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## Revisiting a Jurisprudence of Obligation

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## REVISITING A JURISPRUDENCE OF OBLIGATION

*Ariel Evan Mayse\**  
*Kenneth A. Bamberger\*\**

### ABSTRACT

Through his landmark exploration of obligation as the conceptual touchstone of what he describes as the “Jewish jurisprudence of the social order,” Robert Cover offered an alternate language for legal regimes grounded in a rhetoric of individual rights.

The present essay revisits Cover’s account of the socially embedded nature of law and juridical process, taking seriously both its claims, as well as the cautions of its critics. The essay thus neither abandons the concept of rights as key to jurisprudence nor seeks to present a naïve or romantic characterization of Jewish legal thought, and proceeds wary of the pitfalls inherent in such comparative efforts. At the same time, it argues that Cover’s primary insight regarding the notion of a socially imbricated obligation as a core feature of Jewish jurisprudence and provides an important contribution. This theory is especially valuable in contexts in which contemporary policymakers and advocates have lacked success in locating a language or strategy sufficient to appreciate and address overwhelming modern problems at the juncture of individual and community.

More specifically, drawing on our previous work exploring Jewish law lessons for information privacy and environmental ethics, this essay argues that a nuanced adaptation of Cover’s theory of “incumbent obligation” as the organizing feature of Jewish law, can provide contemporary policymakers with a set of conceptual tools to

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help develop alternative approaches to metastatic surveillance and environmental collapse.

The notion of obligation as the heart of an ethical and jurisprudential system provides a powerful corrective to the post-Enlightenment West's centering of the "individual moral adventure" and the privileging of individual rights that has gone hand-in-hand with this ethos. The pre-modern roots of *halakhah* (Jewish law) permit a powerful challenge to this paradigmatic hegemony, as the Jewish legal tradition precedes liberalism and thus predates conceptions of the individual that undergird much of modern thinking, even as Jewish jurisprudence embodies a deep commitment to protecting individuals. Engagement with this tradition need not supplant liberalism. Rather, it presents a complementary ethical framework that can work within and enrich post-Enlightenment Western discourse. Reflecting this opportunity, revisiting Cover's work provides a conceptual frame that is sufficiently flexible and capacious to provide an additional legal vocabulary and set of jurisprudential values that can help confront the greatest challenges of our age.

2022 *REVISITING A JURISPRUDENCE OF OBLIGATION* 2117

## Contents

I.INTRODUCTION .....	2118
II.FRAMING.....	2123
<b>A. Translating a Jewish Jurisprudence of Obligation ..</b>	<b>2123</b>
<b>B. Valuing the Religious Roots of an Obligations Framework.....</b>	<b>2127</b>
III.SEEKING ALTERNATIVE POSSIBILITIES THROUGH A MINDSET OF OBLIGATION: JEWISH LAW LESSONS FOR PRIVACY AND THE ENVIRONMENT .....	2131
<b>A. Big Data, Surveillance and Privacy as a Social Obligation.....</b>	<b>2131</b>
1. Rights-Based Approaches to the Age of Big Data...	2131
2. Jewish-Law Foundations for an Alternative Path: Privacy, Social Order, and Obligation .....	2134
3. Contemporary Lessons from a Jurisprudence of Obligations .....	2152
<b>B. Responsibility, Obligation and Environmental Ethics ..</b>	<b>2155</b>
1. Grounding Environmental Obligations in the Social Order .....	2157
2. Doctrinal Illustrations .....	2161
3. An Environmental Responsibility Mindset of the Social Order .....	2174
IV.CONCLUSION .....	2178

## I. INTRODUCTION

Through his landmark exploration of obligation as the conceptual touchstone of what he describes as the “Jewish jurisprudence of the social order,”<sup>1</sup> Robert Cover offered an alternate language for legal regimes grounded in a rhetoric of individual rights. “The basic word of Judaism,” Cover wrote, “is obligation or mitzvah,” a notion “intrinsically bound up” in “a myth of Sinai[,]” while “the myth of social contract is essentially a myth of autonomy,” he contrasts, the myth of Sinai is “collective-in-deed, a corporate-experience.”<sup>2</sup> “The experience at Sinai is not chosen. The event gives forth the words which are commandments.”<sup>3</sup>

Accordingly, Cover suggested that a jurisprudence shaped by social obligation could offer a corrective for the shortcomings of a jurisprudence of rights. While the latter possesses profound rhetorical heft “[w]hen the issue is restraint upon power,” it “has proved singularly weak in providing for the material guarantees of life and dignity flowing from community to the individual.”<sup>4</sup> By contrast, Cover described, “[i]n a jurisprudence of mitzvah [obligations], the loaded, evocative edge is at the assignment of responsibility.”<sup>5</sup> This conception, Bill Eskridge explained, “provides a richer understanding of the relationship between the individual and the community than does liberal theory,” for “individual rights, without more, are a thin way to express or normalize” that relationship.<sup>6</sup>

Cover linked this emphasis on obligation to what he saw as another critical and distinguishing feature of Jewish legal discourse: the objective or telos of the law. Drawing upon the writings of Maimonides, the great medieval jurist, Cover argued that Jewish legal sources understand Jewish law (*halakhah*) as formative of the

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<sup>1</sup> See Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987).

<sup>2</sup> *Id.* at 66.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 71.

<sup>5</sup> *Id.* at 72. This sentiment is found in the repercussive essay by Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 12-13 (1983), discussed in Suzanne L. Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 830 (1993).

<sup>6</sup> William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1722 (2001) (crediting the idea to Cover and Susan Koniak).

practitioner's moral and intellectual development, through its capacity to shape human behavior in the context of a rich and multivocal network of shared social and religious duties.<sup>7</sup> "[T]o be one who acts out of obligation," he explained, "is the closest thing there is to a Jewish definition of completion as a person within the community."<sup>8</sup> The Jewish "jurisprudence of the social order"<sup>9</sup> thus embraces the sanctity of the individual, while at the same time imposing responsibility on each community member to ensure the collective behavior necessary for a vibrant, functioning, and good society.

Cover's framing of a jurisprudence of obligations as an alternative to one grounded in rights is often lauded for providing a rich account of the socially embedded nature of law and juridical process.<sup>10</sup> Yet Cover's theory is not without significant discontent, and his evaluation of *halakhah* and its paradigmatic uses for American jurisprudence have drawn critique. Suzanne Last Stone, for example, has interrogated Cover's views and argued that his "tendency to overly romanticize Jewish law also mars his turn to the contrast case as a prescription for American society."<sup>11</sup> Stone suggests that "Cover apparently concluded that a reconception of law as obligation, rather than rights, would partially answer his central concern: the problem of the law's violence."<sup>12</sup> Yet, she argues, Cover actually significantly overstates "the lack of coercive forces in Jewish law,"<sup>13</sup> and somewhat rose-tinted portrayal of *halakhah* thus elides foundational dimensions of Jewish law that embody and flex its coercive and even violent potential.<sup>14</sup> These elements of *halakhah* dealing with compulsion, though less prominent in its medieval and modern literatures, trouble

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<sup>7</sup> Cover, *supra* note 1, at 70.

<sup>8</sup> *Id.* at 67.

<sup>9</sup> *Id.*, at 65.

<sup>10</sup> Eskridge, Jr., *supra* note 6, at 1722; ELLIOT N. DORFF, FOR THE LOVE OF GOD AND PEOPLE: A PHILOSOPHY OF JEWISH LAW 9 (2007); ELLIOT N. DORFF, TO DO THE RIGHT AND THE GOOD: A JEWISH APPROACH TO MODERN SOCIAL ETHICS 19 (2002); see also Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165, 168-69, (2007) (proposing that legal ethics codes incorporate Jewish Law's notion of obligation).

<sup>11</sup> Stone, *supra* note 5, at 870.

<sup>12</sup> *Id.* at 830.

<sup>13</sup> *Id.* at 867-68.

<sup>14</sup> *Id.* at 824.

Cover's thesis precisely because they are hardly ancillary to the Jewish legal tradition.

Stone further demonstrates that Cover's "treatment of the Jewish jurisprudence of obligations omits any discussion of how two of Judaism's most basic religious ideals, to serve God and to emulate God, intersect with the notion of law as obligation."<sup>15</sup> In other words, to a certain degree, Cover has omitted or ignored the fundamentally religious dimension of *halakhah* while employing Jewish law as a foil and a challenge to the secular American legal tradition. This religious component and context, argues Stone, cannot so easily be done away with. Finally, Stone maintains that "[t]he Jewish legal example fails Cover because a community of obligation does not imply particular moral or political ideals."<sup>16</sup> Such obligations, even when socially grounded and communally oriented, do not *ipso facto* yield a particular set of values or ethical principles. Much as a jurisprudence based solely upon rights is impoverished, Stone argues that the moral dimensions of obligation remain opaque and ill-defined if the law's structures and vocabularies are not complemented by broader ethical frameworks—as they are in the native Jewish context.<sup>17</sup>

Attempting to defend the concept of rights as a formidable moral, social and jurisprudential force, Martha Minow engages Cover's theory from a different angle.<sup>18</sup> She rejects the assumption that rights solely implicate the domain of the individual, suggesting that they, too, are situated within a nested constellation of social values. Minow defines rights, in part, as the "enforceable claims of individuals or groups against the state,"<sup>19</sup> but is careful to extend this umbrella to cover all claims "that muster people's hopes and articulate their continuing efforts to persuade"<sup>20</sup> even if they have not been formally declared. Because, claims Minow, these values and "hopes," are elucidated, codified, and made enforceable through the processes of legal interpretation, the foundational concept of rights ought therefore to be seen as by no means inadequate or impotent for the

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<sup>15</sup> *Id.* at 867.

<sup>16</sup> *Id.* at 871.

<sup>17</sup> *Id.* at 823.

<sup>18</sup> See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987).

<sup>19</sup> *Id.* at 1866.

<sup>20</sup> *Id.* at 1867.

law's task of guiding human relationships and shaping the moral interactivity of a society.

Such important correctives to Cover's reading of obligation within the Jewish legal tradition are well taken. The present essay neither abandons the concept of rights as key to jurisprudence<sup>21</sup> nor seeks to present a naïve or romantic characterization of Jewish legal thought, and we are wary of the pitfalls inherent in such comparative efforts. It argues, however, that Cover's primary insight regarding the notion of a socially imbricated obligation as a core feature of Jewish jurisprudence remains an important contribution, especially in contexts in which contemporary policymakers and advocates have lacked success in locating a language or strategy sufficient to appreciate and address overwhelming modern problems at the juncture of individual and community. Accordingly, drawing on our previous work exploring Jewish law lessons for information privacy and environmental ethics,<sup>22</sup> this essay engages with Cover and his interlocutors to explore how Judaism's conceptual and doctrinal approaches rooted in obligation might suggest ways to chart new paths.

We have described elsewhere the ways that notions of individual "rights to be left alone" and "informational self-determination"—central to the modern approach to privacy protection—"offer little defense against the rampant data collection aggregation and use that have increasingly come to define our big-data age."<sup>23</sup> In the social-personal struggle over what Shoshana Zuboff has described as "surveillance capitalism," the individual is poorly-outfitted within the matrix of American law.<sup>24</sup> Current legal and policy discourse, moreover, struggles to overcome a form of technological determinism by which capacity to surveil constrains the breadth of rights not to be surveilled, or to fully conceive the totality and severity of harms wrought by pervasive surveillance and data analytics.<sup>25</sup> If

<sup>21</sup> Indeed, Cover himself recognized that "[s]inai and social contract both have their place" in "[t]he struggle for universal human dignity and equality." See Cover, *supra* note 1, at 73.

<sup>22</sup> See Kenneth A. Bamberger & Ariel Evan Mayse, *Pre-Modern Insights for Post-Modern Privacy: Jewish Law Lessons for the Big Data Age*, 36 J.L. & RELIGION 1 (2021); Ariel Evan Mayse, *Where Heaven and Earth Kiss: Jewish Law, Moral Reflection and Environmental Ethics*, 5 J. JEWISH ETHICS 68 (2019).

<sup>23</sup> Bamberger & Mayse, *supra* note 22, at 1.

<sup>24</sup> SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 360 (2019).

<sup>25</sup> Bamberger & Mayse, *supra* note 22, at 8.



privacy is, as is often claimed, a fundamental human right, it is often an empty one that lacks meaningful legal protection. By contrast, Jewish law's obligation-based doctrines offer an alternative model that could shift the focus from privacy as a negative right to the ways it positively enhances communal value,<sup>26</sup> and provide a language of social relations and the bilateral behaviors they require rather than placing the individual in opposition to society with privacy as a shield.

An obligation orientation rooted in the social order can also offer a missing language for current discourse regarding global climate change and the impending environmental disaster. "In that global warming poses a powerful challenge to the idea that the free pursuit of individual interests always leads to the general good," writes Amitav Ghosh, "it also challenges a set of beliefs that underlies a deeply rooted cultural identity, one that has enjoyed unparalleled success over the last two centuries."<sup>27</sup> Responses grounded in starting points of liberal and market individualism have failed to generate the collective action necessitated by the moral and existential crisis manifest in extreme weather events, loss of biodiversity, depletion of fisheries, pollution of air, water, and soil, prolonged droughts, and mass extinction of species. Moreover, attempts to protect the environment by describing the interests of the non-human world in a language of legal "rights" explains Peter Burdon, simply redirects attention from the source of the harm, "offer[ing] a minimalist alternative to environmental justice claims [that] can be accommodated within the parameters of extractive capitalism."<sup>28</sup> "The problem," he observes, "is with us and we need to place human power at the center of our legal and ethical frameworks. One way to do this is through obligations."<sup>29</sup> Here again, an obligations-based jurisprudence of social order provides a framework for shifting from a starting point of technological capacity and economic advancement to one that focuses on the capacity and

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<sup>26</sup> Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 431 (2016) ("Instead of trying to protect us against bad things, privacy rules can be used to create good things, like trust.").

<sup>27</sup> AMITAV GHOSH, *THE GREAT DERANGEMENT: CLIMATE CHANGE AND THE UNTHINKABLE* 134 (2016).

<sup>28</sup> Peter D. Burdon, *Obligations in the Anthropocene*, 31 L. & CRITIQUE 309, 310 (2020).

<sup>29</sup> *Id.* at 311.

institutions of human actors, which keeps pace with our ability to impact and harm the biosphere.<sup>30</sup>

A nuanced adaptation of Cover's theory of "incumbent obligation" as the organizing feature of Jewish law, can provide contemporary legal scholars with a set of conceptual tools for thinking through these issues of metastatic surveillance and environmental collapse. The notion of obligation as the heart of an ethical and jurisprudential system provides a powerful corrective to the post-Enlightenment West's centering of the "individual moral adventure"<sup>31</sup> and the privileging of individual rights that has gone hand-in-hand with this ethos. The pre-modern roots of *halakhah* permit a powerful challenge to this paradigmatic hegemony, as the Jewish legal tradition precedes liberalism and thus predates conceptions of the individual that undergird much of modern thinking, even as Jewish jurisprudence embodies a deep commitment to protecting individuals. Engagement with this tradition need not supplant liberalism, rather, it presents a complementary ethical framework that can work within and enrich post-Enlightenment Western discourse. Such an effort, in fact, reflects a particular Jewish flavor of Enlightenment thought, reflected by philosopher Moses Mendelssohn: "Every individual is obliged to use a part of his capacities and of the rights acquired through them for the benefit of the society of which he is a member."<sup>32</sup> Revisiting Cover's work provides a conceptual frame that is sufficiently flexible and capacious to provide an additional legal vocabulary and set of jurisprudential values that can help confront the greatest challenges of our age.

## II. FRAMING

### A. Translating a Jewish Jurisprudence of Obligation

Jewish law is, in a sense, a conversation across the generations; it is a discourse spurred by specific questions and cases embedded in

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<sup>30</sup> JOSHUA A. T. FAIRFIELD, *RUNAWAY TECHNOLOGY: CAN THE LAW KEEP UP* 18 (2021); FRANK PASQUALE, *NEW LAWS OF ROBOTICS: DEFENDING HUMAN EXPERTISE IN THE AGE OF AI* 171 (Harvard Univ. Press 2020).

<sup>31</sup> GHOSH, *supra* note 27, at 127.

<sup>32</sup> MOSES MENDELSSOHN, *JERUSALEM: OR ON RELIGIOUS POWER AND JUDAISM* 57 (Brandeis Univ. Press eds., Allan Arkush trans., 2017) (1783). Moses Mendelssohn (1729–86) was a Jewish philosopher whose works were foundational to the Jewish Enlightenment.

time and place, but which is driven by a jurisprudential dialogue across time and across geography, spanning from ancient Israel to every place that Jews have lived.<sup>33</sup> While many doctrines regarding privacy and the environment drawn from this discourse might appear to have ready comparisons in Western jurisprudence, the animating principles reflected in their scope and implementation reveal very different understandings of harms and methods for safeguarding against them. Jewish law, we argue, offers a fundamentally different vision of the individual's role in society and the network of shared obligations that reflect and support that role.

Rather than seeking to enact legislation from these antique and medieval sources, our goal is to “think with” the sources of Jewish law as ethical, philosophical, and jurisprudential prompts, thus, allowing them to enrich and to challenge a liberal mindset that often has neither the values nor the vocabulary to deal with these problems.<sup>34</sup> Accordingly, we seek not to simply gather and collate sources in an attempt to prove that privacy or environmental stewardship are ancient Jewish values, rather, we acknowledge and embrace the constructive dimensions of our project. Our quest is not to articulate the putative original meaning of Jewish jurisprudential discourse, but, in the words

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<sup>33</sup> For more extensive explorations of the Jewish legal system, see MOSHE HALBERTAL, *PEOPLE OF THE BOOK: CANON, MEANING, AND AUTHORITY* (1997); MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* (Bernard Auerbach & Melvin J. Sykes, trans., 1994); CHAIM N. SAIMAN, *HALAKHAH: THE RABBINIC IDEA OF LAW* (2018).

<sup>34</sup> We take seriously the reality that Jewish legal discourse is a particular jurisprudential voice, meant to govern a particular community. *See* Stone, *supra* note 5, at 821 (pointing out that American legal theorists frequently paint Jewish law removed from “the Jewish legal system's internal understanding of its tradition”). And we recognize the necessity in the comparative law project for appreciating those particularities when exploring new resonances and ideas. *Cf.* Michael Walzer, *Nation and Universe*, in TANNER LECTURES ON HUMAN VALUES 509, 509 (1989) (discussing Judaism's “particularist creed” as “one of the chief sources of two universalisms”). Thus, we seek to recognize the “Jewish legal system's own frame of reference”—including the “spiritual underpinnings” of the legal discourse implicating privacy, while at the same time deriving jurisprudential lessons that might inform different legal systems and contexts. Stone, *supra* note 5, at 822. *See generally* Samuel J. Levine, *Applying Jewish Legal Theory in the Context of American Law and Legal Scholarship: A Methodological Analysis*, 40 SETON HALL L. REV. 933, 936-37 (2010) (emphasizing derivation of jurisprudential lessons from Jewish law rather than attempts to transplant substantive doctrines into American law).

of Karl N. Llewellyn, to highlight “the sense which *can be quarried out of it* in the light of the new situation.”<sup>35</sup>

Translating Jewish jurisprudence for the contemporary legal context is an act of selection, and we recognize that not all the strands of thought can—or should—be highlighted or brought into this dialogue. Reading the Jewish tradition with care and attention to these potential pitfalls, however, permits us to draw upon the concepts and vocabulary of *halakhah* in order to mount a powerful challenge to contemporary worldviews by offering an alternative mode of constructing toothsome legal obligations intended to cabin surveillance and protect the environment.

Following what has often been called the “interpretive turn” in law,<sup>36</sup> and with an eye to Cover’s theory of *jurisgenesis* and “the creation of legal meaning,”<sup>37</sup> further suggests expanding and rethinking the narratives that are integrated as animating forces within these conversations regarding regulation and obligation. In the Jewish context, this means serious and deep engagement with the vast realm of narrative, or non-legal, teachings within its canon (called *aggadah*).<sup>38</sup> Drawing upon rabbinic law to address contemporary ethical concerns enables, and perhaps even demands, that our reading of these jurisprudential sources be guided by the rich trove of mythic, theological, and philosophical narratives found both within and without the Jewish tradition.<sup>39</sup> The rabbi and philosopher David Hartman argued that “the development of the *halakhah* must be subjected to the scrutiny of moral categories that are independent of

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<sup>35</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 400 (1950).

<sup>36</sup> Minow, *supra* note 18, at 1861; *see also id.* at n.3 (defining interpretive turn).

<sup>37</sup> Cover, *supra* note 5, at 11.

<sup>38</sup> ABRAHAM ISAAC KOOK, *THE LIGHTS OF PENITENCE, THE MORAL PRINCIPLES, LIGHTS OF HOLINESS, ESSAYS, LETTERS AND POEMS* 196-98 (Ben Z. Bokser trans., 1978); AVINOAM ROSENAK, *THE PROPHETIC HALAKHAH: RABBI A.I.H. KOOK’S PHILOSOPHY OF HALAKHAH* (2007); HAYYIM NAHMAN BIALIK, *Halachah and Aggadah*, in *REVELMENT AND CONCEALMENT: FIVE ESSAYS* 45, 45-87 (Zali Gurevitch ed., Ibis ed. 2000); ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN: A PHILOSOPHY OF JUDAISM* 320-47 (Farrar, Straus & Giroux eds., Stratford Press 1955); *see also* BARRY S. WIMPFHEIMER, *NARRATING THE LAW: A POETICS OF TALMUDIC LEGAL STORIES* (Univ. Pa. Press 2011); MOSHE SIMON-SHOSHAN, *STORIES OF THE LAW: NARRATIVE DISCOURSE AND THE CONSTRUCTION OF AUTHORITY IN THE MISHNAH* (Oxford Univ. Press 2012).

<sup>39</sup> Cover, *supra* note 5, at 23-24 n.66.

the notion of halakhic authority.”<sup>40</sup> The *aggadah* often provides a voice of challenge, sensing insufficiencies in the law and exploring the ways in which *halakhah* may be formulated in a manner that is unfair and even cruel.<sup>41</sup> Such narrative traditions thus push beyond the vision of Jewish law as an isolated, formalistic and totalizing system with internal principles that operate independently of all other values. Given that obligations are triggered by and reflected in social relationships, the network of interpersonal demands that are explored in the *aggadah* offers a different but equally important vantage point.

Privacy and environmental law are, of course, well-developed subfields in American legal scholarship. Other than the gravitas of hoary antiquity, which is not altogether a good thing, what can turning to religious laws developed across the past millennia that modern secular law cannot? Since the early 1970s, many democratic countries have developed robust laws whose aim is to protect the environment and the non-human forms of life within the natural world. Yet the past decade has revealed these laws’ fragility.<sup>42</sup> Their interpretation and enforcement are subject to changes in government, as well as the economic interests and lobbying efforts of major corporations and industries. Regulation is often piecemeal and halfhearted, subject to many of the same economic pressures and personal interests that have shaped the laws’ initial—and often inadequate—formulation. More fundamentally, current approaches to environmental protection do not reflect the capacity to alter basic paradigms in ways that address the most environmentally harmful forms of economic development.<sup>43</sup>

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<sup>40</sup> DAVID HARTMAN, *A LIVING COVENANT: THE INNOVATIVE SPIRIT IN TRADITIONAL JUDAISM* 98 (Collier MacMillan Pub. Inc. 2010).

<sup>41</sup> See the famous midrash about Daniel the tailor, quoted in STEVEN GREENBERG, *WRESTLING WITH GOD AND MEN: HOMOSEXUALITY IN THE JEWISH TRADITION* 211-12 (Univ. Wis. Press 2004). See the exploration of this topic by Professor David Halivni, *Can a Religious Law be Immoral?*, in *PERSPECTIVES ON JEWS AND JUDAISM: ESSAYS IN HONOR OF WOLFE KELMAN* 165, 165-70 (Arthur A. Chiel ed., 1978); GORDON TUCKER, *GOD, THE GOOD, AND HALAKHAH* 365-67 (1989); Moshe Silberg & Amihud I. Ben Porath, *Law and Morals in Jewish Jurisprudence*, 75 *HARV. L. REV.* 306, 306 (1961).

<sup>42</sup> See DOUGLAS A. KYSAR, *REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY* 3-4 (Yale Univ. Press 2010) (discussing the legislation and scholarly literatures discussed therein).

<sup>43</sup> See the critique in FRANK ACKERMAN & LISA HEINZERLING, *PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING* (New Press 2004). See also MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT* (2d ed. 2008).

These legal settings cannot give us a language for the collective self-destruction of humanity, nor can it shift our understanding of basic responsibility and obligations as applying to both the human and the non-human world.<sup>44</sup>

Modern approaches to privacy protection are similarly circumscribed. Current legislation has not sought to place widespread substantive limits on information collection, aggregation, and use in ways that transform the power dynamic of surveillance capitalism. Nor does it reflect a deep appreciation of the profound individual vulnerability wrought from the inseparability of data and person, space, and information. Rights-based frameworks have not developed a robust sense of the positive dimension of privacy as a communal value rather than a shield for individual concerns. As scholars, advocates and policymakers struggle to develop alternative, or additional, frameworks for comprehending and protecting these issues in this technological moment, then, we suggest that the literatures of Jewish law offer both source-material and conceptual guidance for that project.

### **B. Valuing the Religious Roots of an Obligations Framework**

We look to these traditions while remaining committed to the notion of Jewish law—and its co-constructive narratives—as a religious discourse; in that sense this project engages in what might best be described as a post-secular approach to legal scholarship. The importance of mobilizing the voices of religious law and philosophy in such conversations goes beyond motivating compliance.<sup>45</sup> “[R]eligious worldviews” for example, argues Amitav Ghosh, “are not subject to the limitations that have made climate change such a challenge for our existing institutions of governance.”<sup>46</sup> Religious communities and their network of obligations extend beyond the confines of modern nation-states and their territorial boundaries, affording an opportunity for collective action on a massive scale as

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<sup>44</sup> Daniel C. Etsy, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENV'T. L. 1, 77-80 (2017).

<sup>45</sup> See ANNA GADE, *MUSLIMS ENVIRONMENTALISMS: RELIGIOUS AND SOCIAL FOUNDATIONS* (Columbia Univ. Press 2019); JAMES MILLER, *CHINA'S GREEN RELIGION: DAOISM AND THE QUEST FOR A SUSTAINABLE FUTURE* (Columbia Univ. Press, 2017).

<sup>46</sup> GHOSH, *supra* note 27, at 158.

well as a robust way of conceiving of obligations toward future generations.<sup>47</sup> Religious literatures and rituals represent alternative modes of ethical reasoning and value assignment that offer an alternative to current economic systems. “[I]t is impossible to see any way out of the crisis without an acceptance of limits and limitations, and this in turn, is I think, intimately related to the idea of the sacred, however one may wish to conceive of it.”<sup>48</sup> The noted scholar and philosopher Moshe Halbertal has argued that classical Jewish legal sources define objects, spaces and times as “holy” if they are essentially beyond the pale of human instrumentalization and thus cannot be used for extractive, personal or material benefit.<sup>49</sup> A conception of sacredness of the non-human world, or the expansive personhood negatively impacted by surveillance, would thus trigger obligations of limit-setting, responsibility, and connection.

Stone correctly identifies the shortcomings in Cover’s account regarding the concept of duty, yet, in our estimation, this is an opportunity for reconsidering obligation from a post-secular perspective. Religious systems of law, including that of Judaism generally rooted their authority in God’s sovereignty,<sup>50</sup> but they do not necessarily thereby relinquish interpretative autonomy in favor of submission to the dicta of a divine lawgiver. “[T]he subject of the commands, the ordinary legal person,” writes Arthur J. Jacobson regarding religious theories of law, “is God’s partner in lawmaking.”<sup>51</sup> Within this framing of religious duties, then, the human being is tasked with an active role in formulating the law and determining the contours of obligation. As the legal theorist and scholar Richard J. Mouw has suggested, a mature vision of religious duty approaches “the God-human relationship as a covenantal partnership that is characterized by trust, mutual respect, responsible obedience, and a free acceptance of

<sup>47</sup> Edith B. Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT’L L. 198, 201 (1992).

<sup>48</sup> GHOSH, *supra* note 27, at 158.

<sup>49</sup> Moshe Halbertal, *On Holiness*, in BORDERS OF SANCTITY: IN ART, SOCIETY AND JEWISH THOUGHT 30, 30-34 (Emily Bilski et al. eds., 2003) (in Hebrew); Erin L. O’Donnell, *At the Intersection of the Sacred and the Legal: Rights for Nature in Uttarakhand, India*, 30 J. ENV’T L. 135, 141 (2018).

<sup>50</sup> Stone, *supra* note 5, at 868-69; Arthur J. Jacobson, *Hegel’s Legal Plenum*, 10 CARDOZO L. REV. 877 (1989); *see also* Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306 (1961).

<sup>51</sup> Jacobson, *supra* note 50, at 894.

obligation.”<sup>52</sup> This conception of law as an expression of relationship, indeed of partnership, is visible throughout Jewish tradition but is perhaps best illustrated by the rabbinic adage: “A judge who renders judgment that aligns with truth in its deepest sense, even for a single moment, is considered the blessed Holy One’s partner in the works of creation.”<sup>53</sup> Rather than insisting on fealty to divine fiat, as in the theories of Carl Schmitt, such flexible visions of religious duty imagine compliance as emerging from a host of social, intellectual, and theological values other than external enforcement or individual moral choice.<sup>54</sup>

Cover observes that, frequently, “[s]ocial movements in the United States organize around rights.”<sup>55</sup> But conceptions of the individual’s right to be shielded from harm, whether auditory or visual intrusion or ecological degradation, remain insufficient for prompting collective action. Jewish literatures often homiletically interpret the term *mitsvah* (“commandment”) as linked to the Aramaic word *tsavta* (“connection” or “togetherness”), reflecting a belief that the commandments bind one to God but also, as duties that reflect and reify a shared set of values that shape the society as a whole, these statuses bind the individual to the broader community of practice. Here, then, we have a quintessentially Jewish precedent for Milner S. Ball’s proposal of “law as medium-law as connecting rather than disconnecting, enhancing a flow of dialogue, containing the dynamics of life in common.”<sup>56</sup>

There is an additional question at the heart of our project: When a society is faced with radical and unprecedented changes in technological, social, economic, and environmental spheres, how can one look to religious law? As a society and perhaps as a species, we have reached an inflection point that appears gordian in complexity and scope. Our hungers for expansion and extraction have led us to the brink of environmental collapse, as well as pervasive incursions against privacy and personhood. Might, then, these background

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<sup>52</sup> RICHARD J. MOUW, *THE GOD WHO COMMANDS: A STUDY IN DIVINE COMMAND ETHICS* 18 (1990).

<sup>53</sup> Babylonian Talmud, Shabbat 10a.

<sup>54</sup> ELLIOT N. DORFF, *FOR THE LOVE OF GOD AND PEOPLE: A PHILOSOPHY OF JEWISH LAW* 131-88 (Jewish Pub. Soc’y eds., 2007).

<sup>55</sup> Cover, *supra* note 1, at 67.

<sup>56</sup> MILNER S. BALL, *LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY* 122 (Univ. Wis. Press eds., 1985).



developments, and evolving concerns about them, be understood as sort of “constitutional moments” for Jewish law—a precipitating series of events, with effects on relations between the constituent community, so extraordinary as to require revisiting Jewish sources for their wisdom, while extending and emboldening jurisprudential traditions in light of the unparalleled circumstances of our day.

A mindset of crisis, however, does not spur individuals or societies to reinterpret and reevaluate their moral, economic, and legal frameworks. Such paradigms of emergency or catastrophe may lead to fearful conservatism and the utter rejection of change on one hand, or, on the other, to bewildered paralysis and recalcitrant indecision. Both of these eventualities would hamper our efforts to think through the challenges of climate change or the big-data age, and in fact they have already done so. Kyle Whyte, a scholar of Environmental Studies whose work engages deeply with Indigenous traditions, has demonstrated the inadequacy of “[e]pistemologies of crisis”<sup>57</sup> for confronting climate change. When faced with seismic environmental shifts that threaten our ways of life, societies and their laws all too often fall back on the very tools and structures that brought them to that point. Whyte presents an alternative in what he describes as “epistemologies of coordination”—namely, “ways of knowing the world that emphasize the importance of moral bonds—or kinship relationships—for generating the (responsible) capacity to respond to constant change in the world.”<sup>58</sup>

Rabbinic Judaism, born of a crucible following the destruction of the Temple, has survived numerous upheavals that might rightly be called constitutional moments; these have, in fact, often generated a flurry of legal creativity manifest in the dialectically locked impulses of codification and commentary.<sup>59</sup> The writing of Cover on issues of obligation, in turn, might offer a substantive foundation regarding how to go about reexamining the wisdom of Jewish law in order to think through critical times but without falling into a worldview of crisis. His work steers us toward such “epistemologies of coordination” as a potential avenue for responding to the massive dangers of big data and looming environmental disaster. Without romantically assuming that

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<sup>57</sup> Kyle Whyte, *Against Crisis Epistemology*, in HANDBOOK OF CRITICAL INDIGENOUS STUD. 52, 53 (A. Moreton-Robinson et al. eds., 2021).

<sup>58</sup> *Id.*

<sup>59</sup> ISADORE TWERSKY, INTRODUCTION TO THE CODE OF MAIMONIDES 62-74 (Judah Goldin et al. eds., 1980); Halbertal, *supra* note 49, at 57-61, 75.

*halakhah* has all the answers needed to address these staggeringly complicated issues, we are seeking to understand what we ought to glean from Jewish jurisprudence in order to overcome tired paradigms and, as Ludwig Wittgenstein would have it, “to show the fly the way out of the fly-bottle.”<sup>60</sup>

### III. SEEKING ALTERNATIVE POSSIBILITIES THROUGH A MINDSET OF OBLIGATION: JEWISH LAW LESSONS FOR PRIVACY AND THE ENVIRONMENT

#### A. Big Data, Surveillance and Privacy as a Social Obligation<sup>61</sup>

##### 1. *Rights-Based Approaches to the Age of Big Data*

Modern American privacy law has been rooted in the discourse of individual rights since its origins. Seeking to revive legal vitality in the face of a transformational moment in intrusive technological capacity—notably the development of photography—Samuel Warren and Louis Brandeis in 1890 mined both common law doctrine and its understandings about what they termed a principle of “inviolable personality”<sup>62</sup> to weave a coherent modern legal vision of privacy protection.<sup>63</sup> This protection, framed as an actionable “right” of the individual “to be let alone,”<sup>64</sup> placed in that individual the power to determine “the extent to which his or her written work, thoughts, sentiments, or likeness could be given to the public.”<sup>65</sup>

Scholars, courts, and policymakers have debated the contours of this framing, as well as the interests a privacy right should protect,

<sup>60</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 309 (Basil Blackwell ed., 3d ed. 2001).

<sup>61</sup> The following section is based upon Bamberger and Mayse, *supra* note 22, at 58-60.

<sup>62</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

<sup>63</sup> *Id.* at 206-07.

<sup>64</sup> THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT* 29 (Chi.: Callaghan & Co., 2d ed. 1888); *see also* Erwin N. Griswold, *The Right to Be Let Alone*, 55 NW. U.L. REV. 216, 216 (1960).

<sup>65</sup> JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY* 15 (1997).

and the harms it should prevent. Commentators from a range of disciplines have documented the shortcomings of this approach in the face of the even greater technological rupture of the digital age. Yet the fundamental elements of the formulation—designating the individual as both the determinant of the contours of privacy’s scope and the mechanism for its legal protection—have demonstrated powerful normative and legal force for more than a century.

The conceptualization of privacy as a civil liberty has shaped both the emphasis of subsequent policy discussion, and the articulation of the values privacy is understood to protect. The first, Priscilla Regan describes, “has been on achieving the goal of protecting the privacy of individuals rather than curtailing the surveillance activities of organizations.”<sup>66</sup> Accordingly, the second, in prominent articulations, include important individual values such as personal autonomy, emotional release, self-evaluation, and the ability to limit and protect personal communication.<sup>67</sup> The absence of a privacy “right” —the “claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others,” undermines one’s individuality and “core self,” allowing exposure to the dignitary harms of ridicule and shame, and the threat of control by others who possess one’s secrets.<sup>68</sup>

Legal protections rooted in notions of individual rights to “be left alone,”<sup>69</sup> and to “informational self-determination,”<sup>70</sup> however, increasingly offer little insurance against technological capacity for rampant data collection, aggregation, and use. The legal regimes this language of individualism informs broadly replace the substantive promise of privacy as a “fundamental human right” with illusory

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<sup>66</sup> PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 3 (1995).

<sup>67</sup> ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

<sup>68</sup> *Id.*

<sup>69</sup> Warren & Brandeis, *supra* note 62, at 205 (identifying in the common law a “general right of the individual to be let alone”).

<sup>70</sup> BVerfGE 1 BvR 209, 269, 362, 420, 440, 484/83, Dec. 15, 1983, [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215\\_1bvr020983en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1983/12/rs19831215_1bvr020983en.html) (articulating a right to “informational self-determination”); *see also* Alan F. Westin, *Privacy and Freedom*, 25 WASH. & LEE L. REV. 166, 167 (1968) (defining privacy as “the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others”); Warren & Brandeis, *supra* note 62, at 198 (stating that privacy “secures to each individual the right of determining . . . to what extent his thoughts, sentiments, and emotions shall be communicated to others”).

procedural safeguards of “notice” and “consent”—manipulable protections by which individuals “agree” to waive their privacy, often with little understanding of the terms of the bargain, awareness of future uses of information about them,<sup>71</sup> or power to negotiate or opt out.<sup>72</sup> The contours of legal privacy rights, furthermore, are increasingly circumscribed by technological capacity to surveil, replacing any normative or subjective notion of what is “private” with determinations about evolving expectations about what can be surveilled, deeming much of what might feel private as “public” and therefore unprotected. Jurisprudence struggles to comprehend the deleterious effects of intrusive surveillance and information collection, as traditional doctrines regarding what types of individual injury are required in privacy cases lead to cramped understandings of resulting harms.<sup>73</sup>

The rubric of informational self-determination, moreover, often undermines privacy by misdirection from the reality that individual lives, and individual privacy, are enmeshed with broader society.<sup>74</sup> It obscures ways that privacy rights are deemed waived (or never even coalesce) as a condition of participation in society, both online and in real life.<sup>75</sup> Framing privacy as an individual interest,

<sup>71</sup> Joshua A.T. Fairfield & Christoph Engel, *Privacy as a Public Good*, 65 DUKE L.J. 385, 390 (2015) (“Individual control of data is a fundamentally flawed concept because individuals cannot know what the data they reveal means when aggregated with billions of other data points.”).

<sup>72</sup> Ehimare Okoyomon et al., *On the Ridiculousness of Notice and Consent: Contradictions in App Privacy Policies*, in PROCEEDINGS OF THE WORKSHOP ON TECHNOLOGY AND CONSUMER PROTECTION (ConPro ed., 2019) (“[I]t is unlikely that most users comprehend these disclosures, which is due in no small part to ambiguous, deceptive, and misleading statements.”); Lindsey Barrett, *Model(ing) Privacy: Empirical Approaches to Privacy Law and Governance*, 35 SANTA CLARA HIGH TECH. L.J. 1, 17-18 (2018) (“Few people read privacy policies, and those who do are left with little basis to understand the uses of their data.”); Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1661-63 (1999) (discussing the “autonomy trap”).

<sup>73</sup> *Spokeo, Inc. v. Robins*, 578 U.S. 330, 342 (2016) (holding violation of Federal Credit Reporting Act’s informational protections does not constitute injury-in-fact “concrete” enough to confer standing).

<sup>74</sup> Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1234 (2003) (“[M]any privacy problems cannot be adequately redressed by relying on individual initiative alone.”).

<sup>75</sup> DANIEL J. SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* 7 (2007) (“According to the general rule, if something occurs in a public place, it is not private.”); Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI

moreover, often ignores the interconnected nature of human behavior, and of human interests. Surveillance of any one individual can reveal a great deal about others, slicing away at their privacy without any pretense of consent in the waiver of their rights and interests.<sup>76</sup> Yet because of collective action problems, relying on individuals is a poor means of protecting privacy as a public good.<sup>77</sup> The modern discourse of individualism too often masks a post-modern technological capacity that permits near-ubiquitous surveillance of our behaviors, our interactions, our locations, and our personal spaces. It conceals the ways that this capacity can be manipulated by entities whose financial incentives demand ever-growing digital dossiers on individuals using powerful computing in service of increasingly powerful ways to monetize our every behavior.<sup>78</sup>

## 2. *Jewish-Law Foundations for an Alternative Path: Privacy, Social Order, and Obligation*

Jewish legal sources in a variety of doctrinal and narrative contexts speak to the cluster of issues generally associated with privacy. These include:

(1) The well-developed doctrine against *hezek re'iyah* (harm from seeing) as well as prohibitions on *hezek shemiya'h* (harm from hearing)—the closest analogs in the world of the Talmudic sages to surveillance. While this doctrine includes rules governing information collection, its initial mandates concern walls between neighbors' properties and laws limiting doorways and windows in a shared courtyard to prevent persons from gazing into others' domains.

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L. REV. 141, 142 (2014) (discussing how “24/7 data tracking, warehousing, and mining technology” subverts protections based on “reasonable expectation[s] of privacy”).

<sup>76</sup> See, e.g., Karen Levy & Solon Barocas, *Refractive Surveillance: Monitoring Customers to Manage Workers*, 12 INT'L J. COMM. 1166, 1166 (2018) (describing phenomenon of collecting information about one group to facilitate control over an entirely different group); Joel R. Reidenberg, *Privacy Wrongs in Search of Remedies*, 54 HASTINGS L.J. 877, 883 (2002) (discussing the “externalities of information sharing[]” and stating that “[e]ach member of society may have a non-represented stake in another’s disclosures of personal information”).

<sup>77</sup> Fairfield & Engel, *supra* note 71, at 389-90.

<sup>78</sup> Paul Ohm, *Don't Build a Database of Ruin*, HARV. BUS. REV., Aug. 23, 2012, at 2.

(2) The *takkanah* or “enactment” of Rabbenu Gershom (ca. 960–1028),<sup>79</sup> a famed medieval ruling that prohibits, among other things, opening mail belonging to another. Perhaps initially enacted to protect trade secrets, the *takkanah* has been applied to prohibit harvesting information from all kinds of personal communications.

(3) A range of speech rules regarding what information about others—whether publicly accessible or not—may be shared. These rules include a biblical prohibition against talebearing (*rekhlut*), which has implications for both collecting and sharing information. Possibly compromising information about a person’s background, family status, or religious status, even when known by some, is barred from public discourse.

Read together, these sources present an understanding of privacy and a model for its protection that reflects what Cover describes as a “jurisprudence of the social order,”<sup>80</sup> and thus departs radically from the usual building blocks of current privacy discourse.

They root the importance of privacy not only in the protection of the individual, but in the set of values prerequisite for a vibrant, functioning, and good society. The texts animate what is at stake in the protection of privacy, and the ways that privacy harms can rend the fabric of society. Legal doctrine locates neither the meaning of privacy, nor the mechanism for its legal vindication, in individual rights.

Rather, employing a system of *ex ante* obligations, Jewish law establishes a set of prior commitments that help answer the question of what behaviors are appropriate. These duties, moreover, are not dependent on changing custom or technological capacity; Jewish law rejects both technological determinism and the related notion of “expectations” as delineators of privacy’s content.<sup>81</sup>

Anonymity, moreover, is not a determinant of privacy in the Jewish system: rules of behavior largely presume its absence—and apply even when it exists. Privacy rules depend neither on the “confidentiality” or “secrecy” of the information or behavior witnessed

<sup>79</sup> See LOUIS FINKELSTEIN, *JEWISH SELF-GOVERNMENT IN THE MIDDLE AGES* 111 (1964) (discussing the enactment).

<sup>80</sup> Cover, *supra* note 1, at 65.

<sup>81</sup> See Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 U. CHI. L. REV. 181, 195 (2008) (“[T]he reasonable expectation standard begs the question: when does surveillance of online activities change expectations in a way that we as a society should find objectionable?”).

or overheard, or whether or not knowledge is later used or shared; and they apply irrespective of the ability to show subjective personal harm. Jewish sources often reject consent as a basis for intrusion, or waiver of privacy duties, and privacy-protective behavioral mandates on *both* the surveilled and the surveiller may remain binding even if both sides accept the situation. Finally, even when certain types of personally sensitive information or knowledge are publicly known, or can't help but be visible, Jewish law provides rules against their use or sharing.

Together, then, these elements combine to offer both a language about privacy's meaning—including its framing as a social value, the harms that result from intrusions, and the understanding of the socially-situated individuals it is intended to protect—and a framework for employing behavioral obligations as a means for privacy protection, with promise for combatting big data abuses, and that is missing in current discourse.

a.) Privacy's Meaning and Value: A  
Jurisprudence of the Social Order

i. Privacy in Society

If Warren and Brandeis' origin story for Western privacy doctrine rested on shielding individuals from others' prying eyes, Jewish privacy's narrative arises from an ideal, even divine, social ordering: one that places barriers in the way of visual and other intrusions. Regarding the doctrine of *hezek re'iya* (harms from seeing), the Talmud asks how such concerns arose. In answer, Rabbi Yohanan points to the biblical story of Balaam, a seer employed by the king of Moab who, though their enemy, delivered a divinely inspired blessing on the Israelites after he "lifted up his eyes and saw Israel dwelling tribe by tribe."<sup>82</sup> What did Balaam see that inspired this blessing, asks the Talmud? He saw that the entrances of their tents were not aligned with each other. And he said: "These people are worthy of having the Divine Presence rest upon them."<sup>83</sup> The ancient Israelites structured their society to protect the privacy of the individual or familial unit. The openings of their tents were offset, preventing voyeuristic intrusion as well as passive or unintentional

<sup>82</sup> *Numbers* 24:2; Babylonian Talmud, Bava Batra 60a.

<sup>83</sup> Babylonian Talmud, Bava Batra 60a.

glances. Privacy, according to the Talmudic imagination, must be built into the design of community.

Grounding privacy protection in social ordering reflects a broader rabbinic understanding that the laws of damages are critical to a stable society. A community that lives according to the moral principles and legal precepts of the laws of damages, say the rabbis, will be closer to God's vision. In more earthly terms, human beings flourish only when their lives and property are protected from harm.<sup>84</sup>

The categorization of laws of *hezek re'iyah*, moreover, suggests their nature. They are not included in the Talmudic tractate *Bava Kamma*, which discusses most forms of damage and their compensation. Rather, these laws appear in *Bava Batra*, a tractate that largely deals with zoning.<sup>85</sup> As Arye Schreiber describes, in its Talmudic form *hezek re'iyah* constitutes rules "required for peaceful coexistence between neighbors, and as part of a system of laws enabling civilized urban living."<sup>86</sup> Cities are meant to be livable, and rabbinic sources seek to balance economic productivity with human flourishing.

Later Jewish sources further refine the question of "what privacy is for," in Julie Cohen's words.<sup>87</sup> Moses Maimonides (1138–1204)—whose *Mishneh Torah* provided the first full post-Talmudic codification of Jewish law—included the laws of *hezek re'iyah* in his book of *kinyan*, which contains laws governing contracts and acquisitions and, more specifically, *hilkhot shekhenim*, the laws of "living as neighbors."<sup>88</sup> Preventing *hezek re'iyah*, then, constitutes one of a variety of rabbinic laws setting up society "so that people can live together."<sup>89</sup>

Jewish jurisprudence reflects a similar understanding of Rabbenu Gershom's ban on reading personal communications and the prohibitions against revealing information, even when it does not

<sup>84</sup> 1 YA'AKOV BEN ASHER, ARBA'AH TURIM, Hoshen Mishpat, introduction (1923) ("The divine presence rests upon Israel through the merit of keeping the Torah and its civil law."); Louis Jacobs, *Tur, Preface to Hoshen Mishpat: Translation and Commentary*, 6 JEWISH L. ANN. 94 (1987).

<sup>85</sup> Mayse, *supra* note 22, at 90.

<sup>86</sup> Arye Schreiber, *Privacy in Jewish Law: A Historical and Conceptual Analysis*, 20 JEWISH L. ANN. 179, 187 (2013).

<sup>87</sup> Cohen, *supra* note 81.

<sup>88</sup> MISHNEH TORAH, Hilkhot Shekhenim 2:14.

<sup>89</sup> 14 PISKEI DIN SHE'EL BATEI HA-DIN HA-RABBANI'IM BE-YISRA'EL [RULINGS OF THE RABBINICAL COURTS OF ISRAEL] 329-30 (1993-1997).



formally violate a trust.<sup>90</sup> As Rabbi Hayim Palagi (1788–1868), a jurist in Smyrna (present-day Turkey), explained, opening another person’s mail not only constitutes thievery<sup>91</sup> but also transgresses the biblical commandment to “love your neighbor as yourself” and its Talmudic interpretation, “that which is repugnant to you, do not do unto others.”<sup>92</sup> Grounding privacy in neighborly love, behavioral reciprocity, and divine social ordering reflects the universal Jewish value of *tseṇiyut*—the moral core of privacy. While that word and its cognates are used in modern Hebrew by many Jewish law scholars to translate the English word “privacy,” its historical meaning in the sources evokes the particular nuance of a divinely inspired demand for personal humility. Framing *tseṇiyut* as a universal and divine value undergirds much of Jewish legal doctrine. Reflecting Cover’s understanding of shaping a practitioner’s moral and intellectual development as one of Jewish law’s principal ends, promoting and fostering *tseṇiyut* may be correctly identified as the end goal of these doctrines.

ii. Understanding Privacy’s Harms

It is within this social context that Jewish law understands (and links) the inherent harms of visual intrusion, eavesdropping, and information collection and dissemination. Contemporary scholars struggle for a language that comprehends the depth and scope of privacy harms,<sup>93</sup> and American law’s demand for “concrete” (usually economic) individual injury as a prerequisite for legal remedies impoverishes privacy protection. Jewish privacy law, by contrast, operates on a different understanding of harms, reflecting its understanding of privacy as a divine value rooted in social welfare—

<sup>90</sup> See Alfred S. Cohen, *Cherem Rabbenu Gershom: Reading Another Person’s Email*, 55 J. HALACHA & CONTEMP. SOC’Y 99 (2008).

<sup>91</sup> HAYIM PALAGI, SHE’ELOT U-TESHUVOT HAKIKEI LEV, parts 1-2, no. 49, fol. 69b-70a. (1840).

<sup>92</sup> Babylonian Talmud, Shabbat 31a.

<sup>93</sup> See Reidenberg, *supra* note 76, at 883-84 (discussing the way that aggregation of information “compromise[s] the ability of any single member of society to participate in decisions about the treatment of personal information”); Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 667 (2016) (discussing “broken expectations” as a measure of privacy harms); Omer Tene & Jules Polonetsky, *A Theory of Creepy: Technology, Privacy, and Shifting Social Norms*, 16 YALE J.L. & TECH. 59, 82 (2014) (discussing the feeling of “creepiness” as a harm of privacy intrusions).

an understanding that is more capacious in comprehending how privacy invasions harm both individuals and social relations. This is not to say that Jewish privacy is not focused on individual harms or lacks a vision of the individual; to the contrary, the whole community is responsible for upholding the dignity of the individual. Privacy is a mutually constructed dimension of society, necessary for individual flourishing.

Nahmanides, a leading thirteenth-century Talmudic commentator and jurist, presents an influential listing of three intertwined values that explain why *hezek re'iyah* falls into the legal category of “interpersonal harm.”<sup>94</sup> Not surprisingly, he lists the promotion of *tsheniyut*—the divine value of discretion and humility—as a key driver of the laws of *hezek re'iyah*. A principal harm from seeing, then, is the denigration of that ideal.

Yet, Nahmanides also identifies two additional harms that provide a framework for the Jewish understanding of privacy more broadly. First, he explains that the damage from seeing implicates the “evil eye” (*'ayin ha-ra'*), suggesting *inherent* harms of illicit looking. Second, he states that illicit looking leads to “wicked speech” (*lishna bisha*), pointing to the logical *consequences* of seeing: the harmful sharing and use of information.

At the core of the notion of the evil eye is that visual surveillance (even an ill-timed glance) can alter the attention focused on its object and the information gleaned thereby.<sup>95</sup> The penetrating power of another’s gaze may be piercing and deeply unsettling for the surveilled individual. The evil eye, moreover, can enhance jealousy and negative feelings in the watcher. Some medieval sages represented the hurt caused by the evil eye as a negative energy emanating from a person’s gaze.<sup>96</sup>

The noted Lithuanian Talmudist Rabbi Ya’akov Yisrael Kanievsky (1899–1985), identifies more specifically two elements of the harm to the “watched”: bodily or personal damage and property

<sup>94</sup> NAHMANIDES, HIDDUSHEI HA-RAMBAN 27b (1994).

<sup>95</sup> See, e.g., SHULHAN ‘ARUKH, Orah Hayim 141:6 (describing custom not to call two brothers (or father and son) up to the Torah consecutively because of the *'ayin hara* that may come from drawing too much attention to a single family); Babylonian Talmud, Bava Metsi’a 107a (“It is forbidden to stand by the field of another person when it is ready to be harvested.”).

<sup>96</sup> YONAH BEN ABRAHAM GERONDI, *commentary on Pirkei Avot* 2:11 (1961).

damage.<sup>97</sup> Harm to the person is manifest when one individual observes another engaging in private matters and embarrasses the surveilled party. Examining the nature of that injury, he discusses the consensus legal rule that someone observed in their courtyard or home is by definition harmed, because they cannot help but do personal things in those areas. Where private activities are unavoidable, visual intrusions inherently involve “bodily” harm. This understanding, moreover, leads to “property” damage. Knowing that one will be watched, Kanievsky writes, one cannot fully enjoy the physical space.<sup>98</sup> Visual trespass damages surveilled property and results in one of two eventualities. Either the surveilled party will feel deeply uncomfortable whenever they step foot into that space even to use it for innocuous—though private—pursuits. Or alternatively, they will refrain from using it and thus modify their own behavior in an attempt to avoid the surveillance, dramatically reducing the use of one’s own property.

The second type of harm from seeing that Nahmanides recognizes—wicked speech (*lishna bisha* in Aramaic, or *leshon ha-ra’* in Hebrew)—extends the harms of privacy intrusions to their behavioral consequences. The harms of evil speech were codified by Maimonides, who defined the biblically prohibited activity of talebearing as the collection and spreading of information, even true information, from person to person. Indeed, Maimonides defined *leshon ha-ra’* as anything that “causes damage to his friend’s body or property, or even to cause him anguish or fear.”<sup>99</sup> The true harm Maimonides perceived from the spread of information was dire; he likened the human toll of *leshon ha-ra’* to death.<sup>100</sup> Sharing sensitive information can have catastrophic results. Fundamentally, Rabbi Yonah Gerondi explains, revealing someone else’s information inherently injures that person’s ability to live consistent with the divine value of *tsheniyut*: it “is a departure from the way of privacy, and [the sharer] transgresses the will of the secret’s owner.”<sup>101</sup>

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<sup>97</sup> YA’AKOV YISRAEL KANIEVSKY, KEHILOT YAAKOV 23-24 (1990).

<sup>98</sup> *Id.*

<sup>99</sup> ISADORE TWERSKY, A MAIMONIDES READER 64 (1972) (translating MISHNEH TORAH, Hilkhhot De’ot 7:5).

<sup>100</sup> *Id.* (translating MISHNEH TORAH, Hilkhhot De’ot 7:1).

<sup>101</sup> YONAH BEN ABRAHAM GERONDI, SHA’AREI TESHUVAH [GATES OF REPENTANCE] 3:225.

*iii. The Vision of the Individual in the  
Social Order*

Grounding Jewish privacy as a building block of a good society does not exclude the individual from focus. To be sure, the Jewish approach rejects, in Robert Cover's words, a baseline where "the first and fundamental unit is the individual and 'rights' locate him as an individual separate and apart from every other individual."<sup>102</sup> But because its ultimate aim is the "material guarantee[ ] of life and dignity flowing from community to the individual,"<sup>103</sup> the Jewish approach offers a robust vision of the humans who comprise its community. Jewish Law posits the inherent dignity of every individual, recognizing that surveillance may, and often does, constrain free choice and modify individual behavior. So, too, *halakhah* aims to create for individual transformation, a privileged opportunity for change that is severely curtailed through data collection and aggregation. Rather, the jurisprudence of social order seeks to establish a system that protects the dignity of each individual and places the burden on the community for that protection.

Reading the texts against the backdrop of several broader Jewish doctrines offers important understandings of the tradition's view of the individual and their relation to privacy. Two doctrines focus on the inherent worth and value of the individual: the notion that each human is created *be-tselem Elohim* (in the divine image), and the related notion of *kevod ha-beriyot* (inherent human dignity). These concepts make *tsheniyut* such an important value that guaranteeing it to each individual is central to Jewish understanding of appropriate human existence.

But Jewish law is a theologically inflected system of *nomos*, and the link between *tsheniyut* and the inherent value of human life leads to sources that consider privacy through the lens of *imago dei*, the human being's creation in the image of God.<sup>104</sup> Jewish tradition (perhaps strangely) grounds the notion of *imago dei* in the biblical prohibition against leaving the body of an executed criminal on display (Deut. 21:22–23). This proscription, writes legal scholar Yair

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<sup>102</sup> Cover, *supra* note 1, at 66.

<sup>103</sup> *Id.* at 71.

<sup>104</sup> See YAIR LORBERBAUM, *TSELEM ELOHIM: HALAKHAH VE-AGGADAH* (2004), translated in *IN GOD'S IMAGE: MYTH, THEOLOGY, AND LAW IN CLASSICAL JUDAISM* (2015) (citations refer to the original).

Lorberbaum, is rooted in the belief that “the human being who is created in the [divine] image represents a kind of extension of the divine, and therefore its desecration and violation of the image is that of the divine itself.”<sup>105</sup> The notion that leaving a human body in public view is a desecration has evocative implications for surveillance of those still living.

Although Nahum Rakover, author of a monumental work gathering relevant legal sources,<sup>106</sup> attempted to ground Jewish thinking on privacy in this conception of humanity as created in God’s image, Arye Schreiber notes that “Rakover does not substantiate the claim that this is the basis for the alleged right to privacy.”<sup>107</sup> Schreiber is at least partially correct, but one need not root Jewish privacy entirely in the *imago dei* to appreciate its usefulness in a broader cluster of doctrines and ideas counseling for strong protections.

Schreiber and Mark Washofsky instead look to the Jewish doctrine of *kevod ha-beriyot*, perhaps best translated as “human dignity,”<sup>108</sup> to undergird a privacy ethos centered on the inherent worth of the individual. Schreiber notes that “insofar as privacy received some form of broad protection, it was human dignity that was being protected, and privacy was protected when its violation was also a violation of someone’s dignity.”<sup>109</sup> This value is occasionally described in Jewish legal sources as one so important that an individual is allowed to violate a precept of the Torah in order to preserve human dignity.<sup>110</sup>

Jewish sources braid together *imago dei* and *kevod ha-beriyot*, seeing human dignity as rooted not solely in societal conceptions of honor but in the inherent worth and singular power of each human

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<sup>105</sup> *Id.* at 274.

<sup>106</sup> NAHUM RAKOVER, HA-HAGANAH AL TSIN‘AT HA-PERAT [Protection of Privacy in Jewish Law] (2006).

<sup>107</sup> Schreiber, *supra* note 86, at 185 n.20.

<sup>108</sup> Yaakov (Gerald I.) Blidstein, *Great is Human Dignity—The Peregrination of a Law*, 9 SHENATON HA-MISHPAT HA-IVRI: ANN. INST. RSCH. IN JEWISH L. 127, 127 (1982); Yair Lorberbaum, *Human Dignity in the Jewish Tradition*, in THE CAMBRIDGE HANDBOOK OF HUMAN DIGNITY: INTERDISCIPLINARY PERSPECTIVES 135 (Marcus Duewell et al. eds., 2014); AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (Daniel Kayros trans., 2015).

<sup>109</sup> Schreiber, *supra* note 86, at 187.

<sup>110</sup> Babylonian Talmud, Berakhot 19b.

being.<sup>111</sup> Even without accepting the theological premises of rabbinic law, such focus on individual inherent worth as the locus of privacy discourse has much to offer American legal thinking on this subject and on human rights more broadly.<sup>112</sup>

A third relevant principle relating to the individual in Jewish tradition involves the possibility of repentance (*teshuvah*) and growth, and the commitment to facilitating it. The tradition recognizes that the possibility for personal transformation is possible only if an individual can escape the narratives already constructed about him. Regarding repentance, Maimonides claims: “[the penitent] must distance himself exceedingly from the matter in which he sinned, changing his name, as if to say, ‘I am now another person, and not the one who committed those misdeeds.’”<sup>113</sup> Ethical, religious, and intellectual growth is possible only with distance from the past. If one’s personal information endures in perpetuity, controlled by others, transformations become effectively impossible. In appropriate contexts, willed forgetfulness allows for individual change.<sup>114</sup>

The commitment to preserving freedom for individual *teshuvah* reflects a broader textual rejection of privacy incursions that constrain or modify behavior and thereby undermine free choice. Shoshana Zuboff has explained the ways that pervasive surveillance instrumentalizes humans and “operates through the means of behavioral modification.”<sup>115</sup> The Jewish sources echo this individual constraint as a serious privacy harm, reflected in Rabbi Kanievsky’s insight that seeing into a courtyard is harmful because it changes the behavior of the person watched,<sup>116</sup> (as well as in the Talmudic prohibition against sleeping in the same room as a married couple, on the grounds that the lack of privacy will affect their intimate

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<sup>111</sup> See YOSEF DOV SOLOVEITCHIK, YEMEI ZIKARON 9, 11 (Mosheh Krone trans., 1986); Eugene Korn, *Tselem Elokim and the Dialectic of Jewish Morality*, 31 TRADITION: J. ORTHODOX JEWISH THOUGHT 5, 14-15 (1997).

<sup>112</sup> Asher Maoz, *Can Judaism Serve as a Source of Human Rights?*, 64 HEIDELBERG J. INT’L L. 677 (2004).

<sup>113</sup> MISHNEH TORAH, Hilkhot Teshuvah 2:4; Babylonian Talmud, Rosh Hashanah 16b.

<sup>114</sup> Babylonian Talmud, Bava Metsia 85a (describing a sage who fasted for an extended period in order to forget everything he had learned and thus absorb new ideas).

<sup>115</sup> SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 328 (2019).

<sup>116</sup> See *supra* text accompanying note 97.

behavior).<sup>117</sup> As the medieval Rabbi Yonah Gerondi notes, revealing information damages the owner of the information by “frustrat[ing] his plans, as it says, ‘plans are frustrated when not kept secret’ (Prov. 15:22).”<sup>118</sup> Even when past deeds are publicly well known, the harm in revealing them is manifest in the power to undo personal transformation. Rabbi Asher ben Yehiel (1250–1327) wrote that “even the things that have been spoken before you not in the way of a secret, hide them away in the walls of the heart. If you hear them from another, do not say, ‘I heard such a thing.’”<sup>119</sup> Maimonides underscores the destructive nature of collecting nonsecret information in his definition of a person who violates the biblical commandment against talebearing: “One who loads himself up (*to‘en*) with words and goes from place to place, and says, ‘thus said so-and-so, and such have I heard from so-and-so.’ Even though it is true, this destroys the world.”<sup>120</sup> Prohibited talebearing, then, involves “loading up” (*to‘en*) on truthful, nonsecret information—*to‘en* being the same Hebrew word used for laying a burden upon an animal. Simply collecting, aggregating, and using truthful nonsecret information is harmful and prohibited precisely because it changes behavior, and prevents the autonomous decision-making that can lead to personal growth and change.

The full force of these insights can be understood only in light of the fundamental Jewish commitment to protecting free will and free choice, central tenets for most Jewish thinkers from the Talmudic period to the present.<sup>121</sup> Many Jewish scholars see freedom of choice not simply as a prerequisite for responsibility for one’s actions, but rather as key to human flourishing. Rabbi Nathan Shternhartz (1780–1840), a Hasidic leader and author of a theologically inflected legal commentary, claimed that “the entire world was created only for the sake of choice. Therefore, choice has very great power indeed.”<sup>122</sup> God’s will, he writes, has been “hidden and concealed . . . within many veils and shrouds, but He has given power and discernment to the

<sup>117</sup> Babylonian Talmud, ‘Eruvin 63b.

<sup>118</sup> *Id.*

<sup>119</sup> ASHER BEN YEHIEL, ORHOT HAYIM no. 4 (1943); RAKOVER, *supra* note 106, at 53.

<sup>120</sup> MISHNEH TORAH, Hilkhhot De’ot 7:2.

<sup>121</sup> EPHRAIM E. URBACH, THE SAGES: THEIR CONCEPTS AND BELIEFS 255-57 (Israel Abrahams trans., 1987).

<sup>122</sup> 1 NATHAN SHTERNHARTZ, LIKKUTEI HALAKHOT, BIRKHOT HA-SHAHAR 5:74 (1800).

human being to cultivate understanding from this knowledge.”<sup>123</sup> The individual’s quest is, by exercising free choice, to sift through the clouds of unknowing and discern the proper course of action.

From a religious perspective, then, removing choice by shaping a person’s behavior blocks that person’s access to God. They are forced to live exclusively within their present space without seeing beyond its limits (or, in the case of surveillance capitalism, the limits of what advertisers want them to see). In choosing between various paths, the heart and mind do their work; it is thus an act of thievery to obstruct that process, whether through the presentation of a single option or by a studied attempt to force a choice from the limited options in which a third-party offers.

Substantively, moreover, Jewish law holds that “consent” without options, or decisions made under duress, may invalidate a choice—or a sale.<sup>124</sup> The question of choice under duress, of decisions made with severely limited options, comes up in discussions of apostasy, where rabbinic sources evince a deep consideration of the validity of choices made under extreme conditions. For example, Maimonides claims that Jews forced to convert to Islam under duress did not, in fact, make a true choice.<sup>125</sup> Because they lacked a viable alternative, and because their decision-making capabilities were limited in the severest ways, their apostasy is essentially meaningless, and no formal act of *teshuvah* was necessary for them to reenter the fold of Judaism.

Individual choice, to be sure, is not unfettered within a tradition rooted in obligation. Jewish sources place individual choices and freedom within covenantal limits.<sup>126</sup> Central to the Jewish notion of “privacy in society” is a recognition that the individual cannot act entirely freely but must be consistently mindful of the impact of their actions on others, so that their ability to lead a private life is preserved. One cannot build a window looking into someone’s living room, nor can someone on the other side of the fence waive his right to privacy

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<sup>123</sup> *Id.*

<sup>124</sup> Mishnah, Bava Metzia 4:11-4:12.

<sup>125</sup> MAIMONIDES, *Iggeret ha-Shemad*, in 1 IGGEROT HA-RAMBAM 25, 30 (Yitzchak Sheilat ed., 1995).

<sup>126</sup> This sentiment is perhaps best expressed in the famous teaching in Mishnah, Avot 6:2 (“‘And the tablets were the work of God, and the writing was the writing of God, graven upon the tablets’ (Ex. 32:16). Do not read ‘graven’ (*harut*) but rather ‘freedom’ (*herut*), for only one who engages in the study of Torah is free.”).



or *tseiniyut*; these values are fundamental and cannot be forgiven. Jewish law thus balances free choice with limits on privacy-harming behaviors, which, like other damaging activities, are constrained by reciprocal responsibilities within society.

b.) The Doctrinal Contours of Privacy's Protection: A Jurisprudence of Obligation

As the previous discussion reveals at various points, Jewish law employs duties—to build sight-protective walls, intercept communications, or refrain from collecting and sharing information—rather than individual rights to actualize its privacy jurisprudence. The doctrinal contours of this obligations regime, moreover, reflect its grounding in the Jewish understanding of privacy centrality to the social order in at least four related ways.

First, Jewish law seeks to prevent intrusions through categorical commands and prohibitions. Consistent with its understanding of privacy harms, it considers a violation of those rules as injurious *per se* and does not require any additional proof of specific demonstrable harm. As Rabbi Kanievsky describes *hezek re'iya* doctrine, its obligations are enforceable as categorical prohibitions (*issura*), without a showing of specific damages. Individuals are universally obligated, for example, to erect sight-limiting fences. This requirement, Kanievsky explains, arises from the obligation to save *oneself* from sin, since it is forbidden to gaze upon what your friend owns.<sup>127</sup> This understanding draws on a long jurisprudential tradition that categorically prohibits privacy intrusions. There is no *shi'ur*, or threshold amount of damages, necessary for visual trespass,<sup>128</sup> because, as Nahmanides explains, “the eyes are like arrows,” and even a tiny invasion shatters personal well-being and tears at the societal fabric.<sup>129</sup> Behavioral prohibitions also characterize the ban on reading or eavesdropping on others' communications. Reading another's mail is prohibited even when the information is not spread further, and even when tradition does not mandate monetary restitution for damages.<sup>130</sup> The very act of data extraction is prohibited: even one who receives a

<sup>127</sup> See KANIEVSKY, *supra* note 97 and accompanying text.

<sup>128</sup> SHLOMO BEN ADERET, TESHUVOT HA-RASHBA 4:325.

<sup>129</sup> *Id.* (quoting NAHMANIDES, *supra* note 94).

<sup>130</sup> PALAGI, *supra* note 91, at 69b-70a.

letter from a friend may not reveal the words of the letter to others until being told explicitly that you may share.<sup>131</sup> Furthermore, the “prohibition [against eavesdropping] applies even if knowing the information does not cause any damage to the speaker or listener.”<sup>132</sup> Finally, Rabbi Shneur Zalman of Liady explains, even anonymity of the person viewed cannot excuse the harms of visual intrusion.<sup>133</sup> It makes no difference whether one knows the identity of the one seen, or whether the one seen knows that he or she is being viewed. The prohibition remains even if the voyeur is seeing the back of an unmarked house. In this sense, Jewish privacy law operates similarly to the common-law tort of physical trespass, which constitutes harmful behavior even when no traditional damages ensue.

Second, consistent with the ideal of promoting *tse'niyut*, or privacy-promoting individual behavior, obligations are multi-lateral and relational; Jewish law not only imposes detailed obligations on potential surveillors, it also mandates certain behaviors by individuals to protect their own privacy. For example, “[I]t is forbidden [for someone to create] an opening or a window set against the window [of another person] . . . since it violates the quality of *tse'niyut* for another person to observe his deeds throughout the entire day.”<sup>134</sup> At heart, the very idea of *hezek re'iyah* is about sanctity, about moving away from licentiousness, about the invitation to the dwelling place for God. Similarly, as Rabbi Yonah Gerondi interprets, “[i]f you see that a person does not rule over his spirit and does not guard his tongue against revealing secrets, even if exposing the secret does not count as talebearing . . . do not deposit your secret with him.”<sup>135</sup> The demands of *tse'niyut*, or privacy, require that one be exceedingly careful about how and with whom to share information.

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<sup>131</sup> *Id.*

<sup>132</sup> 1 TZVI HIRSH SPITZ, 92 MISHPATEI TORAH 336-37 (1998).

<sup>133</sup> SHNEUR ZALMAN OF LIADY, SHULHAN 'ARUKH HA-RAV, Hoshen Mishpat, Hilkhoh Nizkei Mammon, 12.

<sup>134</sup> *Id.*; see also Hayim David Azulai, *Petah Eynayim, commentary on Bava Batra 60a* (1959) (holding that if two parties establish buildings with facing doors or windows at the same time, then—even though the mutual injury would not be legally actionable under ordinary tort law because both parties have equal claims and liabilities—the arrangement is still prohibited by the laws of *hezek re'iyah*).

<sup>135</sup> GERONDI, *supra* note 101, at 3:226.

Third, and relatedly, while consent plays a significant part in contemporary privacy and data protection law<sup>136</sup> in a manner consistent with the notion of “informational self-determination,” Jewish Law views an individual’s ability to waive protections with far more skepticism, and rejects outright arguments that obligations should be constructively waived by either custom, or *hazakah*—the “presumption” in favor of preserving preexisting conditions akin to the old common law “coming to the nuisance” doctrine.<sup>137</sup>

The strongest precedents against waiving privacy protections arise in the context of *hezek re'iyah*<sup>138</sup>—even when parties clearly wish to waive obligations. Rabbi Shlomo ben Aderet ruled that “even if one explicitly forgives [the right], it has no effect, since one can say ‘I thought I could accept it but I cannot.’”<sup>139</sup> Rabbi Joseph Karo (1488–1575), citing ben Aderet and Nahmanides, explains: “Even if the injured party forgives and suffers, we say to the owner of the window it is forbidden for you . . . , since every moment that you gaze upon him and damage him with your sight you transgress, and you cannot always guard yourself from looking.”<sup>140</sup> Such impulses reflect a broader Jewish doctrinal emphasis on preventing individual harm by taking seriously the power imbalances that can plague agreements about “consent.” As Shahar Lifshitz notes, Jewish Law does not recognize as enforceable “oppressive contracts”—those with difficult or unconscionable terms or arising from unequal bargaining power.<sup>141</sup>

More generally, Nahmanides compares harms from seeing the smoke damage and the smell of a nearby latrine,<sup>142</sup> contexts in which

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<sup>136</sup> Daniel J. Solove, *Introduction: Privacy Self-Management and the Consent Dilemma*, 126 HARV. L. REV. 1879, 1880 (2013) (“Under the current approach, the law provides people with a set of rights to enable them to make decisions about how to manage their data. These rights consist primarily of rights to notice, access, and consent regarding the collection, use, and disclosure of personal data.”).

<sup>137</sup> The doctrine provided an important defense to those accused of creating a nuisance and applied when the harmful activity persisted before plaintiffs acquired impacted property. See Cassius Kirk, Jr., *Torts: Nuisance: Defenses: “Coming to the Nuisance” as a Defense*, 41 CALIF. L. REV. 148, 148-51 (1953).

<sup>138</sup> RAKOVER, *supra* note 106, at 67-69 (describing that consent does not lift *hezek re'iyah* obligations).

<sup>139</sup> BEN ADERET, *supra* note 128, at 3:180.

<sup>140</sup> YOSEF KARO, BEIT YOSEF (1993-1994) (citing BEN ADERET, *supra* note 128, at 3:180).

<sup>141</sup> Shahar Lifshitz, *Oppressive-Exploitative Contracts: A Jewish Law Perspective*, 23 J.L. & RELIGION 425, 426 (2008) (discussing doctrine).

<sup>142</sup> NAHMANIDES, *supra* note 94, at 27b.

preexisting harms are permitted only when nuisances do not impose bodily or personal harms. Because protecting *tseniyut* is analogous to preventing personal harm, the historic absence of a protective sight wall cannot be excused, and the duty to take steps to prevent harms from seeing is not waived. As Rabbi Meir Abulafia (1170–1244) explained, “it does not matter if there is a [preexisting] custom to exempt one party; even in a place where the custom is not to set up a fence he is obligated [to erect one], because there is also a [categorical] prohibition.”<sup>143</sup> “Why are these damages singled out from the other kinds of damages,” Maimonides asks: “Because a person’s mind cannot handle these sorts of damages; one is assumed not to forgive them, since the damage is constant.”<sup>144</sup>

Fourth, while even modern scholars who recognize the “social foundations” of privacy have nonetheless lamented the “fragility” of such socially-constructed norms as social and technological transformations reshape expectations,<sup>145</sup> Jewish law rejects a notion of privacy as determined by technological capacity and the expectations it fosters. Jewish rules reflect stable commitments in the face of architectural choices and shifting expectations. A millennium and a half before Lawrence Lessig highlighted the capacity of physical and digital architecture to regulate,<sup>146</sup> and policymakers adopted it as a tool for governance “by design,”<sup>147</sup> Jewish law embraced design purposefully to protect privacy. Indeed, the entire doctrine of *hezek re’iyah* is derived from zoning rules and building codes. Yet Jewish law goes further, imposing behavioral obligations among both watchers and the watched to protect privacy even when architecture would make intrusions technically possible.

From its inception, Talmudic privacy law embraced architecture as a tool in the service of privacy. The Talmudic tractate *Bava Batra*, which develops the law of *hezek re’iyah*, begins with a discussion of a Mishnah setting forth a straightforward building law: “Partners who wish to make a partition in a [jointly held] courtyard,”

<sup>143</sup> MEIR ABULAFIA, YAD RAMAH, *Bava Batra* 4a.

<sup>144</sup> MISHNEH TORAH, *Hilkhot Shekhenim* 11:4.

<sup>145</sup> Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CAL. L. REV. 957, 957 (1989); *id.* at 1010 (suggesting the “extreme fragility of privacy norms in modern life”).

<sup>146</sup> LAWRENCE LESSIG, *CODE AND OTHER LAWS OF CYBERSPACE* 20–21 (1999).

<sup>147</sup> Deirdre K. Mulligan & Kenneth A. Bamberger, *Saving Governance-By-Design*, 106 CALIF. L. REV. 697, 701 (2018).

the Mishnah rules, must “build the wall in the middle [of the space].”<sup>148</sup> The Talmudic interpretation of this Mishnah specifically links the rule to privacy concerns. It concludes that a wall dividing a commonly held area must not only demarcate space but also prevent visual intrusion. “This implies,” the Talmud concludes, “that *hezek re'iyah* is *hezek* [cognizable harm].”<sup>149</sup> From this design requirement, Jewish law defined visual intrusions as a category of legal injury. As the medieval scholar Rabbi Yaakov ben Asher (1270–1340), summarized: “The law is that *hezek re'iyah* is indeed damage. Therefore, two people who share a courtyard . . . may force one another to divide it and even to build a partition between them so that they cannot look upon each other’s property.”<sup>150</sup>

While architecture is a key tool for protecting privacy, Jewish law makes clear that although physical design may allow visual intrusions, that alone does not justify surveillance. Shneur Zalman explains that one cannot take advantage of a lack of architectural barriers to visual intrusions.<sup>151</sup> In their absence, one must adjust behavior: where architecture does not offer privacy, looking is still prohibited. These prohibitions are quite expansive:

There are those who say that one must take care not to stand against (the opening) of another’s home or courtyard and gaze into it with even an inconsequential glance that is totally unintentional and not an attempt to know his friend’s business. Rather, one should turn aside one’s face when he stands next to (the opening) of his friend’s house so that the friend will not suspect him of intending to look in and find out his business and become like a thief, since there is no [other] reason to be looking in.<sup>152</sup>

A parallel example is reflected in the combination of both architectural and behavioral obligations imposed by the law of *hezek shemiya’h* (harms of listening)<sup>153</sup> on both the listener and the speaker.

<sup>148</sup> Babylonian Talmud, Bava Batra 2a.

<sup>149</sup> Babylonian Talmud, Bava Batra 3a.

<sup>150</sup> BEN ASHER, ARBA’AH TURIM, Hoshen Mishpat 160:1.

<sup>151</sup> SHNEUR ZALMAN OF LIADY, SHULHAN ‘ARUKH HA-RAV, Hoshen Mishpat, Hilkhoh Nizkei Mammon, 12.

<sup>152</sup> *Id.* at 13.

<sup>153</sup> The absence of mention of this doctrine in the classical Talmudic sources has led to some minority views denying that listening harms should be considered a form of

It demands that walls be built between private spaces—that is, that technology and architecture must be marshaled for privacy. But it also recognizes that architecture will not prevent all the harms of overhearing—walls need not be built so thick as to be entirely soundproof. Thus, speakers have a duty to speak in normal tones, and hearers a duty to avoid listening.<sup>154</sup>

c.) The Social Good as a Limit on Privacy

Finally, the same grounding in the social order that leads to Jewish law's otherwise strong impulse towards privacy informs a recognition that privacy doctrines can create harms, and the literatures of *halakhah* struggle with how to negotiate the limits of these doctrines. Struggling with the complexity of privacy is part of the work of creating a good society.

Two sites of discourse point to the importance of circumscribing Judaism's privacy orientation. First, modern readers of rabbinic sources must confront the painful reality that exhortations to humility and modesty have justified oppression. The concept of *tseniyut* has been used by some to limit women's authority. The verse "all the honor of the king's daughter is within" (Psalm 45:14) has been interpreted as instructing women to stay outside of the public eye,<sup>155</sup> even when it comes to performing religious rituals, on the grounds that it would be against *tseniyut*.<sup>156</sup> Medieval rabbis ruled that women may not be appointed to positions of communal power (*serarah*)<sup>157</sup>—a ruling with a long afterlife even in the modern period.<sup>158</sup> And the category of *dat yehudit* or "religious behavior of Jewish women" reinforces compulsions to modesty and humble conduct.<sup>159</sup> The lived experience of many who are forced into the realm of "the private"—

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damage. See ELIYAHU MIZRAHI, SHE'ELOT U-TESHUVOT HA-RE'EM 8 (1938); AKIVA EIGER, *commentary on* SHULHAN 'ARUKH, Hoshen Mishpat 154:2. But most rabbinic authorities concur that auditory surveillance is forbidden. See YITZHAK ZILBERSTEIN, HASHUKKEI HEMED, *on* Babylonian Talmud, Bava Batra 4a (2009).

<sup>154</sup> See, e.g., MENAHEM MEIRI, BEIT HA-BEHIRAH 6 (1956) (cautioning against speaking very loudly next to a wall).

<sup>155</sup> MISHNEH TORAH, Hilkhot Ishut 13:11.

<sup>156</sup> See MOSES SOFER, HIDDUSHEI HATAM SOFER, *on* Babylonian Talmud, Shabbat 21b; BEN YEHI'EL, *supra* note 119, *on* Babylonian Talmud, Shevuot 30a.

<sup>157</sup> MISHNEH TORAH, Hilkhot Melakhim 1:5.

<sup>158</sup> See Daniel Sperber, *On Women in Rabbinic Leadership Positions*, 8 ME'OROT: A FORUM OF MODERN ORTHODOX DISCOURSE, 2010, at 2.

<sup>159</sup> See 8 TALMUDIC ENCYCLOPEDIA 76 (2018) (entry on "dat yehudit").

silence, quiet, or exclusion from the limelight—reveals how the very sources that illuminate doctrines of privacy can also be used to construct shackles.

Second, an important line of Jewish jurisprudence rules that some sensitive information may not remain secret if it relates to potential harms. The contemporary rabbinic judge Rabbi Shlomo Dakhovski allows secret recordings in very limited circumstances to prevent damage to oneself. He follows Rabbi Palagi<sup>160</sup> and Rabbi Shlomo ben Aderet in reasoning that Rabbenu Gershom's decree against reading communications was intended to fortify the ethos of the Torah that people should act with modesty; the prohibition therefore should yield when it undermines other Torah values, such as public or private safety.<sup>161</sup>

The Talmud, in fact, imagines the Sanhedrin, the Jewish high court, as eavesdropping on an individual reputed to have incited others to idolatry.<sup>162</sup> The Sanhedrin thus performs an ordinarily unconscionable act of surveillance but may do so because a religious value (monotheism) trumps an individual's claim to privacy.

Modern rabbinic scholars underscore that limited cases may warrant recording someone or opening their correspondence without their knowledge. Exigencies may demand that privileged information be shared with specifically delimited individuals. As Rabbi Tzvi Hirsh Spitz explains, reading personal letters or listening in on private conversations may be necessary to fulfilling the Torah and preserving religion. "In these and other similar cases it is permitted, *ab initio*, to read or listen to private information."<sup>163</sup> These cases include parents or educators who reasonably suspect a child or student of engaging in illegal activities, and reasonable fear that a person is engaged in untoward behavior.<sup>164</sup> In such cases, when privacy is used to conceal possible damage to society, the countervailing values of Judaism and preserving Torah override one's right to private communication.

### 3. *Contemporary Lessons from a Jurisprudence*

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<sup>160</sup> See PALAGI, *supra* note 91 and accompanying text.

<sup>161</sup> BEN ADERET, *supra* note 128, at 1:557.

<sup>162</sup> Babylonian Talmud, Sanhedrin 67a.

<sup>163</sup> SPITZ, *supra* note 132, at no. 92, 337-38.

<sup>164</sup> *Id.*

*of Obligations*

Jewish law's alternative privacy path rooted in obligations offers guidance to advocates and policymakers struggling to develop alternative, or additional, frameworks for comprehending and protecting privacy in this changed technological moment in four important ways.

First, it suggests the importance of framing individual privacy as a social commitment—the responsibility of every member of society, personal and organizational. This would shift the focus from framing privacy as a negative right to articulating the ways it positively enhances communal value,<sup>165</sup> and offer a language for talking about privacy relations between members of society and the bilateral behaviors required to shape them, rather than placing the individual in opposition to society, and framing privacy as his or her shield.<sup>166</sup> Such a move has not just rhetorical, but practical significance. Shifting part of the burden for privacy's protection from the individual across other members of society would alleviate the anxiety and confusion arising from what scholars have called the “privacy paradox,”<sup>167</sup> by which most Americans express a deep concern about privacy but are practically prevented from protecting it because of the reality that participation in society leaves them open to nearly-unfettered surveillance. Framing privacy as a set of prior legal commitments around which architectures and behaviors must be ordered, would instead offer stable commitments and effective tools to address this shortcoming.

Second, Jewish law offers important language for appreciating the totality and severity of harms wrought by pervasive surveillance and data analytics. Current fragmented legal doctrine too often conceptually severs informational from spatial and emotional harms, and the regulation of each.<sup>168</sup> It further excuses privacy violations by

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<sup>165</sup> Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 19 STAN. TECH. L. REV. 431, 431 (2016) (“Instead of trying to protect us against bad things, privacy rules can be used to create good things, like trust.”).

<sup>166</sup> PRISCILLA M. REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 20 (1995).

<sup>167</sup> See, e.g., Alessandro Acquisti et al., *Privacy and Human Behavior in the Age of Information*, 347 SCIENCE 509, 510 (2015) (“This discrepancy between attitudes and behaviors has become known as the ‘privacy paradox.’”).

<sup>168</sup> See Cohen, *supra* note 81, at 181 (discussing the ways that current U.S. privacy law and theory fail even to recognize the “spatial dimension of the privacy interest”–



removing protection from activities and knowledge deemed to be “public.”<sup>169</sup> Jewish law embraces a unified attention to the range of surveillance capacities, appreciating the interlinked danger of spatial intrusions, information collection, use and dissemination, visibility and exposure, and protecting privacy even “in public.”<sup>170</sup> The Jewish tradition suggests a move away from formalistic legal categories that limit privacy’s domain (in vs. out of the home; publicly available vs. secret) to a policy focus on the types of behaviors and harms that should be prevented, as well as the values that should be promoted. This move is particularly important in extending privacy protection to online spaces and new data contexts, which by definition do not fall into traditional privacy-protected categories but pose enhanced privacy threats.

Third, Jewish law suggests that ongoing policy debates should focus on the adoption of categorical rules and prohibitions—both architectural and behavioral—as the legal mechanisms for substantive privacy protection. Policy approaches based on an individual’s subjective exercise of their privacy rights have been overtaken by technological advances. Objective approaches rooted in the legal vindication of “consumer” or “reasonable” expectations face the danger of collapsing into technological determinism, as scientific advances alter understandings of what is possible, and therefore anticipated. A system of categorical substantive obligations mandating privacy-protective practices and behaviors, by contrast, provides a backstop against ever-increasing technological surveillance capacity.

Finally, Jewish law embraces an important vision of the individual in society. Current regulatory regimes largely degrade a purported “right” to privacy into a procedural guarantee of largely-

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the “interest in avoiding or selectively limiting exposure” that involves the structure of experienced space—as contrasted with the informational dimension).

<sup>169</sup> See Daniel J. Solove, *A Taxonomy of Privacy*, 154 UNIV. PA. L. REV. 477, 496-97 (2006) (discussing the “secrecy paradigm,” by which privacy becomes “tantamount to complete secrecy,” meaning that “if the information is not previously hidden” or “when surveillance occurs in a public place” then “no privacy interest is implicated by the collection or dissemination of the information,” and describing how “[i]n many areas of law this narrow view of privacy has limited the recognition of privacy violations”).

<sup>170</sup> See Reidenberg, *supra* note 76, at 141 (criticizing the ways that current expectations-based doctrines fail to provide privacy “in public” and suggesting a more privacy-protective approach).

ineffective notice about the collection use of one's information, and fictive consent to that use.<sup>171</sup> Jewish law, by contrast, takes seriously the power imbalances that can plague such agreements, prohibiting the waiver of many privacy protections, and requiring explicit consent to do so in others. Moreover, it recognizes the many ways that surveillance can cause a modification of an individual's behavior, inappropriate in light of the Jewish sources' commitment to free choice. In particular, many Jewish legal mandates reflect a recognition that surveillance, and the judgments it allows others to make about us, can trap individuals in incomplete but constraining narratives, inhibiting the fundamental Jewish value of *teshuvah*—personal growth and change. Through its commitment to universally-applicable, non-waivable, privacy protections in the service of free choice and growth, and its linking of the value of privacy to divinity and to the idea that each individual is formed in the divine image and so deserves the opportunity for a private life, Jewish law further serves an “expressive” legal function,<sup>172</sup> signaling the equal importance of effective privacy protection to every human. In this sense, ironically, Judaism's regime of obligation may best reflect the aspiration of a fundamental human right—“to which a person is inherently entitled simply because she or he is a human being.”<sup>173</sup> This right, however, is framed and articulated as an embedded sense of interconnected obligations that are shared by, and between, the individual and the community.

### **B. Responsibility, Obligation and Environmental Ethics**

Cover's articulation of an obligation mindset further suggests looking to the Jewish tradition for inspiration in locating a conceptual framework for addressing a second current threat: environmental crisis. To be sure, legal responses to environmental harms largely diverge from the dominant rights-based approach to privacy protection,<sup>174</sup> in that they are already often framed (whether in

<sup>171</sup> See *supra* notes 72, 136 and accompanying text.

<sup>172</sup> Craig Konnoth, *An Expressive Theory of Privacy Intrusions*, 102 IOWA L. REV. 1533, 1535-36 (2017) (discussing the ways that privacy intrusions send messages about society's values about different groups in society).

<sup>173</sup> MAGDALENA SEPÚLVEDA ET AL., HUMAN RIGHTS REFERENCE HANDBOOK 3 (3d ed. 2004).

<sup>174</sup> Rights-based approaches have been proposed more recently as possible solutions to the failure to address environmental harms, see, e.g., Lidia Cano Pecharroman,

regulation or tort doctrine) in terms of obligations and duties. Yet the cramped nature of such obligations, understood as they are in the dominant framework as exceptions to the baseline of free market economic rights, has hindered a coherent response to climate crisis, systemic pollution, and environmental degradation.

The struggle to develop an alternate language for comprehending and addressing the relations between economic structures and environmental exploitation stems in part from a combination of the trans-jurisdictional nature of the global challenge and the legal and social default towards market individualism where collective action on a grand scale is instead required. These are, Cover notes, exactly characteristics of the context in which a jurisprudence of the social order might provide needed heft. In contexts in which “centralized power” and “coercive violence,” are lacking, he argued, “it is critical that the mythic center of the Law reinforce the bonds of solidarity. Common, mutual, reciprocal obligation is necessary.”<sup>175</sup> Rabbinic tort doctrine, while it cannot provide a wholesale transferrable solution to environmental problems, does offer both a robust accounting of socially embedded duties and commitment to other human parties and the non-human world. These laws emerge from a religious vocabulary that predates the carbon economy, and are therefore prey to neither its assumptions nor legal limitations.<sup>176</sup>

The dawning of the Anthropocene offers the opportunity to reexplore a Jewish legal tradition by highlighting sources that, from a frame of social obligation, both suggest the possibility of different resolutions of questions about legal and moral responsibility, and display ethical concern for the non-human environment. Especially when read in light of the *aggadah*—the narrative element of the Jewish legal tradition—and its demand for action and concern even beyond the letter of the law, core principles of Talmudic law offer useful starting paradigms for facing ecological catastrophe. This section first explores the Jewish tradition’s suggestions of what a system of

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*Rights of Nature: Rivers That Can Stand in Court*, 7 RES. 13 (2018); O’Donnell, *supra* note 49; Susana Borràs, *New Transitions from Human Rights to the Environment to the Rights of Nature*, 5 TRANSNATIONAL ENV’T L. 113 (2016); Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law*, 10 GEO. INT’L ENV’T L. REV. 309 (1997); Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49 (2018).

<sup>175</sup> Cover, *supra* note 1, at 68.

<sup>176</sup> The section draws from Mayse, *supra* note 22, at 68-110.

environmental obligation grounded in a baseline of social obligation rather than market freedom would look like, and the vision of human responsibility that results. It then describes three contexts, in an illustrative rather than exhaustive fashion, to explore how this baseline shift results in different doctrinal and ethical understandings that offer constructive frameworks for appreciating and conceiving of alternative responses to contemporary environmental problems.

### 1. *Grounding Environmental Obligations in the Social Order*

Rabbinic literature understands the laws of damages as critical to a stable society. Human beings flourish only when their lives and property are protected from harm.<sup>177</sup> Peering beyond this utilitarian approach to governing social interactions and obligations, the Talmud refers to the Mishnaic section of “Damages” (*Nezikin*) as “the Order of Redemption” (*Seder Yeshu‘ot*).<sup>178</sup> This suggests that, in the rabbinic imagination, a community living in accordance with the moral principles and legal precepts of damage avoidance will be closer to God’s vision of ideal human flourishing.<sup>179</sup>

Jewish legal sources, accordingly, attribute a very high degree of responsibility to the individual as an actor within the broader social landscape that includes the non-human realm as well. According to a foundational rabbinic articulation, “[a] human being is always considered prone to damage (*mu‘ad*), whether unintentional or intentional, whether [the person is] awake or asleep. If he blinded another person, or broke vessels, he must pay full damages.”<sup>180</sup> Throughout the Jewish narrative tradition, moreover, this responsibility was understood to extend beyond the human to the natural world. The Jewish creation myth charges human beings with serving as guardians (*shomrim*), thus shielding God’s world from harm: “And God took the humn being and placed him in the Garden of Eden, to cultivate and protect it (*le-shomrah*)” (Gen. 2:15).<sup>181</sup> An *aggadic* expands, citing a verse from Ecclesiastes:

<sup>177</sup> See BEN ASHER, ARBA‘AH TURIM, Hoshen Mishpat, *hakdamah* and 1:1.

<sup>178</sup> Babylonian Talmud, Shabbat 31a.

<sup>179</sup> See also BE-MIDBAR RABBAH 13:15.

<sup>180</sup> Mishnah, Bava Kamma 2:6. See also Mishnah, Bava Kamma 1:2, and the two different explanations given by Rabbi Shlomo Yitshaki (Rashi).

<sup>181</sup> See Norman Solomon, *Judaism and Conservation*, 22 CHRISTIAN-JEWISH RELS. 7, 8 (1989); JEREMY COHEN, “BE FERTILE AND INCREASE, FILL THE EARTH AND

Consider the work of God; for who can heal that which is damaged? (Eccl 7:13). When the blessed Holy One created the first person, God took and showed Adam all of the trees of the Garden of Eden, saying, Consider My works—how beautiful and wonderful they are. All that I have created, I have created for you. Pay heed to this - do not damage or destroy My world, for if you do, who will heal it after you?<sup>182</sup>

This point about human action having the power to destroy a flourishing but fragile world is all the more acute in the Anthropocene, and in the context of an increasing awareness that such spoliation and devastation cannot be undone. Rather than seeking to only extract and consume, then, human beings ought to remember that we exist only within a network of obligations. A rabbinic midrash further suggests that the Temple was destroyed, in part, because of our failure to fulfill the command to guard the world from such harm.<sup>183</sup>

This Jewish vision of legal responsibility reflects a theological foundation that considers humanity unique among the works of creation, through which the social fabric of legal obligation extends to the non-human world. According to Rabbi Samson Rafael Hirsch (1808-1888), humans are responsible for safeguarding the world:

Man, in taking possession of the unreasoning world, becomes guardian of unreasoning property and is responsible for the forces inherent in it, just as he is responsible for the forces of his own body . . . . Thus is the person responsible for all the material things under his dominion and in his use; and even without the verdict of a court of law, even if no claim is put forward by another person, he must pay compensation for any harm done to another's property or body for which he is responsible.<sup>184</sup>

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MASTER IT”: THE ANCIENT AND MEDIEVAL CAREER OF A BIBLICAL TEXT (Ithaca: Cornell Univ. Press 1989).

<sup>182</sup> KOHELET RABBAH 7:19.

<sup>183</sup> EIKHAH RABBAH, Petihta 4.

<sup>184</sup> SAMSON RAFAEL HIRSCH, *HOREB: A PHILOSOPHY OF JEWISH LAWS AND OBSERVANCES* no. 360 (Isidor Grunfeld trans., London: Soncino Press 1962). See also Shmuel Chayen, *Environment, Society, and Economics in the Philosophy of Rabbi Samson Raphael Hirsch and Dr. Isaac Breuer* (2010) (PhD dissertation, Bar-Ilan University).

Rabbi Hirsch's philosophical argument suggests that liability for one's damage to other members of a society is triggered even without a claimant bringing suit, because an individual is morally obligated to make restitution and pay for the harm intended of any legal ruling. Humanity is enjoined from causing any kind of harm because, according to Jewish tradition, we are singular beings that are charged with an equally strong obligation to protect and preserve this world. When all creatures were formed, other than human beings, the blessed One asked each one individually for its consent to be created, as it says in the Talmud: "They were created willingly, with their form."<sup>185</sup> But no creature was asked regarding the others, since they do not have free choice and thus cannot destroy or lay waste [to other species]. They will surely profit from the creation of other beings, and thus implicitly agree to their creation, since "one may be granted merit without explicit knowledge."<sup>186</sup> But when it came to humanity, the blessed One asked all other creatures if they should be formed because they have free will and can destroy all the rest of creation. They agreed, however, and all gave permission for human beings to be created. Rather than greedily clamoring to extract the material resources of this world and use them for our own desires, we are called to serve as custodians of the planet. This narrative and philosophical vision is in turn reflected in the contours of doctrinal responsibilities defined by the law.

The competing jurisprudential values of liability and exemption strain against one another in Talmudic discussions of tort law, as the canon "parries and thrusts."<sup>187</sup> One voice seeks ever-greater degrees of responsibility, whereas the other demands that we limit obligation—especially in cases of mitigated or indirect damage. Neither value is universally dispositive. The attempt to balance these ethical and legal principles is key to the project of *halakhah*, and technical or formal analysis remains necessary in order to judge each case on its own terms. Principles such as the exemptions of indirect damage do provide a necessary counterweight to the values expressed in much of the Talmudic discussions of torts, curbing individual culpability in the service of other ethical or economic goals. The

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<sup>185</sup> Babylonian Talmud, Rosh Hashanah 11a.

<sup>186</sup> YA'AKOV LEINER, BEIT YA'AKOV, bereshit p. 26, no. 41.

<sup>187</sup> Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 401-02 (1950).

assertion of liability, however, is a powerful voice in the rabbinic corpus. It engenders a dominant sense of accepting responsibility—and legal liability—for harm that befalls the body or property of another human being.

The complicated moral fabric that undergirds rabbinic *halakhah* rises to the surface with the admission that responsibility and legal liability are not always coterminous—indeed, humans may bear responsibility even for avoiding harms that cannot precisely be proscribed in the law.<sup>188</sup> The notion that one may be “liable according to the laws of heaven” (*hayyav be-dinei shamayim*) even though one is exempt from human legislation” appears frequently in these Talmudic discussions of torts.<sup>189</sup> The principle suggests an admission—begrudging, perhaps—that there are places that the law cannot go in forcing liability or payment. This does not displace one’s ethical and religious obligation to prevent such damage in the first place. The concept of “liable according to the laws of heaven” offers a vision of enduring moral responsibility—and religious duty—even in instances that cannot be adjudicated by a human court and therefore do not trigger a fine nor command recompense.

There is grave urgency in reading *halakhic* sources so that they resonate with the broader principles of environmental concern evinced in the sacred narratives of Judaism, the brooding “mythic center of the Law” described by Cover.<sup>190</sup> Attempting to develop a Jewish environmental *halakhah* requires one to read the legal sources deeply and carefully, but it is attention to the voice of *aggadah*—broadly construed—that will push us beyond the vision of Jewish law as an isolated, formalistic and totalizing system with internal principles that operate independently of all other values. Through focusing on God as the source of all value and life, *aggadah* demands action and

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<sup>188</sup> See PETER CANE, RESPONSIBILITY IN LAW & MORALITY 60 (Hart Publ’g 2002) (“[T]he prime aim of the ‘legal system of responsibility’ is a maximisation of the incidence of responsible (law-compliant) behaviour, not the imposition of liability for irresponsible (law-breaking) behaviour. . . . [T]he prim[ary] purpose of *legal liability*—of legal penalties and obligations of repair—is the sanctioning of those responsible for past conduct and outcomes.”).

<sup>189</sup> Babylonian Talmud, Bava Kamma 59b; see also Babylonian Talmud, Bava Metzia 4b:2; Issac Herzog, *Moral Rights and Duties in Jewish Law*, 41 JUD. REV. 60, 60-70 (1929); ASHER GOLAK, THE FOUNDATIONS OF JEWISH LAW 18-19 (2d ed. 1922); Moshe Silberg, *Law and Morals in Jewish Jurisprudence*, 75 HARV. L. REV. 306, 306-31 (1961).

<sup>190</sup> Cover, *supra* note 1, at 68.

concern even beyond the letter of the law, spelling out a web of obligations rooted in theological and philosophical values.

## 2. *Doctrinal Illustrations*

### a.) Esh: Expanding Notions of Foreseeability

The first doctrinal context involves the concept of *esh* (“fire”), a rabbinic category of torts that addresses the risk of damage caused by inanimate objects or forces that have been set in motion. Many of its defining characteristics are gleaned from the biblical source that imposes liability on one who starts a fire that spreads “so that stacked, standing, or growing grain is consumed.” (Ex. 22:5).<sup>191</sup> Rabbinic law includes in the category of *esh* any moving property that causes damage, whether it is mobilized by an external force (such as wind) or if it “spreads” (similar to a living beast like an ox or a grazing animal) of its own accord (*me-’atsmo*), in a manner that could be foreseeable to expected.<sup>192</sup>

The question facing the Rabbis of the Talmud, then, was how to understand the foreseeability of harms that could be caused by a category of matter that can be mobilized by an external force—and therefore the extent of risks that those who start fires should consider themselves responsible for avoiding, or damages for which they would be liable. In a well-known Talmudic debate, Resh Lakish argued that responsibility for fire should be limited by the general doctrine that applies when harm is caused “indirectly” by one’s property.<sup>193</sup> Because the fire moves by its own power, or that of the wind, he explained, the ensuing damage is far-removed from the original owner and should be considered nothing more than errant property run amok—for which responsibility is limited unless one acted negligently.

Rabbi Yohanan, by contrast, argued that one is fully liable for all the damage caused by fire, “because it [is analogous to the situation in which one shoots] arrows [at another]”<sup>194</sup>—that is, an individual

<sup>191</sup> *Exodus* 22:5. Biblical citations are based on the N.J.P.S. translation.

<sup>192</sup> Babylonian Talmud, Bava Kamma 22b.

<sup>193</sup> Babylonian Talmud, Bava Kamma 22a.

<sup>194</sup> *Id.*



who creates harm by means of fire, or anything analogous to it, is likened to one who causes injury to others or their property directly, with his own hands.

The Rabbis ultimately interpret the biblical verse from which these *halakhot* are derived, which places responsibility on “he who started the fire,” by siding with Rabbi Yohanan, concluding that fire is reckoned an extension of the person himself. This damage is likened to the “direct” damage caused by one who shoots arrows into the domain of another,<sup>195</sup> rather than “indirect” damage caused by errant property.<sup>196</sup> The resulting harm is considered an act of criminal neglect, damage for which one is indeed liable even though it was caused unintentionally. It thus falls under the category of behavior that subjects the firestarter to full liability and responsibility. Particularly when the damage occurs to another human being, the responsibility imposed on the starter of a potent and sizable fire is nearly unlimited.<sup>197</sup>

As a formal matter, the Rabbis defined a set of preventative thresholds that, if correctly set in place and yet are overcome by the fire, exempt the fire’s owner from liability. These include restraining walls, necessary distancing between the fire and the others’ property, and other safeguards against ordinarily occurring wind.<sup>198</sup> Yet despite these provisions, the heavy hand of obligation and liability, however, is rarely lifted for *esh*. “Why does it say, ‘When a fire is started and spreads out’?,” asks the Mekhilta. “The verse renders [one liable for] accidental [harm] just like willful [damage, and] for unintentional together with intentional.”<sup>199</sup> The hazardous nature of fire is such that the law assumes that an individual should foresee that the blaze may well be carried along by wind.

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<sup>195</sup> See Babylonian Talmud, Bava Kamma 22b-23a and the comments of the *Nimmukei Yosef* on Yitshak Alfasi’s digest, regarding how to define actions in regard to their origin. See also Tosafot to Babylonian Talmud, Sanhedrin 77a.

<sup>196</sup> MISHNEH TORAH, Hilkhot Nizkei Mammon 1:1; and MISHNEH TORAH, Hilkhot Hovel u-Mazik 1:1.

<sup>197</sup> MISHNEH TORAH, Hilkhot Nizkei Mammon 14:15 (“If a fire advances and damages a person, causing harm to him, then the one who set the fire is liable—for the damage, for his loss of work, for his healing, and for his anguish—because it is as if it damaged him with his arrows.”). If it damages his animal or his cistern [i.e. the damaged party’s property], then he is only liable to pay for the damage. See SHULHAN ‘ARUKH, Hoshen Mishpat 418:17.

<sup>198</sup> Babylonian Talmud, Bava Kamma 6a; Babylonian Talmud, Bava Kamma 61a-61b; see also Babylonian Talmud, Bava Kamma 22b.

<sup>199</sup> MEKHILTA DE-RABBI YISHMAEL, 22:5.

The notion is that if the fire, despite these precautions, escaped—even, for example, if the safeguard barriers were non-negligently constructed but collapsed for some unconnected reason—one should have had additional precautions in place to remedy even such an unlikely event. “If one could have repaired the fallen fence but fails to do so,” rules Maimonides, “then he is liable. To what may this be compared? To an ox that went out and caused damage; he should have kept watch over it and prevented it from damaging.”<sup>200</sup>

The rabbinic category of *esh*—inclusive of inanimate damage-causing forces that harm persons or property while in motion by means of an external force—provides a precedent vocabulary for speaking about a wide range of modern environmental pollutants.<sup>201</sup> These might include is caustic and toxic chemicals, proven carcinogens and other sorts of harmful waste that carried by the wind, leached into groundwater or otherwise dispersed through the atmosphere.<sup>202</sup> The region known as “Cancer Alley” along the Mississippi River is a humanitarian tragedy in our own backyard, and one that is of our own making.<sup>203</sup> There are many such places all over the world, however, in far-off places that bear the brunt of the environmental degradation produced by our industrial economy. The Toxic Substances Control Act of 1976<sup>204</sup> and its various amendments seek to restrain the introduction of harmful forces into the domestic environment. But even such laudable legislation may be insufficient to ensure that our world remains habitable for coming generations.

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<sup>200</sup> MISHNEH TORAH, Hilkhot Nizkei Mammon 14:4; Babylonian Talmud, Bava Kamma 23a.

<sup>201</sup> See the definition in SHULHAN ‘ARUKH, Hoshen Mishpat 418:1 (“Anything similar to this—that is, a person’s property that moves and causes damage—is included as a sub-category and follows the law of *esh*.”). Talmudic examples of the sub-categories of *esh* (*toledot*) include a stone, a knife or a heavy object placed atop of a building that falls with an expected wind and damages something when it is falling. See Babylonian Talmud, Bava Kamma 3b; SHULHAN ‘ARUKH, Hoshen Mishpat 418:1.

<sup>202</sup> See Edward J. Schwartzbauer & Sidney Shindell, *Cancer and the Adjudicative Process: The Interface of Environmental Protection and Toxic Tort Law*, 14 AM. J. LAW MED. 1 (1988) (discussing environmental pollutants).

<sup>203</sup> Tristan Baurick, Lylla Younes, & Joan Meiners, *Welcome to “Cancer Alley,” Where Toxic Air Is About to Get Worse*, PROPUBLICA (Oct. 30, 2019, 12:00 PM), <https://www.propublica.org/article/welcome-to-cancer-alley-where-toxic-air-is-about-to-get-worse>.

<sup>204</sup> 15 U.S.C. § 2601 et seq. (1976).

The category of *esh* may well include the toxic waste produced by agricultural pesticides and overspray, by chemical or power plants, by mining operations and refineries, and by other industries that shed persistent pollutants or corrosive byproducts that move with the wind or other natural forces.<sup>205</sup> Materials such as asbestos or radiation, whether from active industry or construction debris or nuclear waste that has been improperly decommissioned, are other possible modern analogues of “fire.”<sup>206</sup> It may be difficult to assess and determine liability for this damage,<sup>207</sup> but the harmful effects and aftershocks upon human health and property are readily visible.<sup>208</sup>

Mechanical failures that release such hazardous materials cannot always be avoided, and we have noted that *halakhah* demands only limited liability in such cases. But many cases of acute environmental disaster were preceded by obvious warning signs—fallen fences, in the rabbinic idiom—that were flagrantly ignored. Cutting corners, poor oversight, and decisions made with profits in mind rather than public safety or environmental preservation lead directly to calamity and exacerbate the limitations of technology.<sup>209</sup>

Rabbi Jacob ben Joseph Reischer (1670-1733) was presented with a case in which two individuals were riding in a wagon filled with cotton. One of them was smoking a pipe, paying no mind to the protestations of the second individual or his warnings to descend from the cart in order to exercise that particular habit. When an unusual burst of wind arose, sparks fell from the pipe and the ensuing fire consumed the totality of their merchandise. After emphasizing that rabbinic courts may indeed adjudicate cases of *esh* in the post-Talmudic era, Rabbi Reischer writes as follows:

When the uncommonly strong wind came along, he should have paid mind and removed the smoking tobacco from his hand and the wagon. Especially since

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<sup>205</sup> Benjamin Shmueli & Yuval Sinai, *Liability Under Uncertain Causation? Four Talmudic Answers to a Contemporary Tort Dilemma*, 30 B.U. INT'L L.J. 449, 460 (2012).

<sup>206</sup> W. Noel Keyes & John L. Howarth, *Approaches to Liability for Remote Causes: The Low-Level Radiation Example*, 56 IOWA L. REV. 531, 543 (1970).

<sup>207</sup> Albert C. Lin, *Beyond Tort: Compensating Victims of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1458 (2004).

<sup>208</sup> See Babylonian Talmud, Bava Batra 2b; see also Babylonian Talmud, Gittin 53a.

<sup>209</sup> See Andrew Hopkins, *Was Three Mile Island a 'Normal Accident'?*, 9 J. CONTINGENCIES & CRISIS, 65, 68 (2001).

the first person protested against him. Since he did not do this, even though he did not blow into it at all [i.e. kindle the flame], it is like the case of one who brings the fire [near to a pile of wood].<sup>210</sup> He is obligated to pay for the damage from the best of his property.<sup>211</sup>

Plausible deniability is refused to an individual who engages in something as flagrantly dangerous as smoking whilst sitting upon a tinderbox. Protestations of innocence are all the more irrelevant when one has been warned of the potential danger of his actions. Rabbi Reischer's answer makes it clear that those who skirt harm by a very thin margin must remember that, when foreseeable disasters transpire, they are held liable by the moral voice of *halakhah*.

b.) Bor: Responding to Defenses of Multiple Causation or Cumulative Harm

A second primary rabbinic category of hazard with environmental relevance is that described as damage caused by “pit” or “cistern” (*bor*). The class of damages assembled under this rubric, derived in rabbinic exegesis of Exodus 21:33-34, cover the harms caused by (mostly) stationary objects.<sup>212</sup> Such objects are *always* dangerous, and their harm is considered easily foreseeable by rabbinic legislation. One is not held liable for harm caused by a pit that has been correctly covered,<sup>213</sup> but if the guarding device becomes degraded through neglect or insufficient care, or if the protective measures were not strong enough to guard against reasonable incursions, the owner of the pit once again becomes liable for any harm.<sup>214</sup> The Talmud includes a discussion as to whether or not one may abnegate responsibility for an inanimate dangerous object by attempting to render it ownerless,<sup>215</sup> and concludes that an individual generally

<sup>210</sup> See MISHNEH TORAH, Hilkhot Nizkei Mammon 14:7.

<sup>211</sup> 1 YA'AKOV BEN YOSEF REICHER, SHE'ELOT U-TESHOVOT SHEVUT YA'AKOV 136.

<sup>212</sup> The verses read: “When a man opens a pit, or digs a pit and does not cover it, and an ox or an ass falls into it, the one responsible for the pit must make restitution; he shall pay the price to the owner, but shall keep the dead animal.” Exodus 21:33-34.

<sup>213</sup> See Mishnah, Bava Kamma 5:6 and the discussion on Babylonian Talmud, Bava Kamma 52a.

<sup>214</sup> MISHNEH TORAH, Hilkhot Nizkei Mammon 12:4-5.

<sup>215</sup> Babylonian Talmud, Bava Kamma 29b-6a.

cannot place something dangerous in the public domain and then divest ownership from it.<sup>216</sup>

Two aspects of this class of damages make it particularly useful for environmental law and ethics. First, rabbinic discussions consider the placement of liability if multiple individuals share ownership of an uncovered pit, thus addressing the question of multiple or joint tortfeasors. In most cases, the rabbis hold both parties responsible for any damage caused by this unprotected hazard, but, if one owner fails to cover it up and the other partner encounters it without properly safeguarding the pit, the Mishnah rules that the second is liable rather than the first.<sup>217</sup> Once-shared responsibility, then, may come to rest entirely upon the shoulders of a partner who ignores looming disaster.

Ours is a world of an ever-increasing “responsibility” gap,<sup>218</sup> extending from vast corporate structures to the emergent world of autonomous machines and the hazy theorizations of the torts they cause.<sup>219</sup> Rabbinic conceptions of *bor* help redress this issue, in part, by pointing toward an ethic of shared responsibility and differentiated liability. Furthermore, Rabbi Asher Weiss (b. 1953), a contemporary rabbinic judge and scholar, has argued that a company is subject to the same moral demands levied upon a private person. “Corporations possess intrinsic legal personhood,” claims Rabbi Weiss, and “in regard to the prohibition of thievery and stealing and all similar matters—which are rational commandments that concern interpersonal relations—it is utterly obvious that such commandments are incumbent upon the company.”<sup>220</sup> Each member or investor is

<sup>216</sup> See Babylonian Talmud, Bava Kamma 19b; see also Babylonian Talmud, Bava Kamma 29b.

<sup>217</sup> See Mishnah, Bava Kamma 5:6 and the comments of Rashi on Babylonian Talmud, Bava Kamma 52a.

<sup>218</sup> Shmueli & Sinai, *supra* note 205, at 493-94.

<sup>219</sup> Andreas Matthias, *The Responsibility Gap: Ascribing Responsibility for the Actions of Learning Automata*, 6 ETHICS & INFO. TECH. 175, 175 (2004); Geoff Moore, *Corporate Moral Agency: Review and Implications*, 21 J. BUS. ETHICS 329, 329 (1999); cf. Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 BUS. & PROF. ETHICS J. 1, 27 (1983); see also Edwin M. Borchard, *Government Liability in Tort*, 34 YALE L.J. 1, 6 (1924).

<sup>220</sup> 1 ASHER WEISS, SHE’ELOT U-TESHUVOT MINHAT ASHER 105, 106, 361; see also 1 YITSHAK YA’AKOV WEISS, MINHAT YITSHAK 3; 4 MINHAT YITSHAK 1; SHE’ELOT U-TESHUVOT TSOFNAT PANE’AH 184; cf. 2 MOSHE FEINSTEIN, SHE’ELOT U-TESHUVOT IGGEROT MOSHE, Yoreh De’ah 63; Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 43 (1996).

considered a full partner in the organization and is therefore obligated for any damage caused by the entity as a whole. This framework allows the hand of obligation to penetrate the shell protecting both stakeholders and corporate actors alike from responsibility in the face of ignorance, negligence, and outright maleficence.

A second dimension of the doctrine of *bor* is its vocabulary for considering the cumulative potential of a hazard to inflict harm. A later code summarizes the Talmudic debate as follows: “If one digs a pit that is ten handbreadths [deep], and another comes along and makes it twenty, and another comes along and makes it thirty—all of them are liable.”<sup>221</sup> Each pit was sufficiently deep to kill an animal on its own (ten handbreadths, according to rabbinic law), and therefore all owners are equally liable for deaths caused by the composite. The law is different, however, if the various increments of the pit do not all meet the requisite measure: “If one dug a pit of less than ten handbreadths, even one less, and another came along and made it ten—whether he dug down another handbreadth, or built up the side of the pit—the second person is obligated.”<sup>222</sup> Liability falls upon the individual who adds on the necessary measure, turning the pit from an annoying hindrance into a lethal object capable of killing an animal or a person.

The case of the imperfectly—or impermanently—covered *bor* provides an interesting way of thinking about hazardous materials and industrial waste as well as the more obvious corollaries of open-pit mining.<sup>223</sup> The category of *esh* encompasses pollutants that are set in motion by natural ecological forces and encroach upon the domain of another. *Bor*, by contrast, includes stationary hazards that have been dumped into public land—as well as those placed by one individual upon another’s property.

We might also think about “pits” that are made dangerous or deadly because of materials they hold, not just because of the size of the hole. This might include hazardous materials that have been improperly disposed of and superfund sites, land so contaminated by waste and other persistent toxins that it poses a significant risk to human and animal life. The category of *bor* may cover moving

<sup>221</sup> SHULHAN ‘ARUKH, Hoshen Mishpat, 410:14; see Babylonian Talmud, Bava Kamma 10a-51a.

<sup>222</sup> SHULHAN ‘ARUKH, Hoshen Mishpat, 410:15.

<sup>223</sup> See JILL JACOBS, THERE SHALL BE NO NEEDY: PURSUING SOCIAL JUSTICE THROUGH JEWISH LAW AND TRADITION 183-84 (2009).

pollutants that once had a purpose, but, when obsolete and tossed aside, wreak havoc in the environment and its inhabitants. Items from micro-beads to plastic wrappers, straws, disposable bottles, objects that move about and become the mountains and islands of trash that sully our waterways and destroy human and marine life. The example of the “early pious ones” and the other rabbinic sources demand that such things be discarded and decommissioned in such a way that they are rendered entirely harmless.

The class of damages grouped under the rubric of *bor* also gives us a way of thinking about damage caused by garbage, manure, or compost, as well as all sorts of liquid waste or industrial runoff.<sup>224</sup> “One who pours water into the public domain and others are damaged by it,” says the Mishnah, “is liable for their damage.” In a statement Maimonides based on an earlier rabbinic tradition, we read:

All those who open their gutters and flush their cesspools into the public domain are not permitted to dump the water into the public domain during the summer months, but they are permitted to do so during the rainy season. And yet, if they damage a person or an animal, then they must pay full damages.<sup>225</sup>

One cannot release toxic runoff or hazardous liquids, however, at a time when they will remain undiluted and poison the common areas. Even in the rainy season, one must take responsibility by paying for any damage caused by this dumping.

Such prohibitions against allowing hazardous runoff surely apply to industrial dumping and considerations of how many parts per million of a pollutant represent the threshold of acceptability. But might these sources also refer to other types of riparian pollution caused by businesses or private individuals? And what about oil spills? The disaster of the Deepwater Horizon, leased by BP and owned by Transocean Ltd, leaked some four million barrels of oil into the waters of the Gulf of Mexico and caused the death of eleven individuals.<sup>226</sup> BP paid an enormous and historic fine of over \$60

<sup>224</sup> See Mishnah, Bava Kamma 3:3; Babylonian Talmud, Bava Kamma 30a; *see also* Babylonian Talmud, Bava Kamma 6a; MISHNEH TORAH, Hilkhoh Nizkei Mammon 13:15.

<sup>225</sup> See MISHNEH TORAH, Hilkhoh Nizkei Mammon 13:13; Babylonian Talmud, Bava Kamma 6a-30a.

<sup>226</sup> Ronen Perry, *The Deepwater Horizon Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 3 (2011).

billion for their gross negligence. It is hard to know, however, if even this cost was enough to cover the loss of life, utter devastation to the environment that will be felt for decades to come. Many other oil catastrophic spills have not triggered such a hefty fine or frantic cleanup effort. The unspeakable cost to maritime life, to human life and industry, goes unrecompensed.

The fundamental issue of environmental degradation comes to the fore in Rabban Shimon ben Gamliel's remark regarding the idea of *bor* as it pertains to flushing out one's gutters: "Those who ruin the public domain and damage it, must pay! The first one [who takes possession of the property], may keep it."<sup>227</sup> This is a rather expansive ruling, applying liability even if the parties have obtained permission to dump. The rabbinic court has the prerogative to forfeit ownership of all damaging things that have encroached upon the public sphere as a fine against such behavior. One may be allowed to do something, such as dumping garbage, but he remains liable if in doing he ruins public land or causes damage to another individual.<sup>228</sup>

Contemporary environmental ethicists have described a phenomenon that they call "slow violence," a form of verifiable and measurable harm that is nonetheless extremely difficult to conceptualize and address within contemporary legal frameworks.<sup>229</sup> The category of encumbrances long-term damage carried out over many years, including toxic drift and oil spills, becoming cumulatively lethal even as it remains gradual and often hidden in plain sight. Such harrowing yet enigmatic forms of harm could, in our estimation, be compellingly confronted through thinking with the framework of *bor*. This category of damages reflects a robust ethos of social obligation, one that addresses liability in cases of cumulative damage but also one that spurs consideration of collective action.

These critical issues surface in a recent responsum by Rabbi Menashe Klein, who was asked about the liability of individuals who throw sand on flowers in a public area.<sup>230</sup> Klein claims that it is strictly

<sup>227</sup> See Mishnah, Bava Kamma 3:3, and the remarks of Ovadia Bartenura, commentary on Mishnah, Bava Kamma 3:3; see also Rashi on Babylonian Talmud, Bava Kamma 30a.

<sup>228</sup> Babylonian Talmud, Bava Kamma 30a.

<sup>229</sup> See ROB NIXON, *SLOW VIOLENCE AND THE ENVIRONMENTALISM OF THE POOR* (Harv. Univ. Press eds., 2013); ERDEN EL, *SLOW VIOLENCE IN CONTEMPORARY ENVIRONMENTAL LITERATURE* (Cambridge Scholars Pub., 2020).

<sup>230</sup> 12 MESHANEH HALAKHOT 447. The responsum was penned in 1991.



forbidden to cause such damage, not as an act of theft but as a form of direct or indirect (*gerama*) damage. The conclusion of his ruling holds the seeds of something much deeper, especially when combined with the details of *bor* (and *esh*) detailed above. Rabbi Klein notes that parents must take responsibility for preventing the children from harming the flowers. Most human beings—and especially children—cannot be expected to naturally accord themselves with the highest ethical bar, and for this reason oversight and regulation are necessary. One is not allowed to throw things into a public place that will decimate life, destroy the efforts of others, or cause environmental degradation. This applies to ornamental flowers, but also to crops, drinking water, and surely to the public spaces and resources held in common. This category of damages thus illustrates how, according to rabbinic law, the actions of an individual are profoundly shaped by the obligations to their social community.

c.) Responsibility for Costs Externalized  
Outside One's Individual Property

A third and final doctrinal example—the laws and regulations governing the impact and potential harms of various kinds of economic activity upon their surroundings— even more explicitly frames laws with ecological implications in terms of social order. Industry is not, of course, forbidden by Jewish law, even if businesses create a certain level of noise, air, or water pollutants. But the *halakhah* sets clear boundaries on what level these may reach, determines where businesses may be located in relation to private homes, and establishes demands regarding how owners of a business must clean up damage-causing agents and safeguard others against their damage. Communities are meant to be livable and sustainable, and Talmudic sources demonstrate a careful calculus that balances economic productivity with human flourishing.<sup>231</sup> These investigations of the potential breakdown of healthy relationships between neighbors and the permissible proximity between businesses are distinct from the

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<sup>231</sup> See Babylonian Talmud, Bava Kamma 82b (on the special qualities of Jerusalem and things that are prohibited because of them); MISHNEH TORAH, Hilkhot Beit Ha-Behirah 7:14; see also 1 MINHAT ASHER 93; Zvi Ilani, *Efficiency Considerations in Handling Ecologic Nuisances in Halakhic Literature as Compared with Modern Economic Theories*, 16 SHENATON HA-MISHPAT HA-IVRI: ANN. OF THE INST. FOR RSCH. IN JEWISH L. 27-87 (1990-1991).

## 2022 REVISITING A JURISPRUDENCE OF OBLIGATION 2171

realm of pure tort law,<sup>232</sup> but they reflect a clear moderation of individual enterprise through a thick web of social obligation.

The second chapter of the Talmudic tractate Bava Batra addresses what might be called zoning laws, rabbinic ordinances that govern issues such as noise pollution and foot traffic. They describe the circumstances under which one may dig close to the property of another person and the necessary precautions one must take in preventing damage.<sup>233</sup> The rabbis of the Mishnah were concerned with the fact that certain businesses may degrade the world around it, such as through material pollution:

A permanent threshing floor must be distanced fifty cubits of the town. One may not make a permanent threshing floor within his own domain unless his ground extends fifty cubits in every direction. And one must distance it from one's fellow's plants and from that person's furrow so that it will not cause damage.<sup>234</sup>

Talmudic literature is also concerned with the environmental impact of latrines and the disposal of waste, a necessity of human life but a complicated issue for urban and rural communities alike. Rabbi Ya'akov ben Asher ruled that a latrine must be placed at least fifty cubits from a well, noting explicitly that the obligation to establish the distance is incumbent upon the latrine's owner.<sup>235</sup> This responsibility cannot be displaced with a claim to have been there first. The latrine also causes damage because of the off-putting sight and the terrible smell, which is why open latrines are identified as a particular problem.<sup>236</sup>

Concerns for the social cost of air pollution take several forms in classical *halakhah*, including the pollutant force of unpleasant smells.<sup>237</sup> Rabbinic sources display concern for the impact of fetid

<sup>232</sup> It is telling that Maimonides groups these laws together in his *MISHNEH TORAH* under the heading of *hilkhot shekhenim* (laws of neighbors), whereas the *ARBA'AH TURIM* and *SHULHAN 'ARUKH* refer to them as *nizkei shekhenim* (damages between neighbors).

<sup>233</sup> See Yeshayahu Bar-Or, *Distancing from Environmental Damages*, HA-MA'AYAN (Tishrei 2011), <https://www.machonso.org/hamaayan/?gilayon=19&id=797>.

<sup>234</sup> Mishnah, Bava Batra 2:8.

<sup>235</sup> See BEN ASHER, *ARBA'AH TURIM*, Hoshen Mishpat 155:20; see also JACOBS, *supra* note 223, at 186-88.

<sup>236</sup> See BEN ASHER, *ARBA'AH TURIM*, Hoshen Mishpat 155:56.

<sup>237</sup> See 5 MEIR SICHEL, *AIR POLLUTION—SMOKE AND ODOR DAMAGE* 25-43 (1985).

smells even as they are distinguished from other torts: “Animal carcasses [i.e. slaughterhouses], graves and tanneries must be distanced fifty cubits from a town. A tannery may be made only to the east of a city. Rabbi Akiva says: ‘One may set it up on any side except the west, and one must distance it fifty cubits [from the town].’”<sup>238</sup>

Insufferable smells damage the area by reducing property values and making the surrounding region less livable. Though it may have been less clear to city-dwellers of Late Antiquity, such odors may be harbingers of other insidious pollutants or hygienic concerns. When one wishes to erect an industry known to produce significant smells, one must account for environmental factors and gauge how the wind will distribute the smell or how the relative heat of the winds may—or may not—intensify the problem.

Air pollution from neighboring property or nearby industry comes also in the form of smoke, one of the most invidious and common pollutants. The rabbinic sages were concerned about fire damage that might result from inordinate proximity between ovens and residences, but they were also worried about the way smoke reduces the quality of life and causes outright damage.<sup>239</sup>

Such issues of noxious smoke and smell continue to appear in the responsa literature with remarkable frequency. Some of these responsa offer additional rationales for doctrinal limits distinguishing between industrial pollution and that produced by other uses. Rabbi Meir of Rothenberg, for example, was asked to rule about a bathhouse that was built near a synagogue and disturbed the occupants with the smoke that it produces. Because the fumes were produced infrequently (i.e., not daily), Rabbi Meir argued that it cannot be considered a problem.<sup>240</sup> Rabbi Shlomo ben Aderet distinguished between the voluminous smoke produced by professional ovens and that of ordinary householders, noting that neighborhoods would be impossible if we were to prohibit the latter.<sup>241</sup> Such cases are important because they evince concern for the injured party while recognizing the impossibility of creating a community in which all damage, large or small, is prohibited. Living in the close proximity demanded by human civilization entails individual compromises as well as benefits.

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<sup>238</sup> Mishnah, Bava Batra 2:9.

<sup>239</sup> Mishnah, Bava Batra 2:2; Babylonian Talmud, Bava Batra 20b; Babylonian Talmud, Bava Kamma 82b.

<sup>240</sup> 4 SHE’ELOT U-TESHUVOT MAHARAM MI-ROTHENBERG 233 (Jerusalem 2010).

<sup>241</sup> 4 SHE’ELOT U-TESHUVOT HA-RASHBA 45 (Jerusalem 2010).

In addition to the damages wrought upon homes or individuals, the Mishnah reflects concern for the ways that certain industries will pollute common lands and other businesses. A dovecote, for example, must be built at least fifty cubits from the city, since the birds will consume or damage all agricultural growth within their flight zone.<sup>242</sup> The Mishnah also rules that “a pool for soaking flax must be distanced from vegetables, and leeks from onions, and mustard plant from bees. Rabbi Yose permits mustard plant.”<sup>243</sup> Rabbi Yose, here as elsewhere, claims that it is the responsibility of the individual who may be injured to distance himself or herself from the potentially damaging force;<sup>244</sup> a beekeeper cannot reasonably be expected to follow the small insects and prevent them from harming another’s property.<sup>245</sup> The normative opinion, however, is that all three of these potentially hazardous industries must be distanced with an eye to foreseeable wind and other external forces because their effects extend far beyond their border<sup>246</sup>; the water used in soaking flax will damage other adjacent crops, planting leeks and onions in adjacent beds may compromise the taste of the latter, and the proximity of the mustard plants may ruin the quality of the bee’s honey.<sup>247</sup>

If one fails to protect her or his neighbors from harm through compliance with these obligations, the Talmud again likens the damage caused by the polluting industries or activities to arrows that are recklessly launched into another’s domain—the “direct” personally-generated type of injury that violates the strictest obligations. Even the cautious Rabbi Yose admits that liability rests with the tortfeasor in these cases of direct cross-border damage. Maimonides writes as follows:

To what shall this matter be compared? To someone standing upon his own property and shooting arrows into his fellow's yard, saying, “I am doing this within

<sup>242</sup> Mishnah, Bava Batra 2:5.

<sup>243</sup> Mishnah, Bava Batra 2:10.

<sup>244</sup> Babylonian Talmud, Bava Batra 18b.

<sup>245</sup> HIDDUSHEI HA-RASHBA, *on* Babylonian Talmud, Bava Batra 18b; ROSH *on* Bava Kamma 1:1.

<sup>246</sup> MISHNEH TORAH, Hilkhot Shekhenim 11:1-2; Babylonian Talmud, Bava Batra 22b and 25b. See also the comments of Rabbenu Hananel and Nahmanides on Babylonian Talmud, Bava Batra 22b and Babylonian Talmud, Bava Metzia 117a.

<sup>247</sup> See also Maimonides’ explanation of this passage in his PERUSH HA-MISHNAH LA-RAMBAM (Kapach ed., 1963–1967), and Shlomo ben Aderet’s discussion of the necessary distance in his comments on Babylonian Talmud, Bava Batra 25a.

my own domain!” We stop him from doing so! And so too, regarding all of the distances mentioned above: if he did not move [the object] far enough away, it is as if he has damaged with his arrows!<sup>248</sup>

This kind of damage diminishes property values, impacts crops, and significantly decreases another person’s quality of life even beyond the threshold of what is bearable. In such cases, one cannot claim that “I was here first.” Nor can one claim the right to engage in such behavior on one’s own property.<sup>249</sup> One must be mindful of how the things one does on his own property impact the human life, animal life, and the environment outside of that property. Much like the fire that spreads, one is responsible for the ensuing damage.

The medieval Rabbi Asher ben Yehiel, thus gave the following programmatic ruling for translating the rabbinic mandates for later times:

For [its] ways are ways of pleasantness and all [its] paths are peace (Prov. 3:17). [T]he Torah was insistent that a person should not do something on his own property that causes harm to his fellow . . . and in respect to all those damages, regarding which the extent to which they must be distanced was not clarified in the Talmud, they must be removed to a distance where they will not harm . . . .<sup>250</sup>

By this measure, responsibility for individual behavior on one’s own property extends to the reach of the environmental costs to humans and the natural environment externalized by each industry—in modernity, the direct impact may stretch many miles and perhaps even across the globe.

### 3. *An Environmental Responsibility Mindset of the Social Order*

These doctrinal examples, read in the context of the ethical articulations of traditional narrative accounts, suggest starting points for drawing important additional frameworks for environmental

<sup>248</sup> MISHNEH TORAH, Hilkhot Shekhenim 10:5.

<sup>249</sup> Babylonian Talmud, Bava Batra 23a; SICHEL, *supra* note 237, at 35-36.

<sup>250</sup> See ASHER BEN YEHEL, TESHUVOT HA-ROSH, 108:10 based on the translation in SICHEL, *supra* note 237.

discourse from Jewish law. Maimonides, like Rabbi Hirsch, interprets the whole of religious tort law and the ensuing monetary obligations as reminding human beings to take care of the objects that belong to them and to others. The categories of potentially-damage-imposing elements grouped under the rubric “fire” and “pit” represent forces that are considered within our control and must therefore be carefully controlled:

All of them [i.e. the laws of torts] are concerned with putting an end to acts of injustice and with the prevention of acts causing damage. In order that great care should be taken to avoid causing damage, man is held responsible for every act causing damage deriving from his possessions or caused by an act of his, if only it was possible for him to be cautious and take care not to cause damage.

Therefore, we are held responsible for damage deriving from our beasts, so that we should keep watch over them; and also for damage from “fire” (*esh*) and from a “pit” (*bor*), for these two belong to the works of man, and he can keep watch over them and take precautions with regard to them, so that no harm is occasioned by them. These laws contain considerations of justice (*ha-yosher*)...<sup>251</sup>

Ours is a world of an ever-increasing “responsibility gap,” extending from vast corporate structures to the emergent field of autonomous machines.<sup>252</sup> Legal ownership of objects in such a reality can be difficult to establish in classical rabbinic law,<sup>253</sup> and questions of corporate liability in *halakhah* are an even more complicated matter.<sup>254</sup> Any attempt to define the culpability of modern polluters in the eyes

<sup>251</sup> MAIMONIDES, MOREH NEVUKHIM, pt. 3, ch. 40, *translated in* ALFRED L. IVRY, MAIMONIDES’ GUIDE OF THE PERPLEXED: A PHIL. GUIDE 193 (Univ. Chi. Press 1963).

<sup>252</sup> Andreas Matthias, *The Resp. Gap: Ascribing Resp. for the Actions of Learning Automata*, 6 ETHICS & INFO. TECH. 175, 183 (2004).

<sup>253</sup> See Babylonian Talmud, Bava Kamma 3b-4a, and the comments of the Tosafot printed on that page.

<sup>254</sup> Michael J. Broyde & Steven H. Resnicoff, *Jewish Law and Modern Business Structures: The Corporate Paradigm*, 43 WAYNE L. REV. 1685, 1783 (1996). See also 1 SHE’ELOT U-TESHUVOT HAYIM SHA’AL no. 45.

of Jewish law will, of necessity, be forced to tackle these thorny issues in detail beyond the scope of the present article.

Science has shown us, however, that people are not acting despite the evidence of global pollution and the over-consumption of resources damage our world and its inhabitants, altering our fragile ecosystems and destroying property as well as injuring human and animal life. Yet we have struggled to come up with a language or mindset for compelling collective action, one that comprehends and addresses cumulative pollution, the relations between economic structures and environmental exploitation, and harm to our common inheritance. Rabbinic torts offer a religious vocabulary that predates the carbon economy and is therefore prey to neither its assumptions nor legal limitations, offering a robust accounting of duty and commitment to other human parties and to the non-human world. The approach of these sources, we argue, is a founded social obligation and thus provides a ready response to collective action problems.

Such realigning of the Talmudic sources demands behavioral changes along with a significant shift away from a utilitarian treatment of the natural world toward a reverence that is grounded in personal and communal responsibility.<sup>255</sup> These legal sources must be read through the lens of *aggadah*, thus offering a different prescriptive vocabulary for the mandates of environmental activism from the heart of Jewish literature. Indeed, the interweaving of *nomos* and theology appears in the discussion of one of the very rabbinic torts explored above. When challenged to offer a teaching that involved both *halakhah* and *aggadah*, the sage Rabbi Yitshak the Blacksmith offered the following homily:

If a fire breaks out, and catches in thorns (Ex. 22:5)—even if it breaks out on its own. The one who set the fire must surely make restitution—the blessed Holy One said, “I must pay for the fire that I kindled. I set a fire in Zion, as it says, ‘He has kindled a fire in Zion that will devour its foundations’ (Lam. 4:11) and in the future I shall rebuild it with fire, as it says, ‘I will be a wall of fire around it, and I will be the glory in its mist’” (Zech. 2:9). There is a tradition: The verse begins with damage caused by property and ends with damage caused by the body, teaching you that a person is liable

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<sup>255</sup> See JACOBS, *supra* note 223, at 188.

[for harm cause by fire as if he were shooting]  
arrows.<sup>256</sup>

In the Talmudic understanding, God has the courage to take responsibility—and liability—for destruction wrought. Rabbinic law, accordingly, goes quite far in extending obligations and underscoring that the prohibition against causing damage is a proactive one, and extends beyond making post facto amends. *Halakhah* forbids one to cause *any* harm, claims Maimonides, a prohibition that remains in effect even if one makes full restitution for the damage he has caused (restitution being an admission of the human propensity).<sup>257</sup>

Echoing this point, Rabbi Moshe Sofer ruled that we follow the more stringent opinion in cases of doubt (*safek*) regarding damages because the obligation to protect others from harm stems from the verses: “Be exceedingly careful for your soul” (Deut. 4:15) and “Do not stand upon your fellow’s blood” (Lev. 19:16).<sup>258</sup> *Halakhah* even commands an interdiction of keeping dangerous items—such as aggressive animals or broken equipment—on one’s own property, extending the commandment to build a fence upon one’s roof to include protecting others from any hazardous substances or objects.<sup>259</sup>

It is tempting to foist our burden of responsibility upon others. We may wish to blame previous generations for our present situation, or demand that change come from the next generation rather than from us. But, declares Rabbi Yosef Karo, “a guardian that entrusts their charge to a second guardian remains obligated,”<sup>260</sup> offering a generational language for environmental discourse.

<sup>256</sup> Babylonian Talmud, Bava Kamma 60b; see EMMANUEL LEVINAS, NINE TALMUDIC READINGS 181 (1990). See also Berachyahu Lifshitz, “*Aggadah*” And Its Role in the History of the Oral Law (*Torah She’Be’al Peh*), 22 SHENATON HA-MISHPAT HA-IVRI: ANN. OF THE INST. FOR RSCH. IN JEWISH L. 240-41 (2001-2004).

<sup>257</sup> MISHNEH TORAH, Hilkhot Nizkei Mammon 5:1. See also MAIMONIDES, SEFER HA-MITSVOT, mitsvot lo ta’aseh, no. 279.

<sup>258</sup> SHE’ELOT U-TESHUTOT HATAM SOFER, yoreh de’ah 241. See also SHE’ELOT U-TESHUTOT DIVREI YATSIV, Hoshen Mishpat 71.

<sup>259</sup> Babylonian Talmud, Bava Kamma 15b; Babylonian Talmud, Ketubot 41b; MAIMONIDES, SEFER HA-MITSVOT, mitsvot ‘aseh no. 184 and mitsvot lo ta’aseh no. 298; MISHNEH TORAH, Hilkhot Rotse’ah u-Shemirat Ha-Nefesh 11:4; SEFER HA-HINUKH, 546. The Talmud records that were called even to prevent the loss of another’s land, perhaps extending the biblical commandment to return the lost objects to preserving the natural world. See Babylonian Talmud, Bava Metsia 31a; Deuteronomy 22:3.

<sup>260</sup> SHULHAN ‘ARUKH, Hoshen Mishpat 291:26.



**IV. CONCLUSION**

This essay has outlined doctrines and principles from two different but interrelated jurisprudential realms as illustrations of how Jewish legal traditions, especially as understood by Robert Cover, might offer new ways to think through the pressing ethical, legal, and existential questions of our day. Rather than naively attempting to apply ancient, medieval, or Jewish legal sources to our post-modern context and the unique threats of our day and age, the goal is to expand the toolbox of ideas that are available to contemporary scholars, jurists and activists who seek to develop a robust vocabulary to address the dangers of climate change and the multifaceted harms of rampant surveillance and big data aggregation. Engaging with these problems requires moving beyond old mindsets, and Robert Cover's writings on obligation offer a substantive example and a foot forward of this type of paradigm shift. Responding to the judicious criticism of his method and interpretations by figures like Stone and Minow, we have attempted to carry forward Cover's work and hope to develop it more fully in the years ahead. The present essay, meanwhile, is intended to serve as an emblematic resource for those who seek to escape from the narrow confines of the fly-bottle of much contemporary environmental and privacy discourse.