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RIGHTS AND DUTIES IN JEWISH LAW

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ABSTRACT

In this Article, we argue that rights play a central role in Jewish law. In Section I, we reconstruct Robert Cover's thesis distinguishing the West's jurisprudence of rights from Judaism's jurisprudence of obligation. In Section II, we present Rabbi Lichtenstein's theory that rights play no central role in Jewish law. We show that the theories of Rabbi Lichtenstein and Robert Cover have given rise to the idea that there are no rights in Jewish law, only obligations. In Section III we develop two types of arguments in support of our position that rights are central to Jewish law. Our first argument appeals to Hohfeld's analysis that rights are correlative of duties. Our second argument contends that certain mitzvot are best understood as protecting individuals' rights. In Section IV we discuss two ideas that underlie the "no rights in Jewish law camp." The first idea is that the category of mitzvah is best interpreted as obligation. The second idea is that an obligation to obey God's law implies a law comprised of obligations. We argue that both of these ideas are misguided.

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I. COVER'S THESIS AND ANALYSIS

In *Obligation: A Jewish Jurisprudence of the Social Order*, Robert Cover distinguishes between a jurisprudence of rights and a jurisprudence of obligations.¹ Cover employs this distinction to differentiate a society organized around rights from a society organized around obligations. He then argues that whereas liberal western societies and law are organized around rights, Jewish society and law are organized around obligations.

Cover maintains that “[r]ights’ are the fundamental category” in western societies, but “[t]he basic word of Judaism is obligation or mitzvah.”² Cover explains:

The word “rights” is a highly evocative one for those of us who have grown up in the post-enlightenment secular society of the West. Yet . . . [w]hen I am asked to reflect upon Judaism and [] rights, [], the first thought that comes to mind is that the categories are wrong . . . Judaism has its own categories The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system’s “rights,” is the word “mitzvah” which literally means commandment but has a general meaning closer to “incumbent obligation.”³

To illustrate the centrality of obligation in Judaism, Cover cites the Talmud’s declaration in Kiddushin 31a that it is greater to perform the commandments out of obligation—as obligated—than to perform the commandments voluntarily (“out of love”) when one is not obligated to do them. Cover writes:

One of the great Rabbis of the fourth century, Rabbi Joseph, who was blind, asked the great question of his colleagues: Is it greater to do the commandments out of love when one is not obligated to do them or is it greater to do the commandments out of obligation? He had at first assumed that to voluntarily comply with the commandments though not obligated to do so entailed

¹ Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. L. & RELIGION 65, 65-73 (1987).

² *Id.* at 66.

³ *Id.* at 65.

a greater merit. But his colleagues held that to do the commandments out of obligation—more correctly, to do them as obligated—was the act which entailed greater merit. He then offered a feast for the Scholars if any could demonstrate that the great figure, Rabbi Judah’s position that the blind were not obligated to do the commandments was erroneous.⁴

Cover also points to the fact that in Jewish law “[t]he primary legal distinction between Jew and non-Jew is that the non-Jew is only obligated to the 7 Noachide commandments.”⁵ Cover offers several examples and illustrations to motivate his claim distinguishing Judaism’s jurisprudence of obligation from the West’s jurisprudence of rights.

A. The Organization of Social Movements

The first example pertains to the organization of social movements. Since rights are the fundamental category in western society,

[s]ocial movements in the United States organize around rights. When there is some urgently felt need to change the law or keep it in one way or another a “Rights” movement is started. Civil rights, the right to life, welfare rights, etc. The premium that is to be put upon an entitlement is so coded. When we “take rights seriously” we understand them to be trumps in the legal game.⁶

By contrast, Cover explains, “[i]n Jewish law, an entitlement without an obligation is a sad, almost pathetic thing.”⁷ Therefore, a social movement organized around rights would have no evocative force:

Where women have been denied by traditional Judaism an equal participation in ritual, the reasoning of the traditional legist has been that women are *not obligated* in the same way as are men with respect to those ritual

⁴ *Id.* at 67.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*; but see J. L. Mackie, *Can there be a Right-Based Moral Theory?*, in THEORIES OF RIGHTS 168, 169 (Jeremy Waldron ed., 1984).

matters (public prayer). It is almost a sure sign of a nontraditional background for someone to argue that women in Judaism should have the right to be counted in the prayer quorum, to lead prayer services or be called to the Torah. Traditionalists who do argue for women's participation . . . do so not on the basis of the rights. They argue rather that the law, properly understood, does or ought to impose on women the obligation of public prayer, of study of Torah, etc. For the logic of Jewish Law is such that once the obligation is understood as falling upon women, or whomever, then there is no question of "right" of participation. Indeed, the public role is a responsibility.⁸

Thus, the West's jurisprudence of rights is such that social movements organize around rights. Judaism's jurisprudence of obligations requires a different basis for such movements: obligations.

B. Emancipation and Bar Mitzvah

Cover's second example relates to the emancipation of minors when they come of age. In Western law, a child who becomes legally mature is said to be "emancipated" or "free" or "*sui juris*" (literally, of one's right).⁹ Not so in Jewish law. There, "the child becomes bar or bat mitzvah, literally one who is of the obligations."¹⁰ Rather than becoming free or of one's own right, the child becomes *obligated*.¹¹

C. The Rights of Litigants and the Obligations of Judges

In a third example, Cover asks us to consider "the problem of the dress of litigants before a tribunal," where he explains:

In *Estelle v. Williams* the Supreme Court held that the defendant had a right to appear at his trial (a jury trial) dressed in civilian garb of his choice rather than the convict garb in which he had spent the past days in jail.

⁸ Cover, *supra* note 1, at 67-68 (emphasis added).

⁹ *Id.* at 67.

¹⁰ *Id.* at 67.

¹¹ *Id.*

But, the Court concluded, in the absence of timely objection by counsel the right was deemed waived or not exercised.¹²

Cover argues that the Court's legal conclusion is only coherent in a rights-based system and that a different legal conclusion would be reached in an obligation-based system. Indeed, Cover argues that Jewish law would have issued a different ruling in *Estelle v. Williams*.¹³ Cover then cites Maimonides' treatment of a similar issue:

1. A positive commandment enjoins upon the judge the duty to judge righteously. 2. If one of the parties to a suit is well clad and the other ill clad, the judge should say to the former, "either dress him like yourself before the trial is held or dress like him, then the trial will take place."¹⁴

For Cover, this example illustrates how in Western rights-based law, "we tend to have a system which is almost uniquely dependent upon parties and their representatives asserting their 'fairness rights' . . ."¹⁵ By contrast, in Jewish law's obligation-based system, the emphasis is placed on "judges fulfilling their fairness obligations."¹⁶

D. Foundational and Normative Origins

Cover observes that Western society and Judaism locate their normative-historical origins in different foundational principles.¹⁷ The West locates its origins in the social contract tradition, which begins with autonomous "free and independent" individuals in a state of nature.¹⁸ Cover explains that "[t]he story behind the term 'rights' is the story of social contract."¹⁹ According to that tradition, "[r]ights are traded for collective security. But some rights are retained, and . . . some rights are inalienable."²⁰ He further explains that "[r]ights' are

¹² *Id.* at 72.

¹³ *See id.* at 72-73.

¹⁴ *Id.* at 72 (citing Mishneh Torah, Sanhedrin 21).

¹⁵ *Id.* at 73.

¹⁶ *Id.*

¹⁷ *Id.* at 65-66.

¹⁸ *Id.* at 66.

¹⁹ *Id.*

²⁰ *Id.*

the fundamental category because it is the normative category which most nearly approximates that which is the source of the legitimacy of everything else.”²¹ The ideal that underlies the Western tradition (“that which is desired”) is individuals exercising “perfect freedom with all the alienated rights returned.”²²

In contrast to the West’s origins in individual’s autonomy and rights, Cover locates Judaism’s normative-historical origin in the “heteronomy” of Sinai, in the *obligations* imposed by the law commanded there.²³ Cover writes:

Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy The experience at Sinai is not chosen. The event gives forth the words which are commandments All law was given at Sinai and therefore all law is related back to the ultimate heteronomous event in which we were chosen-passive voice [E]verything was given at Sinai. And, of course, therefore, all is, was, and has been commanded—and we are obligated to this command.²⁴

The different normative-historical origins capture the disparate organizing principles of the two systems. Judaism locates its origins in the obligations commanded at Sinai. The West locates its origins in the state of nature where individuals possess inalienable rights.

E. The Right to an Education and the Obligation to Educate

Cover also suggests that a society organized around rights and a society organized around obligations differ in their approach to guaranteeing education.²⁵ Cover claims that the Western “right to an education” is “empty” because it fails to pick out the duty-bearer—the party obligated to make good on the right.²⁶ Cover explains that “the ‘right to an education’ is not even an intelligible principle unless we know to whom it is addressed. Taken alone it only speaks to a need.

²¹ *Id.*

²² *Id.* at 66.

²³ *Id.*

²⁴ *Id.* at 66-67.

²⁵ *Id.* at 71-72.

²⁶ *Id.* at 71.

A distributional premise is missing which can only be supplied through a principle of ‘obligation.’”²⁷

By contrast, in an obligation-based system, Cover argues, the problem of locating the duty bearer does not arise:

Jewish law is very firm in its guarantee of an education. Something approaching universal male schooling was pursued perhaps two millennia ago . . . [I]t is clear that throughout the middle ages [sic] it was the obligation of families and communities to provide schooling to all male children . . . And it did give rise to a system of schooling unrivaled in its time for educational opportunity. Yet, it is striking that the Jewish legal materials never speak of the right or entitlement of the child to an education. Rather, they speak of the obligation incumbent upon various providers to make the education available. It is a mitzvah for a father to educate his son²⁸

Cover claims that because it fails to specify the duty-bearer:

The jurisprudence of rights has proved singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual. While we may talk of the right to medical care, the right to subsistence, the right to an education, we are constantly met by the realization that such rhetorical tropes are empty²⁹

In this sense, Cover believes that rights-oriented societies struggle to actualize their “empty” rhetoric.³⁰

By contrast, “[i]n a jurisprudence of mitzvoth the loaded, evocative edge is at the assignment of responsibility. It is to the parent paying tuition . . . that the Law speaks eloquently and persuasively.”³¹ For Cover, this example illustrates how the difference between a rights-based system and an obligation-based system explains (what he takes to be) the relative success of the educational system in Judaism. In the Jewish system, education is characterized as an obligation

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 72 (referring to the “jurisprudence of mitzvoth” as one of “obligation”).

incumbent upon a specified duty-bearer, a functionally superior model to the Western approach where education is characterized as an entitlement of the right holder.³²

F. Cover's General Conclusions

Cover makes two evaluative points about the merits of an obligation-based system over a rights-based system. First, he writes that a system of obligations is a purposive, telos-driven system: "A world centered upon obligation is not, really cannot be, an empty or vain world."³³ However, "[r]ights, as an organizing principle, are indifferent to the vanity of varying ends. . . . The rights system is indifferent to ends"³⁴ The Western system that emphasizes rights, does not make "any strong claims about the fullness or vanity of the ends it permits."³⁵ But in a system of obligations, "because [it] so strongly bind[s] and locate[s,] the individual must make a strong claim for the substantive content of that which they dictate."³⁶ Cover approvingly cites Maimonides, who "contrasts the normative world of mitzvoth with the world of vanity—*hebel*."³⁷

Cover's second evaluative point follows from his analysis of the right to education. He explains that rights and rights-talk are often impotent because of the failure to specify the duty bearer.³⁸ Cover then concludes his paper with the following flourish:

[A]s I scan my own—our own—privileged position in the world social order . . . it seems to me that the rhetoric of obligation speaks more sharply to me than that of rights. Of course, I believe that every child has a right to decent education and shelter, food and medical care; of course, I believe that refugees from political oppression have a right to a haven in a free land; of course, I believe that every person has a right to work in dignity and for a decent wage. I do believe and affirm the social contract that grounds those rights. But more

³² *Id.*

³³ *Id.* at 70.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (emphasis added) (referring to "mitzvoth" as "obligations").

³⁸ *Id.* at 72.

to the point I also believe that I am commanded—that we are obligated—to realize those rights.³⁹

In summary, Robert Cover provides us with a perspicuous analysis, rich with examples and illustrations, that captures the differences between Judaism's jurisprudence of obligation and the West's jurisprudence of rights.

II. RABBI LICHTENSTEIN'S ANALYSIS

A. Rights in Halakha

Rabbi Aharon Lichtenstein, an influential Rosh Yeshiva and Jewish thinker of the past half century, delivered a paper on "Individual Rights in Halakhah" at the 1978 Thirteenth American Israel Dialogue Conference.⁴⁰ The theme of the conference was the comparison of individual rights under Jewish law, American law, and Israeli law.⁴¹ Rabbi Lichtenstein opened his presentation by criticizing the very formulation of the topic he was asked to address.⁴² Lichtenstein writes:

[L]et me begin by noting that the very formulation of our topic is non- perhaps even anti-Halakhic in character [T]o place [rights] at the center of a Dialogue intended to deal with the legal aspects of the individual's place in society—this is non-Halakhic. "Rights," natural or other, are the current coin of Roman legists. They are the legacy of Locke and Montesquieu, of John Stuart Mill and Martin Luther King. They are not the *lingua franca* of the Torah or the Talmud, of Rabbi Akiba or the Rambam.⁴³

³⁹ *Id.* at 73-74.

⁴⁰ The Conference was sponsored by the American Jewish Congress. *See generally About Us*, AM. JEWISH CONG., <https://ajcongress.org/about> (last visited Feb. 13, 2022).

⁴¹ *See, e.g.*, Rabbi Aharon Lichtenstein, *The Halakhic Perspective*, 45 CONG. MONTHLY 4, 4 (1978).

⁴² *Id.*

⁴³ *Id.*

Rights, according to Rabbi Lichtenstein, are foreign to Jewish law. They are not the language of the Torah and its scholars. For Rabbi Lichtenstein, the notion that rights should play a central role in a discussion of an individual's place in society is anti-halakhic. Rights belong to Western jurisprudence, not to halakha.

Like Cover, Rabbi Lichtenstein maintains that the central categories of Jewish law are obligation and duty, not rights. "The central Halakhic categories, in this area as elsewhere, are *mitzvah* and *hiyuv*—commandment and obligation, the individual's duties rather than his prerogatives To anyone familiar with Halakhic thought and Halakhic values, the point is self-evident."⁴⁴ Rights are not part of the Torah's language or logic, and they play no central role in Jewish law.

Another similarity Lichtenstein shares with Cover is that he sees Western society's emphasis on rights as flowing from the social contract tradition, whereas Jewish law's emphasis on obligation flows from its conception of the individual as commanded by God:

The point of departure for a Halakhic discussion of the individual's rights is thus fundamentally different from the secularist's. Philosophically . . . secularism regards the individual as primordially and inherently invested with unlimited rights. It is only at a secondary plane that these are somewhat circumscribed in order, as in social contract theory, to assure a *modus vivendi* with others and thus guarantee the rights of each Halakha, on the other hand, regards man as intrinsically limited . . . by his metaphysical relationship to God.⁴⁵

Rabbi Lichtenstein concludes that "[h]alakhah is a form of bondage," and that "[h]alakhah rests . . . on a metaphysical view of man as charged rather than . . . endowed"⁴⁶

Rabbi Lichtenstein highlights specific examples that illustrate his central claim that where western law speaks in the language of rights, Jewish law speaks in the language of obligation:

Two examples, both drawn from areas in which legal rights otherwise figure prominently The normative thrust of halakhah is reflected in its approach to

⁴⁴ *Id.*

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 5, 7.

reciprocal relationships, in whose formulation mutual *responsibilities* loom large. Thus, the Rambam concludes Hilkhot Sekhirut (“the laws of hire”) with the following precept: “Just as the employer is enjoined from embezzling the poor laborer’s wages or detaining them, so is the poor laborer enjoined from cheating on the employer’s work and malingering a bit here and a bit there and spending the whole day disingenuously. Rather he is obligated to be very strict with himself with respect to time and to work with all his might.”⁴⁷

Lichtenstein’s key observation is that, whereas Western law speaks of the worker’s right to receive his wages, Jewish law speaks of the employer’s obligation to pay the worker on time. Likewise, when Western law speaks of the employer’s right to the worker’s labor, Jewish law speaks of the worker’s obligation to work scrupulously for his employer.

Thus, Rabbi Lichtenstein and Cover both endorse the thesis that Judaism is a system of obligations, not a system of rights.

B. The Theory’s Influence and Reception

The thesis advanced by Professor Cover and Rabbi Lichtenstein, which distinguishes Judaism as a legal system organized around obligations as opposed to Western society’s organization around rights, has been enormously influential. It is not clear to us whether Cover or Lichtenstein would go so far as to claim that Judaism has only obligations and no rights. It is possible that Cover intended to distinguish between Judaism’s rhetoric of obligation from the Western rhetoric of rights rather than to draw a substantive distinction between the systems themselves. Similarly, it is possible that Rabbi Lichtenstein only intended to deny the *centrality* of rights in Jewish law, not their existence.

Nevertheless, the thesis advanced by Rabbi Lichtenstein and Professor Cover has given rise to the idea that there are no rights in Judaism, only duties. Their thesis has been interpreted to mean that Jewish law does not recognize or confer rights. It only assigns duties.

Citing Cover, the *Encyclopedia Judaica*’s entry on human rights informs us that in Judaism “man is perceived first and foremost

⁴⁷ *Id.* at 4.

as having obligations and not rights.”⁴⁸ The entry also states that “the point of departure [in Jewish law] being from obligations rather than from rights creates a completely different legal system than that existing in modern constitutional law.”⁴⁹ Benjamin Porat also references Cover and concludes that “Jewish law has managed to function and flourish impressively with (almost) no use of the concept ‘right.’”⁵⁰ The notion that Jewish law has no rights—only duties—appears to have struck a chord.

III. ASSESSING THE THEORY

In this section, we argue against the thesis that there are “no rights in Jewish law.” We argue that such a thesis is both conceptually and substantively problematic. Conceptually, the thesis fails to account for the correlativity of rights and duties. Substantively, the thesis fails to cohere with substantive principles and doctrines within Jewish law. We develop these two arguments below.

A. The Conceptual Objection: The Correlativity of Rights and Duties in Hohfeld’s Analysis

The most extensive and perhaps influential analysis of rights was offered by Wesley Newcomb Hohfeld in his paper “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning.”⁵¹ Hohfeld notes that the term “rights” has four separate meanings or usages in legal discourse: liberty-rights, claim-rights, powers, and immunities.⁵² The most important meaning for our present purpose is what Hohfeld calls a “claim-right.” Hohfeld explains that a claim-right in a right holder always correlates to a duty owed by a duty-bearer to the right holder.⁵³ Hohfeld writes:

⁴⁸ 17 FRED SKOLNIK & MICHAEL BERENBAUM, *ENCYCLOPEDIA JUDAICA* 310 (2d ed. 2007).

⁴⁹ *Id.*

⁵⁰ Benjamin Porat, *Rights-Based Law vs. Duty-Based Law: Old Dilemma, New Perspectives* (manuscript at 6) (on file with authors).

⁵¹ See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L. J.* 16 (1913).

⁵² *Id.* at 30.

⁵³ *Id.* at 32.

Recognizing, as we must, the very broad and indiscriminate use of the term, “right,” what clue do we find, in ordinary legal discourse, toward limiting the word in question to a definite and appropriate meaning. The clue lies in the correlative “duty,” for it is certain that even those who use the word and the conception “right” in the broadest possible way are accustomed to thinking of “duty” as the invariable correlative.⁵⁴

Thus, according to Hohfeld, “[d]uty’ and ‘right’ are correlative terms. When a right is invaded, a duty is violated.”⁵⁵ Pursuant to his view, to speak of X’s right held against Y is logically and conceptually equivalent to speaking of Y’s duty owed to X.⁵⁶ As Hohfeld explains: “[I]f X has a right against Y that he shall stay off the former’s land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.”⁵⁷ More generally, A has a claim right “that B ϕ if and only if B has a duty to A to ϕ .”⁵⁸

Hohfeld’s analysis of claim-rights places significant pressure on Cover and Lichtenstein’s thesis. Given the correlativity of claim-rights and duties, a system of claim-rights is *ipso facto* a system of duties—and a system of duties is *ipso facto* a system of claim-rights. It is, of course, interesting that some systems of law choose to frame their norms from the perspective of the right holder, while others frame their norms from the perspective of the duty bearer.⁵⁹ However, semantics aside, the content of a norm formulated as X’s right against Y is identical to a norm formulated as Y’s duty owed to X.

It follows from Hohfeld’s analysis that many of the duties imposed by Jewish law also confer rights. For example, the Jewish law duty to not murder is equivalent, under Hohfeld’s analysis, to an individual’s right to life. Similarly, the Jewish law duty to support the poor is equivalent, under Hohfeld’s analysis, to the poor person’s right

⁵⁴ *Id.* at 31.

⁵⁵ *Id.* at 32.

⁵⁶ *Id.*

⁵⁷ *Id.* See also THEORIES OF RIGHTS, *supra* note 7, at 8 (“To say that P has a natural right to free speech . . . is usually to say . . . that people owe a duty to him not to interfere with the free expression of his opinions.”).

⁵⁸ See Leif Wenar, *Rights*, STAN. ENCYC. PHIL. ARCHIVE, <https://plato.stanford.edu/archives/spr2021/entries/rights/> (last updated Feb. 24, 2020).

⁵⁹ There may be rhetorical or pedagogical advantages to one over the other. This is one way of understanding Cover’s thesis discussed above.

to welfare. Likewise, the Jewish law duty to provide a child with an education is equivalent, under Hohfeld's analysis, to the child's right to an education.⁶⁰ Thus, Hohfeld's analysis of claim-rights rules out the "no rights in Jewish law" assertion. Benjamin Porat's claim that "Jewish law has managed to function and flourish impressively with (almost) no use of the concept of 'right'"⁶¹ may be true regarding the word "right,"⁶² but it is false regarding the *concept* of "right."

B. The Substantive Objection

Our second argument against the "no rights in Jewish law" theory is that it is inconsistent with substantive principles and doctrines within Jewish law. Beyond the implications of the Hohfeldian analysis of the previous section, which would allow us to infer Y's right whenever X has a duty to Y, our claim in this section is that a clear-eyed analysis of Jewish law reveals that halakha is full of rights protecting an individual's entitlements. In some instances, we claim Jewish law is explicitly interested in securing an individual's right. Further, even where Jewish law does not explicitly speak in the language of rights, "rights" are often inherent in a given set of norms. We contend that the failure to appreciate these rights can lead to an incomplete and inaccurate picture of the halakhic norms in question. Our goal in this section is not to provide a comprehensive list of such halakhic rights. Rather, our purpose is to offer a few examples that

⁶⁰ The same is true in the other direction. The rights conferred by the legal systems of the West impose duties on others to supply those rights.

⁶¹ Porat, *supra* note 50.

⁶² Of course, this is almost trivially true, since the word "right" is an English one. Note that the Hebrew word "*mishpat*," in some contexts, appears to denote 'rights.' See, e.g., Deut. 18:3 ("the right of the priests"); Deut. 21:17 ("the right of the firstborn"); I Samuel 8:11 ("the right of kings"); Exodus 21:9 ("all the rights of a daughter"); Job 36:6 ("give to the poor their right"); Isaiah 10:2 ("to take away the right of the poor"). In what appears to be a related meaning, the word "*mishpat*" also denotes one's "due" or "needs". See, e.g., Exodus 28:30 according to the commentary of Hizkuni *ad loc* ("Aaron shall bear the needs of Israel"); I Kings 8:59 according to the commentary of Radak and Metzudat David *ad loc* ("to provide for the needs of His people Israel"). These two meanings (right and needs) are naturally related. A right protects a person's need and secures that which is due to him. See also Ramban Exodus 15:25, suggesting that "*mishpat*" denotes a law that is properly measured and fairly distributed. Ramban's comment appears to come close to a notion of distributive justice, where law (or *mishpat*) properly protects individuals' needs and what is due to them—i.e., their rights.

illustrate our main claim. A careful and systematic analysis of Jewish law would allow these examples to be multiplied several-fold.

C. The Worker's Right to Eat During Production

Our first example is that of the agricultural worker's right in Jewish law to eat from the food he produces for his employer. This right is widely recognized, and it is codified by commentators as one of the 613 biblical commandments.⁶³ In three places, Maimonides characterizes this mitzvah as an entitlement of the worker, writing that it is a biblical commandment (*mitzvah*) "that the worker shall [be entitled to] eat the produce [of the employer] that he labors on."⁶⁴ This right, like all claim-rights, correlates to a duty incumbent upon the employer, which Maimonides also formulates in his discussion of the rules associated with the mitzvah: "[T]he employer is obligated to allow the worker to consume from what he produces."⁶⁵

But, in three places, Maimonides singles out the worker's *right* to eat as the essence of the mitzvah—in his *Sefer ha-Mitzvot*, in his short summary of the mitzvot, and in his introduction to the *Laws of Sekhirut*.⁶⁶ This emphasis is consistent with the underlying rationale of the mitzvah articulated by some commentators who explain that the mitzvah is designed to protect the worker's interests.⁶⁷ Since it is natural for a person to crave the food that he produces with his own hand, it would be inhumane to deny the worker the right to enjoy (some of) the food he produces, even though it "belongs" to the employer.⁶⁸ In this example, the mitzvah is explicitly formulated by Maimonides as a worker's entitlement, and according to the explanation of these

⁶³ See Maimonides, *Sefer ha-Mitzvot* Positive Commandments, no. 201; *Sefer ha-Hinukh*, Mitzvah no. 576; *Sefer Mitzvot Gadol* (Semag) Positive Commandments, no. 91; *Sefer ha-Battim*, Mitzvah no. 202.

⁶⁴ See Maimonides, *Sefer ha-Mitzvot* Positive Commandments no. 201; *Mishneh Torah*, Koteret to Hilkhoh Sekhirut Mitzvah no. 4; *Minyan ha-Katzar*, Mitzvah no. 201. The quoted language is a direct English translation provided by the authors of this article.

⁶⁵ *Mishneh Torah*, *Sekhirut* 12:1.

⁶⁶ See *Sefer ha-Mitzvot* Aseh 201; *Mishneh Torah*, Koteret to Hilkhoh Sekhirut, Mitzvah no. 4; *Minyan ha-Katzar* 201.

⁶⁷ *Rabbenu Bahya*, Deuteronomy 23, 25; *Sefer ha-Battim*, Mitzvah no. 202.

⁶⁸ See *Rabbenu Bahya*, Deuteronomy 23, 25; *Sefer ha-Battim*, Mitzvah no. 202.

other commentators, the mitzvah's underlying goal is to protect the humane labor conditions of the worker.⁶⁹

The striking feature of this example is that the commandment (*mitzvah*) is characterized primarily as conferring a right upon the worker, not as bestowing an obligation upon the employer.

D. Rule-Conferring Mitzvot and Rights

The previous example demonstrates that some mitzvot are in fact conceived of, and formulated as, rights. In the example to follow, we argue that a significant portion of the mitzvot that comprise Jewish civil law are not formulated as duties. Rather, they are conceived of as power-conferring rules (*dinim*), a large subset of which generate individual rights. Take for example the mitzvot governing torts. The 236th positive mitzvah, Maimonides writes, is “that He instructed us with the rules governing personal injury.”⁷⁰ Maimonides also codifies the “rules governing ox [damages,]” “the rules governing pit [damages,]” and “the rules” of other forms of damages as mitzvot.⁷¹ These mitzvot are not formulated as duties but rather as rules (*dinim*). Furthermore, when we analyze the substantive provisions of these rules, it is clear that many of them confer rights. Consider Maimonides' discussion of trespassing animals in the fifth chapter of the Laws of Monetary Torts. Maimonides writes:

A grazing animal that trespasses and enters private land, even if it has not yet caused damage, [the landowner] can warn the animal's owner . . . if [after three warnings] the animal owner still fails to prevent his animal from trespassing, the landowner has the right (lit. is permitted) to [preemptively] slaughter the animal...⁷²

This provision confers upon a landowner the right to preemptively seize trespassing cattle in order to protect his own property.

This example illustrates a larger phenomenon within Jewish civil law. Maimonides formulates the mitzvot governing the realms of torts,

⁶⁹ Rabbenu Bahya, Deuteronomy 23:25; Sefer ha-Battim, Mitzvah no. 202.

⁷⁰ Sefer ha-Mitzvot, Mitzvah no. 236.

⁷¹ See Mishneh Torah, Koteret to the Laws of Monetary Torts; Sefer ha-Mitzvot, Mitzvah nos. 240-41.

⁷² See Sanhedrin 2:12.

property, contracts, bailments, estates and inheritance as *rules* (*dinim*)—"that He instructed us with the rules (*be-din*) of X."⁷³ An analysis of these "rules" reveals that many of them confer rights.⁷⁴

E. Charity and the Right to Welfare

We now turn to a third type of counterexample to the belief that there are "no rights in Jewish law." In this section, we argue that for some mitzvot, even if they are *formulated* as a duty, their main normative and moral emphasis lie in the *right* that they generate. Consider, for example, the mitzvah of charity (*tzedakah*). Maimonides clearly formulates *tzedakah* as an obligation incumbent upon the giver. In two places, Maimonides formulates the positive commandment "to give charity"⁷⁵ Charity, in theory, could be conceptualized so as to emphasize the duty of the giver instead of the right (or entitlement) of the recipient. Virtue ethicists might say that the duty of charity is to facilitate the giver's virtue of benevolence. For example, some writers characterize a Christian conception of charity according to which "[a]msgiving was understood as a means to redemption" for the wealthy, not a means to aid the poor.⁷⁶ As one writer puts it, "God could have made all men rich, but He wanted there to be poor people in this world, that the rich might be able to redeem their sins."⁷⁷ These views clearly place the moral emphasis of charity on the giver's duty, rather than on the recipient's right.

Although Jewish law clearly formulates the mitzvah of *tzedakah* as an obligation incumbent upon the giver, the substantive halakhic rules of charity reflect the halakha's emphasis on protecting the rights of the recipient. Thus, we argue that the Jewish law

⁷³ See e.g., Sefer ha-Mitzvot Mitzvah 242-244 (the rules of bailments), 245 (the rules of acquisitions), 248 (the rules of estates).

⁷⁴ See e.g., Babylonian Talmud, Bava Kamma 27b-28a (establishing a right to self-help, the rule of *avid inish dina le-nafsheih*); Babylonian Talmud, Bava Metzia 108a and Mishneh Torah, Neighbors 12:5 (conferring the right of first refusal on the owner of abutting land); Babylonian Talmud, Bava Metzia 10a (establishing the right of a worker to withdraw from an employment contract without penalty); Mishneh Torah *Mechirah* 12:13-15 (discussing the right to invalidate a transaction when the item or its value has been misrepresented, the rule of *mekach ta'ut*).

⁷⁵ Sefer ha-Mitzvot Minyan ha-Katzar 195; Mishneh Torah, Koteret to Hilkhos Matnot 'Aniyim no. 12.

⁷⁶ SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 64 (Harvard Univ. Press ed., 2004).

⁷⁷ *Id.* at 2; see also Babylonian Talmud, Bava Batra 10a.

obligation to give charity can be seen as deriving from the right of the poor person to welfare. Put differently, the right of the poor person to welfare is more fundamental than the giver's duty. This is because it is the poor person's right that grounds the giver's duty.⁷⁸

We draw attention to three halakhic rules that support this conclusion. First, the amount of charity that one is obligated to give is *determined* by the needs of the poor.⁷⁹ The fact that the parameters of the obligation are filled out by the welfare rights and needs of the recipient implies that *tzedakah*, despite being formulated as an obligation, actually flows from the right of the poor to have their needs met.⁸⁰ It is the right of the poor to have their needs met that gives rise to the duty to give charity.

Second, Jewish law conceives of *tzedakah* as a legally enforceable debt. If an individual is disinclined to give charity, or fails to do so, the court is authorized to seize his assets to satisfy the needs of the poor.⁸¹ As such, the Jewish law conception of *tzedakah* is closer to our conception of taxation than to our contemporary notion of charitable giving. Commentators are puzzled by this feature of *tzedakah*, since affirmative personal obligations comparable to *tzedakah* are generally not enforceable in Jewish law.⁸² Jewish law authorities explain that the court's power to seize assets flows from the poor individual's *right* to welfare, not from the giver's obligation.⁸³ According to these authorities, an analysis that focuses exclusively on

⁷⁸ One helpful way to think about our claim is to consider Joseph Raz's definition of a right. Raz holds that an individual has a right if, and only if, an aspect of his well-being is a sufficient reason for holding some other person(s) to be under a duty. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 166-72 (Oxford Univ. Press ed., 1986). Under Raz's theory, "rights are grounds of duties in others." *Id.* ("[I]f an individual has a right then a certain aspect of his well-being is a reason for holding others to be under a duty."). Likewise, we argue that even though the Jewish law obligation of *tzedakah* is formulated as a duty on the giver, the reason for that duty is explained by the more fundamental right of the recipient.

⁷⁹ See Tur, Yoreh De'ah 249:1; Mishneh Torah, Matnot Aniyim 7:3.

⁸⁰ See RAZ, *supra* note 78. Returning to Joseph Raz's definition of rights, we can say that an aspect of the poor person's well-being is the reason for holding the giver to be under a duty.

⁸¹ See Bava Batra 8b; Shulchan Arukh Yoreh De'ah 248:1.

⁸² See Tosafot, Bava Batra 8b, s.v. *Akhfeih*; Beit Yosef Yoreh De'ah 248:1. See also RABBI MOSHE BEN NACHMAN (RAMBAN), DINA DE-GARMI 129-30 (Moshe Hirshler ed., 1969).

⁸³ Arukh ha-Shulhan Yoreh De'ah 240:6. See also Ritva Ketubot 49b; Radbaz, Matnot 'Aniyim 7:10.

the giver's *tzedakah* obligation cannot explain the court's power to seize assets for *tzedakah*. Rather, it is the welfare entitlement of the poor individual that explains the novel halakhic rule. This implies that the mitzvah of *tzedakah* is driven by the *right* of the poor to have their needs met.

Third, closely related to the previous point, some authorities hold that if a wealthy individual refuses to give charity altogether, a poor person has the right to seize (without court intervention) some of the wealthy individual's personal assets to satisfy his basic needs. Furthermore, these authorities hold that if the poor person can demonstrate that he has proper standing—i.e., he is the closest relative or neighbor, which Jewish law prioritizes for *tzedakah* over other recipients—he has a right to seize the wealthy individual's possessions. This applies even when the wealthy individual is ready and willing to give charity to a different recipient.⁸⁴ Viewed solely from the perspective of the giver's obligation, it is not clear how we can make sense of the poor person's power to seize the wealthy individual's assets. However, when viewed from the perspective of the poor person's rights, the legal holding of these authorities is quite natural. The poor individual is entitled to seize assets to vindicate his legal rights. This suggests that the recipient's right to welfare is a fundamental component of Judaism's conception of *tzedakah*. Thus, our discussion of *tzedakah* demonstrates that, even where Jewish law formulates a mitzvah as an obligation, that obligation may in fact be grounded in the rights of the correlative beneficiary.

F. Section Summary: Mitzvot are not Reducible to Obligations

The examples covered in this section reflect three different types of counterexamples to the idea that Jewish law has no rights. The first example of the agricultural laborer's right to consume the food he produces illustrates that some mitzvot are *explicitly* formulated as rights. The second example illustrates that many mitzvot are formulated as rule-conferring (*dinim*) rather than duty-generating, and a careful analysis of the rules conferred by these mitzvot demonstrates that they often confer individual rights. The third example illustrates how, even when a mitzvah is explicitly formulated as an obligation, its

⁸⁴ See Machaneh Ephraim Zekhiyah u-Matanah 8; Gilyon Maharsha, Shulchan Arukh Yoreh De'ah 248:1.

substantive provisions reflect that its moral edge and emphasis lies in the right that it confers. In our example, it is the poor person's right to welfare that grounds the giver's obligation of *tzedakah*.

This last example puts significant pressure on Benjamin Porat's thesis. Porat claims that even if Hohfeld is correct that rights and duties are correlative of each other, the fact that Jewish law formulates its rules in terms of duties establishes that the right is merely a byproduct or an epiphenomenon of the duty.⁸⁵ According to Porat, the duty is always more fundamental than the right in Jewish law. The *tzedakah* example, however, suggests the opposite. Even when Jewish law formulates a mitzvah as a duty, the moral emphasis and edge of the mitzvah may nevertheless lie in the right it confers. As between the right and the duty of *tzedakah*, the right is more fundamental.

IV. TWO IDEAS THAT ANIMATE THE NO RIGHTS IN JEWISH LAW THESIS

A. Mitzvah: Commandment or Obligation

The idea that Judaism consists of duties and no rights appears to be motivated by two ideas. The first is that Judaism is a system of mitzvot and that the concept of a *mitzvah* is best translated and understood as "obligation." As we noted earlier, we are skeptical of that claim. The examples surveyed from the previous section—and, again, these examples can be multiplied—indicate that it is incorrect to characterize mitzvot as uniquely generating obligations. In fact, these examples, especially the category of *dinim* (rule-conferring mitzvot) suggest a much broader conclusion. "Mitzvah" should not be understood as "obligation" at all. Strictly speaking, the word mitzvah denotes "commandment."⁸⁶

⁸⁵ See, e.g., Porat, *supra* note 50, at 10 ("[T]he limited talmudic recognition of rights is only of rights as acquired, not of rights as innate.").

⁸⁶ Robert Alter, in his translation of the Bible, consistently translates the word "*mitzvah*" as "command" or "commandment." See, e.g., Exodus 24, 12; Leviticus 4, 2; Deuteronomy 5, 28; 6, 1; 6, 25. The Jewish Publication Society ("JPS") Hebrew-English Tanakh often translates the word "*mitzvah*" as "instruction." For example, see its rendering of Deuteronomy 5, 28; 6, 1; 6, 25. See also MARCUS JASTROW, DICTIONARY OF THE TARGUMIM, TALMUD BAVLI, TALMUD YERUSHALMI AND MIDRASHIC LITERATURE p. 823 (1971) (demonstrating how the Talmud translates mitzvah as "command"). Solomon Mandelkern, in his Concordance on the Bible, renders "*mitzvah*" as "precept" or "law." SOLOMON MANDELKERN, CONCORDANCE

Recall Cover's formulation that "the principal word in Jewish law . . . is the word 'mitzvah' which literally means commandment but has a general meaning closer to 'incumbent obligation.'"⁸⁷ We agree with Cover that the word means "commandment"; however, we do not agree with Cover's claim that the word's "general meaning" is closer to "incumbent obligation."⁸⁸

Rabbi Lichtenstein also appears to conflate the concept of a commandment with that of an obligation. He writes, "[t]he central Halakhic categories, in this area as elsewhere, are *mitzvah* and *hiyuv*—commandment and obligation, the individual's duties rather than his prerogatives."⁸⁹ Here, Lichtenstein appears to reduce both the concept of commandment (*mitzvah*) and obligation (*hiyuv*) to that of duty.

Technically, the word *mitzvah* derives from *tzivah*, meaning "he commanded," and denotes the "commandment" itself.⁹⁰ Understood this way, the concept of *mitzvah* is best understood as the "command of the sovereign" or the "law of the lawgiver."⁹¹ This is quite distinct from the concept of obligation. As a logical matter, it is quite possible for the lawgiver to command that X shall be *entitled* to possess Z, or that X shall have the *right* to Φ . The concept of a "commandment" is consistent with a command conferring rights. Think of a noble host entertaining company for dinner who commands his butler that the distinguished dinner guest shall have the right to a second portion. Or consider the command of a sovereign declaring that women shall have the right to vote. We see nothing in the concept of commandment—or *mitzvah*—to suggest that commandments must

ON THE BIBLE [p. 990] (Shulsinger Bros. 1955). In Reuben Alcalay's English-Hebrew Dictionary, he does not provide the Hebrew word "mitzvah" as a translation of the English "obligation" or of the English "duty." [Vol. 2] RUBEN ALCALAY, THE COMPLETE ENGLISH-HEBREW DICTIONARY [p. 2510] (Massadah Publ'g Co. 1975). But, he does provide "mitzvah" as a translation of the English "commandment." *Id.* In Alcalay's Hebrew-English Dictionary, he renders the Hebrew word "mitzvah" as "command, behest, commandment, precept, law." [Vol. 2] RUBEN ALCALAY, THE COMPLETE ENGLISH-HEBREW DICTIONARY [p. 1457] (Massadah Publ'g Co. 1964). But he also acknowledges that it is sometimes used to connote "religious duty, obligation." *Id.*

⁸⁷ Cover, *supra* note 1, at 65.

⁸⁸ *See id.*

⁸⁹ Lichtenstein, *supra* note 41, at 4.

⁹⁰ Cover, *supra* note 1, at 65.

⁹¹ Note especially the JPS's rendering of *mitzvah* as "instruction" and Mandelkern's rendering of it as "precept" or "law." *Supra*, n. 86.

bottom out in duties. Nothing prevents commandments from conferring rights.

B. The Duty to Obey the Law and the Law's Substantive Content

The second idea motivating the “no rights in Jewish law” thesis is the thought that because we are obligated to obey God’s commands, the commandments themselves must constitute a system of obligations. This idea underlies Rabbi Lichtenstein’s analysis. After noting that the normative thrust of Judaism lies in its assignment of obligations and responsibilities rather than in the conferral of rights, Rabbi Lichtenstein explains that:

The normative thrust of Halakhic law and ethics is not, of course accidental. It is rooted in a metaphysical and theological base. Halakha regards the individual – man in general but the Jew in particular – as God’s servant. The Torah is clear and emphatic on this point. “For unto Me the children of Israel are servants; they are My servants whom I brought forth out of the land of Egypt: I am the Lord your God.” . . . *Halakha speaks of human bondage*.⁹²

But Rabbi Lichtenstein’s analysis conflates two separate ideas. One idea pertains to the normative *reasons for* obeying God’s law. Here, Rabbi Lichtenstein explains that man as servant ought to obey God’s command.⁹³ The second idea pertains to the substantive *content* of the law, the content of God’s particular commands. Rabbi Lichtenstein appears to maintain that, because man is obligated to obey

⁹² Lichtenstein, *supra* note 41, at 4-5.

⁹³ *Id.* at 5. Here Lichtenstein elaborates:

This bondage is grounded in two principles. It derives, in part, from the sheer metaphysical and existential chasm between man and God, from the fact that, given their respective natures, one *ought* to be servant and the other master. It derives, equally, not only from what God is but from what He does and/or has done, from His role as creator, sustainer and provider and from man’s corresponding position of dependence. “They are My servants whom I brought forth out of the land of Egypt.” Whatever the basis, however, the reality should be clear. *Halakha speaks of human bondage*.

Id. (emphasis in original).

God's laws, the substantive content of the law must also be comprised of individuals' obligations, not their rights.⁹⁴

We believe this is a mistake. The underlying normative reasons that make God's commands obligatory and binding are distinct from the substantive content of those commands—to wit, whether God's commands confer rights or impose duties.⁹⁵ Cover also appears to conflate these two concepts. For instance, Cover attempts to motivate his thesis that Jewish law is comprised of obligations, not rights, by appealing to the normative basis of the law—that it was all commanded at Sinai and that “we are *obligated to obey that command*.”⁹⁶ Like Rabbi Lichtenstein, Cover believes that an obligation to obey the law implies a law comprised of obligations.

Cover and Rabbi Lichtenstein's general thesis appears to stem from the idea that, if the normativity of the law stems from a duty to obey God's commands, then the commandments themselves are just *duties owed to God*. The thought is that even if God commands that a poor person shall have a “right to welfare,” my duty to make good on that right is not in fact *owed to the poor individual*. It is a duty owed to God. The poor individual is merely an occasion for me to satisfy my duty owed to God, and the entitlement of the poor individual is a

⁹⁴ *Id.* at 4. Rabbi Lichtenstein's discussion of the reciprocal responsibilities of the employer and worker is clearly about the law's substantive content, not about the normative reasons for obeying the law.

⁹⁵ John Mackie makes a similar point about Kant's moral philosophy. Mackie, *supra* note 7, at 169. Even if Kant's moral philosophy is at bottom a duty-based system grounded in the categorical imperative, that system nevertheless confers rights upon individuals:

It is conceivable that sets of goals and rights should follow from a single fundamental duty. Kant, for example, attempts to derive the principle of treating humanity as an end from the categorical imperative, “Act only on that maxim through which you can at the same time will that it should become a universal law.” Taken as literally as it can be taken, the principle of treating humanity—that is, persons, or more generally rational beings—as an end would seem to set up a goal. But it could well be interpreted as assigning rights to persons. Alternatively it could be argued that some general assignment of rights would follow directly from the choice of maxims which one could will to be universal. In either of these ways rights might be derived from duties.

Id. In any event, it is clear from Kant's *Doctrine of Right* that the categorical imperative—the fundamental duty of Kant's moral system—is intended to generate an entire system of rights. See Immanuel Kant, *Metaphysics of Morals* (Cambridge University Press, 1996).

⁹⁶ See Cover, *supra* note 1, at 67 (“[In Judaism] all is, was, and has been commanded—and we are obligated to this command.”).

mirage, an epiphenomenon of the duty owed to God. Furthermore, to return to our earlier example of the noble host, the present view would hold that the butler owes a duty *to his master*; when the guest requests seconds, the butler satisfies the duty he owes *to his master*. The guest is merely an occasion for the butler to fulfill his obligation to the master.

H.L.A. Hart explicitly advances this conception of religious law. Further, Hart appeals to this conception of religious law to deny that Jewish law confers rights. In his work on rights, Hart discusses “codes of behavior which do not purport to confer rights but only to prescribe what shall be done.”⁹⁷ Hart writes:

[T]here are of course many types of codes of behavior which only prescribe what is to be done It would be absurd to regard these codes as conferring rights [E]ven a code which is plainly a moral code need not establish rights; the Decalogue is perhaps the most important example. Of course, quite apart from heavenly rewards human beings stand to benefit by general obedience to the Ten Commandments: disobedience is wrong and will certainly harm individuals. But it would be a surprising interpretation of them that treated them as conferring rights.⁹⁸

Hart interprets the Ten Commandments as a moral code that prescribes “what is to be done” by imposing obligations. He explicitly denies that the Ten Commandments confer rights.

Why is Hart opposed to viewing the Ten Commandments—which, *inter alia*, command individuals to not murder, to not steal, etc.—as conferring rights? Hart explains:

In such an interpretation obedience to the Ten Commandments would have to be conceived as due to or owed to individuals, not merely to God, and disobedience not merely as wrong but as *a wrong to* (as well as harm to) individuals. The Commandments would cease to read like penal statutes designed only to rule out certain types of behavior and would have to be thought of as rules placed at the disposal of individuals

⁹⁷ H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 182 (1995).

⁹⁸ *Id.*

and regulating the extent to which *they* may demand certain behavior from others. Rights are typically conceived of as *possessed* or *owned by*, or *belonging to* individuals, and these expressions reflect the conception of moral rules as not only prescribing conduct but as forming a kind of moral property of individuals to which they are as individuals entitled; only when rules are conceived in this way can speak of *rights*⁹⁹

Hart maintains that Jewish law cannot generate obligations owed to individuals—only to God. He holds that it is the nature of divine law that its duties and obligations are owed exclusively to God.

From Hart's perspective, religious law cannot confer rights because that would suggest that God's commands generate duties that are not merely owed to God but also to individuals.¹⁰⁰ We disagree. Instead, we are persuaded that Jewish law imposes duties that are *owed to individuals* and confers rights that *belong to them*. We believe that Jewish law confers rights that genuinely form, to borrow Hart's language, "a kind of moral property of individuals to which they are as individuals entitled."¹⁰¹ In fact, some of these are evident in the three examples we cited earlier. As we discussed above, some mitzvot, such as the agricultural worker's right to consume the food he produces, are clearly rights that belong to the individual. In the case of *tzedakah*, the duty is clearly owed to the disadvantaged person, and it is his prerogative to vindicate his right by seizing the resources of the wealthy person who refuses to participate in *tzedakah*. Furthermore, the example of *dinim* that was previously discussed—mitzvot that are power-conferring rules—is exactly the category that Hart sees as quintessential of rights.¹⁰² The mitzvot that are constituted by the rules of torts, property, contracts, bailments, estates, and inheritance are precisely "rules placed at the disposal of individuals and regulating the extent to which *they* may demand certain behavior from others."¹⁰³

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See *supra* notes 71-74.

¹⁰³ See *supra* notes 71-74.

C. Taking *Bein Adam la-Chaveiro* Seriously

We now discuss two principles within Jewish law that reinforce our position that many of the mitzvot governing conduct between individuals are in fact duties *owed to individuals*, that these halakhic rules are in fact placed at the disposal of individuals, and that these rights *belong to them*. Consider first the idea of *teshuvah* (atonement) in Jewish law. Maimonides distinguishes between wrongdoings committed against God (*'aveirot bein adam la-makom*) and wrongdoings committed against other individuals.¹⁰⁴ Maimonides writes:

Repentance [before God] and Yom Kippur atone only for wrongdoings that are [exclusively] between man and God, such as one who eats forbidden food . . . but wrongdoings that are between individuals, such as one who injures another . . . or steals from him, and the like, are such that the wrongdoer cannot receive atonement until he makes restitution to the individual [he has wronged] and appeases him He (the wrongdoer) must appease him (the individual he has wronged) and request forgiveness from him.¹⁰⁵

Here Maimonides holds that for wrongdoings committed against God, it is sufficient for one to repent before God to achieve atonement. However, for wrongdoings committed against other individuals, the wrongdoer cannot achieve atonement until he has reconciled with the party he wronged. The wrongdoer's atonement depends on the forgiveness of the victim. The fact that wrongdoings committed against another individual under Jewish law cannot be rectified without *that individual* granting forgiveness suggests that mitzvot governing interpersonal conduct are truly duties *owed to individuals* and rights *that belong to them*. The wrongdoer cannot be released from his violation until the victim, whom he has wronged, releases him. Thus, the duties governing interpersonal relationships (*bein adam la-chaveiro*) are not merely duties owed to God.

The second Jewish law principle that supports our conclusion is that of *pesharah*. In a nutshell, the principle of *pesharah* provides that notwithstanding the fact that Jewish law offers comprehensive

¹⁰⁴ Mishneh Torah, Teshuvah 2:9.

¹⁰⁵ *Id.*

provisions of civil law governing property rights, torts, contracts, estates, sales, transfers, and the like, that would determine the outcome of *beit din* litigation, Jewish law generally allows, and even encourages, parties to a dispute to waive their rights and to settle their disagreements amicably in a manner that suits them.¹⁰⁶ Put differently, Jewish law does not insist that civil disputes (*dinei mammon*) be resolved in accordance with the strict provisions of its own rules if the parties are content to settle on their own. In fact, it is considered a mitzvah for the parties to forgo their formal legal entitlements and to settle.¹⁰⁷ When the parties cannot reach a settlement on their own, it is considered praiseworthy for them to authorize the presiding judge to impose a settlement that would resolve the dispute amicably and in a manner that is beneficial to both parties.¹⁰⁸ Of course, parties are not required to authorize the judge to do *pesharah* (court-imposed settlement), but they are encouraged to do so.¹⁰⁹

The fact that Jewish law allows the parties to settle their dispute on their own and to bypass the substantive provisions of its civil law reflects that the provisions of its civil law are largely aimed at securing the rights and entitlements of the individuals themselves. If *the parties* are amenable to resolving their dispute amicably or through a court-imposed settlement—all the better. *Their* rights are the ones being protected by the system of Jewish law; therefore, it is up to *them* to decide whether to assert or waive their rights in favor of a mutually acceptable settlement. This suggests that many of the civil law obligations of Jewish law are primarily owed to *other individuals*; they are not duties owed exclusively to God. It is the party whose entitlements are being protected that has the power to waive them, settle the case, and resolve the dispute in a manner that diverges from the statutes and legal provisions of Jewish civil law.¹¹⁰ This implies that Jewish law sees no value in enforcing the particular duties of its

¹⁰⁶ See Babylonian Talmud, Sanhedrin 6b-7a; Riaz Kuntrus ha-Ra'ayot, Sanhedrin 5b; Shakh Choshen, Mishpat 12:6.

¹⁰⁷ See Rashi, Deuteronomy 6, 8; Ramban, Deuteronomy 6, 18; Babylonian Talmud, Sanhedrin 6b-7a; Bava Metzia 30b.

¹⁰⁸ See Babylonian Talmud, Sanhedrin 6b-7a; Shulchan Arukh Choshen, Mishpat 12; Derishah 12:2.

¹⁰⁹ See Sanhedrin 5b; Rabbi Itamar Rosensweig, *Pesharah vs. Din*, JEWISHPRUDENCE (Apr. 21, 2020), <https://bethdin.org/pesharah-vs-din> (providing an overview of Pesharah).

¹¹⁰ For a clear statement that it is at the parties' discretion to decide how they wish to resolve their dispute, see Shulchan Arukh Choshen, Mishpat 12:2.

civil law (*dinei mammon*) separate from protecting the interests of the party whose rights are being protected.

Both of these principles—that of atonement for interpersonal wrongdoings and that of *pesharah*—exhibit the features of what H.L.A. Hart calls the choice theory of rights (sometimes referred to as the “will theory of rights”). According to this theory, the essence of a right is that it makes the right holder “a small scale sovereign.”¹¹¹ To wit,

the function of a right is to give its holder control over another’s duty. Your property right . . . contains a power to waive (or annul, or transfer) others’ duties. You are the “sovereign” of your computer, in that you may permit others to touch it or not at your discretion. Similarly a promisee is “sovereign” over the action of the promisor: a promisee has a right because she has the power to waive (or annul) the promisor’s duty to keep the promise.¹¹²

Both of the principles we discussed in this section—atonement for interpersonal wrongdoings and *pesharah*—capture the idea that the right holder has the power to waive or annul the other’s duty.¹¹³ In both cases, the right holder has the power to annul the perpetrator’s wrongdoing by releasing him from culpability.

Of course, many of the mitzvot are duties owed exclusively to God.¹¹⁴ Jewish law designates this category of mitzvot as “*bein adam la-makom*,” literally commandments between man and God.¹¹⁵ Our central claim is that the other category of mitzvot—those *bein adam la-chaveiro* (literally, between individuals)—genuinely confers rights

¹¹¹ H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 183 (Oxford Univ. Press ed., 1982).

¹¹² Wenar, *supra* note 58.

¹¹³ We do not wish to imply that Jewish law endorses H.L.A. Hart’s “choice theory” of rights over, say, an “interest” theory of rights. We believe that rights in Jewish law also exhibit the features of an “interest” theory of rights, as we indicated above in our discussion of *Tzedakah* and Raz’s definition of rights. *Supra*, notes 78 and 80. Here, our point is simply that rights in Jewish law *also* exhibit the features of the choice theory in making the right holder a small-scale sovereign over the duty-bearer’s obligation. See Wenar, *supra* note 58 (discussing the choice and interest theories of rights).

¹¹⁴ For the distinction between mitzvot *bein adam la-chaveiro* and mitzvot *bein adam la-makom*, see Mishnah Yoma 8:9.

¹¹⁵ *Id.*

upon individuals and generate duties owed *to them*. More to the point, we fear that the “no rights in Jewish law thesis,” like Hart’s analysis, fails to appreciate the distinction between mitzvot *bein adam la-chaveiro* and *bein adam la-makom*, because it reduces our halakhic obligations to others into instances of *bein adam la-makom*—that is, into mere instances of satisfying duties owed to God.

Put differently, the “no rights in Jewish law” camp sees no fundamental difference between the obligation to, for example, not wear clothing made of wool and linen (*kelayim*) and the obligation to not harm one’s neighbor.¹¹⁶ Both are obligations owed exclusively God. In their view, interacting with one’s neighbor is a mere *occasion* for satisfying duties owed to God, in the same way that getting dressed is an occasion to satisfy the obligation of *kelayim*. However, if we are to take the category of *mitzvot bein adam la-chaveiro* seriously, then we must recognize that Jewish law confers rights upon individuals, and it is those rights that we are obligated to support. It is to those individuals that our duties are owed.¹¹⁷

We conclude this section by emphasizing the distinction between the normative reasons for obeying the law and the substantive

¹¹⁶ For the *kelayim* prohibition, see Lev. 19:19; Deut. 22:9-11. For the obligation to not harm one’s neighbor, see Shulchan Arukh Choshen Mishpat 378:1.

¹¹⁷ Of course, by fulfilling our responsibilities to other individuals—*mitzvot bein adam la-chaveiro*—we are *also* fulfilling God’s commands, since He commands us to respect others’ rights through these mitzvot. Our point is that we are not *exclusively* fulfilling a duty owed to God. In our opinion, the individuals who belong to the “no rights in Jewish law” camp, like Hart, believe that when we obey the interpersonal rules of Jewish law, we are *exclusively* fulfilling an obligation owed to God. See *supra* text at note 99.

One way of explicating our position, to give the reader more intuitive traction on our claim, is through the fact that God created individuals with *tzelem elokim* (the divine image). See Genesis 1:27. This metaphysical fact makes it the case that individuals are endowed with halakhic-legal rights and powers. For an example of the idea that certain obligations between individuals flow from their special status of being endowed with *tzelem elokim*, see Genesis 9, 6. As beings created in the image of God, we owe other individuals certain duties and obligations, over which they are small-scale sovereigns. *Id.* See also Midrash Rabbah, Bereshit 24:7. Many of the *mitzvot bein adam la-chaveiro* can be understood as deriving from the special metaphysical and moral status of persons. *Id.* Again, it is God who endows people with special status; but, given that endowment, humans possess rights and entitlements that are correlative of duties that are genuinely owed to them. In this sense, our halakhic duties to others—*bein adam la-chaveiro*—impose rights and are fundamentally different from obligations owed exclusively to God such as *kelayim* (forbidden mixtures).

content of the law's provisions. We have argued that the *substantive provisions* of Jewish law confer genuine rights upon individuals. We maintain that this is consistent with Rabbi Lichtenstein's observation that the *normative basis* of Jewish law derives from the fact that we are obligated to obey God's commands.¹¹⁸ The duty to obey the law is quite another matter from the substantive content of the law's provisions. To be sure, theorists working within what Cover describes as a rights-based western tradition also endorse a duty to obey the law.¹¹⁹

V. CONCLUSION

We have argued against the thesis that denies the existence of individual rights in Jewish law. Professor Cover and Rabbi Lichtenstein have emphasized that Jewish law is primarily organized around obligations. We believe that the reception of their position has obscured the central, if quiet, role that rights play in Jewish law. Failure to appreciate the important role of rights in Jewish law leaves us with an incomplete interpretation of many mitzvot, and it does violence to the integrity of mitzvot *bein adam la-chaveiro* (interpersonal mitzvot). A complete interpretation of Jewish law must take into account both rights and duties.

To be clear, it is not our goal in this article to contend that Judaism is a rights-based system identical to that of West. Nor do we claim that Judaism is primarily a rights-based system. We take no position on the matter. Rather, our modest goal in this article is to demonstrate that individual rights do exist in Jewish law, and that those rights are central to our understanding of a host of mitzvot *bein adam la-chaveiro*.

Comparative law is a double-edged sword. In recent years it has been criticized for failing to take seriously the distinctiveness and the integrity of each disparate legal system.¹²⁰ Yet, in the instant

¹¹⁸ Lichtenstein, *supra* note 41, at 4.

¹¹⁹ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (Belknap Press, 1st ed. 1971); RAZ, *supra* note 78. Thus, these theorists clearly perceive no inconsistency between a system of law organized around individuals' rights and a normative duty to obey the law.

¹²⁰ See, e.g., Michael A. Helfand, *From Doctrine to Devotion: The Jewish Comparative Law Project*, 67 AM. J. COMPAR. L. 685, 686 (2019) (referencing both Suzanne Stone and Samuel J. Levine's comments on the "flattening impulse" of the comparative law project).

discussion of rights in Jewish law, we believe the opposite is the case. By attempting to illustrate the distinctiveness of the different bodies of law, the comparative law enterprise has persuaded itself of substantive, categorical differences between Jewish law and Western law where only rhetorical ones exist.

With respect to the present topic of rights in Jewish law, we believe that the drive to impose categorical differences on the two legal systems threatens the integrity of the fundamental substance of Jewish law. This is because it is this drive that has led theorists to deny the existence of one of its central legal categories: rights. While we readily concede that the English word “right” is not indigenous to Jewish law, the concept that the word represents is central to it. Here, then, the tools of comparative law allow us to give a voice to the quiet categories of Jewish law that might otherwise go unnoticed.