"Be of the disciples of Aaron – a lover of peace, a pursuer of peace, one who loves the creatures and draws them close to Torah". (*Avot* 1, 12)

In memory of a great and noble man, my teacher
Rabbi Professor Aaron Kirschenbaum.

"*Biṣu'a*" and "*Pesharah*": Three Possible Interpretations

Itay Lipschutz

Introduction

In my doctoral dissertation on the subject of "Compromise (*Pesharah*) in Jewish Law," I dealt with, among other things, the institution of *biṣu'a*. Discussed in the first chapter of *Tosefta Sanhedrin*, *biṣu'a* poses an alternative to the resolution of conflict by means of adjudication or legal proceedings, instead resolving conflicts by means of compromise.[1] I argued there that this institution, which was subject to dispute among the tannaim, allowed the court to deviate from the letter of the law in order to realize the values of "peace" and "righteousness" (or "charity") in resolving disputes. I held that the term *pesharah* was originally distinct from *biṣu'a* and was used by the Mishnah and other sources to indicate the settlement of a dispute through compromise in those cases where resolution would be impossible

* Faculty of Law, College of Law & Business. I wish to thank Mordechai Schwarz, Amihai Radzyner, Rinat Kitai-Sangero, and Yuval Sinai for their comments. An earlier version of this article was presented at the Jewish Law Workshop, Faculty of Law, Bar Ilan University and at the Jewish Law Workshop, Faculty of Law, The Hebrew University of Jerusalem. I wish to thank the participants for their comments.

1 Itay E. Lipschutz, "Compromise in Jewish Law" (PhD diss., Bar-Ilan University, 2004) (Hebrew) (below: Lipschutz, "Compromise"). The subjects discussed in the present paper appear primarily in the first five chapters of my dissertation.

within the usual legal framework. Over the course of time the linguistic distinction between *pesharah* and *biṣu'a* became obscured; one may conjecture that this phenomenon is connected with *biṣu'a*'s rise in status, which led to the use of *pesharah* in a broader sense, including the sense of *pesharah* as an alternative to adjudication.[2] I found support for the thesis that the use of *pesharah* in that which previously had been the sense of *biṣu'a* was connected with the rise of the status of *biṣu'a,* in the fact that the term *pesharah* is only mentioned in *Tosefta Sanhedrin* in relation to the question of the number of judges required—an issue that was presumably only discussed among those who supported *biṣu'a*.[3]

A number of recent papers on the subject of *biṣu'a* and *pesharah* in Jewish law have led me to re-examine my previous argument, as well as to critically analyze both my own position and those of the other scholars writing on this subject. Each of the suggestions given in the literature regarding the understanding of *pesharah* and *biṣu'a* in Jewish law has both advantages and disadvantages with regard to one or another aspect of the question: e.g., the textual, the exegetical, the legal aspect, and so on. It follows from this that the preference for one interpretation over another is necessarily influenced by the subjective preference which the particular scholar gives to the advantages and disadvantages of each alternative. In the present study, I undertake a survey of these new interpretations of *biṣu'a* and *pesharah* in rabbinic literature. I also offer a comparison between these interpretations and the thesis I proposed in my doctoral dissertation, as well as a critical examination of all of these interpretations and their respective advantages and disadvantages.

I will particularly focus on three well-ordered proposals for understanding the terms *pesharah* and *biṣu'a* in the teachings of the tannaim and amoraim -

2 Therefore I think that *biṣu'a* is not a distinct term from *pesharah,* which is likewise mentioned in *Tosefta Sanhedrin* and in the talmudic *sugyot* which deal with the subject. Both *biṣu'a* and *pesharah* have certain common features, such as the need for all parties' agreement, and the distributive nature of the solution to the dispute. At a later stage, this evidently led to the use of the term *pesharah* to convey both meanings: namely, *pesharah* as an alternative to adjudication and *pesharah* which is not an alternative to adjudication (for a lengthy discussion, see Itay Lipschutz, "The Meaning of *Pesharah*," *Alei Mishpat* 8 [2010]: 420–22 [Hebrew]).

3 On the role of the *sugya* concerning the number of judges required according to each of the suggestions discussed in this article, see below, following n. 124.

namely, the suggestions offered by Berachyahu Lifshitz and Haim Shapira, and my own suggestion.[4] Due to limitations of space, and in order not to lose the essential points in the mass of innumerable details, I shall not include in this framework all details and relevant sources. Instead, I shall relate to only the most important arguments and to the sources which establish the meaning of *biṣu'a* and *pesharah* in rabbinic literature. In the first part of the article I will discuss *biṣu'a* in the sense of forced compromise, following Shapira's thesis. In the second part of the article I will discuss the connection between *pesharah* and fear of judgment and the channel for adjudication outside of regular legal procedures, in light of the reading proposed by Lifshitz. Throughout, I will juxtapose each of these suggestions with those of the thesis I have advanced in my dissertation. To conclude, I will summarize by noting the principal advantages and drawbacks of each approach.

To begin, I shall present the three tannaitic opinions regarding *biṣu'a,* to which I will refer extensively over the course of the discussion. The source of this dispute is in the first chapter of *Tosefta Sanhedrin.* Although these are cited with minor variations in both the Babylonian and the Jerusalem Talmud, I shall quote them here from the *Tosefta* (based on MS Vienna).

> R. Eli'ezer b. R. Yose the Galilean said: Whoever ''divides'' (הבוצע) is a sinner, and he who praises the one who divides blasphemes before the Omnipresent. Concerning this it says, ''He who praises one who divides scorns the Lord'' (Ps 10:3: ובצע ברך נאץ ה׳). Rather, let the law pierce the mountain. And so said Moses: Let the law pierce the mountain. But Aaron would

4 Berachyahu Lifshitz, "Compromise," in *The Jewish Political Tradition Throughout the Ages*, ed. M. Helinger (Ramat Gan: Bar Ilan University, 2010), 83–104 (Hebrew). This paper is an expansion of an earlier paper published in the collection *Laws of the Land—Law, Judge and Procedure* (Hebrew) (Ophrah: Laws of the Land Institute, 2002), 137; Haim Shapira, "The Debate over Compromise and the Goals of the Judicial Process," *Diné Israel* 26–27 (2009–10): 183–228. For a partial list of other studies published in recent years, see Amihai Radzyner, "'Justice Justice Shall You Pursue': Different Understandings of Juridical Justice in Tannaitic Law," in *My Justice, Your Justice*, ed. Yedidyah Z. Stern (Jerusalem: Israel Democracy Institute, 2010), 59–110 (Hebrew), especially ch. 6, *pesharah* as "justice" at p. 96; Itamar Warhaftig, "Is There Truth in Compromise?" *Tehumin* 25 (2005): 264–76 (Hebrew); Daniel Miller, "Compromise, Law and Mediation," *Tehumin* 25 (2005): 287–91b; Yuval Sinai, *Implementation of Hebrew Law in Israeli Courts* (Jerusalem: Israel Bar Association, 2009), 309–19 (Hebrew).

make peace between man and his fellow, as is said, ''He walked with Me in peace and uprightness'' (Mal 2:6).

R. Joshua b. Qorḥah said: It is a duty (*miṣvah*) to divide (*livṣo'a*), as is said, ''Execute judgment of truth and peace in your gates'' (Zech 8:16). Now, is it not the case that wherever there is true justice there is no peace, and wherever there is peace there is no true justice?! What kind of justice also contains peace? Let us say: *biṣu'a*. And so too does it say regarding David: ''And David administered justice and charity to all his people'' (2 Sam 8:15). Now, is it not the case that wherever there is justice there is no charity, and wherever there is charity there is no justice?! Rather, what kind of justice also contains charity? Let us say: this refers to *biṣu'a*.

R. Shimon b. Menasya said: Sometimes one should perform *biṣu'a*, and sometimes one should not perform *biṣu'a*. How so? Two people who came before someone to be judged: Before he heard their words, or once he heard their words but did not know which direction the judgment is tending, he is allowed to say to them: Go and perform *biṣu'a*. But once he has heard their words and knows which way the judgment is leaning, he is not allowed to say to them: Go and perform *biṣu'a*. Concerning this it is written: ''The beginning of strife is like letting out water'' (Prov 17:14)—until it is revealed, you are allowed to abandon it; once the law has been revealed, you are not allowed to leave it.

Part I: *Biṣu'a* as forced compromise

According to Shapira, *biṣu'a* and *pesharah* appear in the tannaitic sources as two terms having different meanings;[5] the distinction between the two was later obscured by the amoraim in the Babylonian and Jerusalem Talmuds, who relate to the two terms as if they referred to a single legal concept or

5 I have also noted the source of the use of the two terms, *biṣu'a* and *pesharah*, and the distinction between them. See above, near n. 2. But cf. Lifshitz, "Compromise," n. 36, according to whom "[t]here is no distinction between *pesharah* and *biṣu'a*, and specifically for that reason the *tanna* used the terms interchangeably." Indeed, the *rishonim* already took note of the use of these two terms. I cannot elaborate upon this point here.

institution. It seems to me that Shapira's basic assumption is that the tannaim had good reason for using two different terms and that hence, of necessity, each term refers to a distinct, separate legal institution. Thus, *biṣu'a* is subject to tannaitic dispute whereas *pesharah* is not. According to Shapira's thesis, notwithstanding the original difference in tannaitic teaching between the two, there is nevertheless a great similarity between them which, in his view, led to their blurring during the period of the amoraim, such that they came to be perceived as synonymous terms describing one legal concept. Nevertheless, in his opinion, the point of departure for the historical interpretation of the tannaitic sources must be the distinction between the two terms.

According to Shapira, *biṣu'a* represents a kind of "judicial activism"—that is, a judicial activity which the judge initiates and imposes upon the litigants. Just as in the act of "breaking bread" (*beṣi'at ha-pat*), the one breaking the bread divides it among those participating in the meal as he wishes, so does the judge "divide" the issue under dispute between the litigants on the basis of his understanding, without resorting to an unequivocal ruling on behalf of one side or another.[6] In other words, *biṣu'a*, unlike *pesharah*, is initiated by the court and is not dependent upon the consent of the opposing parties. By contrast, *pesharah,* in Shapira's view, is always dependent upon the agreement of the litigants.

Shapira begins the presentation of his thesis with the following statement:

> One who examines the tannaitic sources in a manner distinct from the amoraic sources will see that the two terms appear there in a manner distinct from one another. To begin with, they appear in different contexts. In those places where *pesharah* is mentioned, *biṣu'a* is not mentioned, and vice versa.

This unequivocal statement needs to be qualified. In *Tosefta Sanhedrin* it states, "Just as judgment is performed by three, so too is *pesharah* conducted by three. Once the judgment has been completed, one is not permitted to perform *biṣu'a.*"[7] The tanna here combines *pesharah* and *biṣu'a* in one sentence.[8]

6 Shapira, "Debate Over Compromise," 201, and n. 37.

7 *T. Sanh.* 1:2. according to MS Vienna, and also ed. Zuckermandel; specifically in *b. Sanh.* 6a the reading is *biṣu'a* rather than *pesharah,* even though it is clear that the *Bavli* does not differentiate between the two terms.

8 In *b. Sanh.* 6a this passage is brought as a single quotation: "Our Rabbis taught: Judgment is carried out with three; *pesharah* … Once the judgment is completed,

Nor is this the only such case. Apart from one manuscript, the text of the *beraita* as brought in the *Bavli* is as follows: "*Biṣu'a* is performed with three; thus the words of Rabbi Meir. And the Sages say: *pesharah* is performed by one."[9] It follows from both these sources that the distinction between *pesharah* and *biṣu'a* proposed by Shapira is not unequivocal.

It is important to distinguish between those legal situations in which *pesharah* is not simply an alternative to "judgment" or formal adjudication, but rather the only possible solution, and those which can be resolved by judicial decision based upon law, in which case *pesharah* and *biṣu'a* are conceived as alternatives to judgment. An example of *pesharah* which is not an alternative to adjudication is the mishnah in *Ketubbot* that deals with the collection of debts in the situation of a "fool's circle." Additional examples will be discussed below.[10]

Shapira and I agree regarding the fact that *pesharah* is the term used in all those tannaitic sources dealing with legal situations of the first type - that is to say, cases in which *pesharah* is not an alternative to judgment. The term *biṣu'a* never appears in such tannaitic contexts.[11] My objections to Shapira instead relate to those legal situations in which *pesharah* is in fact an alternative to adjudication. According to Shapira, even in these cases there remains the distinction between *biṣu'a* and *pesharah*, in which *biṣu'a* signifies an initiative of the court imposed upon the litigants, whereas *pesharah* depends upon their agreement. In my opinion, nowhere in Jewish law is there a legal procedure which grants the judge authority to impose compromise as an alternative to adjudication. In fact, the uniqueness of *biṣu'a* lies in the fact that the parties involved authorize the court to rule between them on the basis of compromise.

This *sugya* appears in chapter 1 of *Tosefta Sanhedrin,* in the above-quoted dispute between R. Eli'ezer b. R. Yossi the Galilean and R. Joshua b. Qorḥah.

one may not perform *biṣu'a."* See Shapira, "Debate over Compromise," n. 35, where he takes note of this difficulty and suggests that one is speaking here of *biṣu'a.* In my opinion, the structure of the first chapter of *Tosefta Sanhedrin* indicates that *biṣu'a* and *pesharah* are not distinct institutions.

9 *B. Sanh.* 6a. Thus in all of the manuscripts that I examined, with the exception of MS Firenze. In *Tosefta* MS Vienna and in Zuckermandel, the reading is not *pesharah,* and in *Masoret ha-Shas* there is a note that the reading is *biṣu'a* rather than *pesharah*.

10 See near n. 49 and ff.

11 See Lipschutz, "Meaning of *Pesharah*"; Shapira, "Debate over Compromise," 188.

As we stated, according to R. Eli'ezer *biṣu'a* is prohibited and the one who performs it is called a "sinner," whereas according to R. Joshua b. Qorḥah *biṣu'a* is perceived as a *miṣvah*.

Shapira thinks that the underlying principle in the dispute between R. Joshua b. Qorḥah and R. Eli'ezer relates to the question of whether *biṣu'a* is a desirable procedure and thus, considered a *miṣvah*, or whether it is prohibited and therefore, a transgression. By contrast, *pesharah* is not subject to dispute or controversy, from which it follows, in his opinion, that *biṣu'a* and *pesharah* are distinct and separate legal concepts.

As we shall clarify below, in my opinion the definition of *biṣu'a* in the tannaitic sources differs from the one proposed by Shapira, and the first chapter of *Tosefta Sanhedrin* does not describe two distinct legal institutions. Hence, there is no necessity to posit a dispute between the tannaim and amoraim regarding the definition of *biṣu'a*.

Biṣu'a

The disagreement between Shapira and myself revolves around the definition of *biṣu'a*. As I understand it, *biṣu'a* is a judicial procedure involving compromise, conditional upon the agreement of the litigating parties.[12] The term *biṣu'a* as such, in all of its declensions, does not suggest the authority of the court to impose a compromise against the will of the parties, nor does it indicate the need for their consent. Just as the expression used in the *Mekhilta* regarding *pesharah*—"One makes *pesharah* (compromise) in judgment"—implies neither imposition nor agreement, neither do the expressions mentioned in the *Tosefta* - "It is a *miṣvah* to perform *biṣu'a*"; "it is forbidden to perform *biṣu'a*"; "a person does *biṣu'a*"; "go out and perform *biṣu'a*"; etc., from all of which Shapira infers the judge's authority to act in an independent manner without the agreement of the litigating parties.[13] It is agreed by all that "one makes compromise in judgment" only with the agreement of the two sides.[14] Thus, in my opinion, the use of the term *biṣu'a* does not indicate the Court's authority to impose a compromise on the litigants.

12 On the nature of such an agreement, see Itay Lipschutz, "The Talmudic Compromise—Between Mediation and Arbitration," in *Judge Uri Kitai Book,* ed. Boaz Sangero (Jerusalem: Nevo, 2007), 89–129 (Hebrew).

13 See *Mekhilta de-Rabbi Yishma'el, Yitro, Masekhta de-'Amaleq,* §2, ed. Horowitz, 198.

14 Shapira himself understood it in this manner. See Shapira, "Debate over Compromise," in the text near n. 29.

Among other things, Shapira bases his assertion that *biṣu'a* is an imposed compromise on the fact that the tannaitic statements make no mention of the need for agreement of the parties as a precondition of *biṣu'a,* nor of a requirement that the court obtain their agreement to *biṣu'a*. In his opinion, the tannaitic use of the idiom, on the one hand, and the absence of any mention of the need for agreement, on the other hand, strengthens this conclusion. Furthermore, the judge's request for the agreement of the parties is only mentioned for the first time by the amoraim in the *sugya* in the *Bavli;* however, as mentioned, there is no reference to it either in the words of the tannaim or in the Jerusalem Talmud.

Moreover, Shapira finds in the initial assumption (*hava amina*) of the Babylonian Talmud support for the position that, among the tannaim, *biṣu'a* does not require agreement. The Talmud presents the ruling of the amora Rav: "The *halakhah* is like R. Joshua b. Qorḥah" (who holds that *biṣu'a* is an obligation incumbent upon the judge), and immediately asks how this ruling can be harmonized with the approach of Rav Huna, Rav's disciple, who was accustomed to asking the litigants: "Do you prefer judgment (*din*) or do you prefer compromise (*pesharah*)?" From the question asked there by the Talmud, Shapira concludes that the initial assumption (which endured, in his view, until the period of the amoraim) was that, according to R. Joshua, the judge who executes *biṣu'a* does not require the agreement of the litigating parties. The Talmud's conclusion that the meaning of R. Joshua's view that "It is a *miṣvah* to perform *biṣu'a"* is that the judge is required to attain the agreement of the litigants to compromise, reflects an amoraic innovation - evidently that of Rav Huna. According to Shapira's understanding, Rav Huna's innovation is presented in the Talmud as an interpretation of the words of R. Joshua, but, in fact, it only appears there in order to reconcile the instructions of Rav with the custom of Rav Huna.[15] According to Shapira, this amoraic innovation was superimposed by the Talmud upon the words of the tannaim, and was

15 Shapira, "Debate over Compromise," 202; cf. Radzyner, "Justice Justice," 100 at n. 148. In his opinion, the instruction in *Sifre Deuteronomy*, "One is obligated to perform *biṣu'a*" (below, near n. 21), is consistent with "It is a *miṣvah* to perform *biṣu'a*," according to the simple understanding of the words of R. Joshua b. Qorḥah which, in his opinion, is that which emerges from the *hava amina* (initial assumption) of the *Bavli*. In my opinion this is not so, because R. Joshua b. Qorḥah sees "It is a *miṣvah* to perform *biṣu'a*" as a general instruction, whereas *Sifre* is dealing with an obligation that is only incumbent in a special case, as becomes clear below, near n. 29.

the result of a certain confusion regarding the distinction between *biṣu'a* and *pesharah*. In other words, the amoraim deviated from the path of the tannaim and abandoned the original distinction between *biṣu'a* and *pesharah*.

Shapira's interpretation is a radical one in two distinct senses. The first is stated above: namely, the assertion *per se* that the amoraim departed from the path of the tannaim and blurred the distinction between *pesharah* and *biṣu'a.* According to this interpretation, the amoraim in effect imposed the approach of R. Eli'ezer upon that of R. Joshua. Whereas R. Eli'ezer forbade the judge to perform *biṣu'a* and R. Joshua disagreed with him, seeing *biṣu'a* as a *miṣvah*, the amoraim reinterpreted R. Joshua's view as implying merely that "It is a *miṣvah* to propose *biṣu'a.*" Thus, according to R. Joshua as well, the judge does not have the authority to impose compromise—that is, to perform *biṣu'a* (as Shapira understands the term). According to Shapira, the amoraim removed the edge from R. Joshua's opinion, making it almost equivalent to that of R. Eli'ezer, thereby not leaving even a single tannaitic opinion allowing one to impose compromise. Shapira's idea that the judge in fact has the authority to depart from the law in favor of a compromise based upon his own judgment or discretion is also radical from the standpoint of legal theory.

A radical conclusion of this type could be reasonable if there were not a more moderate way of understanding the talmudic *sugya.* However, in my opinion, the *sugya* may also be understood in a completely different manner, according to which the intention of the Talmud in its question regarding the seeming contradiction between the practice of Rav Huna and the halakhic ruling of Rav following the approach of R. Joshua that "It is a *miṣvah* to perform *biṣu'a*" is as follows:[16] It would appear that, according to R. Joshua, the judge is required to encourage the parties to agree to compromise. Rav Huna, on the other hand, evidently did not think so, but rather presented the litigating parties with the choice between judgment (i.e., the regular judicial procedure) and *pesharah* ("Do you prefer judgment or do you prefer compromise?"). Moreover, Rav Huna placed the suggestion of "judgment" before that of compromise, and did not even attempt to encourage the litigants to compromise, as would have been proper for him to do according

16 In addition, one needs to examine Shapira's assumption that the Talmud's question indicates the "correct" or earliest understanding of the sources. It may be that the purpose of the question and the answer is to refute the possibility of imposed compromise, notwithstanding that the tannaim also did not support it.

to the ruling of Rav, according to which Rav Huna ought to have proposed compromise alone. From the answer given by the Talmud, it would appear that the *miṣvah* or obligation to perform *biṣu'a* does not privilege compromise over adjudication. As implied by the practice of Rav Huna, both compromise and adjudication are *miṣvot*, and neither is preferred over the other. Rather, one is obligated to present both options to the litigants.[17] The meaning of R. Joshua b. Qorḥah's words—that it is a *miṣvah* to perform *biṣu'a*—is thus that, in addition to the obligation to engage in judgment, which is beyond dispute, there is also an obligation to "perform *biṣu'a*," for which reason Rav Huna presents to the litigants both *miṣvot*. By presenting the litigants with both possibilities, one also fulfills the obligation, incumbent upon the judge, to perform *biṣu'a.* R. Joshua b. Qorḥah's innovation thus lies in stating that, not only a judge who adjudicates according to law performs a *miṣvah*, but likewise one who makes a compromise between the parties does so. Therefore, the judge is commanded to present them with both options, that of adjudication and that of *biṣu'a*, or compromise.[18]

However, as Shapira notes, the suggestion of compromise is not explicitly mentioned by the tannaim, nor is there any mention of the requirement of

17 See the argument of Rabbi David Pardo, *Ḥasdei David* on *Tosefta Sanhedrin,* ch. 1 (Jerusalem: Wagshal, 1994), 497, that according to both views—that which asserts that "It is a *miṣvah* to perform *biṣu'a*" and that which holds that *pesharah* is optional—there is an element of *miṣvah* fulfillment in *pesharah*. For if we do not say this, how is it possible to override the Torah's commandment to adjudicate according to the law by engaging in compromise? But in his opinion, a precondition of *pesharah* is the agreement of the parties involved.

18 This seems to have been the interpretation of R. Meir Todros Abulafia, in his *Yad Ramah* at *b. Sanh.* 6b, s.v. *Amar Rav halakhah*. In his opinion, the innovation involved in the conclusion reached by the Talmud is that what is incumbent upon the judge is not to suggest to the sides "You should make a compromise," but rather that he presents them with the choice, "*Either adjudication or compromise*." The matter was also understood thus by R. Abraham Hafutah, "On the Definitions of Law and Compromise," *No'am* 17 (1974): 45 (Hebrew); this understanding also elucidates the Talmud's further question: "Is that not the same as [the view of] the *tanna qamma*?" According to Shapira's understanding it is not clear why they thought there was a similarity between the view of R. Joshua b. Qorḥah and that of the *tanna qamma*. The debate concerning the status of *pesharah* in relation to law continues down to the latter day *poseqim*, who still grapple with the question of whether a judge is required to advocate compromise above adjudication. Cf. Itay Lipschutz, "The Procedural Limits of Compromise (*Pesharah*)," *Shenaton ha-Mishpat ha-'Ivri* 25 (2007): 106 (Hebrew).

agreement on the part of the litigants.[19] However, according to his understanding, there is another procedure which must necessarily occur, and it too, is not mentioned in the words of the tannaim. The court begins its adjudication with a bench of three judges, as required in cases of civil law. At some stage the court decides to turn from adjudication to *biṣu'a*, without requiring the agreement of the parties involved. According to Shapira, this decision, when performed by a bench of three judges, may be subject to disagreement. How are they to determine the issue? Must a decision of this type be accepted unanimously, or does a majority of the judges suffice? The silence of the sources on this point becomes clear in light of the conventional understanding that the decision to depart from judgment according to law is based upon the agreement of the litigants. In other words, the silence of the sources regarding certain details pertaining to *biṣu'a* is characteristic of both proposed interpretations.

I shall now examine Shapira's proposed interpretation, noting further difficulties which it raises. This discussion will be conducted in light of the distinction proposed by Shapira between the two cases mentioned in the tannaitic sources:

1. Those juridical situations in which it is impossible to decide by law. In such a case, *biṣu'a* follows from the absence of any other alternative, and it is regarding such a case that *Sifre* states that the judge "is required to do *biṣu'a*."[20]

2. Juridical situations in which it is possible to decide on the basis of law. In such cases the tannaim disagree whether it is "a *miṣvah* to perform *biṣu'a*" or whether it is forbidden to do so.

19 Although the expression "Go out and perform *biṣu'a*" (צאו ובצעו) definitely contains an allusion to turning to the litigants with a suggestion. See below, near n. 64; for understanding of "Go out and perform *biṣu'a*" cf. Lipschutz, "Compromise," 92–94.

20 The distinction between "he is obligated to perform *biṣu'a*" and "it is a *miṣvah* to perform *biṣu'a*" is explained below according to Shapira's suggestion. However, one should note that this distinction is based upon the reading of *Sifre* in the Genizah, which was preferred by Shapira (cf. Menahem Kahane, *Fragments of Midrash Halakhah from the Genizah* [Jerusalem: Magnes, 2005], 235 [Hebrew]). However, in the Finkelstein edition the reading is רשאי לשתוק ("he is permitted to be silent"). Shapira is convinced that this is a corrupted reading, but in my opinion the matter is still undecided.

Biṣu'a in the Absence of an Alternative

The source for *biṣu'a* in the absence of a viable alternative is found, according to Shapira, in *Sifre Deuteronomy*, §17:

> "You shall not be afraid of any man" (Deut 1:17). If two people come before you, until you hear their words you may be silent; once you have heard their words you may not remain silent. As it says: " The beginning of strife is like letting out water, and so quit before the quarrel begins" (Prov 17:14). Until the law is apparent you are allowed to be silent; once the law becomes apparent you may not be silent.
>
> Once you have heard the case and you do not know whether to merit the innocent and hold culpable the guilty, you must perform *biṣu'a*, as is said: "These are the things that you shall do: Speak truth to one another, execute judgments of truth and peace in your gates" (Zech 8:16). What judgment is that with which there is peace? Let us say, that is *biṣu'a.*
>
> Rabban Shimon b. Gamaliel said: One who lifts the small one up to the place of the great one, and the great one to the place of the small one, that is *biṣu'a*. And the Sages said: Whoever compromises (performs *biṣu'a*) is a sinner, as is said, "One who blesses (ברך) he who performs compromise (בוצע; lit., 'the greedy man') renounces the Lord" (Ps 10:3). We find that this one praises the judge and curses his Creator.[21]

Shapira assumes that the situation described as "You do not know whether to merit the innocent and hold culpable the guilty" refers to lack

21 I have brought here the reading of the Genizah, and cf. Shapira, "Debate Over Compromise," nn. 38–40, and cf. below, n. 105. The words of Rabban Shim'on b. Gamaliel that appear in *Sifre* prior to those of the Sages, in which *biṣu'a* is also mentioned, elicit a great deal of perplexity, but Shapira does not discuss them: "Rabban Shim'on b. Gamaliel said: One who elevates the small one to the place of the great one, or [reduces] the great one to the place of the small one, that is *biṣu'a*." Finkelstein proposes interpreting R. Shim'on b. Gamaliel's words as referring to one who appoints a judge who is unworthy; cf. the suggestion of R. Yosef Razin, *Ṣafenat Pane'aḥ al ha-Torah*, ed. Kasher (Jerusalem: Ṣafenat Pane'ah Institute, 1964), 7; and cf. R. Naftali Zvi Yehudah Berlin, *'Emek ha-Neṣiv* to *Sifre Deuteronomy*, Pt. III (1961), 18.

of knowledge of the facts of the situation and an inability to clarify them.[22] In such a case, *Sifre Deuteronomy* rules that, "You are required to perform *biṣu'a*"—that is, to divide the amount subject to dispute between the litigating parties based upon the judge's own understanding, and without requiring the agreement of the parties.[23]

This approach raises a number of questions. First of all, in a situation in which the facts are not clear, there applies the "great principle" that "the burden of proof falls upon the one who wishes to take from his neighbor," whereas according to Shapira, even a plaintiff whose arguments are not convincing will nevertheless receive part of the sum he is suing for, by dint of the obligation of *biṣu'a* incumbent upon the judge. It follows from this that, according to Shapira's approach, a more detailed and precise definition of *biṣu'a* is required.

Similarly, one must understand the relationship between *biṣu'a* as mentioned in the *Tosefta* and as mentioned in *Sifre*, as well as the relationship among the tannaitic disputes mentioned in each of these sources.[24] If *Sifre*'s approach is understood as relating specifically to the case in which the judge does not know (or does not succeed in clarifying) the facts, the Sages' dissenting view ("The Sages say: Whoever performs *biṣu'a* is a sinner.") is

22 This, despite the fact that the text of *Sifre* is open to two interpretations: lack of knowledge of the facts, or lack of knowledge of the law. Shapira prefers the former interpretation; for his reasoning see Shapira, " Debate," n. 41 and near there.

23 From the context in *Sifre*, one may ask: What is the connection between the first part of the passage, which deals with the question of when it is permitted for a judge to refrain from judging, and the second part of the passage, dealing with *biṣu'a*? It would seem that the common denominator of removing oneself from judgment and *biṣu'a* is that in both cases the judge does not fulfill his obligation to adjudicate according to law. The proof of this understanding is the parallel that we find to the formulation of *Sifre* in the words of R. Shim'on b. Menasya in the *Tosefta* and in the Talmuds, in which the words of R. Shim'on b. Menasya (concerning *biṣu'a*) are attached to those of R. Yehuda ben Laqish (concerning a judge who wishes to remove himself from judgment). In light of this understanding, I have shown that the words of R. Shim'on b. Menasya are closer to the approach of R. Eli'ezer b. R. Yossi the Galilean than they are to those of R. Joshua b. Qorḥah. See Lipschutz, "Procedural Limits of Compromise," 74–76.

24 It is not clear how *biṣu'a*, which is motivated by circumstances of factual doubt, is based upon the homily on the verse dealing with *biṣu'a* in circumstances in which there is no doubt and the purpose of *biṣu'a* is to bring about peace between the two litigating parties.

understood as prohibiting *biṣu'a* in such a case. Shapira felt the difficulty in attributing such a view to the Sages, since in that case *biṣu'a* remains the only available option, and it does not seem reasonable that the Sages should disagree on this point.[25] He therefore suggests interpreting the dispute in *Sifre* as identical to that mentioned earlier in the Tosefta, between R. Joshua b. Qorḥah and R. Eli'ezer, which is clearly not restricted to the narrow case in which one is unable to clarify the facts. In order to reconcile these sources, Shapira suggests that the principled dispute mentioned in the *Tosefta* (regarding those circumstances under which *biṣu'a* constitutes an alternative to adjudication by law) was uprooted from its original, proper context and transferred to *Sifre Deuteronomy*, and therefore cannot be understood within the narrow context in which it appears there. This proposal rejects the literal, straightforward meaning of the wording in *Sifre* and forces us to conclude that there are combined here two different passages which attribute different meanings to the term *biṣu'a*.[26]

However, it seems to me that the more serious exegetical difficulty raised by Shapira's proposal is that *Sifre* bases the obligation to perform *biṣu'a* upon the exposition of the verse:

> "These are the things that you shall do: Speak truth to one another, execute judgments of truth and peace in your gates" (Zech 8:16). What judgment is that with which there is peace? Let us say, that is *biṣu'a*.[27]

In other words, the obligation to perform *biṣu'a* (that is, according to Shapira, to impose compromise) is inferred from the verse in Zechariah emphasizing the value of peace between disputants in the framework of judicial proceeding. The basic assumption implied here according to Shapira—namely, that imposed compromise or mediation is able to bring about peace between opposing parties—seems to me unlikely. Imposed compromise is a legal ruling that can bring an end to a legal dispute, but there is no reason to

25 As we said, this assumption is not necessary, as the judge may rule on the basis of the rules of evidence that "he who takes away from his neighbor bears the burden of proof."

26 One might say that one who performs *biṣu'a* is a sinner because he departs from the rule, "The burden of proof is incumbent upon the claimant."

27 See above, n. 21.

assume that it thereby brings to an end the hostility between the litigants.[28] [29] It follows from this that, even if we adopt the version of *Sifre* which reads "One is obligated to perform *biṣu'a*," the intention there is that one ought to divide the disputed sum between the two sides in the absence of any other option, but the imposed division of the disputed sum cannot bring about peace between the rivals without their prior agreement. It is important to emphasize that an explicit ruling recognizing the imposition of compromise in the event of doubt, whether legal or factual, is only found many years later, in unique circumstances and without relying on the words of *Sifre*.[30]

In my opinion, there is no reason to engage in a forced interpretation which takes the words of *Sifre* out of context and alters their meaning. While the first opinion in *Sifre* relates to a case in which the judge "does not know to merit the innocent and hold culpable the guilty," according to the dissenting view of the Sages that "anyone who performs *biṣu'a* is a sinner." That is, the Sages prohibit *biṣu'a* in all events, not only in those circumstances in which the judge does not know how to rule in a specific case (whether this is so because he does not know how to clarify the facts or because he does not know how to apply the law in the case at hand).[31] It seems to me that the accepted interpretation of *biṣu'a* as requiring the agreement of the parties and not as an imposed compromise is more consistent with the language of both *Sifre* and the *Tosefta.* The *Tosefta* deals with a situation in which the judge is confronted with two alternatives: adjudication or compromise, as a result of which R. Joshua says "It is a *miṣvah* to perform *biṣu'a*." *Sifre* deals with a case in which the only possibility is that of *biṣu'a*, because the judge

28 See the words of R. Jonathan of Lunel (*Sanhedri Gedolah*, vol. 2 [Jerusalem: Harry Fischel Institute, 1969], 14): "…If they wish, but never against their will"—*Responsa Attributed to Riba"sh* (Jerusalem: Machon Or Hamizrach, 1993), 76.

29 I did not find anything relating to this difficulty in the words of Shapira, but a possible answer, albeit to my mind rather forced, is that the value of peace mentioned here refers to peace in the general sense of public peace, but not in the sense of making peace between the rival parties to the dispute. Public peace is obtained when conflicts are resolved, but if this is the aim of *biṣu'a* it is not clear in what way it is preferable to regular adjudication. It is also difficult to understand R. Joshua b. Qorḥah's statement that "wherever there is judgment there is not peace."

30 See *Teshuvot ha-Rosh*, *kelal* §107.6; and cf. R. David b. Shlomo Ibn Zimra (Egypt–Safed, 16th century), *Shu"t Ridbaz*, Part 4, §54.

31 This is also the view of Radzyner (above, n. 4), 101–2 and n. 158.

is unable to rule on the case (for whatever reason); hence *biṣu'a* becomes a kind of "obligation" without which the parties would remain in their state of conflict. In the absence of the litigant's agreement to *biṣu'a,* the judge must say "I do not know," and in certain circumstances is even permitted to recuse himself from judging the case.[32] According to the Sages' dissenting view, *biṣu'a* is prohibited, even if "you do not know to merit the innocent and hold culpable the guilty."[33]

According to the interpretation which I propose, *biṣu'a* is not an imposed compromise, but rather compromise with the agreement of the litigating parties, from which it follows that there is no relation between it and the law "They shall divide." Compromise to which both parties agree does not contradict the "great principle" that "the burden of proof falls upon he who would take from his fellow." As for the relation between the tannaitic controversy in *Sifre* and in the *Tosefta*, *Sifre* indeed explicitly discusses a case in which the judge is unable to adjudicate for one reason or another, whereas the *Tosefta* discusses *biṣu'a* in a broader context. It may be that *Sifre* restricts or limits the applicability of *biṣu'a* relative to the *Tosefta*, but this too is not necessarily the case. The understanding of *biṣu'a* as agreed-upon compromise removes the difficulty regarding how imposed or forced compromise can bring about peace.

Part II: *Biṣu'a* as an Alternative to Adjudication and the Controversy Thereon

Biṣu'a as an alternative to formal adjudication, according to Shapira, refers to an imposed compromise made at the initiative of the judge, who prefers it in a given case to regular legal proceedings. In his opinion, it is this

32 The statement, "I do not know" is a unique possibility offered to the judge by Jewish law. See *m. Sanh.* 3:6; 5:5; removing oneself from judgment is a possibility that appears in *Sifre Deuteronomy* §17, and in the parallel in *t. Sanh.* 1:7 in the words of R. Yehudah ben Laqish.

33 I have not found in Shapira any relation to the conclusion of the words of the Sages in *Sifre*: "We find that this one praises the judge and curses his Creator." This may be interpreted as describing the difference in the attitude of each one of the litigants to *biṣu'a* after it has been imposed upon him—according to Shapira's view. But one may also interpret it as saying that the preference for *biṣu'a* over Torah law is in itself seen as a kind of cursing of the Creator and His law. See on this at length below, n. 105.

understanding of *biṣu'a* that lies at the heart of the three-way controversy in the first chapter of *Tosefta Sanhedrin* among R. Joshua b. Qorḥah, R. Eli'ezer b. R. Yossi the Galilean, and R. Shim'on b. Menasya. In what follows I shall present the views of the different tannaim and discuss the interpretations that have been offered for them.

1. Rabbi Eli'ezer son of Rabbi Yossi the Galilean

> "R. Eli'ezer son of R. Yossi the Galilean says: Whoever performs *biṣu'a* is a sinner."[34]

According to Shapira's approach, the judge who does *biṣu'a*, that is, imposes a compromise ruling, "is a sinner," because he fails in his obligation to judge in accordance with the law. One who does so, according to R. Eli'ezer, displays his contempt for the law, as he puts aside the justice innate to the law and rules differently.[35] Further on, R. Eli'ezer finds support for this approach by invoking a tradition attributed to Moses, namely, "Let the law penetrate the mountain." After the presentation of this Mosaic tradition, the text immediately presents Aaron's contrasting approach:

> But Aaron made peace between man and his fellow, as is said: "In peace and uprightness he walked with Me" (Mal 2:6).[36]

If the reference to Aaron is indeed part of R. Eli'ezer's position, it indicates a certain softening or moderation of his approach.[37] According to Shapira's

34 *Tosefta*, above, near n. 5.

35 One should note that the unusual expressions used by R. Eli'ezer ("sinner," "cursed") need to be understood in light of the exegesis by which R. Joshua commands the judge to impose *biṣu'a*. The harsh expressions used by R. Eli'ezer express his sharp opposition to the extreme idea of forcing compromise.

36 *Tosefta*, ibid., near n. 5.

37 Shapira notes two exegetical options regarding whether or not the path of Aaron is part of the opinion of R. Eli'ezer or is presented there as a dissenting opinion (Shapira, "Debate on Compromise," 210–11). According to one view, R. Eli'ezer mentions Aaron as exemplifying a path with which he agrees; that is, R. Eli'ezer only prohibits *biṣu'a* if it is imposed upon the parties, whereas Aaron's path makes peace without coercion. According to the second view, Aaron's path is presented as opposed to the view of R. Eli'ezer. I tend more towards the former view, as generally speaking, a dissenting opinion does not begin with the word "but" (*aval*). It is also difficult to assume that Aaron serves as a counterweight against Moses, upon whom R. Eli'ezer relies.

understanding, R. Eli'ezer is opposed to *biṣu'a*—that is, imposed compromise—but not to making peace between the parties with their agreement. From the above description, it would seem that Aaron sought to bring about peace between man and his fellow, something that presumably cannot be brought about by means of force.[38] But according to the accepted interpretation of the two Talmuds and their commentators, *biṣu'a* also refers to agreed compromise—and, if so, the *Tosefta* becomes clearer. R. Eli'ezer prohibits the court from engaging in any kind of mediation, as in his opinion the function of the court is to rule according to law. R. Eli'ezer is not opposed to activities intended to bring about peace between man and his fellow, as was done by Aaron, provided that these are performed outside of the courtroom.[39]

Shapira's view is based upon the interpretation of the tannaitic dispute offered by R. Yeshayahu Aharon Zaqen (*Ria"z*). It is worth citing his words here in full:

> When two people come for a judgment, it is incumbent upon the judges to ask them whether they prefer adjudication or if they wish to reach a compromise. And one does not force them to seek compromise, but makes the matter dependent upon their will. If they prefer compromise, they take hold of [an object through which one symbolically effects] acquisition one to the other, and accept the compromise which will be imposed upon them… And it [the compromise] is not similar to a legal judgment by which they are judged even against their will.[40]
>
> Once the judgment is completed… the judge is not allowed to make a compromise between them, but "let the law penetrate the mountain." And it seems to me that all of these things only apply when the judges wish to impose upon them compromise *as seems fit in their eyes, and not by the agreement of the litigants*. But if they inform them of the nature of the compromise and pacify them until they are satisfied with the matter, so that each

38 Shapira himself, ibid., interprets this passage according to Rashi and *Tosafot*, even though he rejects their understanding of *biṣu'a*.

39 It is interpreted thus by Rashi and *Tosafot* ad loc. We have already noted the relationship between the words of R. Eli'ezer here and those of the Sages in *Sifre* §17 above, near n. 25.

40 R. Yeshaya Trani, *Pisqei Ria"z le-Masekhet Sanhedrin 'im Qunṭres ha-Re'ayot* (Jerusalem: Israel Institute of the Complete Talmud, 1994), 20 [§§52–53].

> one forgives the other, or one gives the other a certain known thing [sum], even after the adjudication has been completed, it is fitting to do so, provided only that there be no compulsion in the matter, but that it be done in a spirit of reconciliation and persuasion. And this is a great *miṣvah*, and it brings about peace between man and his fellow. And this was the matter of Aaron, who loved peace and pursued peace and made peace between litigants until they are satisfied with the matter, as is explained in the *Treatise of Evidence*, in Proof §3.[41]

Ria"z here draws a distinction between a compromise "without the knowledge of the litigants" and one in which "they are satisfied with the matter, to forgive one another." According to Shapira, *Ria"z*'s comments regarding Aaron bringing about peace are consistent with his understanding of *biṣu'a* as a compromise brought about at the initiative of the court. According to this view, the tannaitic dispute dealt with *biṣu'a* as a compromise imposed upon the litigants: R. Eli'ezer, who prohibited *biṣu'a,* allowed a compromise agreed to by the litigants as a way bringing about peace in the manner of Aaron. It follows from this that, in his opinion, the tannaim who disagreed regarding *biṣu'a* did not disagree regarding *pesharah*.[42]

In my opinion, *Ria"z* did not mean to suggest that there is a procedure of imposed compromise at the initiative of the court. Such a procedure does not exist anywhere in Jewish law, and it is clear that the *Ria"z* did not intend to introduce such a far-reaching innovation almost as an aside and without proof. To the contrary, his words prove that Shapira's distinction between *biṣu'a* as imposed compromise and *pesharah* as agreed to by both sides is unknown to him, for he uses these two terms interchangeably. Moreover, *Ria"z* does not bother distinguishing between them, even when he quotes from tannaitic sources, using the term *pesharah* even when the tannaitic source reads *biṣu'a. Ria"z*'s innovation, as I understand it, lies in

41 Ibid., §58, p. 22; and cf. ibid., 2: "But *pesharah* is when the judges impose it upon them against their will, just as one imposes judgment against their will, and for this one certainly needs the agreement of the litigants if they wish a compromise to be imposed upon them at the discretion of the judges." And cf. in *Qunṭres ha-Re'ayot*, ibid., 3: "Therefore the judges must receive the consent of the litigants, and they impose upon them a compromise based upon their judgment, and according to the need and the time and the litigants."

42 Shapira, "Debate over Compromise," 210.

the important distinction he makes between two kinds of agreement on the part of the litigants: agreement of both sides to the process of *biṣu'a* per se, and agreement to the content of the *biṣu'a*. In the former case the litigants agree to a procedure whose result is not known in advance, relying upon the court and upon its discretion and good judgment. In the second case it is the litigants who make the compromise and agree upon the details of the compromise, the court merely serving as mediator.[43]

Moreover the words of *Ria"z*, "they take hold of [an object through which one symbolically effects] acquisition one to the other and *accept* the compromise which will be imposed upon them," imply that the request for *biṣu'a* is conditional upon the agreement of the parties, and that only after the court has received in advance the agreement of the litigants to the procedure of *biṣu'a* is the judge allowed to issue his compromise ruling and impose it upon the parties. It is thus that we are to understand the continuation of the words of *Ria"z* in his second section. The expression mentioned there, "compromise *as seems fit in their eyes* [i.e., that of the judges] *and not by the agreement of the litigants"* may be misleading. It would seem as though *Ria"z* recognizes an imposed compromise. But one must note that *Ria"z* relates in his words to the *content* of the compromise, and it is only in this context that he says "as seems fit in their eyes and not by the agreement of the litigants." In light of his words in the first section, that "one does not force them to seek compromise, but the matter is dependent upon their will," it is clear that *Ria"z* does not recognize imposed compromise (which, as mentioned, has no explicit source in talmudic law), unless the litigants agreed in advance or authorized the court to rule for them via compromise.

2. R. Joshua ben Qorḥah

> R. Joshua b Qorḥah said: It is a duty (*miṣvah*) to divide, as is said, ''Execute judgment of truth and peace in your gates'' (Zech 8:16)… Rather, what kind of justice also contains peace? Let us say: *biṣu'a*…. And what kind of justice also contains charity? Let us say: this refers to *biṣu'a*.

43 This distinction has also existed for the past two decades in Israeli law, in the The Courts (Consolidated Version) Act - 1984, §79a. For elaboration see Lipschutz, "Talmudic Compromise."

The key to our *sugya* lies in the approach of Rabbi Joshua b. Qorḥah. What is meant by that type of *biṣu'a* which constitutes an alternative to judgment, which Rabbi Joshua b. Qorḥah raises to the level of *miṣvah*?

Shapira thinks that, according to R. Joshua, the value of "peace" is preferable to that of "truth" and justifies making a ruling by way of compromise. The same holds true for the value of *ṣedaqah* ("charity"), also mentioned in the words of R. Joshua as a justification for *biṣu'a*, which may involve an element of compassion and giving charity to the one who is culpable.[44] As we mentioned, Shapira sees such a ruling as being imposed by the judge. This implies that, in his opinion, R. Joshua justifies the *miṣvah* of *biṣu'a* as imposed compromise, because it advances the values of peace and charity.[45] As I shall explain below in detail, this understanding of *biṣu'a* is, in my view, quite problematic.

Peace and Righteousness. Shapira's interpretation of R. Joshua b. Qorḥah's position, namely that the court is allowed to impose "charity" on a litigant who is about to win his case, raises the following difficulties: (a) What is the source of the court's authority to impose "charity/righteousness" or "peace" upon the litigants against their will? (b) Even in a situation in which the court is permitted to impose charity,[46] the person still has the option to

44 Shapira, "Debate over Compromise," 212.

45 Ibid. However, in his understanding, charity is an unintended outcome of *biṣu'a*, whose true goal is peace. By the fact that the one found culpable under law is not required to pay the full amount due by law, one essentially practices charity towards him. He therefore concludes that, "The principle of peace is applicable to every dispute, whereas charity only applies when it is the weaker and poorer side that is found culpable." According to this view, one arrives at the conclusion that there may be a conflict between the values of peace and charity. When the side found culpable is wealthy, the imposition of a compromise that benefits him is for purposes of peace and does not fall under the rubric of charity.
We disagree with the understanding of the underlying values upon which *biṣu'a* or *pesharah* is based with regard to the following two points: (a) As I understand it, the reference to"charity" in the words of R. Joshua is not a result but rather a value in its own right; hence the value of charity may be implemented even when the one who is culpable by law is not poor or weak. (b) In my opinion, the considerations involved in charity in compromise are not identical to the *miṣvah* of charity to the poor but rather are motivated by broader considerations, such as "beyond the letter of the law." For a study of "[underlying] values of *pesharah*," see Lipschutz, "Compromise," 123–44.

46 See, e.g., Maimonides, *Hil. Mattenot Aniyim* 7.10 and the sources of that *halakhah*.

choose to whom he wishes to give that charity. Certainly, the court cannot impose upon one of the litigants the obligation to give charity specifically to his opponent. (c) The institutionalization of a judicial procedure of imposing a solution upon a "wealthy" litigant whereby he gives charity to a "poor" one contradicts, offhand, an explicit prohibition of the Torah: "You shall not be partial to a poor man in his legal suit" (Exod 23:3).[47] (d) Even if one were to say that the judge has such authority, is this a realistic procedure? "Peace" between opponents requires one to alter a subjective cognitive situation, and one who argues that it is possible to do so by means of an imposed solution bears the burden of proof. Of course, these questions do not arise if we follow the accepted understanding of *biṣu'a*, not as an imposed compromise, but rather as an agreed one, whether the agreement is given to the procedure itself or to the content of the compromise.[48]

***Biṣu'a* in Balanced Cases**. The focus of the distinction drawn by Shapira between *pesharah* and *biṣu'a* is the difference between agreement and an imposed, judicially-initiated solution, in which *biṣu'a*, unlike *pesharah*, is subject to a tannaitic dispute. In those tannaitic sources dealing with *pesharah*, we find a number of sources dealing with those cases in which a difficulty arises as to how to resolve a dispute. The only *mishnah* in which the term *pesharah* is mentioned deals with the case of the "circle of fools," which can only be resolved if "they make a compromise."[49] An additional source is the *baraita* that deals with the right of priority in the passage of ships or camels in a narrow public thoroughfare which only allows room for only one ship or one camel simultaneously. The *baraita* states that "they make a compromise among themselves."[50] The accepted understanding of this ruling is that in such cases the court does not have the power to impose a compromise upon parties enjoying equal rights, but it is incumbent upon

47 See, e.g., his *Hil. Sanhedrin* 20.4. Indeed, the issue of imposing "beyond the letter of the law" is exceptional. See below near n. 61.

48 These difficulties in understanding the approach of R. Joshua b. Qorḥah should have brought about a more limited interpretation of the extent of imposition [of compromise]. However, Shapira thinks that R. Joshua adheres to a view that extends it, according to which *biṣu'a* may be imposed throughout the course of the judicial process, so long as the verdict has not been issued.

49 *m. Ketub.* 10:6.

50 *t. B. Qam.* 2:10.

the court to encourage them to reach a compromise.[51] Shapira interprets *biṣu'a* as the court's authority to impose a compromise even in those cases where it is possible to decide according to law between parties who do not have equal rights. If so, it is difficult to understand why specifically in those cases in which there is no legal preference for any side, and there is no way to resolve the conflict between them in a juridical manner, no mention is made in the *baraita* of the view supporting *biṣu'a* as an imposed compromise.

***Biṣu'a* vs. Torah Law**. According to Shapira, *biṣu'a* as an imposed compromise raises the need for a clearer definition of the conditions under which the court is permitted to deviate from the law and turn towards *biṣu'a*. The passage from *Sifre Deuteronomy* mentioned earlier refers, according to Shapira, to *biṣu'a* in those cases where the judge is unable to clarify the facts, in which case *biṣu'a* is a necessary solution. Conversely, in the *Tosefta*, *biṣu'a* is portrayed as an alternative to adjudication. Several questions therefore arise: under what circumstances is it possible for the judge to exercise his own discretion in choosing between *biṣu'a* and adjudication by law? What are the conditions for this, and what are the considerations which the judge must weigh? These questions are made more important in light of the fact that the judge is allowed to deviate from adjudication in favor of *biṣu'a* at each stage of the hearing prior to its conclusion, even without the consent of the litigants. Moreover, the assumption is that the judge ought to strive to bring about peace and charity whenever possible. As he is authorized to impose *biṣu'a* without the agreement of the litigants, and assuming that it is indeed possible to achieve the goals of peace and righteousness under compulsion, there would seem to be no room at all for ruling according to the law, and the judge is always commanded to deviate from the law and to perform *biṣu'a* so as to augment peace and righteousness. Is it conceivable that R. Joshua b. Qorḥah, who instructs the judge that "It is a *miṣvah* to perform *biṣu'a*," intended to uproot the Torah commandment of judging by law and to turn almost all the laws of the Torah into, in effect, a dead letter?[52] According to this reading, Torah law is not even a default option, but merely something on

51 See Lipschutz, "Compromise," 51; Shapira, "Debate over Compromise," 194.

52 I have emphasized here the difficulty involved in comprehending the limits of imposed compromise. However, even when compromise is contingent upon the agreement of the parties, there is need for suitable limits to compromise. On this issue, see the chapter dealing with "limits of compromise" in Lipschutz, "Compromise," 145.

the order of "expound it and receive a reward"—[that is, something intended for intellectual guidance alone]. By contrast, the accepted understanding of *biṣu'a* as agreed-upon compromise does not nullify the practical aspect of Torah monetary law. The definition of monetary law in the Torah as the default option, from which the parties are allowed to depart by mutual agreement, is based upon the individual's right to forego [that which is his lawful due], to make conditions, and to agree on monetary matters.[53] The significance of this point lies in the fact that, in the absence of agreement on the part of the litigants, the court cannot impose *biṣu'a* upon them of its own initiative but must rule according to the law of the Torah. By contrast, according to Shapira *biṣu'a* gives the judge extensive discretion to impose a compromise on the parties even against their will, thereby placing in the shadow both the legislator and the law. In fact, according to Shapira's interpretation, the words of R. Joshua b. Qorḥah bring into the world a great "legal" or "constitutional" revolution. Not only does it push the law into a corner, but the judge also receives far-reaching, undefined, and unlimited authority and becomes an absolute ruler of the judicial proceeding. By right, a "legal revolution" of this type ought not to have been introduced into the heart of Jewish law in an indirect or allusive manner, waiting to be discovered by means of learned exegesis. If such were in fact R. Joshua b. Qorḥah's actual intention, we may presume that he would have stated the same in a more explicit manner.

Alternative Conflict Resolution. Shapira suggests that the tannaitic dispute regarding *biṣu'a* may be explained in a manner analogous to the contemporary dispute concerning mediation and, more generally, alternative dispute resolution (ADR).[54] The dispute between the advocates of mediation as a central way of resolving disputes and its opponents is interpreted as one regarding the primary goal of the judicial procedure—resolving disputes or doing "justice." Shapira proposes understanding the tannaitic dispute as follows:

> According to the view of R. Eli'ezer b. R. Yose the Galilean, the judicial process is not intended simply to resolve disputes, but to perform justice. Consonant with this, the function of the

53 Even according to this approach, there are those who think that the commandment to perform *biṣu'a* does not give preference to *pesharah* over adjudication by law, but rather poses it as a suitable alternative, albeit without a preferential status. See above, n. 18.

54 Shapira, "Debate over Compromise," 220.

> judge is to implement the law. From this point of view, there is no room for a procedure of compromise, as such a process is not intended to do justice. By contrast, according to the approach of R. Joshua b. Qorḥah, who sees compromise as a *miṣvah*, the judicial process is not primarily intended to perform justice, but to resolve the dispute between parties. Such being the goal, the law does not enjoy any priority over other solutions. The law simply provides a default option for the resolution of the dispute; however, the litigants are permitted, at any given stage, to prefer some other solution. According to R. Joshua b. Qorḥah, one must always grant preference to that solution which advances peace between the parties over one that leaves the enmity between them.[55]

The comparison drawn by Shapira between the tannaitic dispute and the contemporary dispute regarding ADR and the goals of the judicial process ignores one important difference between them. In the contemporary context, supporters of ADR see the resolution of the dispute as the primary goal. The basis of ADR is the agreement of the litigants to seek an alternative path for resolving the dispute between them. The imposition of mediation, compromise or any other alternative to adjudication does not at all arise. Hence the tannaitic dispute regarding *biṣu'a* as an imposed settlement of the dispute, not according to the law, in no way resembles the contemporary dispute regarding ADR. The claim that, according to R. Joshua b. Qorḥah, "one must always prefer a solution which advances peace between the opposing parties over one which leaves the enmity between them" is inaccurate for two reasons: (a) according to R. Joshua compromise might be based on "charity" and not

55 Ibid., 222–23. The tannaitic dispute may be understood in a different way, according to which R. Joshua b. Qorḥah agrees with R. Eli'ezer that the goal of judicial procedure is not the resolution of disputes alone. The dispute between them concerns the issue as to whether it is possible that, in addition to the aspect of justice served by adjudication, another path is possible in which the result is based not upon justice alone but upon justice combined with other values, such as peace and charity. In response to the theological argument of R. Eli'ezer that it is forbidden to deviate from the law because "judgment is God's," R. Joshua might counter that God Himself behaves according to the attribute of compassion as well as that of justice. For an understanding of this type, see R. Isaiah Horowitz, *Shenei Luḥot ha-Berit*, *Mishpaṭim* 3 (Jerusalem: Yad Ramah Institute, 2006), 197. In this spirit see the section on "the theology of compromise" in Lipschutz, "Compromise," 300.

on "peace" alone; (b) bringing about peace and calming hostility between the parties are indeed among the goals of ADR, but cannot be achieved by coercion. It seems to me that the focus of ADR is on moving the resolution of conflicts from the judicial establishment to various extra–establishment institutions. The parallel to this in our *sugya* is thus not *biṣu'a* but rather the path of Aaron, "loving peace and pursuing peace" and resolving disputes outside of the courthouse.[56]

Distributive Justice and Corrective Justice. Shapira has suggested illuminating the tannaitic dispute around *biṣu'a* from an additional viewpoint, by means of an analogy to two different and contemporary approaches to justice: "corrective justice" and "distributive justice."[57] In his opinion, R. Joshua b. Qorḥah, who bases *biṣu'a* on "righteousness," sees the fact that the one who is culpable under law is poor as "relevant to the results of the ruling, and the judge must not ignore it."[58] The implementation of the approach of "distributive justice" to the world of law gives the judge the authority to redistribute "wealth" between the litigants. R. Eli'ezer disagrees with R. Joshua and adheres to the approach of "corrective justice," from which he derives his opposition to the implementation of "distributive justice" within the framework of adjudication. It is clear that, according to the accepted understanding of *biṣu'a* as compromise to which both parties agree, the judge performing the compromise is not directly confronted with the demands of either "corrective justice" or "distributive justice." But even according to the accepted understanding of *biṣu'a*, we are not exempt from discussing the appropriate discretion or judgment of the judge who performs the compromise.[59]

Connecting the tannaitic dispute concerning *biṣu'a* to the implementation of "corrective justice" or "distributive justice" through law, as has been proposed by Shapira, entails, in my opinion, several difficulties since, according to Shapira, *biṣu'a* refers to imposed compromise. The judge's authorization to perform *biṣu'a,* that is, to impose a compromise upon the parties for reasons of "distributive justice," thereby prefering a poor litigant in opposition to

56 See above, n. 39.

57 Shapira, "Debate over Compromise," 223–26.

58 Ibid., 226.

59 See Lipschutz, "Compromise," 243–82.

the law, contradicts the explicit prohibition in the Torah, "You shall not be partial to a poor man in his legal suit" (Exod 23:3).[60]

The closest mechanism in Jewish law to deviation from the law in order to favor a poor litigant is found in the approach of several of the *rishonim* (classical medieval authorities) stating that it is permitted for the judge to require a litigant to behave "beyond the limits of the law." However, this view is controversial and only permits the imposition of "beyond the letter of the law" under special circumstances, with certain conditions, and not as a general ruling. Under other circumstances and without such conditions, a judge is prohibited from requiring a litigant who has won his case to forego his rights "beyond the letter of the law" in favor of the poor litigant because of the latter's poverty.[61] Moreover, the law is a prior condition for "beyond the letter of the law," for if there is no law there can be no "beyond the letter of the law."[62] Similarly, even according to those *rishonim* who permit imposing a solution "beyond the letter of the law," the conditions required for this make such a solution relatively rare, leaving the judge a narrower range of discretion in comparison to the degree of discretion he has according to the conventional understanding of *biṣu'a* as agreed-upon compromise. Thus, the identification of *biṣu'a* as an imposed compromise "beyond the letter of the law" and with "true justice which involves righteousness" is not reasonable, and certainly an imposed *biṣu'a* can hardly be identified with "true justice in which there is peace."

60 See above, n. 47; in my understanding the value of charity in R. Joshua b. Qorḥah is not in the sense of the commandment of giving charity to the poor; see above, n. 45.

61 The literature on the subject of "beyond the letter of the law" is very extensive. It will suffice here to refer to Ron S. Kleinman, "The Imposition of Norms 'Beyond the Letter of the Law' on Public Bodies," in *Sefer Shamgar,* ed. Aharon Barak (Tel Aviv: Israeli Bar Association, 2003), 1:469–504 (Hebrew) and the bibliography there; cf. Aaron Kirschenbaum, *Equity in Jewish Law,* 2nd ed. (New York: Ktav, 1991).

62 The approach which allows coercion to act "beyond the letter of the law" raises a difficulty in understanding the relation between "law" and "beyond the letter of the law." On the one hand, these norms have been transformed into part of the law itself; on the other hand, there is then no significance to the concept of "law." A similar difficulty is raised by Shapira's approach to *biṣu'a*. If it is possible to impose compromise, it is not clear what the difference is between it and "law."

3. Rabbi Shim'on ben Menasya

> R. Shim'on b. Menasya said: Sometimes one should divide, and sometimes one should not divide. How so? Two people who came before someone to be judged: Before he heard their words, or once he heard their words but did not know which direction the judgment is tending, he is allowed to say to them: Go and divide. But once he has heard their words and knows which way the judgment is leaning, he is not allowed to say to them: Go and divide. Of this it is written: ''The beginning of strife is like letting out water'' (Prov 17:14) – until it is revealed, you are allowed to abandon it; once the law has been revealed, you are not allowed to leave it**.**

Consistent with his approach, Shapira explains that the expression "he will perform *biṣu'a*" refers to the judge, while the expression "Go and perform *biṣu'a*" refers to the litigants. However, "Go and perform *biṣu'a*" in fact seems to relate to the cooperation of the parties involved and their agreement to *biṣu'a*. Yet, according to Shapira, this should not be seen as an appeal for the agreement of the parties to *biṣu'a* but rather the formal order of the judge given to the litigants. The language of the legal ruling, "go out and perform *biṣu'a*," suggests a technical division which the parties are able to perform by themselves, implying the imposition upon the parties of the division of whatever monies are subject to dispute. This is similar to the manner in which the judge may issue a ruling: "Let them divide!" Just as the judge who rules "Let them divide!" does not require the agreement of the parties, so too in the case of an order, "Go and perform *biṣu'a*."[63]

However, in my opinion, the term "Let them divide!" ought not to be compared to that of "Go and perform *biṣu'a*." Whereas the former is the formal wording of a judicial order addressed to the disputants at the conclusion of an adjudicative process (an assumption which is not at all self-evident), the words "Go out and perform *biṣu'a"* cannot be the formulation of such a command, as it does not explain how one is to "perform *biṣu'a*" and to divide the money between rival parties. It does not seem reasonable to assume that such vague language could serve as the formal order concluding any sort of judicial process. The words of R. Shim'on b. Menasya deal not with the formal wording of a legal ruling (or, more precisely, a "ruling of *biṣu'a*") but rather

63 Shapira, "Debate over Compromise," 202.

with the issue of the judicial procedures, and that stage at which it is permitted to turn to *biṣu'a*. It seems more likely that the statement, "He is permitted to say to them, 'Go out and perform *biṣu'a*'" is a halakhic statement attributed to R. Shim'on b. Menasya that permits, at a certain stage, turning toward *biṣu'a*. A convincing proof of this is that R. Shim'on b. Menasya emphasizes that the stage of adjudication at which it is permitted to say "Go out and perform *biṣu'a*" is before the judge has heard the arguments of the parties, or when he has heard them, but does not yet know in which direction the law tends. It is certainly clear that, if the judge has not yet heard the arguments of the parties involved, one cannot interpret "Go out and perform *biṣu'a*" as an operative instruction for imposing compromise, for "If one answers before he hears, it is his folly and a shame" (Prov 18:13).[64]

Rabbi Shim'on b. Menasya follows an intermediate position, according to which *biṣu'a* is not a *miṣvah*, as in the view of R. Joshua b. Qorḥah, but neither is it prohibited, as in the view of R. Eli'ezer. Rather, in his opinion, *biṣu'a* is an option open to the judge to perform. Shapira understands R. Shim'on b. Menasya's position as being based upon the idea of fairness, according to which the stage at which it is permitted to perform *biṣu'a* is only so long as the judge has not yet settled on his position in the case. Thus, he interprets the judge's authority to impose *biṣu'a* as being based on putting himself into the shoes of the contending parties. A rational litigant will voluntarily agree to make a compromise based on considerations of the chance of winning weighed against the risk of losing, so long as he does not know with certainty which way the ruling is likely to go. A litigant who knows that the law is on his side will not agree to compromise. On the other hand, one who knows for certain that the law favors his opponent will agree to almost any compromise. Similarly, a judge who imposes *biṣu'a* against the will of the parties is only allowed to do so in a situation in which it is reasonable to assume that rational litigants would agree to compromise—that is to say, at a stage when it is not yet known which way the law tends. So long as the judge has not yet formulated his own opinion he is allowed to impose a compromise which, it is reasonable to anticipate, would be accepted by rational litigants. However, once the judge is aware of having formulated his own position on

64 Only after hearing the argument of the parties involved can the judge arrive at a suitable solution or division or, alternatively, realize that there is no justification for *biṣu'a*. See Lipschutz, "Procedural Limits," 68–69.

the case, *biṣu'a* would not be fair, since at this stage, the judge already knows that justice is with one of the two sides.[65]

Thus, according to Shapira, R. Joshua b. Qorḥah and R. Shim'on b. Menasya disagree not only on the question as to whether *biṣu'a* is a *miṣvah* or merely a permissible option but also regarding the very nature of *biṣu'a.* In contrast to R. Joshua, who sees in *biṣu'a* the implementation of the values of "peace" and "righteousness," R. Shim'on b. Menasya asserts that *biṣu'a* is intended to represent the interests of the sides on the basis of the initial data. The two disputes are interdependent: R. Joshua sees *biṣu'a* as the implementation of certain values and therefore, in his view, as a *miṣvah*, Whereas R. Shim'on b. Menasya understands it simply as an efficient tool for balancing the interests of the litigants and therefore, in his view, as something voluntary or optional. This being the case, the two tannaim use the identical term to describe two distinctive judicial tools. However, it is difficult to accept such an interpretation, which removes the sting from an explicit tannaitic dispute, particularly given that this interpretation is not at all rooted in the language of the tannaim. So long as we have no hint of this in the actual tannaitic text, we must interpret the dispute surrounding *biṣu'a* as relating to various legal details which apply to it, but not to its actual definition. But according to Shapira, the dispute relates not only to the details of the law, but even to the very definition of the term *biṣu'a*. This being so, one must ask how R. Eli'ezer defined *biṣu'a* so as to lead him to use such harsh language regarding it. Did R. Eli'ezer have a third definition? Could it be that three tannaim all defined the same legal term differently, while all the tannaitic sources ignored the dispute regarding the definition, and focused only on the disagreement concerning the legal dispute? From the viewpoint of substance, it is not clear why one ought to attribute to R. Shim'on b. Menasya an independent definition of *biṣu'a* when there is no particular difficulty in assuming that he agrees with the understanding of *biṣu'a* as the implementation of values likewise R. Joshua b. Qorḥah understands *biṣu'a* in this way, but in R. Shim'on's opinion, the implementation is not a commandment or *miṣvah*, but merely an option.[66] The procedural instruction of R. Shim'on b. Menasya, prohibiting *biṣu'a* after one knows

65 Shapira, "Debate over Compromise," 215–17.

66 See at length in R. David Pardo, *Ḥasdei David*, 497.

which way the law tends, seems quite consistent with the view of *biṣu'a* as a tool for implementing values.[67]

The idea of fair *biṣu'a* on the part of the judge who "enters into the shoes of the litigants" and proposes a compromise at which rational litigants would arrive by themselves if they were to attempt compromise by themselves, is not contradicted if *biṣu'a* is understood specifically as compromise with the agreement of both parties.[68] That is to say, in a case in which the parties have not themselves succeeded in arriving at a compromise, the judge is allowed to propose a compromise which, to the best of his judgment, balances the interests of rational litigants—but it is not reasonable that a judge should be permitted to impose such a compromise on them. Paternalistic imposition of a compromise by the court against the will of the parties and in the name of judicial "fairness" would be astonishing, just as one ought to be astonished by the very idea of authorizing the judge to perform *biṣu'a* and impose a compromise, thereby depriving the litigants of their right to full implementation of the law.

4. Once the Judgment is Completed One is Not Allowed to Perform *Biṣu'a*

This *halakhah* in the *Tosefta* determines the procedural boundary of *biṣu'a*. Before the judicial procedure is completed one may perform *biṣu'a* but not thereafter. The Talmud determines that R. Joshua b. Qorḥah, who states that "it is a *miṣvah* to perform *biṣu'a*," likewise concurs with this view.[69]

67 Shapira, ibid., dwells upon the connection between *biṣu'a* and the judge's abandonment of judgment, mentioned in the *Tosefta* by Rabbi Yehuda b. Laqish near the words of R. Shim'on b. Menasya. This connection specifically leads, in my understanding, to a completely different understanding of R. Shim'on b. Menasya's view. See Lipschutz, "Procedural Limits," 70–77.

68 At the same time, it seems to me that this idea is alien to the tasks of both judgment and compromise for which the judge is appointed. According to this idea, the judge does not seek out a just compromise, but rather weighs the prospects and risks to each side, and hence what compromise it is worthwhile for him to accept.

69 *b. Sanh.* 6b–7a. According to Rashi's interpretation, the "conclusion of judgment" occurs when the judges inform the litigants: "So-and-so is culpable, so-and-so is in the right" (ibid., Rashi, s.v. *nigmar ha-din*). This formulation of the conclusion of judgment raises the question of why there is any need to emphasize the fact that after the judgment's conclusion, the judge may not propose (or impose, according to Shapira) any compromise on the litigants. After the conclusion of

It would appear that this *halakhah* is not at all consistent with Shapira's approach regarding *biṣu'a* as an imposed compromise. How could one imagine that a judge who has already completed the judicial process would rescind his verdict and instead impose a compromise on the parties involved? Whereas the *Tosafot* were troubled by Rashi's interpretations because it was difficult for them to understand why a litigant who had won his case would agree to forego his rights and instead agree to a compromise, the difficulty here is far more severe. How is it conceivable that, after the judge has reached a decision and has concluded the case, his decision would then be nullified in order to impose a compromise against the wishes of the contending parties, not because some error was found in the ruling but merely because "it is a *miṣvah* to perform *biṣu'a*"? The imposition of a compromise may even reach the point of absurdity in a case where the losing side remains opposed to compromise for one or another reason (such as "honor"). However, according to the accepted understanding, giving preference to mutual compromise above adjudication due to value considerations, ("peace" and "righteousness"), this *halakhah* becomes self-evident. It bars the judge from advocating compromise once the judicial procedure has been completed, notwithstanding that it might still be possible at this stage to persuade the litigants to make a compromise and thereby augment "peace" and "righteousness." The innovation involved in the normative instruction—"Once the judgment is completed one may not make *biṣu'a*"—lies in its negating this possibility.[70]

Intermediate Summary

Shapira suggests that we understand *biṣu'a* in the tannaitic teaching in a different manner from its understanding by the *amoraim*, the *geonim*, the *rishonim* and the *aḥaronim*. Shapira's innovative interpretation is motivated by his desire to give distinct and separate meanings to the terms *pesharah* and *biṣu'a*. However, as I have attempted to demonstrate, Shapira's arguments are not convincing and the interpretation which he proposes requires us to deal with difficulties which are not inconsequential.

At times, scholarly literature does not refrain from attributing to the amoraim a lack of understanding or a deliberate change of direction from

judgment, what significance can there be in *biṣu'a*? See *b. Sanh.* 6b, *Tosafot* s.v. *nigmar ha-din*.

70 In my article, "Procedural Limits," 78–86, I show that it is possible to base this norm upon varied rationales.

tannaitic teachings. However, it seems to me that such a position requires a strong factual basis and demands great caution. The authority of the amoraim as authentic and loyal interpreters of the tannaitic tradition derives from the fact that they were close in time and place to the tannaim and their teachings and had received it as a living tradition, passed down to them from master to disciple. Hence, it seems to me that an interpretation such as the one proposed by Shapira demands strong proofs—particularly so when one wishes to reject the interpretation offered by early amoraim to explain the opinion of late tannaim.

Part III. *Biṣu'a* – the Law Which is Outside of the Law

According to Berachyahu Lifshitz, both *biṣu'a* and *pesharah* reflect the litigants' agreement before the court.[71] The difficulty in the conventional explanation lies, in his opinion, in the possibility that compromise may represent a deviation from the law. Thus, R. Eli'ezer's strong objections to *biṣu'a* derive from the contempt toward the law which, in his view, is expressed by *biṣu'a* or *pesharah.* That is, "The more highly one praises compromise, the greater the damage done to the law."[72] The opinion of R. Joshua b. Qorḥah, who praises *biṣu'a* and even sees it as a *miṣvah*, is explained by Lifshitz in light of the fact that the litigants agreed to accept the decision of the judge from the outset not as a legal-juridical ruling but rather as one whose source lies in the judge himself. From a practical point of view, there is no difference between a formal legal verdict and an agreed-upon compromise; *biṣu'a* must also be in accordance with the law. Hence, the dispute between R. Eli'ezer and R. Joshua is concerned not with the result but rather with the process of *biṣu'a* itself: whether it is a *miṣvah* or whether perhaps a transgression.

71 But Lifshitz also acknowledges compromise made outside of the courtroom on the basis of mutual agreement regarding the content of the compromise (see Lifshitz, "Compromise," 86–87 and n. 19). He is therefore forced to admit that the term *pesharah* refers to both types of agreement, which differ greatly from one another; cf. ibid., n. 36, where he states his opinion that there is no distinction between the meanings of *pesharah* and *biṣu'a*.

72 Lifshitz, "Compromise," 88. However, this difficulty is an inevitable consequence of the polarity characteristic of this dispute. Not only is *biṣu'a,* according to one opinion, a *miṣvah* and, according to the opposing view, forbidden, but the negative view also uses extraordinarily strong language in its condemnation of the practice. See below, near n. 105.

Both of these tannaim have respect for the law, but "R. Eli'ezer derives from this the obligation to judge by virtue of law alone, whereas R. Joshua is fearful of judgment and of the severity of punishment due to one who errs regarding the law; for precisely that reason, he prefers to refrain from judging on its basis."[73] The motivation for performing compromise is thus, according to R. Joshua, fear of the law and fear of the punishment that may befall a judge who errs in legal ruling.[74] The precise definition of *pesharah* and of *biṣu'a*, according to Lifshitz, is "the agreement that the judgment will not be conducted on the basis of law, i.e., Torah law, but rather, dependent upon the agreement of the parties involved, along a different channel: that of law outside of the law."[75] The results of the two procedures, that of law and that of compromise, must be identical.[76] It follows that, according to this definition, *pesharah* is analogous to arbitration an institution that defines, through mutual agreement, the identity of the judge but not the content of the law.[77] In what follows I shall examine Lifshitz's proposal for understanding *biṣu'a*, discuss fear of judgment as the primary motivation for compromise, and the understanding of the tannaitic dispute regarding it.

73 Lifshitz, "Compromise," 91.

74 Ibid., 88–89, and the numerous sources which he cites in his notes; cf. Shapira, "Debate Over Compromise," 198 and nn. 31–32 in relation to the controversy between R. Elazar ha-Moda'i and R. Joshua in *Mekhilta de-Rabbi Yishma'el*, *Amaleq*, *Yitro,* §2 (ed. Horowitz, 198), on the verse (Exod 18:21), "those that fear God." In my opinion, one may interpret both tannaitic views as seeing fear as coming from God but disagreeing as to whether this fear leads the judge to enter more deeply into the judgment or whether it causes him to be frightened of engaging in judgment and to instead make compromise.

75 Lifshitz, "Compromise," 93. See above, n. 21, for the view of R. Shim'on b. Gamaliel in *Sifre*, which implies that *biṣu'a* influences the end result. Lifshitz finds support for the view that [in both procedures] the result is identical ("Compromise," 92) in *b. Sanh.* 32b, which brings an exegesis of the verses comparing the justice obtained in adjudication with that obtained through compromise. However, see below, near n. 121.

76 Lifshitz, "Compromise," 99 and n. 57: "This is *pesharah*, this is arbitration, so that the arbitrator may judge them according to the law of Torah."

77 For a proof that arbitration is not necessarily directed towards compromise, see Yuval Sinai, "Arbitration as an Ideal Judicial Procedure," *Jewish Law Association Studies* 18 (2008): 279–95, at 284–88.

Biṣu'a and Fear of Judgment

According to Lifshitz, *pesharah* is a halakhic–judicial tool intended to ease the weighty responsibility incumbent upon the judge who rules according to Torah law and to lighten the burden of the fear of judgment.[78] In order to prove this thesis, Lifshitz needs to demonstrate that the severity of Torah law, or of judgment conducted according to Torah law, is so great that fear of the law caused the judges to try to evade judging by Torah law and that fear of judgment is the central factor underlying the entire discussion of *pesharah* and *biṣu'a*.[79]

Lifshitz cites several Jewish legal sources which elaborate upon the weighty responsibility placed upon the shoulders of one who judges by Torah law. This responsibility is expressed, first and foremost, in the great care that the judge must take against distorting the law, a sin whose severity can be inferred from numerous sources as well as from the punishment imposed for distortion of the law not only upon the judge but also upon his entire generation.[80]

78 One might have expected a question regarding the status of the judge who erred in *biṣu'a*, and whether or not he is held responsible for his error, similar to the question of the Talmud at the beginning of *b. Sanh.* (3a), "But from this, [does it follow that] if they erred they do not pay?" However, no such question is found in the sources. By contrast, according to the understanding that in compromise the litigants give the judge the discretion to deviate from the law, the question of responsibility in the event of error does not arise.

79 Regarding fear of judgment, see Amihai Radzyner, "*Dinei Qenasot*: A Research in Talmudic Law," (PhD diss., Bar-Ilan University, 2001), 278 (Hebrew), and the bibliography cited in his notes; Yuval Sinai, *Judge and Judicial Procedure in Jewish Law* (Jerusalem: Sacher Institute, 2010), 397–400 (Hebrew), and the bibliography cited there; Haim Shapira, "'For Judgment is the Lord's': On the Relation between God and the Judicial Process in the Bible and in Jewish Tradition," *Meḥqerei Mishpaṭ* 26 (2010): 74–79 (Hebrew); and, most recently, Yuval Sinai, "The Religious Perspective of the Judge's Role in Talmudic Law," *Journal of Law and Religion* 25 (2009–10): 357–77.

80 It will suffice here to refer to the sources cited by Lifshitz, "Compromise," 88–90 and in the notes there; cf. above, in the previous note. Regarding the practice of Rav Huna (*b. Sanh.* 7b) to add ten additional judges to the court, see my suggestion for interpreting this custom without reference to fear of punishment: Itay Lipschutz, "Judge's Deliberation," *Shenaton ha-Mishpat ha-Ivri* 26 (2011): 299 ff. (Hebrew); idem, "Are Two Better off Than One? On Jurisdiction and Estoppel, and on the Panel's Mode of Work," *Mishpatim* 43 (2013): 513–70 (Hebrew).

These sources also emphasize the unique understanding of Torah law as a religious system of law in which, so to speak, God Himself is present in the judicial process, from which there follows the severity of distorting or misrepresenting the law. But Lifshitz takes an additional step, arguing that these sources reflect a clear tendency to refrain from judgment in light of the fear of judgment, as proof of which he presents two primary sources. The first consists of the words of the *Bavli* at *Sanhedrin* 7b, adjacent to the discussion of *pesharah* cited above, based upon *Tosefta Sanhedrin*, chapter 1, in which there also appears the basic source on the issue of compromise:

> And also,[81] "Jehoshafat said: 'And he said to the judges: See what you are doing, for judgment does not belong to man, but to the Lord" [2 Chr 19:6]. And lest the judge say, "For what do I need this trouble?" does it not already say "and I am with them in the matter of judgment" (ibid.). You have naught but what your eyes see.[82]

The *Tosefta* portrays the enormous tension in which the witnesses who testify and the judges who make the rulings find themselves. At the height of this tension, the judge thinks to himself that it might be better for him were he to abandon the judicial bench: "For what do I need this trouble?"[83] It would appear that the fear of judgment is likely to prevent the judge from judging. The concluding statement in the *Tosefta* is intended to relieve the tension and to make it clear to the judge that "'I am with them in the matter of judgment'–you have naught but that which your eyes see"; or, in the more familiar language of the *Bavli*, "The judge has naught but that which his eyes see." As Rashi explains there:

> "[He is] *with you* in the matter of judgment"—according to that which is *with your* hearts, the way in which your hearts tend; that is to say, your arguments—He is with you in the matter of judgment. According to those things you shall judge, and you will not be punished, for the judge has no reason to fear and to

81 In the original: יהומ.

82 *T. Sanh.*, ch. 1, according to MS Vienna.

83 Lifshitz claims that the background to this homily is found in 2 Chr 19:6–7. The end of the verse, which is not quoted in the *Tosefta*, emphasizes fear of punishment. In my opinion, the full verse indicates that the fear involved is not of error in judgment, but rather of injustice, favoritism and bribery.

> withhold himself from judgment; rather, according to what his eyes see—he should judge, and intend to bring it about to its justice and truth, and thus he will not be punished.[84]

That is, despite the severity of slanting the judgment, and despite the words of imprecation, warnings, and threats, the judge is called upon not to withdraw from judgment but rather to judge according to the best of his understanding and on the basis of what he sees,[85] knowing before Whom he judges, whom he is judging, and with whom he is judging. This explanation of Rashi is suitable to the simple meaning of the *Tosefta,* from which it follows that there is not even the slightest hint of a tendency or suggestion to the judge that he should refrain from judging according to Torah law.[86] The above-cited verse from 2 Chr 19:6 assures the judges that God will be with them and will help them. This promise is the basis for the *Tosefta*'s affirmation that God will help the judge who judges honestly, according to his best understanding, and does not distort the judgment. The judge is anxious because of the seemingly impossible demand directed toward him, as a mortal human, to judge a true judgment according to the Divine Torah. The tension is relieved in view of the scriptural promise that God does not ask more of man than he is capable: "The judge has naught but that which his eyes see."[87]

84 Rashi at the end of *b. Sanh.* 6b. This is stated more explicitly in *Rama"h*, ad loc.: "That is to say, that the judge who is fit to judge ought not to refrain from judgment altogether… but should rule according to what his heart tends towards, and then he is not punished."

85 It is interesting to note the words of the *Zohar* II:117a (*Mishpaṭim*), which interprets this saying as stating that the perception of the heart goes beyond physical seeing, because judgment is done in the heart, and the heart sees.

86 See Lifshitz, "Compromise," n. 31, who thinks that Rashi's interpretation here is weak and strained. In his view, the end of the passage contradicts the beginning. However, following my suggestion, there is no contradiction here, but rather a necessary answer, because God does not impose upon man that which is impossible.

87 See Sinai, *Judge and Judicial Procedure,* 399, who shows through the *sugya* in the *Bavli* (*Sanh.* 7a–b) that Palestinian amoraim of the first generation emphasize the fear of judgment. However, along the lines of my argument here, one must observe that, just as it states that "A judge who does not judge a true judgment causes the Divine Presence to depart from Israel," so too does it say that "A judge who judges a true judgment causes the Divine Presence to dwell in Israel." The conclusion called for here is that fear of judgment is appropriate but is not

The second source used by Lifshitz is the *sugya* of the Jerusalem Talmud at the beginning of *Sanhedrin*, involving R. Aqiva and two of his disciples, R. Yossi b. Ḥalafta and R. Shim'on b. Yoḥai.[88] The *Yerushalmi* relates that when people came to R. Yossi to be judged according to Torah law he refused to do so, saying "I do not know Torah law," instead demanding that the litigants accept that he would decide for them. The *Yerushalmi* relates further that in the days of R. Shim'on b. Yoḥai, the Sages lost the authority to rule in monetary matters,[89] and that R. Shim'on viewed this in a positive light, saying that he was not sufficiently wise or learned to judge by the law of the Torah. In contrast to these two incidents, which complement one another in expressing the rabbis' reluctance to engage in judgment according to Torah law, a third story is brought according to which, when people stood before R. Aqiva in judgment, he would say to the litigants: "You should know before whom you are standing: before He who spoke and the world came into being—as is said, 'And the two people who have the dispute shall stand before God' (Deut 19:17)—and not before Aqiva Ben Yosef." The implication is that R. Aqiva, unlike his disciples, was not afraid to judge by Torah law, while indicating to the parties that in actuality the judgment was executed before God.

According to Lifshitz, all three of these stories revolve around *biṣu'a*. R. Yossi, who refused to judge according to the law of Torah, was willing to mediate between the parties on condition that the source of authority would be the agreement of the parties, even though it was clear that he intended to judge according to Torah law and not deviate from it in any way. According to Lifshitz's understanding of *biṣu'a*, R. Yossi refused to judge but was willing to "do *biṣu'a*." In his opinion, this is likewise the explanation for R. Shim'on b. Yoḥai's joy when the authority to judge monetary cases according to Torah law was removed, as he feared making an error in judgment.[90] This understanding leads Lifshitz to the conclusion that we have here a dispute

intended to stifle the judge from fulfilling his function. See at length below (near n. 99), although I cannot elaborate here. Cf. Sinai, "Religious Perspective."

88 *Y. Sanh.* 1.1 (18a).

89 The conventional understanding is that the Roman rulers cancelled the judicial autonomy enjoyed by the Sages and prohibited them from judging. See also Shapira, mentioned in the next note.

90 For a different understanding of this issue, see Haim Shapira, "The Rabbinic Court in Yavneh—Status, Authority, and Function," in *Studies in Jewish Law and Halakhah* ed. Y. Habbah and A. Radzyner (Ramat Gan: Bar Ilan University Press, 2007), 333 (Hebrew); cf. idem, "Debate Over Compromise," 71–74.

between R. Aqiva on the one hand and R. Yossi and R. Shim'on, on the other. R. Aqiva adheres to a view similar to that of R. Eli'ezer b. R. Yossi the Galilean, who rejects *biṣu'a*, for which reason R. Aqiva emphasizes that, notwithstanding his fear of judgment, he must judge according to the law of Torah. In contrast, R. Yossi and R. Shimon, in their fear of judgment, follow R. Joshua b. Qorḥah's preference for *biṣu'a*, and they therefore refrain from judging under Torah law.[91]

In my opinion, the primary difficulty in this understanding is that the relevant *sugya* in the *Yerushalmi* contains no reference to either *biṣu'a* or *pesharah*. The Jerusalem Talmud devotes an entire discussion to *biṣu'a* and to compromise, but this is separate from stories about Rabbi Aqiva and his disciples. I agree with Lifshitz that these three stories in the Yerushalmi deal with a fear of judging. I likewise accept with his explanation that R. Yossi, who refused to take upon himself judging by the laws of Torah and ruled according to his own understanding, strove to have his ruling coincide with Torah law.[92] However, in my opinion, the behavior of R. Yossi is not the *biṣu'a* mentioned in the tannaitic sources mentioned earlier, nor in the *sugya* of the Talmud. It should be observed that it is not reasonable that R. Joshua b. Qorḥah would disagree with Rabbi Aqiva, nor does it necessarily follow from the style of the *Yerushalmi* that R. Yossi and R. Shim'on disagree with Rabbi Aqiva.[93]

In my opinion, it is more likely that the differences among the tannaitic views derive from the generation gap between R. Aqiva and his disciples, R. Yossi and R. Shim'on. From the words of the *Tosefta,* it would appear that the answer to fear of judgment on the part of the Jewish judge takes the

91 See Lifshitz, "Compromise," just after n. 40.

92 Cf. Sinai, " Religious Perspective." However, from the period of the *rishonim* on, R. Yossi b. Ḥalafta's words were interpreted in relation to "compromise." See Sinai, *Judge and Judicial Procedure*, 397–98, n. 52.

93 This is certainly so according to the view that R. Joshua b. Qorḥah was the son of R. Aqiva. See Rashi at *b. Shevu'ot* 6a, s.v. *Yehoshu'a b'no shel R. Aqiva*. It is also not necessary to assume that R. Yossi and R. Shim'on b. Yoḥai here disagreed with R. Shim'on b. Sheṭaḥ (*b. Sanh.* 19a), for the words of R. Aqiva here are like his language there. R. Shim'on b. Sheṭaḥ explained to King Yannai that his standing in the court was tantamount to standing before God, similar to the language used by R. Aqiva in explaining to litigants the severity of Torah judgment.

form of Divine help for the juridical activity of the judge,[94] as follows from the verse, "And I am with you in the words of judgment," which, according to the tanna, serves as an answer to the helpless judge who finds himself pondering, "For what do I need this trouble?" The response is to tell him that he is not alone, that God is with him in the matter of judgment and assists him. In the *sugya* in the *Yerushalmi*, R. Aqiva seems to reflect the approach that sees God's presence in judgment, saying to the litigants: "You are not standing before me, but before God." God's presence enables R. Aqiva to engage in judgment according to Torah law without anxiety. This being the case, why don't R. Yossi and R. Shim'on b. Yoḥai share the approach of their mentor R. Aqiva? From R. Shim'on's words, it seems to follow that the intervention of the Roman government and their nullification of the Jewish courts' authority to engage in judgment by Torah law were accompanied by a spiritual decline of the generation, and they again raise the idea of fear of judgment fearing lest God will not assist the judges in such a lowly generation. This is not the only place in the Talmud where political events connected with the destruction of the Temple and departure into exile were perceived as reflecting the lowly spiritual level of the generation and of its leaders.[95] We therefore find that the words of R. Yossi and R. Shim'on, "I do not know" and "I am not wise," are not simply protestations of modesty or of their intellectual shortcomings. The words of these tannaim express the fear and the acceptance of the decline of the generations and the hiding of the Divine face, which led to the conclusion that they no longer enjoyed the Divine Presence nor His assistance in the act of judgment, and therefore could no longer be successful in delving into the depths of Torah law and judgment.[96]

94 This matter is connected to the concept of God's presence in the judicial process. See on this subject at length in Shapira, "'For Judgment is God's,'" 51.

95 Thus, for example, the exile of the Sanhedrin from Jerusalem is described as a journey of wandering and descent, parallel to the exile of the Divine Presence from Jerusalem. See *b. Rosh Hash.* 31a; *Lam. Rab.*, ch. 1.

96 Rav A. I. Kook seems to have understood the *sugya* in the *Yerushalmi* in a similar matter. See his *Iggerot ha-Re'ayah*, vol. I, §20 (Jerusalem: Rav Kook Institute, 1985), where he states that, in accordance with the limited powers of the nation, so do there appear in reality practical obstacles, such as fear of the rulers, and at times also spiritual obstacles. When such obstacles appear we are pleased, because we recognize therein the will of Supernal Providence in these times. Hence R. Shim'on b. Yoḥai was pleased about the removal of judgment from Israel in his day. See also Lifshitz, "Compromise," n. 31.

Lifshitz's understanding raises an additional difficulty. R. Yossi refuses to engage in judging by Torah law because of a fear of judgment and asks the litigants to accept his ruling without responsibility. The *sugya* simply states his position and does not explain how R. Yossi would react had the litigants refused his request and insisted upon their right to be judged by Torah law. My conjecture is that, if R. Yossi was motivated by fear of judgment, he would also refuse their request because he was afraid of the great responsibility that was placed upon the shoulders of a judge who acts as if he is judging by Torah law. If, however, according to Lifshitz's understanding, in the final analysis, the results of *biṣu'a* were identical to those of ordinary jurisdiction, it is not reasonable that the parties would have the right to insist specifically to be judged by Torah law. Moreover, it is not clear why the judge required the agreement of the parties. What does it matter to the litigants whether they are judged by procedures that involve adjudication or compromise, *pesharah*, when, on the one hand, this in no way affects the results and, on the other, it can silence the fears of the judge and relieve him of the punishment he expects should he make an error? As Lifshitz says, "Why should it matter to the one who wins to call this *pesharah*, compromise, and thereby save the judges from the punishment due them if they err in their rulings?"[97] Moreover, it would seem that the judge's fear of judgment is a matter between himself and his Creator and not of concern to his litigants. Therefore, the logical assumption would be that the decision concerning the choice of *biṣu'a* over regular adjudication ought to be left to the exclusive discretion of the judge. But, according to Lifshitz, both *biṣu'a*

97 Lifshitz, "Compromise," 96. The *Tosefta* states that "Once the judgment has been completed, one is not allowed to perform *biṣu'a*." Lifshitz, ibid., argues that, according to his understanding, this resolves the question of the *rishonim* as to how *biṣu'a* could be relevant after the conclusion of the judgment. But these matters are only resolved from the viewpoint of the litigant who benefited from the ruling, for if his agreement is required after the conclusion of adjudication, as Lifshitz interprets this term, there is no reason for him not to agree. But according to Lifshitz the purpose of *biṣu'a* is to save one from fear of judgment. If so, it is not at all clear how, after the judges have concluded their adjudication, they may be saved from punishment and modify their fear by means of *biṣu'a*. On the other hand, if the matter is helpful, why not allow *biṣu'a* after the conclusion of the ruling? Perhaps even R. Eli'ezer should agree to *biṣu'a* after adjudication.

and *pesharah*, as implied by their names and linguistic significance, derive from the agreement of the parties involved.[98]

It seems to me that the sources that deal with fear of judgment reflect a double tendency. On the one hand, the tannaim wished to fashion a judicial personality who feels a certain awe of judgment and who is not too much at ease with making legal decisions.[99] On the other hand, they wished to encourage the judge, notwithstanding his fear of judgment, not to be afraid to carry out his mission—namely, to make a true judgment to the best of his ability.[100] Fear of judgment is a positive and desirable trait, but it must not paralyze the judge from fulfilling his function.[101] As a response to the view that, "One who withholds himself from judgment removes himself from enmity and theft,"[102] it is stated that, "Every judge who rules a true judgment, even for one hour, is considered by Scripture as if he is a partner of the Holy One blessed be He in the acts of creation."[103] As a counter to the statement, "'Many are the corpses he has caused to fall' (Prov 7:26)—this refers to a sage who has not reached the level of teaching and nevertheless rules," it also says, "'And all those slain are a mighty host' [ibid.]—this refers

98 In the context of our remarks here, Lifshitz's understanding of *biṣu'a* is suitable specifically to the model proposed by Shapira, according to which, *biṣu'a* is not dependent upon the agreement of the parties. Indeed, the *rishonim* relate to the need for *pesharah* in a situation in which one of the litigants would [otherwise] be required to take an oath. There is a systemic consideration there of refraining from taking an oath because of its severity. Such compromise (i.e., in place of an oath) was evidently imposed on the parties, in a manner not accepted in the classical *pesharah*, which depends upon the agreement of the parties. See Lipschutz, "Procedural Limitations of Compromise," 98–101.

99 Based upon *m. Avot* 4:7.

100 Thus, for example, *b. Shab.* 139a: "If you see a generation subject to numerous troubles—go and examine the judges of Israel." There is no intention here of frightening people so as not to judge, but here too it would seem that the troubles come about because the judges distort the judgment, and not necessarily because they err.

101 It is worth noting the words of the late Justice Silberg in High Court Case 132/66, Segev vs. Rabbinic Court, PD 21 (2), 505, 548: "The *dayyan* must fear and tremble of any deviation from the **pure** truth…". The question is whether a religious judge is judged by the nature of the results of his ruling or by the purity of his conduct. Cf. Sinai, "Religious Perspective."

102 *M. Avot* 4:7.

103 *B. Shab.* 10a; cf. *m. Pe'ah* 8:9.

to a *talmid ḥakham* who has reached the stage of teaching but does not teach."[104] That is to say, it is appropriate that a rabbi possess a certain degree of fear of halakhic ruling and a judge a certain fear of judging, provided that this fear does not prevent them from executing their responsibility.

To conclude this discussion: it is important to emphasize that in the basic tannaitic source of *biṣu'a*, ch. 1 of *Tosefta Sanhedrin*, R. Joshua b. Qorḥah justifies *biṣu'a* as bringing about "peace" and "charity" [or "righteousness"], and does not mention fear of judgment. If fear of judgment is in fact the motivation for *biṣu'a*, why is it not mentioned in these words of R. Joshua? Moreover, one also needs to understand the harsh and severe language used by R. Eli'ezer, who strongly opposed *biṣu'a*, to the extent that he referred to one who performed *biṣu'a* as a sinner and to one who blesses it as a blasphemer. What led R. Eli'ezer to condemn a judge whose only sin was fear of judgment, and the result of whose judicial activity is, in practice, consistent with the law? Is it preferable to have a judge who has no fear of judgment, while the judge who is imbued with fear of judgment and wishes to relieve himself of its heavy burden should be subject to all the harsh terms that R. Eli'ezer attributes to him?[105]

104 *b. Avodah Zarah* 19b and parallels; and Maimonides, who interwove them in *Hil. Sanhedrin* 20.8.

105 See the explanation offered by Lifshitz, "Compromise," 94 and n. 41, that the praise for the ruling is given to the judge who performs *biṣu'a*, rather than to his Creator, and that this is evidently perceived as a kind of blasphemy. I find this explanation problematic: shall we say that the judge who performs compromise because of fear of judgment is therefore blamed for profaning his Creator? See the reading quoted there by B. Lifshitz, op cit., at n. 41, based upon *Midrash ha-Gadol* to Deut 1:17, as well as the fragment from the Genizah brought by M. Kahane, *Fragments of Midrashic Halakhah*, 234–35: "We find that this one praises his judge and curses his Creator." In my opinion the reading in *Midrash ha-Gadol* can be interpreted thus under the inspiration of the verse cited in the opinion of R. Eli'ezer: "One who blesses (ברך) he who performs compromise (בוצע; lit., 'the greedy man') renounces the Lord," in which the "one" who praises the judge is the *tanna* who praises the judge for compromising, and not necessarily one of the litigants. Lifshitz understood "this one" and "this one" as referring to the litigants (cf. the interpretation brought by Radzyner, "Justice, Justice"). One should note that in the rabbinic lexicon the idiom "we find" (נמצא) serves to summarize a dispute and to emphasize opposing situations; see *m. Ḥallah* 4.5; *b. Ḥul* 24a; and numerous other examples in the same chapter. Here too, where the two disputing tannaim express themselves in a polarized and opposite manner (blessing and curse) in relation to compromise. In my proposed interpretation,

According to Lifshitz's understanding, compromise and *biṣu'a* resolve the problem of fear of judgment confronted by the judge, enabling him to engage in judgment without the sense of heavy responsibility imposed upon the judge who rules according to Torah law. This result is obtained through both *biṣu'a* and *pesharah*, as I propose understanding them; however, it seems to me that this is a side effect of compromise and not its aim.[106]

Understanding the Controversy Over *Biṣu'a*

In addition to the issue of the connection between fear of judgment and *biṣu'a*, it is worthwhile examining the opinions of the tannaim who disagree regarding *biṣu'a* as such, according to Lifshitz's thesis. As we said earlier, R. Eli'ezer prohibits *biṣu'a*, designating one who performs *biṣu'a* as a sinner and one who praises him as "blaspheming" or "scorning God" (see the passage quoted in the introduction to this paper). By contrast, R. Joshua b. Qorḥah considers it a *miṣvah* to perform *biṣu'a*, based on two verses from which he learns that *biṣu'a* is "judgment in which there is peace" and "judgment in which there is righteousness/charity" [ibid.]. According to Lifshitz, "peace" and "righteousness" suggest agreement, indicating that *biṣu'a* and compromise require the consent of the litigants. However, these values do not have any power to influence the judge's actual ruling. As explained above, the litigants agree that the judicial process be conducted before the judge, but not by virtue of Torah law. According to this explanation, R. Joshua's words involve a certain redundancy and unnecessary elaboration of the exegesis of the verses. This difficulty is exacerbated in light of the fact that this explanation seems to imply that "peace" and "righteousness" are essentially synonymous – that both terms express the same basic idea, the need for the litigants' agreement to the process. There is no allusion to the content of this agreement; according to Lifshitz, the lengthy and detailed words of R. Joshua imply that the judge does not rule by virtue of Torah

the expression, "We find that this one… and this one…" refers to the dissenting tannaim and not to the litigants.

106 See Radzyner, "Justice, Justice," n. 100, who presents a different formulation of this argument according to which "fear of judgment in monetary law is what brought about the ascent of *pesharah*." Fear of judgment may have been a catalyst to the rise of compromise and to its acceptance, but this claim also requires confirmation.

law.[107] I have undertaken a linguistic analysis of the term *biṣu'a* elsewhere;[108] here I will only relate to the question of why, according to my understanding of *biṣu'a*, R. Joshua b. Qorḥah needs two separate verses and two separate concepts, "peace" and "righteousness," in order to describe or define *biṣu'a*.

R. Joshua's detailed remarks defining *biṣu'a* and its significance emphasize the gap between the regular judicial process and *biṣu'a*. R. Joshua emphasizes that "peace" and "righteousness" are absent in a regular judicial procedure, whereas *biṣu'a* is a form of justice in which both are present. It would follow from this that we need to better understand "peace" and "righteousness," why they are absent from regular judgment, and the uniqueness of *biṣu'a* as a legal institution that unites justice with the extra-legal concepts of "peace" and "righteousness."[109]

With regard to peace, Lifshitz argues that the purpose of both judgment and of compromise is the making of "peace"—that is, compromise as a factor making for peace does not have any advantage over judgment, and from the sources that he brings, it follows that regular adjudication is also capable of bringing about "peace." Thus, for example: "Once the judgment has been issued, peace is made between them";[110] and also, "[When] judgment is made, truth is made and peace is made."[111] From these and other sources it follows that judicial ruling has the power to create peace between rivals. As I understand it, there are at least two possible meanings of the term "peace": (a) reconciliation, and the creation of friendship and even closeness between the rival parties, and (b) "social peace"—that is, bringing about law and order within the public realm and the resolution of all disputes

107 See Lifshitz, "Compromise," n. 19. The meaning of compromise made outside of the court is resolution of the conflict *not* according to the law, in a manner of peace, but compromise made within the court has a completely different meaning. As I understand it, there is no need to attribute such different and diverse meanings to the same term.

108 See Lipschutz, "Meaning of *Pesharah*." The essence of my conjecture is that the term *biṣu'a* and the term *pesharah* were originally used to designate different legal institutions. The two terms were subsequently used interchangeably.

109 For the interpretation which I propose for "peace" and "righteousness" in *pesharah*, see Lipschutz, "Compromise," 123–44; idem, "The Values of Compromise."

110 *Mekhilta*, *Masekhta de-Neziqin* 1 (ed. Horowitz–Rabin, 246–47), and in Ish-Shalom, ed., *nifsaq ha-din*.

111 *y. Meg.* 3:6 (74b) and in parallels. For further sources, see Lifshitz, "Compromise," n. 52.

in a non-violent manner, but not necessarily creating peace and harmony between the opponents.[112] In the sense of public harmony, "peace" is one of the purposes of the law and of juridical activity, but peace, in the sense of friendship and reconciliation between the opposing sides, is not attained by means of judgment or law. Moreover, the law does not concern itself with the question of the closeness and harmony which will exist between the sides at the end of the process.

It seems to me that those sources brought by Lifshitz praising judgment as bringing about peace must necessarily disagree with R. Joshua b. Qorḥah, whose language is clear: "And wherever there is true judgment there is no peace, and wherever there is peace there is no true judgment."[113] It follows from this that, according to R. Joshua, *biṣu'a* is intended to further the cause of "peace," which is impossible to obtain through the normal process of adjudication[114]—that is, bringing about peace in its first meaning, i.e.,

112 See Lipschutz, "Compromise," 127–33.

113 Such is the reading in MS. Vienna of the *Tosefta*; cf. Radzyner, "Justice, Justice," 98–99. In his opinion, "truth" is absent from *biṣu'a.* He supports this opinion with a reading in the *Bavli* and from a careful reading of the *Tosefta.* According to his approach, "Compromise is also 'judgment' but it is not 'truth'" (on the difficulty of distinguishing between "judgment" and "true judgment," see there, n. 141). I agree with his conclusion in principle, but it seems to me that there is no inherent difficulty in the fact that "truth" is mentioned in the formula of *pesharah* used by R. Joshua as "true judgment in which there is peace," for the homily of R. Joshua b. Qorḥah bases *pesharah* on a synthesis of the opposing principles of "judgment" (or "true judgment," in some readings) and "peace." "Compromise" is a third concept, not identical to either one of its components, which takes into consideration both true judgment and peace. *Pesharah* is certainly not equated with truth, but neither is it alien to true judgment. This idea is expressed in the judicial discretion of the one making the compromise; see below, n. 120.

114 It may be that R. Joshua disagrees with the other approach, as follows from the sources mentioned. This is particularly striking in the source cited above in n. 111, based on the verse as expounded by R. Joshua in order to support his view. But it is also possible that the gap between the position of R. Joshua and that which follows from the sources mentioned reflects a gap between an ideal position and a realistic one. An allusion to this may be found in *Exod. Rab.* 30:1. Thus, the secret of the peace achieved at the end of the adjudication is that the source of the conflict is in the laws themselves. That is, the litigants' rivalry derives from the desire to clarify the law of the Torah given by God. Once the verdict has been given and the judgment has come to light, there is nothing left about which to quarrel. It seems to me that such an approach to the place of peace in judgment seeks to raise reality to the level of the idea. Similarly, see *b.*

bringing about love and harmony between the rival parties. This view also follows from the homily of the *Mekhilta*: "'And I shall judge between man'—this is judgment (*din*) in which there is no compromise. 'and between his fellow'—this is judgment in which there is compromise, in which the two of them depart from one another as friends."[115] We see from these words of the *Mekhilta* that a legal ruling leaves the litigants as "people," whereas compromise concludes the dispute in such a way that the litigants who were hitherto rivals or opponents leave the courthouse as "fellows" or "neighbors."

In my opinion, even if we accept Lifshitz's thesis that the fear of judgment is the primary motivating force behind *biṣu'a*, it does not follow that the results of *biṣu'a* must necessarily be consistent with the results of regular adjudication, as he asserts. Lifshitz raises a number of arguments against the accepted understanding of *biṣu'a* as compromise, implying that the parties forego their rights and accept deviation from the law. First of all, in his opinion, *biṣu'a* that deviates from the law involves "the judge making himself superior to the legislator, as one who knows better than him how the judgment ought to be conducted" and "protest against the justice inherent in the law."[116] Lifshitz argues further that, just as adjudication provides justice, peace and righteousness, to which *biṣu'a* and compromise are unable to add anything (as he understands it), so too the expression "beyond the letter of the law" (*lifnim mi-shurat ha-din*) does not signify any greater degree of justice: "It [justice] is executed in a complete way by the law itself."[117] As I understand it, law by its very nature or essence does not claim to bring about love and brotherhood, peace or fellowship between opponents, but simply to rule on the legal question at hand and to determine the rights and obligations of each one of the litigants. In practice, law is indifferent to the nature of the relationship that will exist between the parties after it issues its ruling. Therefore, compromise does not imply any superiority or arrogance on the part of the judge over the legislator. Moreover, a judge who distorts the law because of his desire to reconcile two parties and to bring about peace between them neglects his task and sins in distorting the law if he does so without their agreement. Similarly, recognition of the existence of

Sanh. 7a: "One who loses the judgment should rejoice"; as Rashi explains: "As they judged a true judgment he has not lost anything."

115 *Mekhilta*, *Yitro*, *Masekhta de-Amaleq*, 2 (p. 196).

116 Lifshitz, "Compromise," 103.

117 Ibid., n. 29; I have added the parentheses.

ethical obligations and rights beyond those established by the law does not necessarily shadow or obscure the justice contained within the law. I do not find any fault in going "beyond the letter of the law" as an institution that deviates from the law in order to implement certain sublime ethical norms, which the obligation to fulfill is not rooted in the law itself.[118]

An important argument raised by Lifshitz against compromise as a deviation from the law is that the result achieved is the outcome of an arbitrary decision of the judge. "From whence does he decide that it is permitted to deviate 'a little bit' from the law, which tends towards one party, in favor of his neighbor?" According to Lifshitz's suggestion, the decision on behalf of compromise merges with or is consistent in its results with the law.[119] Indeed, broad application of the judge's own discretion stems from the understanding of compromise as a deviation from the law.[120] Its justification is the fundamental desire to increase "peace" and "righteousness"—Torah values which cannot be advanced by law in and of itself, but a pre-condition for the possibility of doing so is the agreement of the litigants. Upon the fulfillment of this condition, the two sides accept for themselves the broad discretionary judgment of the judge. Moreover, from the words of R. Joshua, who taught that compromise is "true judgment in which there is peace," we learn that compromise is not "true judgment" in itself, but that other considerations are weighed as well.

Lifshitz went on to create a basis for his claim that there is only one "justice" for both adjudication and compromise, relying upon the talmudic homily on the verses "with justice you shall judge your neighbor" (Lev 19:15) and "justice, justice shall you pursue" (Deut 16:20)—"one for law and one for compromise."[121] In my opinion, the proper interpretation of this rabbinic homily is that there is an element of justice in both adjudication and

118 Thus, it is determined, for example (in *b. B. Meṣi'a* 24b), that after the owners gave up hope of recovering their lost article, the one who found the article is no longer obligated by law to return the article, but one who does so acts "beyond the letter of the law." Legal philosophy deals extensively with the relationship between law and ethics, and there is, likewise, extensive literature on "beyond the letter of the law" which I cannot elaborate on here; see above, n. 61.

119 See Lifshitz, "Compromise," 92–93—that compromise is also judgment.

120 See Lipschutz, "Compromise," 243–82, where I dealt with the judicial discretion of the one performing *biṣu'a*.

121 *B. Sanh.* 32b; this claim raises the question of why, according to Lifshitz, a special homily was devoted to a comparison of justice in [regular] adjudication and that

compromise, albeit not necessarily in the same sense. Hence, one may not conclude from this homily that the same justice is involved in both law and compromise.[122] Moreover, from this verse they also inferred the obligation of the judge to practice procedural justice in compromise just as in law, as explained by Rashi (ad loc.): "Make justice in your law and make justice in your compromise, according to what your eyes see, and you should not pursue one more than the other." Maimonides also seems to think that the comparison between juridical justice and the justice of compromise does not relate to the substance of the justice involved, but rather to the equal treatment of the litigants in both cases (*Hil. Sanhedrin* 21.1): "It is a positive commandment for the judge to judge with righteousness, as is said, 'With justice shall you judge your neighbor' (Lev 19:15). What is a righteous judgment? It is one in which the litigants are treated equally in every respect." But there is no reason to conclude from this that the just end result in a compromise is identical to that of law. On the basis of this *sugya*, the *Shulḥan Arukh* rules as follows (*Ḥoshen Mishpaṭ* 12.2): "Just as he [i.e., the judge] is warned [i.e., prohibited] not to distort judgment, so is one warned not to distort compromise toward one more than to the other." We see from this that, in his understanding, the comparison between law and compromise relates to the matter that the judge may not prefer one litigant above the other, but there is no proof here that compromise and adjudication are identical in their results.[123] Finally, it should be noted that the homily, "One for judgment and one for compromise" does not relate to *biṣu'a* and *pesharah* in the sense in which they are mentioned in the *Tosefta* and in the Talmuds at the beginning of *Sanhedrin*. Instead, it refers only to the specific idea of *pesharah* which does not appear as an alternative to adjudication. Hence, one cannot draw inferences from the *sugya* of *pesharah* (at *b. Sanh.* 32a) regarding that of *biṣu'a* (ibid., 6a).[124]

involved in compromise, since according to his understanding of *biṣu'a* and its purpose, there is no reason to distinguish between them.

122 It would seem that this homily echoes the words of R. Aqiva (*b. Ḥag.* 14a; *b. Sanh.* 38b): "One for law and one for righteousness," which describe two modes of divine conduct of the world—conduct by "law" and conduct by "righteousness." On the relation between justice and compromise, cf. Sinai, *Judge and Judicial Procedure*, 395–96.

123 *Shulḥan Arukh, Ḥoshen Mishpaṭ* 12.2 and Rashi at *b. Sanh.* 32b, s.v. *aval qera'ei* and compare Lifshitz, "Compromise," 93.

124 See above in the Introduction and near n. 10. For more on the distinction among these different kinds of compromise, see Lipschutz, "Compromise," Chapter 2

A further comparison between *pesharah* and regular adjudication appears in the opinions of the tannaim, according to which the number of judges required for *pesharah* is identical to that required for adjudication. It is explained in the Babylonian Talmud that these views were inferred by means of analogy (*heqesh*) between *pesharah* and adjudication. Here too, this must be understood, in my opinion, as a procedural analogy (*heqesh*), but not as indicating the substance or nature of compromise, and certainly not as suggesting that the legal result must be identical to that of regular adjudication, for in the same *sugya* one finds an opinion that sees *pesharah* as a *miṣvah* but demurs regarding the analogy between *pesharah* and adjudication.[125] Moreover, the *sugya* raises the possibility that there is a tanna who thinks that, even though adjudication may be performed before one judge, compromise requires three judges. It would therefore appear that the analogy between *pesharah* and law is no more than an analogy between two legal procedures conducted by the court regarding one specific subject (i.e., the number of judges), and that this is its only innovation.[126]

According to all of the suggested interpretations, one ought to turn one's attention to the tannaitic dispute regarding the number of judges required for *biṣu'a* and *pesharah*. This subject appears three times in the first chapter of *Tosefta Sanhedrin* and is repeated, in part, in the parallel *sugyot* in both Talmuds. The number of judges required is a subject that unifies various procedures mentioned in the Mishnah and *Tosefta*, which discuss the number of judges suitable in each case. In the final analysis, we find three opinions regarding the number of judges required for *biṣu'a* and *pesharah*:

and esp. p. 55.

125 It is difficult to explain such an opinion on the basis of the understanding that the results of compromise and adjudication are identical. Why should one be strict and require three judges for making compromise whereas for adjudication one judge is sufficient? However, such an opinion is consistent with the understanding of *pesharah* as a process involving a certain complexity that does not exist in regular adjudication. See the unanswered questions articulated by Lifshitz in his paper, nn. 36, 38.

126 See, e.g., *Tosafot* to *b. Sanh.* 6a, s.v. *biṣu'a be-sheloshah*, which distinguishes between adjudication and compromise by the nature of the decision-making process amongst the panel of judges.

three judges, two judges, and one judge.[127] One also needs to understand the root of this dispute.

As we stated, the number of judges required for *biṣu'a* is mentioned alongside other subjects which are mentioned with their required form, such as monetary law, capital law, ordination of elders, redemption, and others. For each of these procedures the number of judges, or people required for the validity of the procedure in question is specified. However, according to Shapira's understanding, there is no specific moment or formal stage at which the procedure of adjudication becomes one of *biṣu'a*. At any given moment, even after the conclusion of the trial or hearing, so long as the verdict has not yet been issued, the court may decide not to rule according to law, but to perform *biṣu'a* instead. One must say that the tannaitic dispute regarding the number of judges required for *biṣu'a* deals with that undefined stage, which is not known in advance, at which the court abandons the process of adjudication.[128]

As I understand it, the *biṣu'a* which the tannaim have a disagreement over the number of the judges, is well defined. The transition from adjudication to this form *of biṣu'a* takes place through mutual agreement of the parties involved. As the process of *biṣu'a* differs from that of regular adjudication in terms of its judicial discretion, and particularly in terms of its results, one may easily understand why there were those tannaim who thought that the number of judges required for *biṣu'a* was different from the number required for regular legal proceedings. If, however, *biṣu'a* is meant to be identical in result to adjudication, as argued by Lifshitz, one would not expect the number of judges involved in *biṣu'a* to be subject to dispute or discussion. Why change the bench's composition if, in terms of the nature of the judges' activity, the litigants involved, and the results of the process, there is not meant to be any difference between them?

To summarize: Lifshitz has proposed a new thesis, according to which *biṣu'a* and *pesharah* are legal alternatives available to the judge who is imbued with fear of judgment. *Biṣu'a* and compromise, according to Lifshitz, express

127 However, the *Bavli* reduces the controversy to two primary opinions, stating that the view requiring two judges suffices in principle with one judge (*b. Sanh.* 6a). Likewise in the *Tosefta* the view that suggests the sufficiency of two judges is absent.

128 For another difficulty in the stage of transition from adjudication to *biṣu'a*, see above, following n. 19.

the idea that it is not Torah law that authorizes the judge to rule between the parties, rather the agreement of the litigants. However, the results of the *biṣu'a* or *pesharah* must be in accordance with that of law and not deviate from it in any way. I have attempted to show that the evidence brought by Lifshitz to establish his proposal does not necessarily prove this and that one may also resolve the difficulties which he raised regarding the accepted understanding.

Afterword

Upon concluding this discussion, I wish to return to those things with which I began and elaborate on them somewhat: each of the suggestions that has been raised in the research literature regarding the understanding of *pesharah* and *biṣu'a* in Jewish law has both advantages and disadvantages. Shapira's proposal sheds new light on the terms *biṣu'a* and *pesharah* as distinct terms in tannaitic teaching and explains the difference between them. His proposal is likewise useful in explaining the unusual style used by R. Eli'ezer in prohibiting *biṣu'a*—namely, his understanding of *biṣu'a*, in a radical manner as imposed compromise, thereby eliciting stringent opposition, which does not suffice with a simple prohibition of *biṣu'a* but labels the one performing it a sinner and blasphemer! Similarly, the absence of explicit mention of agreement on the part of the litigants as a precondition of *biṣu'a* strengthens his understanding of *biṣu'a* as imposed settlement. Lifshitz's proposal, by contrast, offers a new understanding of the motivation underlying *biṣu'a* and *pesharah*: namely, fear of judgment. In his understanding of matters, this occupies a central place in the teachings of the Sages and may explain the motivation for *biṣu'a* and *pesharah*, as well as other issues. Lifshitz's proposal is based upon a legal–philosophical view that strengthens the rule of law. Unlike Shapira's proposal, that of Lifshitz attempts to reconcile the tannaitic sources with the talmudic ones.

In contrast to both of these suggestions, the approach which I have advocated might be described as a "value–approach to *biṣu'a*." According to this understanding, both *biṣu'a* and compromise constitute an alternative route to judgment, requiring the prior agreement of both sides. *Biṣu'a*, as an alternative to adjudication by law, permits the judges to take into consideration various factors which have no place within the framework of formal law, and thus may bring about a result which the law is incapable of reaching. At the center of this alternative stand the values of "peace" and

"righteousness." R. Eli'ezer's strident opposition to *biṣu'a* may be understood in light of this background. I also propose an explanation for the source of the distinct terms *pesharah* and *biṣu'a*. In particular, I attempt to show how the understanding of *biṣu'a* as value–based compromise resolves the difficulties raised by the other proposals. The conceptual consistency of the terms "peace" and "righteousness" is particularly striking in light of my suggested understanding of *biṣu'a* as the making of peace between man and his fellow and the implementation of flexible considerations. Peace cannot be obtained by an imposed settlement (Shapira), nor when one adheres rigidly to the letter of the law (Lifshitz). It is likewise difficult to interpret *biṣu'a* as imposing charity upon the rival litigants. According to the interpretation proposed by these scholars, it becomes very difficult to explain the *halakhah* that "Once the judgment has been completed [i.e., the verdict has been issued], one is not allowed to perform *biṣu'a*," as well as those laws concerned with the number of judges required for *biṣu'a*. However, alongside its exegetical advantages, my suggestion also lacks some of the advantages of the other proposals, which I have enumerated.

As stated earlier, I attach great significance to historical proximity - namely, that in the case under discussion here, the teachings of the *later* tannaim were interpreted by the *early* amoraim, who were close to them in time. This point reduces the possibility of unfamiliarity or misunderstanding of tannaitic *biṣu'a* by the amoraim. To this, one should add the fact that we have not found any traces among later voices that might help confirm the alternative proposals; they therefore should bear the burden of proof. Beyond this, the labor of weighing and evaluating so as to determine which interpretation is preferable is, in the final analysis, a difficult process, and not a task which I have taken upon myself within the present framework. In this paper I have attempted to list the primary advantages and drawbacks of each of the approaches without "deciding" among them. Such a decision would depend on a determination of the weight accorded to fear of judgment, as well as issues of legal philosophy relating to the right of the judge to deviate from the law, either with or without the agreement of the litigants. The discussion in this article helped me to predicate my position, consistent with a range of talmudic sources, that *pesharah* and *biṣu'a* constitute an alternative to adjudication based on the values of "peace" and "righteousness."