jerusalem: Yad Harav Nissim, 2015), 224–25.

פמא אסמתא אל חכמ ען קדמאיהם דרך טובים וארחות צדיקים פנב אן יתבע אלא אן הרה פריצה עלי על מאלך לא עלי על האכם לא כן אל האכם לא יידר פי חכמה ולא ינקץ ולא ירת ולא יחייף לקו לא תעשו עול במשפט לא תשא פני דל ולא תהדר וגו'

But what they called in the name of their early ones “the way of the virtuous and the paths of the righteous,” this is obligatory only on the litigants, not on the judge. Indeed, the judge should not add (anything to the law) in his verdict, subtract (from it), or corrupt (it), so as not to distort the dictum “You shall not render an unjust judgment; you shall not be partial to the poor or defer (to the great)” (Lev 19:15).

R. Asher b. Yeḥiel similarly argues that the court may not enforce the standard of *lifnim mishurat ha-din*. By contrast, R. Eleazer b. Yoel Halevi, R. Eliezer b. Nathan and R. Mordekhai b. Hillel Hakohen rely on the talmudic case of the porters to demonstrate the enforceability of the standard of *lifnim mishurat ha-din*. See Ben-Menahem, “Equity,” 40–42; Friedman, *Talmud Arukh*, 419–20 n. 398; and Kleinman, “Coercion,” 479–80.

57 For supererogation see, in general, David Heyd, *Supererogation: Its Status in Ethical Theory* (Cambridge: Cambridge University Press, 1982).

58 See Silberg, *Darko shel talmud*, 97–138; Kirschenbaum, *Beyond Equity*, 109–36; Shilo, “*Lifnim mishurat hadin*,” 359–90; Louis Newman, “Law, Virtue and Supererogation in the Halakha: The Problem of ‘Lifnim mishurat hadin’ Reconsidered,” *JJS* 40 (1989): 61–88; Kleinman, “Coercion,” 476–90.

59 For the principle of *middat ḥasidut* see, e.g., *b. B. Mets.* 51b–52a; *b. Shab.* 120a; *b. Hul.* 130b; Kirschenbaum, *Beyond Equity*, 68–73; Silberg, *Darko shel talmud*, 115–18.

Tzvi Novick has convincingly demonstrated that the use of *lifnim mi-shurat ha-din* as a general marker of religious supererogation represents a post-talmudic development.⁶⁰ In the classical talmudic corpus it refers to a more limited form of behavior in excess of the strict law, entailing the renouncing or waiving of a right to which one is entitled by law.⁶¹ In this context, Novick traces three stages of development: 1. In the earliest tannaitic stratum, represented by the halakhic midrashim, the notion of *shurat ha-din* (or simply *din*, *ba-din*, or *shurah*) occurs by itself, and indicates a rule or governing norm, which is not contrasted with any supererogatory norm that is said to trump it.⁶² 2. In the next tannaitic stage, represented by the Mishnah and Tosefta, *shurat ha-din* acquires a more specific implication of trumping, in which one norm is said to be supplanted by another. This supplanting, however, has nothing to do with renunciation or waiving of a right.⁶³ 3. Only in the final stage, represented in the Babylonian Talmud,⁶⁴ is *shurat ha-din* contrasted with *lifnim mi-shurat ha-din*, while the latter becomes a technical term for renouncing or waiving a right to which one is entitled by law.⁶⁵

For *qedoshim tihyu* see, e.g., Naḥmanides on Lev 19:2.

- 60 For the controversy between Maimonides and Naḥmanides regarding whether supererogatory standards apply to everyone (Naḥmanides) or only to pious individuals (Maimonides) see Shilo, "*Lifnim mishurat hadin*"; Ben-Menahem, "Equity," 32–35.
- 61 Tzvi Novick, "Naming Normativity: The Early History of the Terms *šurat ha-din* and *lifnim mi-šurat ha-din*," *JSS* 55 (2010): 391–92. See also Newman, "Law, Virtue and Supererogation," 72; Hayes, *Divine Law*, 177–78.
- 62 See especially *Mekhilta de-Rabbi Ishmael*, *Vayassa* 6; *Mekhilta de-Rabbi Shimon b. Yoḥai*, Exod 17:2.
- 63 See e.g., *m. Git.* 4:4; *t. Ter.* 2:1–3; *t. Ma'as. Sh.* 3:8.
- 64 While this notion is already attested in a tannaitic source (*Mekhilta de-Rabbi Ishmael*, *Yitro* 2; *Mekhilta de-Rabbi Shimon b. Yoḥai*, Exod 18:20), Novick argues that it reflects a marginal, late, and obscure use of the term in tannaitic literature.
- 65 Novick, "Naming Normativity," 392–93; Cohen, *Jewish and Roman Law*, vol. 1, 52. See also *b. Ber.* 7a in which God is said to pray that "I shall act with my sons in accordance with the measure of mercy and enter for them within the line of the law"; Kirschenbaum, *Beyond Equity*, 111. Interestingly, Ohrmazd is similarly said to act in accordance with the principle of *meh-dādestānīh* ("the higher or greater law"). See, e.g., Domenico Agostini, Eva Kiesele, and Shai Secunda, "Ohrmazd's Better Judgement (*meh-dādestānīh*): A Middle Persian Legal and Theological Discourse," *Studia Iranica* 43 (2014): 177–202.

In some occurrences of *lifnim mi-shurat ha-din* in the Babylonian Talmud, the principle seems to refer to non-deontological supererogatory behavior that is subject to individual discretion.⁶⁶ In other occurrences, however, the principle refers to a fully-normative, justiciable, and probably also enforceable, standard. Thus, the following tradition is recorded in *b. B. Mets.* 24b:

רב יהודה הוה שקיל ואזיל בתר מר שמואל בשוקא דבי דיסא אמ' ליה מצא כאן ארנקי מהו הרי אלו שלו בא ישראל ונתן סימניה מהו חייב להחזיר תרתי לפנים משורת הדין כי הא דאבוה דשמואל אשכח חמרא במדברא ואהדרניה למאריה לבתר תריסר ירחי שתא לפנים משורת הדין.

Rav Yehudah was walking behind Mar Samuel in the marketplace. He (=Rav Yehudah) asked him, If one finds a purse here what is the law? (Mar Samuel replied,) It belongs to the finder. (Rav Yehudah asked again,) If a Jew comes and provides its distinctive identifying markers what is the law? (Mar Samuel replied,) He must return it. How can both statements be true? (The second statement reflects that which is) “within the line of the law” (*lifnim mi-shurat ha-din*), as Samuel’s father found an ass in the desert and returned it to its owner after twelve months “within the line of the law” (*lifnim mi-shurat ha-din*).⁶⁷

In this case, the principle of *lifnim mi-shurat ha-din* is introduced by the editors,⁶⁸ not simply to explain the exceptional behavior of an individual as a matter of supererogation, but to explain the normative instruction given by Samuel to Rav Yehudah concerning the legal status of a lost object found in the marketplace. There is no reason to doubt the obligatory and deontological nature of the instruction.⁶⁹ While according to the strict law, an object found in the marketplace belongs to the finder, if a Jew provides distinctive

66 See, e.g., *b. B. Qam.* 99b; *b. Ketub.* 97a.

67 *b. B. Mets.* 24b (Hamburg 165).

68 The words *lifnim mi-shurat ha-din* seem to be part of the editorial stratum according to MS Hamburg 165, which does not contain the preceding words “he said to him.” If the words were uttered by Samuel, then the principle should all the more be seen as obligatory. See the discussion in Ben-Menahem, “Equity,” 27–29.

69 The obligatory nature of Samuel’s ruling was pointed out by several post-talmudic commentators (e.g., R. Eleazer b. Yoel Halevi and R. Mordekhai b. Hillel Hakohen). See Kleinman, “Coercion,” 479–80.

identifying markers, one is *obligated* to return the object in accordance with the principle of acting “within the line of the law.”⁷⁰

Uprightness and Excess of the Law in *Īšō‘bōxt’s* Compendium

Unlike the rabbinic legal tradition, which contains a detailed body of civil law, the early Christian Church was largely concerned with religious matters and did not develop a systematic body of civil law.⁷¹ As a result, Christian jurists appealed to other legal systems for the adjudication of private law. While most Christian jurists appealed to Roman law in civil matters,⁷² East Syrian

- 70 The obligatory status of norms derived from the principle of *lifnim mi-shurat ha-din* is not unanimously accepted in the Babylonian Talmud, although it seems to be the position of the talmudic editors. Compare, e.g., the immediately following story about Rav Naḥman and Rava. Also compare the anonymous Geonic responsum devoted to the concealment of information in the course of a sale contract, which determines—in line with the common law doctrine of caveat emptor (“let the buyer beware”)—that it is not the responsibility of the seller to inform the buyer about the state of the purchased goods. Rather, it is the buyer’s responsibility to examine the goods for blemishes prior to concluding the transaction. The Gaon adds that, while the seller would be commended for acting beyond the requirement of the law by disclosing such information to the buyer, this is not obligatory according to the law.

ודאי דעביד לפנים משורת הדין מוכר למיפק מעון דשמיא ומתרעומת דלוקח ומודע ליה די ש בה מומין, אבל מן דינא לית ליה. הילכך שמעון הוא דהוה באעי מידק לנפשיה.

Of course, it is in accordance with the principle of ‘(going) within the line of the law’ (*lifnim mi-shurat ha-din*) if the owner, so as to avoid religious sin in the eyes of God and the grudge of the buyer, discloses to the buyer that the animal is blemished. But according to the law (*min dina*), he is not obligated to do so.

The Gaon who issued this responsum applied the law to its letter, indicating that the litigant may voluntarily choose to uphold the moral standard of *lifnim mi-shurat ha-din* if he/she is so inclined. The heightened moral standard is relegated in the process to the sphere of unenforceable religious/ethical guidelines addressed to the individual and subject to his/her discretion.

- 71 The compartmentalization of religious and civil law is often tied to Matt 22:21.
- 72 Not only Latin and Greek speaking Christians, but also Syriac speaking Christians appealed to Roman law in civil (and family) matters. The most important channel for the impact of Roman law on Syriac Christianity is the Syro-Roman law book. For a critical edition see Walter Selb and Hubert Kaufhold, *Das syrisch-römische*

Christian jurists developed a distinctive body of civil law based mainly on the Sasanian legal system, which was still largely in force in Syro-Mesopotamia and Iran well into the Abbasid period.⁷³

The first comprehensive attempt to codify civil law in the East Syrian Church was undertaken by ʾĪšōʾbōxt of Rev Ardashir⁷⁴ at ca. 775–79.⁷⁵ While the author is conversant in biblical law, synodic law, Roman law, and even Islamic law, his compendium is based mainly on the Sasanian legal system, relying in particular on legal concepts and decisions found in the Sasanian collection of real and hypothetical case law, known as the *Mādayān ī Hazār Dādestān* (“The Book of a Thousand Judgements”), compiled in the first half of the seventh-century prior to the Islamic conquest of Syro-Mesopotamia and Iran.⁷⁶ ʾĪšōʾbōxt’s legal compendium was originally composed in Middle Persian, but survived only in Syriac translation, produced at the behest of

Rechtsbuch, 3 vols. (Wien: Verlag der österreichischen Akademie der Wissenschaften, 2002). For earlier influences of Roman law on Syriac Christianity see Yifat Monnickendam, “The Kiss and the Earnest: Early Roman Influences on Syriac Matrimonial Law,” *Le Muséon* 125 (2012): 307–34.

- 73 See Uriel Simonsohn, “The Introduction and Formalization of Civil Law in the East Syrian Church in the Late Sasanian–Early Islamic Periods,” *History Compass* 14 (2016): 231–43; Richard Payne, *A State of Mixture: Christians, Zoroastrians, and Iranian Political Culture in Late Antiquity* (Oakland: University of California Press, 2015), 93–126; Richard Payne, “East Syrian Bishops, Elite Households, and Iranian Law after the Muslim Conquest,” *Iranian Studies* 48 (2015): 5–32.
- 74 On ʾĪšōʾbōxt see Lucas Van Rompay, “Ishoʾbokht of Rev Ardashir,” in *Gorgias Encyclopedic Dictionary of the Syriac Heritage*, ed. Sebastian P. Brock et al. (Piscataway, NJ: Gorgias Press, 2011), 216; Marc Aoun, “Jésusbokht, métropolitain et juriste de l’Église d’Orient (Nestorienne). Auteur au VIIIe siècle du premier traité systématique de droit séculier,” *Tijdschrift Voor Rechtsgeschiedenis* 73 (2005): 81–92.
- 75 For a Syriac edition and German translation see Eduard Sachau, ed. and trans., *Syrische Rechtsbücher*, 3 vols. (Berlin: Georg Reimer, 1914), vol. 3, 1–201, 289–344. For preliminary studies see Nima Jamali, “The Book VI of ʾĪšōʾbokht’s Corpus Juris and the Emergence of Procedural Laws in the Church of the East,” *Journal of the Canadian Society for Syriac Studies* 17 (2017): 37–48; Mathieu Tillier, “The Evolution of Judicial Procedures in East-Syrian Canon Law after the Islamic Conquests: The Judicial Oath,” *J ECS* 70 (2018): 227–40.
- 76 For a critical edition and German translation see Maria Macuch, *Das sasanidische Rechtsbuch “Mātakdān ī Hazār Dāstistān” (Teil II)* (Wiesbaden: Kommissionsverlag Franz Steiner, 1981); Maria Macuch, *Rechtsskasuistik und Gerichtspraxis zu Beginn des siebenten Jahrhunderts in Iran. Die Rechtssammlung des Farroḫmard ī Wahrāmān* (Wiesbaden: Harrassowitz, 1993).

Catholicos Timothy I after ʿĪšōʿbōxt’s death. The Syriac translation contains a few Persian terms (provided in transliterated form in Syriac characters) accompanied by a Syriac translation/definition.⁷⁷

In the first book of his compendium, devoted to legal theory and the nature of the law and its adjudication, ʿĪšōʿbōxt reflects on the relationship between law and morality and, subsequently, delves into the question of the normative status, justiciability, and enforceability of heightened moral standards in the sphere of private law. Setting the stage for the ensuing discussion, he distinguishes between three spheres of law: religious law (*nāmūsā*),⁷⁸ moral law or “uprightness” (*triṣūtā*),⁷⁹ and civil law (*dinā*). The sphere of “uprightness” (*triṣūtā*) is defined in terms reminiscent of Zoroastrian moral theory, centered on the idea of good thoughts, good words, and good deeds⁸⁰ (and the avoidance of evil thoughts, evil words, and evil deeds), a fact which underscores the extent of ʿĪšōʿbōxt’s immersion in local Iranian culture.

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- 77 For the Middle Persian terms, see Jean-Pierre de Menasce, “Some Pahlavi Words in the Original and in the Syriac Translation of ʿĪšōbōxt’s Corpus Iuris,” in *J. M. Unvala Memorial Volume*, ed. Jamshedji Maneckji Unvala (Bombay: Kanga, 1964 [rep. 1985]), 6–11; Maria Macuch, “A Pahlavi Legal Term in Jesubōxt’s Corpus Iuris,” *Irano-Judaica* 7 (2019): 73–102.
- 78 The term *nāmūsā* has a broader meaning in Syriac, which partly overlaps with the term *dinā*. See Michael Sokoloff, *A Syriac Lexicon: A Translation from the Latin, Correction, Expansion, and Update of C. Brockelmann’s Lexicon Syriacum* (Piscataway, NJ: Gorgias Press, 2009), 922. For ʿĪšōʿbōxt, however, *nāmūsā* designates mainly religious Church law.
- 79 For the meaning of *triṣūtā* (goodness, rightness, uprightness, rectitude, integrity), see Sokoloff, *Syriac Lexicon*, 1668; J. Payne Smith, *A Compendious Syriac Dictionary* (Eugene, OR: Wipf & Stock, 1999 [1902]), 620. Cf. also the equivalent Jewish Babylonian Aramaic term (תריצותא) in Michael Sokoloff, *A Dictionary of Jewish Babylonian Aramaic of the Talmudic and Geonic Periods* (Ramat Gan: Bar-Ilan University Press, 2002), 1234, and the parallel Mandaic term in E.S. Drower and R. Macuch, *A Mandaic Dictionary* (Oxford: Oxford University Press, 1963), 490.
- 80 For the idea of “good thoughts, good words, and good deeds” in Zoroastrianism (Avestan *humata, hūxta, huvaršta*) see, e.g., Mary Boyce, “Humata, Hūxta, Huvaršta,” *Encyclopædia Iranica*, vol. 12, 561–62.

כל דבר אפי' ראייתו, טעמו. ראי' מ, ה' אפי' רבנותו כח
 ב' כח טעמו טעמו.

The third chapter concerning uprightness (אֲדִירָא): uprightness is known (=manifest) in word (כְּבִלְלָא), in thought (כְּסִבְכָא), and in tangible objects (כְּחִבְכָא).⁸¹ Uprightness which is in tangible objects is seen in people in (the realm of) weights.⁸² And that which is in thought is to think of each thing what it really is, of good that it is good and of bad that it is bad and, in short, of each thing what it really is. And the same is also true for speech, (namely to say) of each thing what it really is.⁸³

- 81 For this particular meaning of the term אֲדִירָא (as opposed to 'matter, thing') see Sokoloff, *Syriac Lexicon*, 1271.
- 82 For this particular meaning of the term כְּסִבְכָא see Sokoloff, *Syriac Lexicon*, 1364–65 (the typical meaning 'wood' does not make much sense in the present context). *Īšō' bōxt* might be referring here to upright moral behavior in the sphere of measurements and weights.
- 83 For the Syriac text see Sachau, *Syrische Rechtsbücher*, 10–12. My translation differs in several details from Sachau's German translation and the Hebrew translation by Uriel Simonsohn in Bar Belinitzky and Yuval Rotman, eds., *The Cave of Treasures: Syriac Anthology from Late Antiquity in Hebrew Translation* (Tel Aviv: Tel Aviv University Press, 2018), 115–22. For the manifestation of faithfulness in deed, word, and thought, compare also *She'iltot de-Rav Aḥai Gaon, Vayḥi*, 36:

שאלתא דמחייבין דבית ישראל למישקל ולמיטרא בהימנותא ואילו מאן דאמר ליה לחבריה מזובננא לך האי מידי לא בעי ליה למיהדר ביה ואע"ג דאי בעי למיהדר מצי הדר דיבורא בעלמא הוא דא"ל אפילו הכי לא מיתבעי ליה למיהדר בדיבוריה אלא מיבעי ליה למיקם בהימנותא ועליה איתמר הדין קרייא עיני בנאמני ארץ לשבת עמדי מלמד שזוכה ויושב במחיצתו של הקב"ה ולא מיבעייתא דאמר ליה מזובננא האי מידי אלא אפילו גמר בליביה לזבונני ליה אע"ג דלא אפיק מן פומיה לא מיתבעי ליה למיהדר ביה דכתיב הולך תמים ופועל צדק ודובר אמת בלבבו כי הא דרב ספרא הוה ליה ההוא חמרא לזבונני אתא ההוא גברא ובעייה הוה קא קרי ק"ש א"ל מי זבנת לי ניהלי בזווי פלן לא אהדר ליה סבר לא ניחא ליה בהכי אטפי ליה וא"ל יהבת לי ניהלי בזווי פלן לא אהדר ליה בתר דאסיק אמר ליה מן כד אמרת בזמן קדמא גמרי בלבי לזבונני לך הא טופנא לא שקילנא מינך ואי א"ל והדר ביה מיתקרי מחוסר אמנה ואי יהיב ליה זווי ולא משך והדר ביה קאי באיסורא אבל אמרו מי שפרע מאנשי דור המבול ומאנשי דור הפלגה ומאנשי סדום ועמרה ומן המצריים שנטבעו בים הוא יפרע ממי שאינו עומד בדבורו.

A question concerning the obligation of the House of Israel to negotiate in good faith. And, so, if one says to his fellow, 'I will sell you this item,' he should not go back on his word. Even though it is (legally) within his right to go back on his word if he so wishes, as it is merely words he uttered, he should not go back on his word, but should stand in good faith. And with regard to such a person the verse says, "I will look with favor on the faithful in the land, so that they may live with me (whoever walks in the

After outlining the contours of “uprightness” (*triṣūtā*) as pertaining to faithfulness in action, word, and thought, Iṣō bōxt discusses the relationship between “uprightness” (*triṣūtā*) and civil law (*dinā*).

וְכִי גִבּוֹרֵי יָדָם הַגְּבִיחוּ בְּדַבָּר וּבְעָשׂוֹת וּבְמַחְשָׁבוֹת
 כַּמֵּהָרָגִים וְכַמֵּהָמוֹת וְכַמֵּהָעֲוֹנוֹת וְכַמֵּהָעֲלָפוֹת
 וְכַמֵּהָחֲרָבוֹת וְכַמֵּהָמִּוֹנוֹת וְכַמֵּהָשִׁחָיוֹת וְכַמֵּהָשִׁחָרְפוֹת
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 וְכַמֵּהָשִׁחָחַטִים וְכַמֵּהָשִׁחָחַטְוִים וְכַמֵּהָשִׁחָחֹטְעִים
 וְכַמֵּהָשִׁחָחֹטְעֵי הַבֵּית
 וְכַמֵּהָשִׁחָחֹטְעֵי הַבַּיִת

way that is blameless shall minister to me)” (Ps 101:6) and he will live to sit in the presence of the Holy One, Blessed be He. And this is not only if he uttered, ‘I will sell you this item,’ but even if he just decided in his heart to sell it to him even though it did not come out of his mouth, he should not go back on his thought, as it says “Those who walk blamelessly, and do what is right and speak the truth in their heart” (Ps 15:2). As in the story told of Rav Safra (cf. *b. B. Bat.* 88a), who once had an ass for sale. A certain man came and inquired about it. Rav Safra was (busy) reading the Shema. The man said to him, ‘Are you willing to sell (this ass) to me for such and such an amount?’ He did not answer him. The man thought that the price he offered was insufficient. He added to that amount and asked him again, ‘Are you willing to sell (this ass) to me for such and such an amount?’ He did not answer him. After he finished the Shema, he (=Rav Safra) said to him, ‘From the time you presented your first offer, I already decided in my heart to sell it to you; I will not take from you the sum you added.’ And if a person utters (words) and then retracts he is regarded as ‘lacking in faithfulness’ (*מחוסר אמנה*). And if he (=the buyer) already paid the money but did not yet take hold of the item, and the seller retracts, he stands in violation of a prohibition (but the sale cannot be enforced, as we learn.) ‘The (rabbits) said, however, He who exacted punishment from the Flood generation and Dispersion generation, the inhabitants of Sodom and Gomorrah, and the Egyptians who were drowned in the Sea, He will exact punishment of him who does not stand by his word.’

While the curse of *mi she-para*’ (applied to a person who retracts from a sale transaction after the payment has been made, but before the item had been legally acquired) and that of *meḥusar amanah* (applied to a person who retracts from a verbal commitment) are talmudic categories that appear already in tannaitic literature (see above), the additional category of retracting from mere thought and the emerging tripartite taxonomy of faithfulness in deed, word, and thought seem to be the innovation of Rav Aḥai Gaon, who died only several decades prior to Iṣō bōxt.

ההוא והוא. אלא אף על פי שכל מה שכתבנו להלכה הוא כפי שכתבנו להלכה. והוא כפי שכתבנו להלכה.
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The fourth chapter concerning the difference between law (הלכה) and uprightness (ישרות): uprightness (ישרות) differs from law (הלכה) in the fact that not all that is within the purview of 'law' is upright, and not all that is upright is necessarily within the purview of 'law.'

That what is upright is not necessarily within the purview of 'law' is (for example) when a person makes a (promissory) contract (אבדה) with his fellow (saying), 'I shall give you so and so, my daughter, as a wife' or 'I shall give you a certain possession of mine.' But when it is claimed of him (by his fellow), he says 'I wanted to give you, but now I shall not give you.' And (as for) said woman or said possession, according to (the measure of) uprightness – they belong to him (=the plaintiff), but according to the law (הלכה), as long as he does not actually give and does not realize the contract (אבדה), they are not his.

That what is within the purview of 'law' is not necessarily upright is (for example) when a person brings to the judge a(n already) redeemed bill (אבדה), but the judge does not know that what is in the bill was (already) redeemed, and thus rules and decides (הוא) that it should be redeemed. This is in accordance with the law, but is not upright (ישרות), because (the purview of) uprightness is more limited (אבדה) than that of the law.⁸⁴

In this passage, Īšō' bōxt provides two examples for the theoretical distinction between law and "uprightness."⁸⁵ The first example concerns

84 For the Syriac text see Sachau, *Syrische Rechtsbücher*, 12–13. My translation differs in several details from Sachau's German translation and the Hebrew translation by Uriel Simonsohn in Belinitzky and Rotman, *Cave of Treasures*, 115.

85 Īšō' bōxt's argument that promises are not enforceable according to the standards of civil law is curious, since according to Sasanian law, promises were not only religiously binding, but also legally enforceable, as evident throughout the *Mādayān ī Hazār Dādestān* (e.g., MHD 20.7–13; 56.12–15; 67.13–18; 68.12–14; 71.12–19; 109.11–19). See Berachyahu Lifshitz, "Promises in Talmudic Law and Persian Law," *JLA* 19 (2011): 185–89. Īšō' bōxt's position is similar, though, to

faithfulness and acting in good faith: while the fulfilment of a promise is obligatory as per the standards of “uprightness,” it is not so according to the standards of civil law. The second concerns fair dealing and abuse of rights: while the presentation of a valid document in court, attesting to a legal obligation that had already been satisfied, is legitimate by the standards of civil law, it is condemnable by the standards of “uprightness.”

After outlining the relationship between law (*dinā*) and “uprightness” (*triṣūtā*), ʾIšō bōxt delves into a related sphere of heightened moral behavior that lies beyond that of civil law, which he terms *ḥasrūt dinā* (lit. “less than, or short of, the law”) and *yatīrūt dinā* (lit. “more than, or in excess of, the law”). These Syriac terms translate the Persian legal terms *passand*⁸⁶ and *behdādestānīh*⁸⁷ respectively, both of which seem to refer to a heightened standard of moral behavior in the sphere of private law or a form of supererogation transcending the strict law. The difference between the two is that *passand* seems to refer to making a concession, receiving *less* than the law permits, by renouncing

that of Jewish law, in which retraction from a promise (or any form of future-oriented obligation that does not entail an act of acquisition) has religious/moral implications, but generally does not warrant judicially-enforceable remedies. See, e.g., Berachyahu Lifshitz, “Why Doesn’t Jewish Law Enforce the Fulfilment of a Promise,” *Mishpatim* 25 (1995): 161–79 (Hebrew); Warhaftig, *Undertaking in Jewish Law*, 466–72.

- 86 For this reconstructed meaning of *passand* see Mēnōy Xrad 1.52–53 (“With enemies struggle in accordance with the law; with friends proceed with *passand* that is due to friends”); Menasce, “Some Pahlavi Words,” 8. Shaul Shaked (private communication) has recently suggested reading *psyd*, based on the Aramaic root PSD (“to spoil, lose, be deficient”), instead of the reconstructed Middle Persian form *passand*. Although this root is unattested in Syriac, it is attested in Jewish Babylonian Aramaic and Mandaic. See Sokoloff, *Dictionary of Jewish Babylonian Aramaic*, 917; Drower and Macuch, *Mandaic Dictionary*, 375.
- 87 *behdādestānīh* is another form of Pahlavi *weh-dādestānīh*, both of which refer to supererogatory behavior and going beyond the requirements of the law. See Macuch, “Pahlavi Legal Term,” 76–84. Cf. Yishai Kiel and Prods Oktor Skjaervo, “The Sabbath Was Made for Humankind: A Rabbinic and Christian Principle in Its Iranian Context,” *Bulletin of the Asia Institute* 25 (2015): 14 n. 40. A related Pahlavi term, *meh-dādestānīh* (lit. “higher/greater law”) is well-attested in Pahlavi literature and has been subject to various interpretations. See Macuch, “A Pahlavi Legal Term,” 86–95; Agostini, Kieseles, and Secunda, “Ohrmazd’s Better Judgement.” In legal contexts—especially in the *Pahlavi Videvdad* and the Pahlavi commentary on the *Nīrangestān*—the term refers to the overriding of a religious prohibition by a higher principle/value of the system. See esp. Kiel and Skjaervo, “Sabbath,” 6–9.

or waiving a right to which one is entitled by law, while *behdādestanīh* refers to behavior in excess of the law, giving *more* than what the law requires.

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The fifth chapter concerning what we call *passand* and *behdādestanīh*, which mean (acting) short of the law and in excess of the law. These two are very similar to each other.

passand is what is short of the law. For example, when a person owes his fellow the principal and interest (of a debt).⁸⁸ And for reason of poverty or illness or for another reason he cannot pay off his debt. And he says to his creditor: let me give you the principal alone.

behdādestanīh is that which is more than the law. For example, a daughter, which according to our law is entitled to half of the share of a son, but she is given a full share, so that she does not remain at home and a blemish might be found in her.⁸⁹

The notion of *passand/ḥasīrūt dinā* is exemplified through the case of a creditor, who agrees to waive the interest on a loan (which he is legally

88 The technical term for usury/interest in Syriac, which is also employed by ʾĪṣō' bōxt in his chapter on usury (book 5, chapter 9; Sachau, *Syrische Rechtsbücher*, vol. 3, 168) is ܩܘܕܐܢܐ. Here he uses the term ܩܘܕܐܢܐ (contrasted with ܩܘܕܐܢܐ), which refers more generally to increasing, multiplying, and doubling. For the root 'ḳ' see Jonas Greenfield, "Studies in Aramaic Lexicography I," in *Al kanfei yonah: Collected Studies of Jonas C. Greenfield on Semitic Philology* (Leiden: Brill, 2001), 6–21; Sokoloff, *Syriac Lexicon*, 81; Drower and Macuch, *Mandaic Dictionary*, 32a; Amit Gvaryahu, "Twisting Words: Does Halakhah Really Circumvent Scripture?" *JJS* 68 (2017): 280.

89 For the Syriac text see Sachau, *Syrische Rechtsbücher*, 12–15. My translation differs in several details from Sachau's German translation and the Hebrew translation by Uriel Simonsohn in Belinitzky and Rotman, *Cave of Treasures*, 116.

entitled to receive in accordance with the parties' agreement) since the debtor is poor, ill, or otherwise unable to redeem the interest. While, according to the civil law, the creditor retains the right to insist on receiving the interest on the loan even if the debtor is unable to pay up, the equitable standard requires him to settle for the principal alone. The notion of *behdādestanīh / yatīrūt dinā* is exemplified through a case of inheritance law. While, according to the civil law (*dinā*), a daughter is entitled to only half of the share given to each of her brothers, acting "in excess of the law" entails equal distribution of the inheritance between the sons and daughters of the deceased. The norm, according to which a daughter inherits only half of a son's share, is rooted in Sasanian law (and was still very much in practice in Syro-Mesopotamia and Iran in the Abbasid period),⁹⁰ in contrast to Roman law (=sons and daughters inherit equally)⁹¹ and rabbinic law (=daughters do not inherit when there are sons).⁹²

90 See Macuch, *sasanidische Rechtsbuch*, 85; Payne, *State of Mixture*, 113–14. For other East Syrian sources attesting to this norm see, e.g., Simeon of Revardashir (Sachau, *Syrische Rechtsbücher*, 3:245): "Therefore, a complete share is given to a son, while a half share to a daughter, for her maintenance, nourishment, and garments". See also Q. 4:11: "Allah instructs you concerning your children: for the male, what is equal to the share of two females."

91 See, e.g., CI 3.36.11; GI 3.14; Dig. 45.3.20.1; Nov. 118.1. See also Selb and Kaufhold, *syrisch-römische Rechtsbuch*, vol. 2, 22 ("male and female inherit equally"). The latter passage, from the Syro-Roman law book, is alluded to in *b. Shab.* 116a–b, which attributes the notion of egalitarian inheritance practices to a (Christian) philosopher: "He (=the philosopher) said to him: From the day you were exiled from your land, the Torah of Moses was taken from you, and the Torah of the 'avon gilyon (lit. "the sheet of sin," a word play on *evangelion* [εὐαγγέλιον]) was given to you, and it says in it: 'The son and the daughter inherit as one' (i.e., equally)" (אמ' להו מן יומא דגלייתון מן ארעכון איתנטיילת אורייתא דמשה מנכון ואתיהבת לכון אורייתא) (דעון-גיליון וכתב' ביה ברא וברתא כחדא יירתון). See Yakir Paz, "The Torah of the Gospel: A Rabbinic Polemic against The Syro-Roman Lawbook," *HTR* 112 (2019): 517–40. For the Christian context of this talmudic story, see also Holger M. Zellentin, *Rabbinic Parodies of Jewish and Christian Literature* (Tübingen: Mohr Siebeck, 2011), 153–56; Thierry Murcia, *Jésus dans le Talmud et la littérature rabbinique ancienne* (Turnhout: Brepols, 2014), 241–317.

92 See, e.g., *m. B. Bat.* 8:2 (the daughter does not inherit when there is a living son). Compare *t. B. Bat.* 7:10 (ed. Lieberman, 155); *y. B. Bat.* 8:1 (16a); *b. B. Bat.* 111a–b. See also Yonatan Feintuch, "Daughters' Inheritance: Halakha, Law and Literature (Following the Story of R. Yehudah Nesi'ah)," *Shenaton Ha-mishpat Ha-ivri* 28 (2015): 203–27 (Hebrew).

All in all, ʾĪšō bōxt constructs two separate principles/categories—“uprightness” (*triṣūtā*), on the one hand, and acting in excess of the law or short of the law (*yatīrūt/ḥasīrūt dinā*), on the other hand—which establish and facilitate a heightened standard of moral behavior in the sphere of private law transcending the strict law. The standard upheld by the two principles/categories, however, is not one and the same. Indeed, the standard of acting in excess of the law or short of the law (*yatīrūt / ḥasīrūt dinā*) is more demanding than that of “uprightness” (*triṣūtā*). While acting in excess of the law or short of the law requires supererogatory waiving of rights to which one is entitled by law and entails significant financial loss—e.g., waiving the interest on a loan; renouncing a double share in the inheritance—the principle of “uprightness” (*triṣūtā*) requires a more basic standard of “good faith,” “fair dealing,” and avoidance of unconscionable behavior and abuse of rights—e.g., not retracting from a promise; not presenting in court a valid legal document attesting to an obligation that had already been redeemed—more closely aligned with contemporary standards in private law.

The principles/categories of “uprightness” (*triṣūtā*) and acting in excess of the law or short of the law (*yatīrūt / ḥasīrūt dinā*), and the moral standards they facilitate, are very similar to the talmudic principles and moral standards we have examined. ʾĪšō bōxt’s construction of “uprightness” (*triṣūtā*) is reminiscent of the talmudic principles of performing that which is “upright and good” and avoiding the “ways of Sodom,” all of which require good faith and fair dealing and seek to prevent abuse of rights. ʾĪšō bōxt’s construction of acting in excess of the law or short of the law (*yatīrūt / ḥasīrūt dinā*) is reminiscent of the talmudic principles of acting “within the line of the law” and “walking in the way of the virtuous,” all of which require altruistic and supererogatory behavior—to the extent of incurring financial loss—and involve a dimension of distributive justice.

The principles/categories developed by ʾĪšō bōxt, designating a heightened standard of moral behavior in the sphere of private law, are not merely legal equivalents of the talmudic principles, but also semantically connected. Indeed, the semantic range of Syriac *triṣūtā*—goodness, rightness, uprightness, rectitude, integrity—is akin to that reflected in the Hebrew *ha-yashar ve-ha-tov*, while the structure of Syriac *yatīrūt dinā* (and Persian *meh-dādestānīh*) is similar to that of Hebrew *lifnim mi-shurat ha-din*, all of which indicate some sort of spatial movement above/beyond the line of the law.

According to this passage, the judge should apply that which is in excess of the law or short of the law by way of admonition and advice to the litigants (in his religious capacity as teacher of the faith), but not by way of command. If the litigants decide to follow the moral admonition and perform that which is above and beyond the letter of the law, they are indeed worthy of praise, but the judge must not enforce it on them. This passage mitigates the impression of the enforceability of moral standards in excess of the strict law, but retains nonetheless the court's role in applying such moral standards. Not unlike the talmudic reconstruction of the curse of *mi she-para* ' as a religious procedure performed by the court itself (rather than a divine measure of punishment as indicated by the tannaitic sources) that resolves the problem of the non-enforceability of incomplete transactions, *Īšō 'bōxt* similarly expects the judge to apply moral standards exceeding the strict law by carving out a religious space within the court and distinguishing between the civil and religious functions of the judge. Thus, *Īšō 'bōxt* ultimately seems to occupy a middle position between the Babylonian Talmud and Rav Sa'adya Gaon. Unlike Rav Sa'adya Gaon who altogether denies the judge any role in the application of such standards, *Īšō 'bōxt* would have the judge adjudicate and apply moral standards exceeding the strict law, but his involvement is restricted to a designated "religious" space.

That said, the Persian category of *weh-dādestanīh*, upon which *Īšō 'bōxt* based his conception of acting in excess of the law or short of the law, appears to have functioned as a fully-normative, justiciable, and enforceable principle. Indeed, according to the *Mādayān ī Hazar Dādestān*, acting in accordance (or in dissonance) with the principle of *weh-dādestanīh* bears concrete legal ramifications. A person whose actions are more in line with the principle of *weh-dādestanīh* is regarded as suited to take an oath (*pad war... weh-dādestantar*) in the context of judicial proceedings, which provides him/her with a significant legal advantage.⁹⁵ This would essentially mean that the court can enforce the normative standard of acting in excess of the law, perhaps not directly, but by barring a litigant who fails to live up to this standard from taking an oath in future court proceedings, thus impeding his/her legal standing.

translation by Uriel Simonsohn in Belinitzky and Rotman, *Cave of Treasures*, 116.

95 See MHD 6.2–6, 13.6–13, 13.16–14.2, 14.7–12, 14.12–17; Macuch, "Pahlavi Legal Term," 76–84.

It would seem that it is precisely this prevailing legal approach that ʾĪšōʾbōxt sought to mitigate in his legal compendium, by arguing that Christian judges should indeed apply such standards in court, but only by way of religious admonition, not by way of command. If this reconstruction is correct, we might be able to discern a parallel shift in the Jewish and Christian legal cultures of Syro-Mesopotamia between the late Sasanian and early Abbasid periods. While the Babylonian Talmud and *Mādayān ī Hazar Dādestān* largely reflect the normative, justiciable, and enforceable status of heightened moral standards in the sphere of private law, Jewish and Christian jurists in the early Abbasid period, who still operated under the influence of Sasanian law, deviated from this legal model to varying degrees, while maintaining a more formalistic stance of judicial conformity to the strict law. In this context, Rav Saʿadya Gaon seems to have gone farther than ʾĪšōʾbōxt, who instructed judges to apply moral standards in excess of the strict law, while wearing their “religious” hat.

Conclusion

In this article, I centered on a set of rabbinic principles—*veʾasita ha-yashar ve-ha-tov* (“you shall do that which is upright and good”), *kofin ʾal middat sedom* (“we [=a court] may coerce regarding the ways of Sodom”), *le-maʾan telekh be-derekh tovim* (“so that you shall walk in the way of the virtuous”), and *lifnim mi-shurat ha-din* (“[going] within the line of the law”)—establishing a heightened standard of moral behavior in the sphere of private law in excess of the strict law. We saw that these principles were developed and systematized mainly in the context of the Babylonian (rather than Palestinian) branch of rabbinic legal culture and that they are reflective of the distinctive cultural and jurisprudential environment of the Syro-Mesopotamian Near East in the late Sasanian period. Notwithstanding Palestinian rabbinic antecedents, I posited that it is mainly in the context of Babylonian rabbinic legal culture that moral principles and values establish fully-normative, justiciable, and enforceable standards of behavior in excess of the strict law.

The four talmudic principles were contextualized with, and illuminated through, ʾĪšōʾbōxt’s taxonomy of moral and legal categories and the Iranian legal terminology underlying his account. We saw that the category of “uprightness” (*triṣūtā*) informs the talmudic principles of performing that which is “upright and good” and avoiding the “ways of Sodom,” which require good faith and fair dealing and seek to prevent unconscionable behavior and

abuse of rights, whereas the category of acting in excess of the law or short of the law (*yatīrūt/ḥasīrūt dīnā*) informs the talmudic principles of acting “within the line of the law” and “walking in the way of the virtuous,” which require altruistic and supererogatory behavior—to the extent of incurring financial loss—and involve a dimension of distributive justice.

Unlike the talmudic principles, however, which establish a fully-normative, justiciable, and enforceable standard of behavior in excess of the law, and in an attempt to push back against the Sasanian concept of *weh-dādestanīh* underlying his legal taxonomy, Īšō‘bōxt instructed judges to apply moral standards in excess of the strict law only in their religious capacity as clergymen. In so doing, Īšō‘bōxt seems to occupy a middle position between the non-formalistic view of the Babylonian Talmud, on the one hand, and the formalistic stance of Rav Sa‘adya Gaon, on the other.