

“These Are Matters Which Shatter Roofs”: R. Shimon Shkop on Law and Normativity More Broadly¹

Alex S. Ozar

“If there is such a thing as the truth of the matter about the subject matter of ethics...why is there any expectation that it should be conceptually simple, using only one or two ethical concepts, such as *duty* or *good state of affairs*, rather than many? Perhaps we need as many concepts to describe it as we find we need.” (Bernard Williams, *Ethics and the Limits of Philosophy*, 17)

“A suggestion emerges about why philosophers appeal to rules in theorizing about morality, and about how rules are then conceived. The appeal is an attempt to explain why such an action as promising is *binding* upon us. But if you *need* an explanation for that, if there is a sense that something more than personal commitment is necessary, then the appeal to rules comes too late.” (Stanley Cavell, *The Claim of Reason*, 307)

It is a contingency of intellectual history, Elizabeth Anscombe says, that our “ordinary” normative terms—‘should’, ‘needs’, ‘ought’, ‘must’—acquired a “sense in which they imply some absolute verdict (like one of guilty/not guilty on a man) on what is described in the ‘ought’ used in certain types of

- 1 Much of this material was worked through in the course of three study sessions under the auspices of the OU-JLIC program and Slifka Center for Jewish Life at Yale University, and thanks go to Yoni Greenberg, Adin Feder, Daniel Kipnis, Shalhevet Schwartz, Avi Cooper, Todd Warshawsky, Benjamin Wallach, and Ella Lubell for helpful and deeply enjoyable discussion. Thanks as well to the anonymous reviewer for several helpful comments and suggestions.

context.” This happened because “between Aristotle and us came Christianity, with its law conception of ethics. For Christianity derived its ethical notions from the Torah.”² When law, with its absolute verdicts, becomes central to the ethical life, Anscombe claims, it tends to become the whole of it, the coup being so thorough as to erase the living memory of what it has supplanted. We are thus deprived of the full array of normative resources we, as human persons, need to live well.

Rabbi Shimon Yehuda ha-Kohen Shkop (1860–1939) certainly does not question either the authority or normative centrality of Torah law. But he is, I will argue, animated by a deep sense, cognate to Anscombe’s, that we are wired such as to be relentlessly susceptible to a comprehensive legalism in our reflective normative outlook—and that this is a critical problem. Given his commitments, this anxiety issues in a programmatic effort, enacted through the medium of talmudic legal analysis, to sustain a fundamental open-endedness of the ethical life precisely in the face of a never-shaken fidelity to the rigid strictures of law. Talmudic law, Shkop labors to show, both points its adherents to spheres of normativity beyond itself and is itself structured such as to address modes of normativity beyond the deontic—both the right and the good, pre-defined obedience and personally dynamic responsibility, the callings of both individual agents and communities of shared concern. Shkop’s project represents a paradigm shift, as it were, but a paradigm shift wherein the original paradigm remains in place. This requires an ambitious form of philosophical therapy on Shkop’s part, a procedure for helping his readers to recover something they did know they had lost; a consequence of the project’s ambition in this respect, however, is that it is bound to be misunderstood. Understanding that misunderstanding is vital to understanding the project.

In what follows, I focus on Shkop’s discussions of responsibilities concerning courses of action representing uncertain but plausible transgressions of biblical statute, the ground for the authority of rabbinic legislation, and the nature and ground of the Torah’s civil law, in each case seeking to bring to light the structures of normativity, and the underlying orientation to normativity as fundamentally open-ended in character, introduced and evoked therein. In the final sections I engage Shai Wozner’s *Legal Thought in*

2 G.E.M. Anscombe, “Modern Moral Philosophy,” *Philosophy* 124 (1958): 1–19 (4).

the Lithuanian Yeshivot,³ the first book-length work of academic scholarship on Shkop's thought, alongside Avi Sagi's "Religious Command Vs. Legal System: A Chapter in the Thought of Rabbi Shim'on Shkop,"⁴ to which Wozner's book is at critical points in response. Where Sagi sees Shkop's concept of "civil-law jurisprudence" ["*torat ha-mishpatim*"], as apart from Torah law ["*mishpat ha-torah*"], as amounting to a form of natural law, Wozner denies that for Shkop it enjoys imperatival force at all except and insofar as it is supplemented with divine command. While I defend Sagi's position from the brunt of Wozner's rebuttal, I argue that Sagi's approach cannot quite capture that what is at stake in Shkop's project is the introduction not simply of a further source of law but of forms of normativity beyond the statutory and deontic. I argue that Wozner's reading, on the other hand, is mistaken, but mistaken in a way precisely such as to highlight, through the form of the mistake, the therapeutic radicality of Shkop's intervention. Sagi and Wozner's relation to Shkop mirrors that of the earlier figures he defines his work against: On both sides, it is less a matter of denying Shkop's conclusions than simply failing to see, and so failing to engage, the worlds of normative possibility, beyond but not negating the juridical, that Shkop aims to help us see. Thus, a case emerges that the vitality of Shkop's project is intrinsically perpetual: So long as there is law in the normative universe, there will be need for the labor of showing that law is not all there is—and that law itself can point beyond itself.

It is a canonical principle of talmudic law that where a given course of action would entail the uncertain but plausible transgression of a biblical prohibition, that course of action is to be regarded as prohibited.⁵ According to the medieval figure Shlomo ibn Aderet (1235–1310), this principle itself enjoys the status of a biblical injunction: Biblical law, for ibn Aderet, enjoins against courses of action representing even the merely plausible transgression of its injunctions.⁶ According to Maimonides, however, the principle is the

3 Shai Wozner, *Legal Thought in the Lithuanian Yeshivot: The Heritage and Works of Rabbi Shimon Shkop* (Jerusalem: Magnes Press, 2016) (Hebrew).

4 Avi Sagi, "Religious Command Vrs. Legal System: A Chapter in the Thought of Rabbi Shim'on Shkop," *Da'at* 35 (1995): 99–114 (Hebrew).

5 *Safeq de-oraita le-humra*—"A biblical uncertainty (i.e., an uncertainty regarding a biblical prohibition) is resolved toward stringency."

6 See Shlomo ibn Aderet, *Torat ha-Bayit* 4:1.

product of rabbinic rather than biblical legislation, which is to say that as a matter of strictly biblical law, there is no prohibition against courses of action representing the merely plausible transgression of a biblical prohibition.⁷ Suppose, for instance, one comes across a food item for which one discerns equivalent probabilities of its being either forbidden or permissible to eat. For ibn Aderet, there is a biblical injunction against consuming the food item, whereas according to Maimonides there is no such injunction.

In support of his position, ibn Aderet appeals to the fact that a “suspended guilt” [*“asham talui”*] offering can be mandated in response to acts representing merely plausible transgressions, as in the consumption of plausibly but not certainly prohibited foods. Maimonides’ view is “impossible,” he writes, as “given that it is outright permissible to engage in doubtful prohibitions, how could one be liable for a guilt offering?”⁸ In other words, to say both that an act is not prohibited and that one can incur atonement-requiring liability in performing that act is for ibn Aderet a logical inconsistency. Since one indeed can incur liability in performing the act, therefore, it must be that the act is indeed prohibited—and Maimonides is thus refuted. Aryeh Leib ha-Kohen Heller (1745–1813) takes this reasoning a step further. Supposing it is indeed not prohibited to consume a plausibly prohibited food item, he reasons, it must be the case that the food item, regardless of the reality of the matter, is regarded by the law as positively, definitively non-prohibited: “We do not worry that you may transgress, for even if you do transgress there is no prohibition, since doubtful cases are regarded as non-prohibited as a matter of Torah law.”⁹ Plausible pork is transformed into certain non-pork, even if it is, in fact, pork. For Heller, to say both that it is not prohibited to perform an act—consuming a piece of meat identified as plausibly but not certainly pork—and that in performing the act one in fact transgresses a prohibition, that is, consumes what is in fact pork, is a logical inconsistency. If it is not wrong to do X, Heller reasons, then the doing of X cannot in any way and under any description constitute a wrong. Since on the Maimonidean view it is not wrong to consume the plausibly prohibited food item, consuming the food item cannot constitute a wrong; hence, since consuming pork would indeed constitute a wrong, consuming the food item cannot have constituted the consumption of pork.

7 See Maimonides, *Teshuvot ha-Rambam* (Blau) 310.

8 Ibn Aderet, *Torat ha-Bayit* 4:1.

9 Aryeh Leib ha-Kohen Heller, *Shev Shemateta* 3.

Both accentuating and circumscribing the radicality of this position, Heller notes that this reasoning does not and could not apply to the prohibition against acts representing a threat to human life: Where an act represents a plausible yet uncertain threat to human life, as in the consumption of a food item we have reason to believe may have been contaminated with snake venom, it is not possible, Heller says, to take a Maimonidean position that the consumption of the only plausibly contaminated item is not prohibited.¹⁰ Given Heller's reasoning, to say that it is not prohibited to consume the item would mean that the consumption of the item cannot represent the transgression of a prohibition—in this case that the consumption of the item cannot represent the consumption of snake venom. But this of course cannot be so guaranteed, as snake venom is snake venom regardless of any legal framework to which it is subject. "With regard to danger," Heller concludes, "cases of plausible but uncertain prohibition are resolved stringently, as if one transgresses in a case of danger there is no one to save him."¹¹ But while juridical considerations cannot make snake venom medically safe, it can, for Heller's Maimonides, make pork into non-pork.

Responding to Heller's interpretation of the Maimonidean position, Shkop points out one of what he takes to be its absurd implications: If the fact that you are permitted to consume what is to you an uncertainly prohibited food item means that the food item, irrespective of fact, is regarded as non-prohibited, it follows that there should be no reason why I should not deliberately offer you only enough information regarding an item I know to be prohibited for you to conclude that it is plausibly but not certainly prohibited and so enable you to consume the item without transgression. Given your epistemic perspective and evidentiary set, Heller's Maimonidean position has it, you simply are not under such conditions subject to a prohibition against consuming the item, and so there is no harm done. Shkop simply invites his reader to see this conclusion as the *reductio ad absurdum* of Heller's interpretation he believes it surely is: "Behold, according to this it would have been permitted to feed one's friend a certainly prohibited food so long as one first told him it was doubtfully prohibited."¹² It is simply ridiculous, Shkop protests, to conclude that I do no wrong in manipulating your evidentiary

10 Ibid.

11 Ibid.

12 Shimon Yehuda ha-Kohen Shkop, *Sha'arei Yosher* (Jerusalem: Daniel Meir Asyag, 2010), 1:2, p. 15.

set so as to facilitate your consumption of what I know to be a prohibited item. That I do not do wrong in doing X, he concludes, does not mean that my doing of X cannot constitute a wrong done.¹³

Shkop then turns to address ibn Aderet's argument, levelled against the Maimonidean position that acts representing uncertain prohibitions are not prohibited by biblical law, that the fact that liability for a suspended guilt offering is incurred in cases of uncertain transgression entails that the performance of a plausibly prohibited act is itself biblically prohibited. As Shkop puts it, "Since acts involving the uncertain transgression of prohibition are permitted, how can it be that one is liable for a guilt offering?"¹⁴ The argument can be presented as follows:

- (1) If there is no statutory prohibition against performing act X, then one incurs no liability in performing act X.
 - (2) One does incur liability in performing acts representing uncertain but plausible violations of biblical prohibitions.
- Therefore,
- (3) It is not the case that there is no statutory prohibition against performing acts representing uncertain but plausible violations of biblical prohibitions.

The argument is valid. The conditional in premise (1), however, requires that

- (4) One incurs liability in performing act X only if performing act X violates a statutory prohibition.

For Shkop this premise represents a failure in conceiving the range of our responsibilities as persons. First, reiterating his rejection of Heller's view, he explains how it can be that while it is not prohibited to perform an act representing an uncertain violation, the performance of that act can nonetheless constitute a transgression: "Acts involving uncertain transgressions have not been rendered permissible by the law of the Torah; rather it is only that the Torah has not *specifically* enjoined it."¹⁵ What the Maimonidean view

13 For a similar distinction, see W.D. Ross, *The Right and the Good*, ed. Philip Stratton-Lake (New York: Oxford University Press, 2009), 6: "Additional clearness would be gained if we used 'act' of the thing done...and 'action' of the doing of it...from a certain motive. We should then talk of a right act but not of a right action, of a morally good action but not of a morally good act."

14 Shkop, *Sha'arei Yosher*, 1:3, vol. I, p. 54.

15 *Ibid.*, p. 36.

says, on Shkop's interpretation, is that the laws of the Torah do not include, in addition to the first-order prohibitions, a further statute prohibiting the performance of an act representing the plausible violation of the first-order prohibitions. But that fact, Shkop argues, simply has no bearing on the standing of the first-order prohibitions themselves. Hence, he says, "The uncertain prohibition remains in place."¹⁶

In considering the performance of an act representing a plausible transgression of a prohibition, therefore, the deliberating agent is left without determinative statutory guidance: There is no injunction addressing this circumstance specifically, and whether and in what way the first-order injunction in question has any bearing in such a case is precisely what is at issue. For Shkop, however, the absence of direct statutory instruction simply does not entail the absence of salient normative guidance, as "it is certainly appropriate [*"vadaï she-ra'ui lo"*] according to the way of the Torah for one who is solicitous of his soul to recoil from uncertain prohibitions."¹⁷ Shkop here introduces a distinctive mode of *ought* into the normative arena: In addition to and independent of their qualifying as either prohibited or not, proposed actions can qualify as more or less *appropriate* for a given agent to perform. In this case, Shkop argues, the fact that the proposed action represents the plausible transgression of a prohibition gives the agent a reason to refrain from the action despite the fact that the action, given the uncertainty properly featuring in its description, is not directly prohibited by statute. The basis for this reason is simply the fact that the action *may* in fact turn out to constitute a transgression, and that if it does the agent will then be responsible for the transgression that s/he turns out to have committed.

For Heller, such open-endedness is a conceptual impossibility: If an act is not prohibited to an agent at the time of the act's performance, that act cannot come to have constituted a transgression; or, equivalently, if the act comes to have constituted a transgression, it cannot have been permitted at the time of the performance. Shkop's intervention is to hold open precisely this structure of normative possibility: It can indeed be the case, he insists, that genuinely permissible actions turn out to have constituted transgressions. In challenging Heller's position, Shkop thus champions a form of what

16 Ibid.

17 Ibid.

contemporary philosophers know as *moral luck*.¹⁸ For Shkop, it simply is part of the moral life that the moral valence of our choices can, and sometimes does, defy our capacity to know or control in advance, and yet we must choose all the same. What we can always control, however, is the extent to which we take responsibility for how our choices turn out: Precisely when we do not yet know what a given action will mean, and where as such that action is not simply prohibited to us, we have the opportunity and ought to take personal responsibility for making a choice—and for the choice we end up having made. We can then be held, and hold ourselves, responsible on that basis for that which happens as a result of that choice. In other words, “The uncertain prohibition remains in place.”

Just so, Shkop argues, we can be held, and hold ourselves, responsible for our failures to take responsibility in the first place. Where an act involving a plausible but uncertain transgression is not prohibited, we are indeed, so far as the law is concerned, free to choose it. As moral persons, however, our own sense of responsibility for our actions may well recommend that we refrain: “According to my view the Torah did not require one from the outset to remove themselves from it, as every person can take care for themselves to fear lest they become ensnared in sin and hence should remove themselves from the outset.”¹⁹ Where we do not so remove ourselves, we may well find our own sense of responsibility recommends we take responsibility now for our prior failure of responsibility. This, Shkop says, is the answer to ibn Aderet’s question regarding the suspended guilt offering:

For that which the Rashba [Rabbi Shlomo ibn Aderet] asks, that since cases of doubtful prohibition are permitted, how can it be that one is liable for a guilt offering—according to what we have explained, it is not permitted with full permissibility, but rather it is only that the Torah did not add a further, express prohibition addressed to the case of an uncertain prohibition. Thus, there is space to say that for one whose heart aches him, and fears sin—it is incumbent upon him to bring a suspended guilt offering.²⁰

18 For a collection of classic essays on the concept, see *Moral Luck*, ed. Daniel Statman (Albany: State University of New York Press, 1993).

19 Shkop, *Sha'arei Yoshel*, 1:3, vol. I, p. 36.

20 Ibid.

Ibn Aderet takes for granted, as we saw, that one can incur an atonement-demanding liability in performing act X only if performing act X violates a statutory injunction. For Shkop, this position represents a failure to recognize the full range of personal failings one can and ought to seek atonement for. Our responsibilities do not end where the prescribed-in-advance statutory guidance to which we are subject runs out. And just as these extra-judicial responsibilities are fundamentally personal in character, functions of who we are and choose to be, so too are the corresponding liabilities: The Torah cannot make one's heart ache, but there are times when, irrespective of statutory compliance, one's heart indeed ought to ache, and insofar as it does the Torah is prepared to facilitate appropriate redress in the form of a "suspended guilt" offering. Even as the question as to the reality of the first-order violation remains unresolved, and so the statutory "sin" offering mandated for such violations is not mandated, one ought to make one's heart right with the law. It is opening the "space" ["*maqom*"] as Shkop puts it, for these dynamics within the normative arena of the halakhically-bound agent which defines Shkop's project here.

Shkop does not so much argue for the validity of these dynamics as simply make them available for direct recognition by our natural, common-sense grasp of normative realities: We are simply to see that such extra-judicial responsibilities can make a genuine claim on us. This approach, however, raises what he treats as a critical, potentially decisive objection: For what ultimately grounds these responsibilities? What, or who, makes a claim on us in this regard that we ought to honor? Shkop addresses the problem as part of a further discussion concerning the normative status of rabbinic legislation. According to Maimonides, what lends rabbinic, as opposed to biblical, legislation its binding force is itself biblically legislated statute: Positively, "You shall act in accordance with the instruction given you and the ruling handed down to you," and negatively, "you must not deviate from the verdict that they announce to you either to the right or to the left" (Deut 17:11).²¹ Naḥmanides, however, argues that grounding the authority of rabbinic legislation in biblical statute would undermine the recognized distinctions in status between biblical and rabbinic legislation, since all rabbinic injunctions would thus be backed by a biblical injunction as well, rendering the distinction effectively null.²² On what grounds, then, is rabbinic

21 See Maimonides, *Hilkhot Mamrim* 1:1–2.

22 See Naḥmanides, *Critical Comments on the Book of the Commandments*, Root 1.

legislation binding on Naḥmanides' view? Shkop articulates this question with noticeably heightened rhetorical pitch:

How greatly do I stand here perplexed that we could be obligated to heed the voice of the words of our sages of blessed memory in the absence of an injunction from the Torah—who shall adjudicate the matter for us if not our father in heaven? And if he did not enjoin us to heed the voice of the words of our sages of blessed memory, who shall obligate us in this? These are matters which shatter roofs, and there is neither carpenter nor the son of a carpenter who can resolve them.²³

That Shkop's perplexity and disbelief are less genuine than affected for rhetorical purposes is made clear by the fact that words immediately following the resoundingly decisive lament "there is neither carpenter nor the son of a carpenter who can resolve them" are the matter-of-fact "And I have found a resolution to this."²⁴ Shkop himself does not find the question particularly compelling, and we will see that his answer to the question is precisely to reject its premise. What his rhetoric makes clear, however, is that he is pointedly aware that it is a question his presumed readers are sure to ask, and in the absence of an adequate response on his part, are sure to hold as a critical objection to, perhaps refutation of, the position he has staked out. Shkop understands that how he engages this question is thus critical to the success of his project.

The premise implicit in the objection is that the only possible ground of binding normativity is direct divine command: That is, we are bound to do or not do X if and only if God has commanded us to do or not do X. Shkop rebuts this view first by simply articulating, on Naḥmanides' behalf, a ground for the authority of rabbinic legislation other than direct divine command: "And I have found a resolution to this, which is that according to Naḥmanides it is incumbent upon us to carefully observe the commands of our sages of blessed memory on the basis of the recognition of our own reason, as since they found it to be for the good to so institute and enjoin, such is indeed the good and the true before us."²⁵ There are two critical points here: (1) That the ultimate ground for the normative authority of rabbinic

23 Shkop, *Sha 'arei Yosh'er*, 1:7, vol. I, p. 96.

24 Ibid.

25 Ibid.

legislation is the fact that that which is legislated by the rabbis represents intrinsic goodness and truth.²⁶ (2) This requires that we enjoy the independent rational capacity to recognize goodness and truth as such—were we to lack this capacity, we could not be said to be bound by the authority of rabbinic legislation—and in fact we do.

Shkop takes for granted that acting in accordance with goodness and truth is self-recommending: that we ought to do what is good and true is akin to the more overtly tautologous claim that we ought to do what we ought to do. If he is correct that the ground of rabbinic authority is the intrinsic goodness and truth of rabbinic legislation, therefore, no further argument is needed. Point (2), however, is seen by Shkop as requiring justification. Do we indeed possess an independent rational capacity for the recognition of truth and goodness as such? It is common to think that acceptance of divine sovereignty is inconsistent with according validity to an autonomous human faculty of moral judgment, because the latter proposition would seem to present the possibility of rejecting the divine will and because so much as the possibility of submitting the divine will to human judgment, even where the divine will is ultimately affirmed, would seem to set up the human judge as the one genuinely in charge. For Shkop, however, this line of reasoning must be wrongheaded, as what is certain is that acceptance of divine sovereignty on normative matters *requires* autonomous human judgment, for it is none other than reason which “accedes to heed the voice of God.”²⁷ As he puts it more fully later on the work:

And even as at first glance it is a perplexing thing: What compulsion [*hekhrealh*] and obligation [*hiyyuv*] to perform an action devolves upon a person in the absence of a Torah command and injunction? But upon closer inspection this can be understood, for even the obligation and compulsion toward service of God and fulfillment of His will is too a matter of obligation and compulsion according to the law of reason and rational recognition.

To heed God’s commanding voice cannot be, Shkop sees, for one to be a passive instrument of the divine will: Blacksmiths do not give commands to or expect

26 The rabbis’ authority is thus *epistemic* in character – they are regarded as authoritative guides to, not authors of, the right and good.

27 Shkop, *Sha’arei Yosher*, 1:7, vol. I, p. 96.

obedience from their mandrel cones. Fidelity to divine command rather can only obtain as a mode of personal agency—as an activity of which persons are the free authors, even as that activity is itself a submission to an external authority. Divine sovereignty thus presupposes autonomous normative judgment on the part of human persons, as it is only by way of coming to the judgment that God's word is indeed such as to be heeded—that it represents the good and the true—that one can heed the divine will as a personal agent.

It is important that, as a logical matter, to conclude from the fact that autonomous human reason is a necessary condition for binding normativity that it is likewise a sufficient condition would be a straightforward non-sequitur. There would be nothing at all incoherent in the idea that we (a) enjoy the capacity to recognize as true and good that which is true and good, but that (b) the only thing we can or do identify as true and good is compliance with divine command. What Shkop is appealing to with his argument, therefore, is not only the formal-logical role of reason in the workings of normativity but a substantial positive conception of reflective personal agency as free and undetermined as well. Once the ineluctability of personal judgment is established—once we have acknowledged that persons can and must recognize the good and true of their own accord, if the true and good are to have purchase at all—the normative field becomes fundamentally open-ended *de facto*: Absent further argument or evidence, there are no grounds for limiting in advance what forms the true and good might be discovered, or made, to take.

At this point, a skeptic might persist in insisting that while we may indeed recognize various forms of normative charge—hardly anyone would dispute that the conventions of etiquette can give us reason to do this or that, for instance—nothing can genuinely *obligate* us in absence of a command from a supremely authoritative being: Until the unconditioned force of divine directive is in play one can always demand justification for any given normative charge, and withhold assent until such justification is received. This is true whether the normative charge in question issues from a less-than-supremely authoritative source or, even if it does issue from God, it represents a form of address other than a strict injunction: In either case, one can coherently ask whether one *really* needs to heed the charge, and if so, on what grounds. It is this open-endedness which Stanley Cavell argues has underlain the anxiety motivating philosophers to conceive of morality in statutory form: “A suggestion emerges about why philosophers appeal to rules in theorizing about morality, and about how rules are then conceived.

The appeal is an attempt to explain why such an action as promising is *binding* upon us."²⁸ What rules provide is a sense of *finality*, there being no further question, in principle, as to either what one must do or whether one must do it. To say that there is a rule demanding one keep their promises, to take Cavell's example, is to say that there is nothing further to discuss or debate as to whether one must keep their promises, in the same way that it would be simply ridiculous to raise the question, not whether a given a pitch was indeed a strike, but whether the third strike of the at-bat really ought to constitute a strikeout. For Cavell, however, this is a false security: "But if you *need* an explanation for that, if there is a sense that something more than personal commitment is necessary, then the appeal to rules comes too late."²⁹ Rules are not binding on us simply by virtue of being rules; the rules of baseball, for instance, do not bind those not playing baseball, or even those who choose to cease playing baseball mid-game. They are binding on us, rather, only insofar as we are personally committed, perhaps on grounds of their evident truth and goodness, to their being binding on us. This, again, is because normativity exclusively binds persons rather than objects. Once we see this, we see that the finality we were hoping to secure in the appeal to rules is both not available and, crucially, not necessary: Non-statutory forms of normativity can make every bit as strong a claim on us as can statutory forms. The question is only which normative calls we find we ought to heed, and the answer to that question, Cavell and Shkop invite us to see, is fundamentally open-ended.

Shkop thus has available a ready solution to the question regarding the basis for the authority of rabbinic legislation on Nahmanides' view that it is not mandated by biblical command: "Just as reason accedes to heed the voice of God," he says, "so too reason decrees observance of all that which our sages of blessed memory and our holy rabbis have enjoined us."³⁰ Returning to his earlier analysis of Maimonides' position on our responsibilities regarding acts representing plausible but uncertain transgressions, Shkop celebrates the finding that his line of reasoning ("*sevara*") is shared across the range of contesting medieval authorities: Both Maimonides and the lead dissenter from Maimonides' view on rabbinic authority ascribe, albeit in different contexts,

28 Stanley Cavell, *The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy* (Oxford: Oxford University Press, 1999), 307.

29 Ibid.

30 Shkop, *Sha'arei Yosher*, 1:7, vol. I, p. 96.

binding validity to the deliverances of personal normative judgment.³¹ The “line of reasoning” in question is not simply that the deliverances of human rationality can in principle enjoy the binding normativity of scriptural law. This proposition in itself is an entirely unremarkable commonplace of talmudic thinking—in one place the Talmud remarks regarding a proposed derivation, “What do I need a verse for? It is a *sevara!*”³²—to which the drama and argumentative labor of Shkop’s presentation would not be a legible response. Importantly, in further analyzing the basis for ibn Aderet’s position that there is indeed a biblical prohibition against acts representing plausible but uncertain transgressions, Shkop argues that the source of this proposed prohibition is likewise “from reason” (“*mi-sevara hu*”).³³ And yet, though his aim is to secure a maximally broad coalition, he does not mention ibn Aderet among those who share the line of reasoning in question, a line of reasoning which, after all, was developed precisely to refute ibn Aderet’s critique by making conceptual space for an alternative view. What is at stake in Shkop’s argument is thus not whether reason can legitimately provide access to binding normativity—that much is taken for granted at this point. The question, rather, is what *forms* of binding normativity we are prepared to recognize. In particular, the question here is whether or not we are prepared to recognize forms of binding normativity beyond the statutory.

What distinguishes ibn Aderet’s position, on Shkop’s reading, is precisely that the prohibition on actions representing plausible transgressions of biblical statute itself enjoys the force and form of a biblical statute: “Just as we are obligated to heed a certainly applying negative injunction, so too it is incumbent upon us to take care regarding uncertainly applying injunctions—this principle [*sevara*] is among the canons of the laws of the Torah.”³⁴ That we are enjoined from actions representing uncertain prohibitions is thus a “law of the Torah” [*mishpat ha-torah*] in its own right.³⁵ Should one perform an act representing an uncertain transgression, one will thus be in certain violation of the second-order statute requiring that one refrain from uncertain transgressions. On Shkop’s interpretation of the Maimonidean view, in contrast, in confronting the uncertain possibility of transgression

31 Ibid.

32 See *b. B. Qam.* 46b.

33 Shkop, *Sha ‘arei Yoshel*, 1:8, vol. I, p. 114.

34 Ibid.

35 Ibid.

the rational human person ought to judge that possibility, and the resulting liability should it obtain, as strong reasons to refrain from the act in question; to fail to consider the likelihood of transgression in one's deliberations would be simply irresponsible. The decision, however, is ultimately up to the individual agent, and should they decide that they are willing to accept responsibility for the risk and go forward with the act they will bear no guilt for that decision as such, for they will have violated no law. There is thus real normative force at play, but it is not that of statutory obligation, and it is validating the autonomous personal capacity to recognize and heed such non-obligatory normative force which constitutes Shkop's principal philosophical project in these passages.

The effort to broaden the normative field in decentering the statutory pervades Shkop's work in service of a variety of conceptual functions. Analyzing the talmudic principle, that items from which it is prohibited to derive any benefit [*"issurei hana'ah"*] are considered valueless—an expensive steak cooked in fine milk, for instance, is seen for legal purposes as without resale value, actual market realities notwithstanding—Shkop considers an explanation on which this is entirely a function of the statutory prohibitions in play. That is, since by law the relevant agents may not derive any benefit from the item, the item is left, regardless of the item's value considered in itself, *de facto* without value. In rebutting this interpretation, Shkop points to the talmudic position that one who renders another's object prohibited must pay damages for the value of the object, showing that it is difficult to account for in strictly deontic terms:

If we say that the damage to the object prohibited for consumption or benefit is on account of the interference, by way of the fact that they are bound to observe and heed what the Torah forswears, with the capacity of the owner from enjoying it, then it should follow that if, when the item was prohibited the owner was not aware of the prohibition imposed upon their property, the item had yet to lose any value, for they were not at that point obligated to refrain from enjoying the object. From the perspective of the owner, the main part of the loss was only consummated when they became aware of the prohibition upon the object, and it is certainly not plausible that liability is

initiated by the notification, and so on account of what action do we charge the damager with liability?³⁶

If the reason prohibited items are valueless is simply a consequence of their being the objects of prohibitions addressed to an agent, then where those prohibitions are for whatever reason in fact not addressed to a given agent, the objects should not be without value relative to that agent. Limiting our normative equipment to rules addressed to deliberating agents thus makes nonsense of the inter-agential reality of such prohibitions and their effects: If I burn down your house, then whether or not *you* ever become aware of it, the fact is that you have lost your house at my hands, and I owe you recompense as such—the law tracks lived reality. To acknowledge that the analogue is, or so much as can be, true when I render your tithes impure (rendering them ritually unfit for consumption), as the Talmud makes clear, is to acknowledge that the deontic points beyond itself:

Rather, it is certainly the case that the primary loss in question is the fact that the item is in truth prohibited [*“ne’ esar be-emet”*], and even prior to the owner’s becoming aware, it was already unfit for consumption. The liability is thus for the act of rendering the item prohibited, just as if he burned or obliterated it, as in becoming prohibited it becomes in actuality like a deleterious substance to a Jewish person.³⁷

Wozner takes this as an example of what he regards as Shkop’s “naturalistic” supernaturalism, the claim being that Shkop takes this and related positions because he regards the Torah’s prohibitions as reflecting spiritual-metaphysical forces representing real dangers to the souls of Jewish persons.³⁸ But while it is true that Shkop regularly speaks of prohibited items as spiritual “poison,” he is always careful to qualify the ascription, as he does in the above passage, with a duly cautious “like” or “as if.”³⁹ Shkop is careful, in other words, to clarify that his thesis is not quite a metaphysical one. Shkop’s point is rather a “grammatical” one concerning the conceptual structure of the legal

36 Ibid. 1:9, vol. I, p. 143.

37 Ibid., emphasis added.

38 See Wozner, *Legal Thought*, 142–219.

39 Shkop, *Sha’arei Yoshel*, 1:9, vol. I, p. 145: “Rather it is *like* a substance the eating of which is damaging to the body, and it is *like* a toxin which injures a person” (emphasis added).

universe: Torah law, on Shkop's understanding, comprises both deontological prescriptions addressed to deliberating agents as well as ascriptions of value to objective states of affairs—both the right and the good, the directive and the evaluative. The latter of each pair ground a range of normative charges, explaining why, for instance, one ought not to render their fellow's tithes impure even where they will not become aware of the resulting prohibition, and why one incurs liability in doing so. They also explain on what basis items prohibited for benefit are considered valueless: Not because any given agent is subject to a given deontic rule regarding them, but because the law ascribes to them the objective status of deleteriousness. Regarding the axiological ascription of objective badness to prohibited objects, in contrast to the metaphysical ascription of supernatural harmfulness, Shkop drops the "as if" qualifier. "The Torah prohibition," he says, "truly [*be-emet*] transforms the item into something unfit."⁴⁰

The idea of a game is helpful in clarifying what is at stake in these distinctions. Suppose in a tennis match I see clearly that your shot landed out of bounds, though you, given your frame of reference, hold the well-grounded belief that it was inside the line. Supposing that I am magnanimous and so disposed against disappointing you, it would seem that I am under scant normative pressure to disabuse you of your error. That your shot's landing outside the line entails your conceding the point to your opponent is a rule addressed to you as a deliberating agent, and so where you are not aware that the shot indeed landed outside the line, you are thus not addressed by the rule. Thus, no transgression is committed when you fail to concede the point, and so I am not bound to forestall that eventuality—no harm, because no foul. Suppose, however, that in addition to the rules of the game, tennis were to advance the claim not only that one ought to concede the point upon their shot's landing out of bounds, but that it is *good*, independently of the players' obligations, for points to be conceded to the opposing player when a player's shot lands out of bounds. The out-of-bounds shot, in Shkop's language, would on this picture be "in truth" a lost point. Were that the case, I would as a faithful tennis player thus be bound by a normative reason—not an obligation, as there would still be no rule to this effect, but a responsibility of some kind—to inform you as to the reality of your out-of-bounds shot so as to ensure that a wrong is done at neither your nor my hands. Insofar as tennis comes to include normative claims such as this, however, and so

40 Shkop, *Sha'arei Yosher*, 1:10, vol. I, p. 158.

comes to demand our personal engagement through an open-ended range of normative responsibilities, we might conclude that it has become less of a *game* and more a form of human-personal *life*. Shkop's conviction that Torah law features objective ascriptions of value as central engines of normativity is thus a conviction that Torah law is, or ought to be, less a game than a form of human-personal life, a normative scheme which persons are called to inhabit fully, to live, as persons.

This is not a logical claim as to what normative structures *must* obtain regarding prohibited items—there indeed are games, and Torah law might have been one. On Shkop's view it in fact does not obtain even with regard to all halakhic prohibitions: Items prohibited by rabbinic decree, he argues, in fact do not enjoy any ascription of objective axiological status, their consumption or benefit being governed, rather, exclusively by statutory imperatives addressed to agents. The wrong committed in consuming a rabbinically prohibited food item such as poultry cooked with milk is thus not the consumption of the poultry-dairy combination per se, but rather the formal transgression of disobedience to a rabbinic decree, whatever that decree may be.⁴¹ This explains why items from which it is rabbinically prohibited to benefit, unlike their biblically enjoined counterparts, retain their monetary value,⁴² as they remain fit for consumption in themselves. Further evidence for this theory is the ruling that where food items were sold and subsequently consumed under the false pretense of their permissibility, the seller must provide restitution only if consumption of the items in question was *biblically* prohibited, the reason again being that items prohibited by rabbinic decree remain valuable in themselves.⁴³ Since the potential wrong in play is the refusal to heed rabbinic instruction rather than the consumption of the item per se, so long as the buyer was unaware of the instruction in this case, their failure to comply with it cannot constitute disobedience—unwitting disobedience is no disobedience at all—and is as such of no normative bearing. Thus, the buyer, having already consumed the prohibited item, has done no wrong and so suffered no loss.

Halakhah, on Shkop's view, is thus inclusive of a normative field which does indeed consist exclusively of deontic imperatives addressed

41 Ibid.

42 See *b. Qidd.* 58; *Shulḥan Arukh, Even ha-Ezer* 28:1.

43 Shkop, *Sha'arei Yosher*, 1:10, vol. I, p. 158. For the ruling in question, see Maimonides, *Mishneh Torah, Hilkhot Mekhirah* 16:14.

to deliberating agents—that is, a field possessing the normative structure characteristic of games—and which as such indeed does not call for the open-ended range of responsibilities characteristic of personal engagement. So long as the relevant rules are heeded by the relevant agents, no resulting state of affairs bears positive or negative value, and so no responsibility toward ensuring or avoiding any state of affairs is called for. The point for Shkop, however, is that strictly deontic normativity is no more than simply one component among many of the fully personal normative life—of which Torah law is surely a form.

* * * * *

With all this in the background, I turn now to Shkop’s best known, most celebrated, and, I argue, least understood contribution to talmudic legal theory in his analysis of the origins and nature of halakhic civil law. It is a fundamental principle of rabbinic jurisprudence that with respect to property disputes, “the burden of proof rests on they who would extract from their fellow.” Where I am presently in possession of an object, I am thus within my rights in maintaining possession of that object, even where legitimate questions have been raised as to its proper provenance, until such time as you conclusively demonstrate that it in fact belongs to you. Shkop begins his analysis by taking up what was by his time already a well-worn rabbinic question: Given that in maintaining possession of the object I stand at risk of violating a biblical injunction—that against theft—why am I not bound by the usual principle requiring that one refrain from a course of action so much as plausibly representing a biblical transgression? One traditional answer is that from the perspective of the law, my ceding possession to you on these grounds represents no gain, as we would be presented with the identical conundrum, only with the roles flipped.⁴⁴ Shkop argues that this solution is inadequate, however, as the burden-of-proof principle can apply even where the conflict is asymmetric in terms of potential transgression: Even where it is the case that you are sincerely certain that the item belongs to you, and so from your perspective stand no risk of violation, so long as the facts appear to me to be indecisive—that is, until such time as I receive, beyond your assurance, proof that the object is yours—I may retain possession.⁴⁵ And even where the potential for transgression is symmetric, Shkop points out,

44 This argument is attributed to R. Yehiel Bessen (1550–1625). See *Keneset ha-Gedolah* to *Hoshen Mishpat* 25:67.

45 Shkop, *Sha'arei Yosher*, 5:1, vol. I, p. 1, referencing *Quntres ha-Sefeqot* 1:66.

the mutual intolerability of either the defendant's or plaintiff's prospective possession surely does not entail the tolerability, to either the court or the defendant themselves, of the defendant's prospective possession.⁴⁶

Having thus found this line of argument unsatisfactory, Shkop looks to an approach offered by Rabbi Yehonatan Eybeschutz (1690–1764):

In truth there is no question in the first place, as this simply is the command and injunction of “Thou shall not steal”—that is, *definitive* theft. Where an object of uncertain theft, on the other hand, is in your possession, there is no prohibition of theft, as the form of the statute is such that “the burden of proof rests on the one who would extract from their fellow.” Thus, one can maintain possession, and there is no possibility of transgressing an injunction at all, as the Torah did not prohibit theft in cases such as this.⁴⁷

For Eybeschutz, it is not that one may disregard the possibility of transgressing the statute against theft in cases where the statute uncertainly applies, but that in such cases there simply is no potential transgression to disregard, as the statute itself excludes such cases from its provenance. Eybeschutz stresses that there is talmudic precedent for such statutory exceptions regarding uncertain cases: The strictures regarding children of illicit sexual couplings, to take one instance of several, are said not to apply so long as a given child's status as such has not been definitively established.⁴⁸ Shkop, while acknowledging this solution as viable enough as a logical matter, turns Eybeschutz's evidence on its head: The fact that in every other case where such an exception is made the Talmud offers an explicit scriptural derivation for that exception, Shkop argues, implies that the case of uncertain theft, which enjoys no such derivation, does not belong to the same class. If the exception is a matter of explicit statute, in other words, there should be an explicitly stated statute to that effect. Not only does the Talmud contain no mention of any such statute, however, but it explicitly rejects the suggestion that the burden-of-proof principle should require a statutory source at all, asserting that it is rather simply a matter of sound reason.⁴⁹ Moreover, Shkop

46 Shkop, *ibid.*

47 Yehonatan Eybeschutz, *Urim v-Tumim, Kitsur Teqafot Kohen* 23.

48 See *b. Qidd.* 73a.

49 Shkop, *Sha'arei Yoshel*, 5:1, vol. III, p. 1. See *b. B. Qam.* 46b.

argues that the suggestion is simply false, as the injunction on theft in fact does remain in force in cases where its transgression is a plausible outcome: Where the plaintiff claims certainty and the defendant is unsure as to the truth of the matter, the defendant bears at least an obligation “in the hands of heaven” to hand over the object⁵⁰—an obligation they would not have were the injunction against theft simply inapplicable. An exclusively statutory solution, Shkop concludes, is simply not adequate to the facts.

The mistake generating the conundrum, Shkop argues, is precisely to think that rightful possession of an object—ownership—is a function of who in a given situation would or would not violate the deontic injunction against theft in holding the object. But this view, Shkop writes, is simply absurd: “It is in no way possible to say that our assigning an object to Reuben is on account of Simon’s being enjoined by the laws of the Torah not to steal it from him. The matter is rather the reverse.”⁵¹ That is, who would or would not violate the injunction against theft is rather a function of, and subject to a prior determination regarding, who the object in question belongs to. And that determination, Shkop says, is in no way a function of divine imperatives: “Where we are adjudicating with regard to some right or acquisition of a person regarding a certain object or financial obligation, we are not at all adjudicating with respect to the observance of some commandment [*mitsvah*], but rather regarding the reality of who the item belongs to.”⁵² Shkop grounds this claim in a sweeping interpretation of the Torah’s laws governing civil matters:

All the civil laws regarding monetary matters between a person and their fellow—they are not like all the commandments of the Torah. For with regard to all of the commandments—that which the Torah enjoins us to do and not do—the obligation devolving upon us to fulfill them is first and foremost to fulfill the commandment of God. But with regard to the civil laws this is not the case, as prior to the commandment of God devolving upon us to pay or return we must have already been subject to a legal obligation [*“hiyyuv mishpati”*].⁵³

50 See *b. B. Qam.* 118a.

51 Shkop, *Sha ‘arei Yoshel*, 5:2, vol. III, p. 14.

52 *Ibid.*

53 *Ibid.*

The first question to be asked in a disputed-property case is thus not which of the parties stands at risk of violating the Torah commandment against theft but rather the more direct question of who, given the facts of the case, ought to enjoy possession of the object in question. And that determination is a function of a form of juridical normativity distinct from and more basic than that entailed by direct divine commandment—what Shkop calls “civil-law jurisprudence” [*“torat ha-mishpatim”*], as opposed to Torah law [*“mishpat ha-torah”*].

Among the considerations entering into that determination will be (1) who is presently in possession of the object, and (2) whether or not the plaintiff has offered definitive proof in their favor. Where the plaintiff has in fact not offered definitive proof in their favor, then despite what may be open questions of fact, the sum-total considerations of civil-law jurisprudence will deliver the verdict that the item ought to remain in the possession of the plaintiff. That determination, despite its responsiveness to ongoing uncertainties, is itself a definitive one—whoever is determined, all things considered, to be the rightful owner, is the rightful owner, full stop. Anyone other than the owner, should they then seize the object, will thus stand liable for transgressing the Torah commandment against theft. And critically, in response to Shkop’s initial question, continued possession poses no risk of transgression whatsoever for the party determined by the law as the rightful owner. Shkop stresses, against Eybeschütz’s view, that where a course of action does in fact represent an uncertain but plausible transgression of the Torah commandment against theft—he suggests a case where one is unsure if the person whose property they would detain is a non-Jew, which if true would on some views render the Torah prohibition against theft inapplicable—one is indeed obligated to refrain from that course of action on account of the risk, as is the case with respect to every biblical prohibition. The Torah injunction against theft, qua Torah injunction, operates no differently than any other. The difference, however, is that whether or not the injunction against theft applies in a given case at all is dependent on the prior determinations of civil-law jurisprudence. And that, Shkop argues, is because in practicing fidelity to this commandment, the agent is subject to a binding normative field in which civil-law obligations [*“hiyyuvei mishpati”*]¹—the obligation, for instance, to respect property ownership as determined by civil-law jurisprudence—are both valid and structurally prior to the obligation to heed the commandment’s dictates per se.

For Avi Sagi, Shkop's model here amounts to a "sharp separation between the realm of religious commandment and the realm of law," where the former is grounded in "the command of God" and the latter "grounded in reason and rationality" ["*sekhel u-sevara*"].⁵⁴ What this amounts to, Sagi concludes, is a robust recognition by a traditional rabbinic authority of the validity of *natural law* alongside divine commandment. Wozner rebuts this characterization, arguing that Shkop's conception of civil-law jurisprudence incorporates clearly positivist and conventional elements—rabbinic legislation and local mercantile practice are said to be key components of its determinations,⁵⁵ for instance—inconsistent with the strict conceptual necessity indicated by a natural-law picture.⁵⁶ This is a quibble about words, however, as Sagi is forthright in clarifying the version of "natural law" he ascribes to Shkop is a "moderate" one which "does not necessarily express a definitive metaphysical truth."⁵⁷ Moreover, Sagi takes full note of the positivist and conventional elements of Shkop's conception: Shkop's language, Sagi says, indicates that he identifies his conception of civil-law with a "system of positivist legislation."⁵⁸ Sagi's argument, however, is that Shkop's references to positivist elements "are no more than a specific application, in the realm of positivist legislation, of the fundamental principles of natural law."⁵⁹ Critically, as with the authority of rabbinic law and the responsibility to avoid courses of action representing plausible but uncertain transgressions, Shkop understands the epistemic warrant for accepting the deliverances of civil-law jurisprudence as normatively binding as an achievement of autonomous personal rationality:

And even as at first glance it is a perplexing thing: What compulsion [*hekhreah*] and obligation [*hiyyuv*] to perform an action devolves upon a person in absence of a Torah command and injunction? But upon closer inspection this can be understood, for even the obligation and compulsion toward service of God and fulfillment of His will is too a matter of obligation

54 Sagi, "Religious Command," 104.

55 See Shkop, *Sha 'arei Yoshel*, 3:3, vol. II, p. 23.

56 See Wozner, *Legal Thinking*, 226–31.

57 Sagi, "Religious Command," 105.

58 Ibid.

59 Ibid.

and compulsion according to the law of reason and rational recognition.⁶⁰

Even where the details of the civil law are filled in according to local custom, therefore, those details enjoy binding normativity only insofar as they reflect that which reason can in principle recognize directly, without recourse to the contingent realities of social convention and positivist legislation, as “the true and the good.” So long as that much is clear, whether this model of normativity qualifies for classification as “natural law” is of merely lexical and rhetorical import.

Wozner stresses that Shkop’s distinction between civil-law jurisprudence and Torah law is not entirely a matter of their respective grounds: It is not, in other words, and as Sagi’s formulations might imply, as if civil-law jurisprudence represents simply more of the kind of thing offered by Torah law but sourced in reason rather than revelation.⁶¹ For Wozner, the distinction is radical and categorical: Whereas Torah law consists of deontic imperatives, civil-law jurisprudence does not “impose behavioral imperatives of any kind.”⁶² What Shkop’s civil jurisprudence provides, on Wozner’s reading, are exclusively definitions and determinations of status which, limited as they are to the descriptive plane, do not of their own accord issue in guidance on conduct; it is only in conjunction with God’s commandments that civil jurisprudence enjoys normative implications for agential conduct. When Shkop says, for instance, that civil jurisprudence entails that in borrowing money one incurs a “personal encumbrance” which is a “legal ruling that one stands obligated to make such and such of his property available to their fellow, this obligation being a legal obligation even without a Torah commandment,”⁶³ this does not mean that one who borrows money is obligated, independently of Torah commandment, to make their property available to their debtor for collection. “It is not a principle of conduct which obligates [*mehayyev*] the debtor to pay the debtor the funds owed to him, but rather a definitional principle defining a legal state of affairs in which the debtor owes [*hayyav le-*] the creditor a sum of money.”⁶⁴ It is only, Wozner says,

60 Shkop, *Sha'arei Yosher*, 5:2, vol. III, p. 15.

61 See Wozner, *Legal Thought*, 236, 239.

62 *Ibid.*, 235.

63 Shkop, *Sha'arei Yosher*, 5:2, vol. III, p. 14.

64 Wozner, *Legal Thought*, 232.

when one is also subject to the commandment of God requiring that one pay monies they owe that the state of affairs of owing monies, as defined by civil jurisprudence, entails an obligation to pay. On its own, civil jurisprudence is normatively inert.

Shkop, as we have seen, does regularly employ the term "obligation" in explicating civil-jurisprudential principles, as in "one stands obligated to make such and such of his property available to their fellow" for debt collection. But Wozner, in support of his contention, claims that the Hebrew "*hayyav*" is ambiguous in rabbinic Hebrew between an imperatival sense, as in "One is obligated [*hayyav*] to eat fourteen meals in the *sukkah*,"⁶⁵ and a neutrally descriptive sense, as in "the debtor owes [*hayyav le-*] the creditor one thousand shekels."⁶⁶ The latter usage of *hayyav* does not on its surface attach to any required action, Wozner says, but rather simply indicates a certain relation between two parties. This interpretation is not sustainable, however. In the first place, it is simply not clear that the concept "A owes B money" can be made sense of without the concept of A's being under an imperative to provide the funds to B. Second, if we do grant that there can indeed be such a concept of imperative-free owing—that is, obligation-free obligation—to claim that for Shkop the descriptive usage of *hayyav* intends the imperative-free sense is, without further evidence, simply to beg the question in favor of Wozner's view. In the absence of further argument or evidence, the phrase "A owes B money" is straightforwardly interpreted as "A is obligated to provide money to B." Third, Shkop explicitly employs the term *hayyav* as attaching to particular courses of conduct, denoted by verbal infinitives, required of agents, as in "one stands obligated to make such and such of his property available to their fellow." Finally, precisely the question of how one can be bound to do something in absence of divine command is, as we have seen, a critical moment in Shkop's project, and it is raised explicitly in reference to the civil-jurisprudential obligation to pay monies lawfully owed:

It appears that the commandment to pay a creditor is subsequent to the determination of the matter of the debt in accordance with the civil-jurisprudential law, such that where an obligation of the civil-jurisprudential type of law devolves upon Reuben,

65 *M. Sukkah* 2:6.

66 Wozner, *Legal Thought*, 232.

the Torah then adds an injunction and commandment to take care to pay the debt which he owes in accordance with the civil-jurisprudential law. And though at first glance it is a perplexity as to *what compulsion and obligation there could be upon a person to do something* in absence a commandment and injunction of God. But when we examine the matter well, we can understand this...⁶⁷

It is not the case, therefore, that for Shkop the deliverances of civil-jurisprudence cannot in themselves entail agential imperatives. They can and do: When, in accordance with civil-jurisprudential law, one owes something to a second party, one is, independently of any divine commandment, bound by an imperative to provide that thing to that party.

Wozner's most prominent conceptual evidence for his interpretation is the fact that, for Shkop, the determinations of civil-jurisprudential law apply with respect to legal minor—individuals who, Wozner asserts, are not bound by agential imperatives. But in fact children are agents, and they are subject to imperatives of various kinds: Four-year old's ought to share, must not injure their fellows without due cause, and, where they have taken possession of an object belonging to a second party, are obligated to return the object to that party. It is true that minors are often not themselves criminally liable for their infractions, but that one is not liable to requital in failing to heed a given imperative simply does not entail that one is not subject to that imperative, nor that compliance to that imperative is not rightly demanded of them by their guardians and superiors. And while it is true that talmudic law considers minors exempt from Torah commandments, Shkop's civil-jurisprudential principles are not Torah commandments.

Shkop, in refuting the idea that ownership is a function of the commandment against theft rather than vice-versa, appeals to the fact that "[i]f the thief is a child, and so not subject to the commandments, it is nonetheless incumbent upon the court to save the oppressed from their oppressor and to compel the child to return the stolen object to its owner."⁶⁸ The civil-jurisprudential facts of ownership, theft, and debt, Shkop concludes, must therefore obtain even in the absence of Torah commandments, as it is only on that basis that the court can be obligated, as Shkop sees it surely is, to compel the

67 Shkop, *Sha'arei Yosher*, 5:2, vol. III, p. 15 (emphasis added).

68 Shkop, *Sha'arei Yosher*, 5:1, vol. III, p. 2.

commandment-exempt child to return the stolen object. Wozner concludes from this that on Shkop's view, while it is indeed the case that "the child 'owes' the object"—note the scare-quotes—it is nonetheless the case that, in the absence of a divine commandment, "the civil-jurisprudential obligation does not in itself impose upon him any imperative at all."⁶⁹ But again, the fact that the child is not subject to Torah commandments simply does not entail that the child is not subject to civil-jurisprudential imperatives. To assume that it does is to assume that the only binding imperatives are Torah commandments, which is to beg the question of Wozner's thesis, and to do so such as to negate what is the central aim of Shkop's project: To invite us to see that there indeed are forms of binding normativity beyond that of Torah law, and beyond statutory and deontic more generally. Critically, it is not the case for Shkop that the court is required, independently of Torah commandment, to retrieve a citizen's property where that property has been taken by some force lacking moral responsibility (a racoon, for instance, or a monsoon). It is where the property has been taken by a human child, and so where a wrong has been done—and a right stands to be done in correction of that wrong—that the court is responsible for seeing to it that the wrong is so righted. And the court's responsibility is not simply to return the object, but to "compel the child to return the stolen object to its owner"—that is, to see to it that the agent in question fulfills their responsibilities.

It is worth noting further that for Shkop the court's responsibility to ensure the return of property stolen by a minor itself does not appear to rest on a Torah statute: Not only does he not mention one in explicating it, but, again, the point of adducing the court's responsibility in this regard is precisely to exhibit the validity of civil-jurisprudential imperatives independent of divine commandment. It is on account of the determination as to the reality of "for whom, according to civil jurisprudence, it is fitting to maintain possession of the object"—the determination of a way the world ought to be—that the appropriately licensed societal figures are charged with the responsibility to right the wrong so determined. Wozner is thus quite right to stress that the distinction between Shkop's categories of Torah law and civil-jurisprudential law is less a matter of their source than of their substance and form: The lack and perhaps even inapplicability of statutory law notwithstanding, children are responsible for returning objects they have stolen to their rightful owners,

69 Wozner, *Legal Thought*, 242.

and society, through its duly appointed delegates, is responsible for seeing to it that that responsibility is met.

Wozner's final argument in favor of his thesis points to a pointed silence in Shkop's discussion of items stolen from a gentile: "In the entirety of his extended discussion of this topic, Shkop does not even once say there is a legal, moral, or religious obligation to fulfill the civil-jurisprudential obligation and so to return the stolen object to its gentile owner."⁷⁰ From this Wozner concludes that for Shkop there is no imperative whatsoever to return the object. But Shkop does say that even according to the talmudic view on which there is no Torah prohibition against theft of a gentile's property, an item stolen from a gentile remains the property of the gentile, which, for Shkop, is to say that the gentile remains the one "for whom it is fitting, in accordance with civil jurisprudence, to maintain possession of the object."⁷¹ And that is to say that the thief is bound by a "civil-jurisprudential imperative" [*hiyyuv mishpati*] to return the object to the gentile. Short of adducing a divine commandment, what more could Shkop say that would convey that one is obligated to fulfill their civil-jurisprudential obligations? That one is *really* obligated to fulfill their civil-jurisprudential obligations? But what it would mean to say that? (What would it mean to deny it?) In what context would one find themselves compelled to affirm it, and why? In the end, the strongest argument against Wozner's thesis is simply to observe that we of course are, irrespective of what divine commandments we have and have not received, obligated to repay our debts and the like. Who would doubt that? Would Shkop? On what grounds?

Wozner's move from (1) the claim that "Shkop does not even once say there is a legal, moral, or religious obligation to fulfill the civil-jurisprudential obligation" to (2) the conclusion that there is no imperative to fulfill the civil-jurisprudential obligation, if it is not flatly begging the question, appears to reflect the same anxiety Cavell diagnoses as underlying the philosophical predilection for appeal to rules in explicating morality: "The appeal is an attempt to explain why such an action as promising is *binding* upon us." In our case, Wozner's appeal, which he finds unmet by Shkop, is an attempt to explain why civil-jurisprudential obligations really are binding upon us. But as Cavell says, "if you *need* an explanation for that, if there is a sense that something more than personal commitment is necessary, then the appeal

70 Ibid., 245.

71 Shkop, *Sha'arei Yosher*, 5:1, vol. III, p. 2.

... comes too late.”⁷² In Shkop’s idiom, where the roofs are shattered by the question of whether and how we can be bound by imperatives in the absence of divine commandment, and there is no carpenter nor son of a carpenter who can provide an answer, the right response is likewise to simply see that insofar as we are persons capable of recognizing and committing to the pursuit of the true and the good, no answer is necessary. And we surely are persons capable of recognizing and committing to the pursuit of the good and the true.

Against ibn Aderet and Heller, Shkop labors to show that we can be bound by responsibilities for that which is not enjoined upon us by statute, and for outcomes as yet unknown. Along with Nahmanides, Shkop labors to show that we can be bound to heed the authority of those with no credentials beyond our recognition of their grasp of the true and the good. Against Bessen, Eybeschütz, and a centuries-long tradition of inquiry, Shkop labors to show that we are bound, independently of divine statute, to seek a just society and to fulfill our obligations incurred thereby and therein. Through these efforts Shkop demonstrates for us that the study of law can help us to remember, in the face of law’s temptations, that there is more to the ethical life than law—perhaps even that there is more to law than law.

72 Cavell, *Claim of Reason*, 307.

