

## Because . . . : Justifying Law/Rationalizing Ethics

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ONE LINK WITHIN JUDAISM BETWEEN ETHICS AND LAW MAY BE FOUND IN the deployment of rationales in *halakha*, Jewish law. Although rationales exist in biblical as well as rabbinic legal sources, in this essay I explore two rabbinic examples that are frequently cited, considered closely related, and applied to interactions between Jews and gentiles: *mipnei darkhei shalom* ("for the sake of peace") and *mipnei eivah* ("because of concern to prevent enmity"). I survey the broad range of issues to which these rationales are attached, evaluate current theories interpreting these rationales and their relationship to each other, and conclude with reflections on the dynamic tension between and historical development of *halakha* and ethical concerns.

Embedded in the Holiness Code in Leviticus is a rule to leave the corners, gleanings, and random fruits of one's field for the poor and stranger.<sup>1</sup> The same rule is echoed a few chapters later in a discussion about pilgrimage festivals.<sup>2</sup> Deuteronomy offers a third instance of this rule, elaborating that such foodstuffs are to be left for the stranger, orphan, and widow.<sup>3</sup> In each case, the Torah (Jewish Scripture) concludes the rule with a phrase connecting it to God. In the first two, the conclusion is *ani adonai elheibhem*—"I am Adonai your God."<sup>4</sup> The Deuteronomic version, however, concludes *Yhwh an yitwareb chab adonai elheibehab b'chol me'aseh yadacha*—so that Adonai, your God, will bless you in all your handiwork.

These concluding phrases indicate possible reasons why Israelites should follow this commandment. All versions mention God, but the third offers a more expansive explanation. Suggesting that obedience garners God's blessing appeals to human reason and desires. Such explanatory phrases adjoining certain laws are found throughout the Jewish legal corpus, biblical and rabbinic.<sup>5</sup> In a profound way, these concluding phrases are more than mere explanations for obedience. They offer various kinds of justifications or prime motivations for compliance. In certain situations, one complies precisely because of the justification provided.

What purpose do such rationales serve in *halakhah* (Jewish law)? What might be the relationships between rationalization and ethics in the evolution of *halakhah*? To attend to these questions, in this essay I analyze humnarily created rationales linked to Jewish-gentile relations. The focus on Jewish-Gentile relations is purposeful. It highlights the fact that this discussion of how *halakhah* evolves and functions has real application for Jewish behavior toward the more-than-Jewish world. How Jews can and should interact with persons outside the covenantal community reflects Jewish values and dramatically affects the well-being of Jews individually and collectively. Jewish-Gentile relations are critical to Jewish survival and moral character, and they deserve special consideration.

Some laws may express attitudes and mandate behaviors toward gentiles that people today find troubling if not offensive. In this essay I do not consider these rules as living norms; I examine the historical development of these attitudes and behaviors in search of how ethical and political considerations influence (and are influenced by) such laws.

Although there are many rationales linked to laws pertaining to Jewish-Gentile relations,<sup>6</sup> I explore only two here: *mipnei darkhei shalom* (for the sake of the ways of peace) and *mipnei etzab* (for the sake of preventing enmity). Contemporary scholars of these rationales perceive them as similar if not related in goal and in function.<sup>7</sup> Analysis of these rationales as they apply to Jewish-Gentile relations, however, reveals their differences in substance and function. These laws—one of several types of rabbinic law—are called *takkanot*.<sup>8</sup> I briefly summarize the *takkanot* according to three overarching realms of human interaction: economic, social, and religious interaction. I also take stock of existing interpretations of these rationales and their possible relationship. In the concluding section I assess how this legal formulation (X because of Y) functions in isolation as well as within *halakhah*. My ultimate purpose in this essay is to explore the interaction between *ought* and *why*.

## The Rationales

### *Mipnei Darkhei Shalom*?

The phrase *mipnei darkhei shalom*—which is understood to derive from the Prov-ertb “[the Torah’s] ways are ways of pleasantness, and all its paths are peace”<sup>10</sup>—has been revered as the quintessential purpose of the Torah.<sup>11</sup> What are *darkhei shalom* (paths of peace), and how do they apply to relations with gentiles? *Takkanot* that use this rationale might be understood economically and socially.

The economic issues for which the rabbis deploy this rationale include accessing foodstuffs and protecting means of production and taxation. Talmudic

rabbis expand the Levitical command not to prevent the poor from accessing unreaped foodstuffs in the field to include poor gentiles as well, for the sake of peace.<sup>12</sup> Maimonides thinks this expansion is important enough to stipulate that Jews should consider poor gentiles in the same category as poor Jews.<sup>13</sup> Other Talmudic and medieval sages offer the contrapositive of this law in the form that Jews are to support poor gentiles just as they are to support poor Israelites—with foodstuffs as well as financially—for the sake of peace.<sup>14</sup> Maimonides links to this version the biblical verses that say that God is compassionate to all God’s creations and all the Torah’s paths are peace.<sup>15</sup> For some rabbinic authorities, this rule to support poor gentiles is contingent on the presence of poor Israelites. In other words, if a Jew comes across a poor gentile with no one about, the Jew is permitted not to attend to that gentile’s material needs.<sup>16</sup> Similar conditionality is applied to the rule that Jews are to protect gentile means of production.<sup>17</sup> Jews are to gather unattended gentile tools to protect them from being stolen, for the sake of peace. The desire to protect against thievery is not sufficient, however, to justify such behavior; the phrase *mipnei darkhei shalom* is deployed as the more compelling rationale. Finally, Talmudic sages rule that cities ought to collect taxes from both Jewish and gentile communities for the sake of peace.<sup>18</sup> This particular topic remained dormant until the twentieth century, possibly because Jews have not had authority over city governance for much of Jewish history. Recent *halakhah* states that Jews should be sure to collect taxes from all citizens regardless of religion. Here, however, the rationale “for the sake of peace” is dropped; instead, this rule is endorsed so that gentiles will have nothing about which to complain against the Israelites.<sup>19</sup>

In the social sphere, the rationale *mipnei darkhei shalom* is applied to verbal communication and care for the living and dead. Many sages through the centuries have expressed concern about how Jews interact with gentiles during the Sabbatical year, when Jews are particularly dependent on gentiles. This concern also extends to gentile festivals, when overly friendly greetings from Jews might excite gentiles in their idolatry. Some rabbis permit greeting gentiles once, *mipnei darkhei shalom*—a greeting sufficient to maintain social relations without spurring unnecessary division or stimulation.<sup>20</sup> Such fear of stimulating relations with gentiles is abandoned when gentiles are at their most vulnerable—during times of sickness, mourning, and death. Jews are to extend care to gentiles just as they are to care for Jews in similar circumstances, including eulogizing<sup>21</sup> and burying the dead,<sup>22</sup> comforting the mourning,<sup>23</sup> and attending the needs of the ill<sup>24</sup>—all for the sake of peace.<sup>25</sup> One scholar interprets this obligation as conditional on the presence of similarly needy Jews.<sup>26</sup> Literally applied and uncomfortable to fathom, this condition suggests that if there were no similarly needy Jews present, a Jew is permitted to ignore the plight of ailing and dead gentiles. Most sages, however, do not insist on this conditionality.

*Mipnei Eruah*<sup>27</sup>

Concern to protect Jewish–Gentile relations from souring prompts some rabbinic authorities to permit previously prohibited behavior. They justify these reforms with the phrase *mipnei eruah*—“because of the fear of arousing enmity.” Another way to translate this phrase is “because of the concern to prevent enmity.” *Takkanot* with this rationale pertain to economic, religious, and social interactions.

The economic legislation that uses this rationale speaks of the tinning of business with gentiles, giving and receiving monetary gifts, and protecting means of production. Transacting with gentiles before, during, and after gentile festivals is increasingly permitted through Jewish history because of the concern about enmity,<sup>28</sup> as well as the increasing economic interdependence of Jews and gentiles.<sup>29</sup> Although some premodern sages permit Jews to receive and even give monetary gifts to gentiles on their holidays to minimize the possibility of aggravating animosity,<sup>30</sup> others disallow this kind of exchange because of fears that it would spur idolatry.<sup>31</sup> The Talmud justifies Jewish intervention to protect gentile means of production with the phrase *mipnei eruah*, and this rationale trumps other rabbinic and even Toraic concerns.<sup>32</sup> Maimonides, however, thinks that *eruah* applies only when the means of production and the goods themselves are a gentile’s, in all other circumstances, this rationale does not sufficiently justify Jewish intervention.<sup>33</sup>

In the realm of religion, the sages express concern about midwifery and nursing. They also discuss fasting, feasting, and exchanging religious items. Some Talmudic scholars forbid Jews to midwife for gentiles because of the propensity for those infants to become idolaters.<sup>34</sup> Because some medieval sages are concerned that refusing to assist birthing gentiles, even with pay, would inspire unnecessary hostility, they therefore permit assistance to gentiles in birthing and nursing.<sup>35</sup> Although Jews are prohibited from fasting on gentile holy days because of potentially antagonizing them,<sup>36</sup> Jews are conditionally permitted to participate in gentile festival and wedding feasts.<sup>37</sup> Late-medieval sages even permit the sale of Jewish religious objects to gentiles because of *eruah*.<sup>38</sup>

Socially, the sages permit Jews to break Shabbat prohibitions to assist at childbirth and to assist gentiles in dangerous situations. Although early on Jews were prohibited from assisting gentiles giving birth or nursing,<sup>39</sup> later sages permit such assistance because of *eruah*.<sup>40</sup> Some authorities would rather a Jewish woman offer excuses than actually assist. If hostility is already apparent and payment is offered, however, Jews certainly should attend to gentile birthing needs even during Shabbat.<sup>41</sup> Early rabbis would rather prevent arousing animosity and therefore permit Jews to extract gentiles stranded in a pit, although offering excuses may absolve a Jew from doing so.<sup>42</sup> Later scholars suggest that payment should be offered before a Jew is obliged to assist a gentile in dire straits.<sup>43</sup>

During wars between Jews and gentiles, however, fears of animosity do not trump the military obligation to kill the helpless gentile.<sup>44</sup>

**Taking Stock of Existing Proposals**

Some basic questions will clarify the roles that *because* clauses play in *halakhab*. First, regarding justification: Why are these rationales employed? A second question pertains to the relationship between these rationales. Although current theories offer interesting options, I maintain that none adequately reflects the complexity of the textual evidence surveyed here.

*Mipnei Darkhei Shalom*

With regard to justification, Wurzburger contrasts justifications of expediency “dictated by the *enlightened self-interest* of the Jewish community” with justifications that reflect “a supreme *ethical principle* which transcends purely pragmatic considerations.”<sup>45</sup> He contends that both justifications are plausible. To what degree, however, are these justifications mutually exclusive? Some scholars, including Wurzburger, consider *mipnei darkhei shalom* purely “an intrinsic moral value.”<sup>46</sup> He bases his decision on Maimonides’ opinion; the latter uses the verse “God is good to all and God’s compassion extends to all creatures” as well as a biblical command to emulate God’s moral attributes in connection with this rationale.<sup>47</sup> In the final analysis, “the ways of peace” is grounded in what Wurzburger calls “agent-morality”—an ethical impulse.<sup>48</sup>

Novak echoes this argument. He writes that *shalom* is “the chief covenantal benefit” and is more than the cessation of hostilities: *Shalom* implies “a positive presence, not just an absence of harm.”<sup>49</sup> He concludes, “Clearly, ‘the ways of peace,’ as a theologically grounded principle, is far deeper than the goodwill and tolerance that comes from social contract type thinking. *Shalom* is of cosmic importance: It is considered to be one of the names of God.”<sup>50</sup> Both Wurzburger and Novak regard *mipnei darkhei shalom* as reflecting a religious sensibility, although Wurzburger perceives this rationale as possibly inculcating virtue within the individual adherent.

Blau, in an article about Jewish virtue ethics, also regards this rationale as one that can be categorized according to either one or another motivation. Citing an opinion by R. Moshe Isserles about giving charity to poor gentiles *only when* poor Jews also are present, Blau allows that *mipnei darkhei shalom* can “reflect a pragmatic consideration.”<sup>51</sup> Blau would rather follow Maimonides’ explication of the rationale with “God’s compassion extends to all creatures” as a proof-text that “clearly implies that, according to Rambam, *darkhei shalom* is derived from the ethical mandate of *imitatio Dei*.”<sup>52</sup>

In his history of Jewish-gentile relations, Katz similarly sees “the ways of peace” as a moral goad.<sup>53</sup> Katz refers to this *bezarze* clause as a “wholesome maxim urging fairness and loving-kindness to all human beings, irrespective of their religious or national affiliation.” Although he admits that deployment of this rationale may have had mixed motivations, he insists that the primary motivation nonetheless was a universalist ethical sensibility.

In contrast to these scholars, Rosen’s thoroughgoing analysis of this rationale as it is linked to laws of Jewish-Jewish relations as well as Jewish-gentile relations concludes that *mipnei darkhei shalom* is a strategic maneuver to avoid enmity.<sup>54</sup> Hayes also reaches this conclusion in her comparison of the Babylonian and Palestinian Talmuds.<sup>55</sup>

Not all scholars agree that this rationale can be compartmentalized by virtue of its motivation. For example, Schiff, in his study of several rationales, concludes that the majority of *takkanot mipnei darkhei shalom*, even in modern times, reflect “more than practical interest.”<sup>56</sup> According to these scholars’ interpretations, this *bezarze* clause is deployed at base for enlightened self-interest; at best, it reflects and, it is hoped, reinforces an ethical impulse.

### *Mipnei Eivah*

We now turn to explore possible reasons why *mipnei eivah* is employed. According to the thirteenth-century Talmudic commentator Yom Tov ben Abraham Ishbili (the Ritba), a biblical prohibition (*sivrei d’oraita*) remains prohibited because the Torah is not concerned about *eivah*.<sup>57</sup> Furthermore, rabbinic prohibitions without attendant rationales cannot be overturned and permitted because of *eivah*.<sup>58</sup> Nevertheless, he declares, “We permit in every instance where there is *eivah*, as we do today.”<sup>59</sup>

The Ritba hereby clarifies how to resolve a conflict among authorities when relations between Jews and gentiles are relatively peaceful. Of supreme authority are prohibitions originating in the Torah; next are prohibitions originating from rabbinic legislation without rationales; third are rabbinic prohibitions with rationales. Changing social realities bring this hierarchy into question, however. If the social or political milieu is such that enmity is possible, probable, or actual, rabbis are permitted to legislate to protect members of the Jewish community. To be clear on this point: Changing social reality, as reflected in use of the phrase *mipnei eivah*, justifies overturning previous legislation—even some Toraitic prohibitions.

Furthermore, *takkanot* are temporary measures, not immutable directives.<sup>60</sup> According to Elon, *takkanot* “fill a lacuna in the law created in consequence of changed social and economic realities and the emergence of problems which find no answer in the existing *halakhot*,” and . . . amend and vary the existing *halakhot* to the extent that this is dictated by the needs of the hour.”<sup>61</sup> Deployment of this

rationale therefore reflects exigencies of a historical moment and a desire to protect the Jewish individual and community from external threats arising at that moment.

In addition to this historically located interpretation of *mipnei eivah*, a universalist understanding is similarly plausible. The sages who employ this rationale may have thought in generic terms—for example, “there may be conceivable cases when animosity would arise if any Jew were not to do X, therefore we should permit X across time and space.” This argument echoes Kant’s self-consistent universe, wherein one acts as one would have others act as well. One might think, for example, that permission to transact with gentiles on gentile holidays *mipnei eivah* and permission to assist a gentile at birth on Shabbat for pay *mipnei eivah* reflect a universalist imagination. These very permissions raise the question, however: If relations between Jews and gentiles were good, would the rabbis have enacted these *takkanot*? That is, if hostility from gentiles were not a reality or possibility, would the sages have permitted Jews to transact with gentiles during gentile festivals even though such transactions previously were prohibited? Similarly, would they have permitted a Jew to assist a gentile in giving birth on Shabbat for pay if the rejection of such permission would not inspire gentile anger toward Jews? This rationale seems to reflect less a universalist sensibility than a concern about real political repercussions.

Contemporary scholars echo the Ritba’s understanding that *mipnei eivah* reflects political and social concerns. Zemer argues that “the Sages permitted certain forbidden actions ‘to prevent enmity,’ that is, if the prohibition was liable to lead to hostile relations with Jews or non-Jews.”<sup>62</sup> Blau also understands this rationale to be purely an instrumental tool.<sup>63</sup> Hayes concurs, arguing that the *eivah* principle relaxes restrictions.<sup>64</sup> She summarizes her position as follows:

The erosion of the law prohibiting transactions indicates that the *halakhab* of the rabbis was not the articulation of an ideal by an elite out of step with the life of “the ordinary Jew,” but rather a set of guidelines cognizant of shifting circumstances and reflecting genuine needs of the general Jewish community. In addition, it appears that in their articulation of a more lenient *halakhab*, the Babylonians relied upon *halakhic* principles (*misibum eivah* . . . ) that were already operative in earlier sources.<sup>65</sup>

This is no small point: The phrase *mipnei eivah*, reflecting changing social and political realities, is used to alter previous rules. Below I argue that these *takkanot* do not merely relax preexisting rules but overturn them altogether and thereby expand possible Jewish-gentile interactions. Only with regard to fasting and feasting on gentile holidays does this rationale limit Jewish behavior. Furthermore, one could argue that this *bezarze* clause permits behaviors rabbis otherwise would prohibit or at best disdain. Does incorporation of a concern about enmity perhaps express Jewish feelings of weakness vis-à-vis gentiles?

Had conditions been different, the rabbis might not have needed to permit these behaviors and justify them in this manner. Nonetheless, social forces tie rabbis' hands. *Halakhah* can bend for political purposes.

### *The Relationship between the Rationales*

On the deeper issue of how these rationales might be related, three possible relationship models become apparent. One model portrays these rationales as equivalent opposites, another as complementary opposites, and a third as overlapping concerns. Although these models are attractive, none adequately reflects the complexities of the legislations or justifications.

If *takkanot mipnei darkhei shalom* were motivated purely by pragmatic concerns, one might consider them like *takkanot mipnei etivah*. Whereas Blau considers these rationales similar,<sup>66</sup> Hayes sees the similarity in terms of opposites: "This phrase *mipnei darkhei shalom*, 'in the interests of peace,' is simply the positive counterpart of the 'for fear of creating enmity' principle."<sup>67</sup> This position of equivalent opposites is championed by Würzburger. He declares, "The Talmud uses the positive formulation *mipnei darkhei shalom* and the negative formulation *mipnei etivah* interchangeably."<sup>68</sup> Elsewhere he writes:

As a matter of fact, many ordinances for which Tannaitic sources give no reasons but which resemble the kind of enactments that the Mishnah justified on the ground of *darkhei shalom* are explained in the Gemara as necessary for the prevention of *etivah*. Thus, there is no conceptual difference between the two formulations, which, for all practical purposes, are equivalent. It thus appears that what in earlier periods was termed *darkhei shalom* became, as a result of a later change in terminology, *mipnei etivah*.<sup>69</sup>

Thus, for Würzburger, earlier *takkanot mipnei darkhei shalom* and later *takkanot mipnei etivah* are not only similar, they are equivalent. The only significant difference between these rationales is their terminology—a difference he does not address.

Jehiel Jacob Weinberg's *responsim* about burying Jews and gentiles similarly conflates these rationales. Weinberg permits burying a Jew in a gentle cemetery, particularly during a time of war when there might not be time to locate a Jewish cemetery.<sup>70</sup> He reaches this conclusion by citing a Talmudic passage regarding burying gentiles alongside Jews *mipnei darkhei shalom*, and he considers such teachings equivalent to legislation protecting against *etivah*. Such equivalence, however, does not obtain in considering the *takkanot* themselves. Only *takkanot mipnei darkhei shalom* address burial issues. Weinberg might be suggesting that these *takkanot* imply that if Jews do *not* tend to the burial needs of gentiles, acrimonious relationships might ensue, but *etivah* is never linked with burial.

Considering these rationales equivalent presupposes that their motivations and functions are similar if not exactly the same. As I discuss below, such an assertion is problematic at best, if not inaccurate. One might conclude, as Würzburger and Weinberg do, that the pragmatic concern implicit in laws *mipnei darkhei shalom* is the same pragmatic concern articulated by *mipnei etivah*. The former, however, seek to improve Jewish–Gentile relations, whereas the latter protect relations from (further) souring. This important, though slight, difference is picked up in the second relationship model. Furthermore, equating these rationales hides the variety of issues they independently address, as well as their *halakhic* duration.

A second relationship model portrays these rationales operating on complementary opposites of the Golden Rule. For Novak, two governing principles guide rabbinic legislation regarding Jewish–Gentile relations. The first is "what is done 'to avoid enmity.' That is roughly the equivalent of 'what is hateful to you, do not do to someone else.' It is basic human decency."<sup>71</sup> Thus, *takkanot mipnei etivah* establish minimal standards of human decency.<sup>72</sup> The "second principle is what is to be done 'for the sake of peace.' That is roughly the equivalent of 'love your neighbor as yourself.'"<sup>73</sup> Therefore, *takkanot mipnei darkhei shalom* prompt ideal human decency.<sup>74</sup> Yet Novak considers the Levitical command to "love your neighbor" to mean "Love your fellow Jews—and whoever happens to be among them—when they are both in need of your personal concern."<sup>75</sup> That is, ideal human decency is to attend to the needs of gentiles when they are among similarly needy Jews.

We find evidence of Novak's model in Isaac Tyrnau's compilation of Austrian customs in the fourteenth and fifteenth centuries. Tyrnau legislates that Jews should not give Purim gifts to gentle maidservants unless those servants are accustomed to receiving such gifts—in which case Jews should continue to give such gifts *mipnei darkhei shalom*. All Israel should behave this way and even give to gentiles who do not work in Jewish homes. In fact, Jews should give to everyone because overlooking any particular gentle may bring about *etivah*.<sup>76</sup>

Tyrnau's logic is that because some gentiles are accustomed to receiving gifts when Jews celebrate Purim, at least these gentiles should continue to receive gifts for the sake of peace. No *takkanah* employing *mipnei darkhei shalom*, however, speaks of giving gifts to gentiles on Jewish holidays; they only address receiving and giving gifts on gentle holidays. Tyrnau may want to apply this rationale to a new case. Nevertheless, according to Tyrnau, gentiles who do not usually receive such gifts may become upset at this preferential treatment of certain gentiles by the Jewish community. To prevent potential animosity, the Jewish community should strive to give gifts to all gentiles, regardless of whether they are accustomed to this practice. Hence, legislation to prevent enmity understandably urges at least basic human decency, and legislation to promote the ways of peace depicts ideal behavior.

Novak summarizes this Golden Rule coin of *mipnei darkhei shalom* on one side and *mipnei etrah* on the other: “All of this indicates that there is no overt inclusion from intercovenantal love of any outsider, and at the same time no overt inclusion of any outside [sic] either. Thus, the former justification precludes xenophobia, and the latter precludes imperialism.”<sup>77</sup> Although this model seemingly is comprehensive, it does not adequately address the uniqueness of each rationale and the exceptions to this either/or categorization. For example, one would be hard-pressed to say that prescribing minimal verbal interaction with gentiles during their celebrations for “the ways of peace” truly prompts ideal human behavior; conversely, one would be hard-pressed to say that permitting midwifing on Shabbat only when payment is offered and hostility threatened sets a reasonable standard for basic human decency. Nor does this model address these rationales’ different functions in *halakhab* and in the development of moral character.

A third possible relationship model refers to the overlapping concepts of the right and the good.<sup>78</sup> Dorff distills these concepts: “Judgments of ‘the right’ . . . are assertions of what must be done to advance *the basic needs of a society as that society envisions them* . . . ‘The good,’ in contrast, is a declaration of *the less basic needs or the ideals of a society*.”<sup>79</sup> The *right*, he continues, “must be defined in terms of the needs of human survival as a particular society sees them.”<sup>80</sup> Furthermore, these basic needs (physical as well as spiritual) are regarded as fundamental rights, without which a particular society would not be distinct or extant.<sup>81</sup> The level of right and wrong deals with a society’s existence. This is the level of rule morality, in which rules are catalogued according to whether they relate to actions that are required, optional, or forbidden. The *good*, on the other hand, transcends rule morality.<sup>82</sup> The good expresses ideals as a particular relationship or society sees them, and these ideals have positive repercussions.<sup>83</sup> Although these ideals are desirable, they are less essential to societal survival than are rights. As such, the urgency of rights compels action more than the aspirations of the good.<sup>84</sup>

This distinction enables one to classify these rationales as attending to the right and the good. Although both rationales address health care and business issues, it is possible to say that the ways of peace urge attending to public health by minimizing the diseases sick and dead gentiles could spread and that enmity is linked primarily with the private health of a mother and her potential child. Similarly, the ways of peace require Jews to protect gentile means of production, whereas legislation that is based on fears of enmity speak primarily about protecting Jewish business interests. In addition, *takkanot mipnei darkhei shalom* speak of public finance concerns such as taxation and distribution of resources, whereas *takkanot mipnei etrah* attend to business cycles generally and private economic concerns.

Given this evidence, one might be tempted to say that *mipnei darkhei shalom* tends to be associated with issues of the common good, such as economic justice and public health. In many ways these common goods are basic needs, protection

of which is necessary for the survival of Jews and gentiles alike. Succinctly, these particular *takkanot* may be considered as laws protecting rights. One might also say that *mipnei etrah* tends to be allied with issues of private good, such as personal business interests and personal health. These *takkanot* express what would be preferred or good in particular circumstances.<sup>85</sup>

Maimonides supports this model when he obliges Jews to meet the basic needs of persons who are nearby prior to those who are far off.<sup>86</sup> Fulfilling duties to meet basic needs is of greater import than doing acts of moral goodness.<sup>87</sup> Yet this model of right and good does not adequately address all the issues found among these *takkanot*, the motivations behind these rationales, or their roles in *halakhab* generally. Not every *takkanah* fits neatly into either category. For example, consider the law to assist—albeit for payment—a gentile stuck in a pit: Is not protecting the Jewish community from probable hostility a fundamental communal need and not an ideal personal behavior? It is similarly difficult to understand how not eulogizing a gentile would compromise Jewish-gentile relations or, conversely, how eulogizing a particular gentile attends to the basic needs of either community. Finally, this model does not account for changes within a rationale’s connotation.

### Ethics, History, and Halakhab

The foregoing survey of motivations behind and relationships between these rationales shows the extent to which these *because* clauses defy easy categorization. Sensitive to such complexities, in this concluding section I offer observations to begin addressing the initial questions of these rationales’ purposes in *halakhab* and the relationship between rationalization and ethics in the evolution of *halakhab*.

Broadly speaking, there are two main formulations of law. The simplest laws (that is, “do X” or “do not do X”) do not carry attendant rationales. Their utterance seeks compliance without appealing to human reason or indicating ulterior motives. For example: Do not murder. Period. The reason is self-evident for the survival of a community. Further words may jeopardize obedience—as shall soon be evident. The laws explored here, however, take the form “X because of Y.” A review of the Ys, the justifications, in these *takkanot* precedes discussion of “X given Y,” which explores what these laws actually do. I conclude this essay by examining the practice “because of Y.”

### What “Y”?

The clauses *mipnei darkhei shalom* and *mipnei etrah* offer several justifications compelling obedience. The first is *authority*. At the start of this essay I noted

that the Bible links God to certain laws and thereby increases their import. The rabbis construct a hierarchy of humanly created rationales, determining which rationale is more authoritative and can trump other rationales when they are in conflict.<sup>88</sup> A second justification is *goal oriented*. These *post facto* goals range from the pragmatic to the sublime. Some rationales articulate a goal of preservation; others seek to inculcate an ethical impulse.<sup>89</sup> A third kind of justification is an *appeal to motivation*, of which two kinds are expressed here: one pragmatic, the other ethical. These motivations are already extant within the individual.

Each time the phrase *mipnei ervah* or *mipnei darkhei shalom* is used, it appeals to one or another of these justifications. Although it is necessary to observe that both rationales express a Jewish *realpolitik* sensibility, this sensibility may not be sufficient. The pragmatic concern of *ervah* appears to be more akin to political realism than the pragmatism of *darkhei shalom*. For example, the permission for Jews to protect gentile means of production to prevent arousing animosity expresses a pragmatic appreciation of Jewish-gentile relations that is different from that found in legislation permitting Jews to protect gentile tools (from theft) for the sake of peace. Although both rationales seek to protect Jews (a pragmatic concern indeed), the former articulates a negative incentive and the latter offers a positive incentive. Furthermore, although pragmatic concern often is sufficiently authoritative for *mipnei ervah*, that is not always the case for *mipnei darkhei shalom*. Instead, “the ways of peace” sometimes reflects or inculcates an ethical, if not explicitly theological, impulse. *Mipnei ervah* does not inspire or reflect ethical impulses, although it occasionally voices theological concerns about idolatry. Therefore, what the rabbis consider sufficiently authoritative reasoning behind these rationales may differ by rabbi and by issue. Nonetheless, these rationales express an authority the rabbis deem compelling.

Timing is another dimension to consider. Some justifications indicate that certain goals may be attained by doing a particular law X. For example, self-preservation or reinforcement of an ethical impulse is possible, *b’diyarad*—after the fact—by performing a particular behavior. This justification renders the law X a means to an end Y. In these instances obedience, though necessary, is merely the means to attain these goals. For example, Maimonides justifies classifying poor gentiles in the category of poor Israelites—thereby obliging Jews to care for poor gentiles similarly—with the rationale *mipnei darkhei shalom*. He further supports his ruling by citing two biblical verses teaching that divine compassion extends to all creatures.<sup>90</sup> In so doing, Maimonides renders *imitatio Dei* as a goal attained in part by complying with this rule. Maimonides also rules that a Jew ought to assist a gentile whose burden has fallen from the gentile’s ox *mipnei ervah*.<sup>91</sup> That is, the goal of self- and communal preservation is attained by performing this particular action.

Conversely, justifications of motivation create compliance by appealing to what already exists. For example, when we speak of ethical impulses already

integrated into one’s sensibility or animosity that already exists, we are appealing to preconditions necessary to perform a law. The formulation “X because of Y” in these instances becomes “because of Y, do X.” In other words, *lebachiah*, from the outset, certain conditions must obtain before a law can be put into practice. The law becomes contingent on circumstances outside its control. Despite their own personal experiences of tension with gentiles, several medieval rabbis rule that because of the ways of peace, Jews ought to comfort gentile mourners.<sup>92</sup> In so doing, they may regard *mipnei darkhei shalom* as a universalist ethical impulse that should be enacted regardless of changing social climates. A parallel situation appears in the eighteenth-century ruling by Jacob ben Tzvi Emden that suspicion of animosity is sufficient to permit selling *mezzuzot* to gentiles.<sup>93</sup> That is, mere suspicion of bad or worsening relations between Jews and gentiles serves as a precondition for this ruling.

Regardless of whether a justification speaks of preconditions, a desired goal, or an authority, deploying a justification reflects changing social and political realities. Also significant is when these rationales are dropped or changed. Yet Maimonides argues that even if a ruling’s rationale no longer exists, a future *beit din* cannot overturn a previous ruling unless that court is superior to the initiating court.<sup>94</sup> If Maimonides were correct and later courts can never be superior—at least in wisdom—to prior ones, then no rabbinic rule could be challenged and overturned. Such an assertion, however, does not accord with the evidence surveyed here.

Other authorities argue that rabbinic rulings may indeed be overturned. Avraham ben David, Maimonides’ contemporary, points to the Talmud to justify his opinion that later courts may overturn previous legislation when the original justification no longer exists.<sup>95</sup> A few centuries later, David ibn Zimra rules that a *takkanah* maintains its force only if earlier sages did not apply an explicit reason for it. Furthermore, “If they stipulated that their enactment was the result of some particular factor, then when that factor disappears the enactment disappears with it.”<sup>96</sup> A recent Reform rabbinic *responsa* concludes:

If the Rabbis explicitly adopted their ordinance for a particular reason, to address a specific problem, it strains credibility to assert that they meant that *takkanah* to endure for all time, regardless of changing circumstances, even in the absence of the reasons for which they enacted it. It is far more reasonable to understand them as saying that the *takkanah* does not outlive its rationale, that it endures only so long as necessary to resolve the difficulty that led to its creation.<sup>97</sup>

This conclusion makes reasonable sense when one speaks of political concerns such as real or potential hostility between Jews and gentiles. Recall the Ritha’s argument that despite the principle that rabbinic prohibitions without attendant

rationalizes cannot be overturned even by enmity, enmity nevertheless justifies permitting.<sup>98</sup> That is, changing social and political realities can inspire and justify overturning *halakhot* prohibitions, and, conversely, such permissions become obsolete when those historical conditions no longer obtain.

This conclusion becomes problematic when *takkanot* are justified for ethical or theological motivations—or, for that matter, with appeals to God's authority. For example, to what extent does a ruling to eulogize over dead gentiles for the sake of peace reflect historical conditions and therefore must be subject to time and space horizons? It may be more accurate to say that laws taking the form "X because of Y," when Y is a theological or an ethical motivation, are *not* time-bound. Only *takkanot mipnei darkhei shalom* that reflect pragmatic or enlightened self-interest and *takkanot mipnei etzab* altogether may be subject to such internal sunset conditions. In other words, some *halakhot* are not applicable for all times and all spaces.

### Given Y, What Is X?

These *takkanot* reveal that circumstances may justify permitting previously prohibited behaviors. Hayes remarks, "Although it is difficult to see much conceptual difference between *mishum etzab* and *mipnei darkhei shalom*, the latter seems to be used primarily to relax prohibitions of a social and communal nature (extending greetings to non-Jews, assisting the sick and poor among non-Jews, etc.)."<sup>99</sup> *Takkanot mipnei etzab*, on the other hand, relax economic prohibitions.<sup>100</sup> I venture that Hayes is partially correct. Although *takkanot mipnei darkhei shalom* do indeed relax restrictions, most *takkanot mipnei etzab* overturn previous prohibitions. The exceptions are rules regarding Jewish fasts and feasting on gentle holidays and selling *mezuzot*.<sup>101</sup> This distinction is subtle and important. For many rabbis, fears of hostility justify permitting prohibited behaviors toward gentiles. Assisting at childbirth and nursing are two obvious illustrations. Concern about the ways of peace, on the other hand, justifies expanding Jewish behavior toward gentiles.<sup>102</sup> For example, for "the sake of peace" Jews are to expand their conceptualization of the poor to incorporate gentiles. Similarly, although the Tannaim do not prohibit eulogizing dead gentiles, the Amoraim expressly permit Jews to do so with the *because* clause *mipnei darkhei shalom*. Although both "because of Y" phrases expand Jewish behavioral repertoire toward gentiles, one does so by overturning previous legislation, the other by relaxing existing norms.

R. Y. Unterman, a former Chief Rabbi of Israel, understands *mipnei darkhei shalom* as an ethically inspired rationale; therefore, laws invoking this rationale are obligatory.<sup>103</sup> In contrast, he admits that rabbis employ *mipnei etzab* to permit *isarei d'oraita*—Toraitic prohibitions—and only if there is danger to life do rabbis overturn Toraitic Shabbat prohibitions. Implied in his statement is that

laws justified by the ways of peace are binding for all time, whereas laws justified by concerns of animosity, though powerful enough to overturn Toraitic rulings, are historically inspired if not historically confined. If danger to life no longer obtains, laws *mipnei etzab* overturning Toraitic Shabbat prohibitions may no longer bind.

Another possible interpretation is that perhaps, for Unterman, permission to midwife a gentle on Shabbat for pay really aims to protect gentiles from unnecessary health risks. In this instance, such permission reflects an ethical impulse: All life, regardless of religion, deserves protection—even on Shabbat. Here *mipnei etzab* becomes what Wurzburger calls agent-morality: a "precept mandating the cultivation of moral disposition patterning itself after the divine model."<sup>104</sup> If this analysis were true, one could comfortably agree with Wurzburger that *mipnei etzab* and *mipnei darkhei shalom* are equivalents on some levels. The vast majority of rules justified by *etzab*, however, are rules that do little to cultivate "moral disposition" emulating God. Instead, they protect Jews from unnecessarily sparking gentle hostility. When Y is *etzab*, X is pragmatic, and character is irrelevant.

An interesting observation is that when religious issues are addressed, only *etzab* is invoked. This observation certainly makes sense. Rabbis would be reluctant to create enactments altering Jewish religious practices for the sake of the ways of peace because (in their mindsets) are extant religious practices not designated or at least condoned by God? Although religious practices might not explicitly promote "the ways of peace," surely they do not detract from them. Using the rationale of "preventing enmity," on the other hand, is a technique to curb potentially unctuous Jewish behaviors such as co-opting gentle holidays and unnecessarily giving gentiles more to celebrate on their holidays. That no *takkanah* speaks explicitly of ritual or liturgical change is not surprising because few gentiles had exposure to or potentially grave concerns about such practices that were internal to the Jewish community.<sup>105</sup>

### "Because of Y"

The formulation "X because of Y" makes certain laws accessible to human reason and motivation. In so doing, it helps to move a Jew from mere obedience of a law to compliance—by which I mean that a Jew can understand and appreciate why a law should be followed and, one hopes, agree to that reason while performing that very rule. The formulation "X because of Y" can create buy-in.

This same formulation also renders a law vulnerable to critique and rejection. Why explain the importance of a rule or justify a rule within the ruling itself? Why do Jewish lawmakers give psychological, sociological, and theological concerns such import? Some individual legislators feel that including these rationales is necessary and good in certain instances. Others, however, feel that these



*because* clauses no longer construct compliance and may in fact obstruct obedience. They either strike these clauses from the rules or alter the phrases themselves. For example, whereas Maimonides permits giving monetary gifts to gentiles on gentle festivals because of enmity, neither Karo nor the Ritba mention enmity; instead, they cite concerns about idolatry.<sup>106</sup>

The presence of rationales in law suggests that obedience requires rationalization. To be more precise, certain laws require rationalization. Novak defines rationalization as “the substitution of a secondary meaning or effect when a primary meaning or cause is available.”<sup>107</sup> He asserts that relying on rationalizations for already rational commandments is “theoretically intolerable because it is a distortion of what we know to be true.” If *takkanot* justified by *mitanei dankhei shalom* and *mitinei etivah* were rational in the first place, legislators would not need to use these rationales. Because they did see fit to employ these *because* clauses, one might conclude that they thought these behaviors were nonrational from the outset.

Nonrational laws use *because* clauses to inspire compliance. The reasons articulated in these *because* clauses are secondary because the primary reasons for these laws are beyond comprehension and necessarily incommunicable. In fact, Maimonides considers the search for primary reasons for nonrational laws a practice of protracted madness.<sup>108</sup> Secondary reasons, however, are human constructs because they are conceived by humans and transmitted through human language. Because they reflect human reason, they also reveal social and political influences. The practice of dropping the rationales or laws altogether similarly speaks of the influence externalities have on *halakhab*. At least for some of the foregoing cases, human reason is sufficient to overturn previous *halakhab*—even Toraic *mizvoth*—and to expand Jewish obligations toward gentiles.

In other words, human reason, shaped by changing social and political conditions, may overturn previous nonrational *halakhor*. Would an “X because of Y” that overturns a previous “X because of Y” always be nonrational, however? To what degree may a rationalization shift from a secondary meaning to a primary meaning? If a reason becomes the primary reason for a law, does that reason render the law rational? Perhaps a secondary reason becomes so integrated into a person’s character that it becomes a motivation. For example, once the appeal to “the ways of peace” to bury dead gentiles sought to inculcate compassion, emulating God’s compassion for all God’s creatures; if that compassion were to become so imbued by the people who perform this law, a time might come when this rationale no longer appealed to a goal but instead spoke of a motivation. The goal to emulate divine compassion no longer compels people who already are compassionate; such compassion becomes a prerequisite. Furthermore, individuals who embody such compassion may no longer regard this rule and its attendant rationale as nonrational. They perceive the law as a rational expression of extant principles. “The ways of peace” hereby shifts from a

secondary reason for a nonrational law to a primary reason for a now-rational law. This kind of move, in fact, may be evidenced by jurists who drop the *because* clause altogether. A law of the form “X because of Y” can become simply “X.” For example, Talmudic sages ruled that taxing all citizens of a city regardless of religion should be done *mitanei dankhei shalom*.<sup>109</sup> This rationale was dropped in the twentieth century by Abraham Isaac Kook in Israel.<sup>110</sup>

On the other hand, the assertion that laws of the form “X because of Y” are necessarily nonrational does not easily comport with the laws I survey in this essay. For example, rules whose goal is preservation can be understood to be rational from the outset because their explicit goal enables future obedience to the law. Many laws with *dankhei shalom* seek this goal, as do most with *etivah*. Just because a law includes a justification clause does not mean that the law has a primary reason that cannot (or must not) be rationally articulated. The justification clause itself may express the primary reason for a certain rule. One therefore must conclude that “X because of Y” laws may be either rational or nonrational—at least with these two rationales.

A third option also is plausible. Some legislators may have observed extant Jewish behavior toward gentiles that was not then encapsulated in *halakhab*. Eager to keep Jews in line with Jewish law, they may have worked with other communal leaders to incorporate these behaviors into the legal corpus. To this end, they may have framed laws in a way that made sense to them at the time. They sought to legalize extant behavior and used these rationales as convenient if not homiletical tools to render the laws similar to other *takkanot*. In a way, these laws may have been *takkanot ha-kahal*, communal enactments, reflecting the practices and will of the majority, though justified and interpreted by the rabbis.<sup>111</sup>

Whether rational, nonrational, or homiletic, formulating laws with justification clauses is essential to the pedagogy of morality. Linking laws to certain rationales helps Jews understand why performing possibly nonrational behaviors is more than just an obligation. Dorff summarizes *halakhab*’s pedagogic role: “Formulating moral norms in terms of law is thus very important educationally; for by so doing people are required to act in accordance with moral rules as a step in teaching them how to do the right thing for the right reason.”<sup>112</sup> Novak also regards these particular *halakhor* as inspiring people to adhere to both aspects of the Golden Rule. These justification clauses co-relate Jewish behavior with Jewish values.

The formulation “X because of Y” and its alterations also show that *halakhab* itself is a learning legal system, in that *halakhab* is open to external influences such as contemporary Jewish concerns and gentle attitudes, and it adapts itself to be increasingly persuasive to its adherents. This survey teaches that pragmatic concerns, especially *etivah*, remain powerful rationales to adjust and overturn certain *halakhor* if such laws are regarded as politically dangerous to Jews.

Similarly, *darkhei shalom* reflects and reinforces ethical ideals and may be deployed to justify relaxing restrictions.

One should be wary, however, in adopting these rationales without critical consideration of their genesis and use. Most of the *takkanot* I survey in this essay were established during economies of scarcity and within politics of relative danger. Given that circumstances have radically altered, the applicability of these laws and even of their attendant rationales becomes suspect. On the other hand, the Jewish community should not abandon wholesale the *halakhi* project of creating an increasingly holy people<sup>13</sup> just because most *halakhot* are from a different era and circumstance. Instead, the formulation “X because of Y” enables Jews to participate in the ongoing pursuit of making Jewish laws increasingly consonant with Jewish values, and vice versa. No less an authority than Maimonides understands that even if laws do not reflect rationality or correct belief, they are necessary for the betterment and welfare of Jews individually and collectively.<sup>14</sup> With this formulation, Jews may contribute to the rich interaction between law and history, between ethics and *halakhab*, and influence the varied and dynamic relationships between Jews and gentiles.

## Notes

This essay draws from my rabbinic thesis: “*Mipnei Darkhei Shalom and Mipnei Eivah*: Reasons to Do the Right and the Good” (New York: Hebrew Union College-Jewish Institute of Religion, 2003). Thanks are due to Daniel Crane-Hirsch for insightful conversations and comments throughout. A previous draft of this essay was presented at the Society of Jewish Ethics in Chicago, Illinois, January 2004; the rich conversation that followed helped clarify certain points. The anonymous reviewers for the *Journal of the Society of Christian Ethics* also deserve substantial gratitude for their careful critique and suggestions.

1. Leviticus 19:9–10.
2. Leviticus 23:22.
3. Deuteronomy 24:19.
4. According to Rashi, the first mention of God refers to potential divine punishment for not adhering to this negative command, and the second implies potential reward for following this rule. See Rashi on Leviticus 23:22: *ani adonai elohiteihem*.
5. Even in the most foundational commandments, the *Aseret Dibrot*—the 10 Words—we find them: “Honor your father and your mother, so that you may long endure on the land that Adonai your God is assigning you” (Exodus 20:12). See also the phrases beginning with *ki* (for) in verses 5, 7, 11.
6. Such as *mipnei tikken ha’adam* (for the sake of repairing the world); *mipnei takkanat barshava* (to facilitate rehabilitation); *mishum kevod habriot* (out of respect for the dignity of the individual); *mishum shalom mulhut* (for the sake of peace of the polity); *mipnei darkhei no’im* (for the sake of the ways of pleasantness).
7. See the following works: Walter S. Wurzburger, “Darkhei Shalom,” *Gesher: Bridging the Spectrum of Orthodox Jewish Scholarship* 6 (1978): 80–86; Daniel L. Schiff, “Principles of Power: The Application of Ethical Norms within the Halacha” (Rabbinic thesis, Hebrew

Union College-Jewish Institute for Religion, Cincinnati, 1987); Walter S. Wurzburger, *Ethics of Responsibility: Pluralistic Approaches to Covenantal Ethics*, 1st ed. (Philadelphia: Jewish Publication Society, 1994); Jennie Rosen, “*Mipnei Darkhei Shalom* in Rabbinic Tradition” (Rabbinic thesis, Hebrew Union College-Jewish Institute of Religion, New York, 1997); David Novak, *Covenantal Rights: A Study in Jewish Political Theory*, New Forum Books (Princeton, N.J.: Princeton University Press, 2000).

8. *Takkanot* are legislated reforms for the purpose of improving *halakhab*. I use this term following Menachem Elon, who categorizes these rationales in his discussion of *takkanot*. See Menachem Elon, “*Takkanot*,” in *The Principles of Jewish Law*, ed. Menachem Elon (Jerusalem: Keter Publishing House, 1975), 76.

9. This essay also includes *mishum darkhei shalom*, which is linguistically the equivalent of *mipnei darkhei shalom*. The former is less frequently employed than the latter; hence, I use the latter as my referent.

10. Proverbs 3:17.

11. Babylonian Talmud (hereafter BT) *Gittin* 59b. See Rashi there: *amar lo d’vritia bi*.

12. Mishnah *Gittin* 5:8.

13. Mishnah Torah, by Maimonides (hereafter MT) *Mattenot Aniyim* 1:9. In the previous *halakhab* (1:8), Maimonides argues that Jews ought not give gentiles gifts for free. This law pertains to gentiles generally. In *halakhab* 1:9, Maimonides is speaking specifically about poor gentiles—a subcategory that, according to his calculus, should be considered among poor Israelites. See also *Tur Chošen Mishpat* 249:2 about the prohibition of giving gifts to idolaters. The Bet Yosef says that this prohibition applies only to Ishmaelites and not to converts who have accepted upon themselves the Noachide laws, and Israelites are obliged (*mitzvata*) to ensure their physical well-being (*Beit Yosef Chošen Mishpat* 249:2).

14. BT *Gittin* 61a. *Tosefta Gittin* 3:13. See also Jerusalem Talmud (hereafter JT) *Gittin* 5:9.

15. MT *Me’atshim* 10:12.

16. Shulechan Arukh, by Joseph Karo (hereafter SA) *Yoreh Deah* 151:12. See also *Tur Yoreh Deah* 151: “The *Tur Yoreh Deah* 351 reads, “Thus it is permitted (*mutar*) to sustain their poor . . . for the sake of peace”—but this is not a requirement. See also *Shab* on SA *Yoreh Deah* 151:12; *Prishah* on *Tur Chošen Mishpat* 249:2; Joel Sirkes’ (1541–1640) *Beit Chadash* on *Tur Yoreh Deah* 351; and *Encyclopedia Talmudit* “*Darkhei Shalom*” col. 623, footnote 117.

17. JT *Avodah Zarah* 1:3; JT *Gittin* 5:9, however, reads “we wash (*on charsum*) gentile tools”; MT *Gzeilab v’Aveidah* 11:3; *Tur Chošen Mishpat* 266; *Beit Yosef Chošen Mishpat* 266:1; SA *Chošen Mishpat* 266:1.

18. *Tosefta* BT *Gittin* 3:18. JT *Gittin* 5:9.

19. *Responsa Da’at Kohen*. 132: *omamun iach* and *umazanti Pnaction*. Note that Kook drops the phrase *mipnei darkhei shalom*.

20. Rashi on BT *Gittin* 62a. *vin kofin*. See also I Chronicles 12:10; *gemara* at the end of BT *Gittin* 62a; MT *Semita v’Yoev* 8:8; SA *Yoreh Deah* 148:10. MT *Me’atshim* 10:12; MT *Evel* 14:12 (in his *Responsa* 449 [*sharab amoni*], Maimonides does not say this is a *mitzvah*); *Beit Yosef Yoreh Deah* 158:1; *bagoyin sheyordim*; *Tur Yoreh Deah* 335; *Beit Yosef Yoreh Deah* 335:9; SA *Yoreh Deah* 335:9; *Shab* on SA *Yoreh Deah* 335:9; Moshe Feinstein’s *Iggerot Moshe Yoreh Deah* II:130; *hamazon l’china*; Pinchas Zivchi’s *Ateret Paz* 13 *Chošen Mishpat* He’orat 12:1; *ubar min*.

21. *Tosefta* on BT *Gittin* 3:18. See also BT *Gittin* 61a. Interestingly, the *gemara*’s referent *nokhem* reappears only in nineteenth- and twentieth-century discussions *responsa* literature. See David Tzvi Hoffman (1843–1921): *Melamed Le’Ho’el*. II: *Yoreh Deah* 137:2; Mordechai Yaakov Breisch: *Chekat Ya’akov*. *Yoreh Deah*. 203:7; Jehiel Jacob Weinberg

- (1885–1966): *Shnei Eish*. 3:101a; Eliezer Judah Waldenburg (1917–): *Tzitz Eliezer*. 10:25:9; Pinchas Zivchi (1948–): *Ateret Paz*. 1:3 *Even HaEzer* 5: *v'q' d'bigmama*, see also *Tur Yoreh Deah* 151.12; *Beit Yosef Yoreh Deah* 151.12; SA *Yoreh Deah* 151.12.
22. *Beit Yosef Yoreh Deah* 367.1; SA *Yoreh Deah* 367.1; *Shakh* on SA *Yoreh Deah* 367.1; Chaim Palache (1788–1869, Turkey). *Chayim Byad*. 125: *mat lecyah*.
23. MT *Evel* 14:12; Rosh on BT *Gittin*. 5:23; *Syfer Kolbo*. 114: *ein mefamin*. On the other hand, it is interesting to note that some rabbis felt that the rule to comfort gentiles either did not need comment or should be excluded from their discussion of caring for gentiles for the sake of peace. For example, nowhere does Rashi comment on this injunction, even though he enjoyed a historical era of fairly consistent positive relations with gentiles. In the twentieth century, only one scholar refers to Maimonides' rule to comfort gentle mourners—but only as a proof-text for a discussion on giving to the poor (*Ateret Paz*. 1:3: *Choohen Mishpat*: 12.1). This relative silence may reflect the desire of some rabbis to minimize social interaction between Israelites and gentiles, particularly when gentiles would be feeling particularly vulnerable and needy—such as during mourning. Unlike burying the dead and visiting the sick, comforting mourners may create draw-out and involved relations. Possibly the rabbis downplayed this *takkanah* to avoid establishing such strong emotional bonds between Israelites and gentiles.
24. *Tur Yoreh Deah* 335; BT *Gittin* 61a. See also IT *Demai* 4/24a, JT *Gittin* 5/47c, JT *Avodah Zarah* 1/39c. See also *Syfer Ha-Itrim*. 175; *Kitzur Piskei HaRosh* on BT *Gittin* 5:22.
25. MT *Evel* 14:12; MT *Melachim* 10:12.
26. Rashi on BT *Gittin* 61a. *im mutei Yisrael*.
27. There also is the phrase *mishum etrah*, which is less common than *mipnei etrah*; this essay surveys both forms.
28. BT *Avodah Zarah* 7b. See also discussion on BT *Avodah Zarah* 6b and 11b. Another Tosafist also rules leniently: Tam allows business even on gentile holidays not because of *etrah* but because transacting does not automatically aid and abet idolatry. *Tosafot*. BT *Avodah Zarah*. 2a. *asur*.
29. BT *Avodah Zarah* 11b. *b'golah*.
30. MT. *Avodah Zarah*. 9:2; SA. *Yoreh Deah* 148:5; BT *Avodah Zarah* 65a; *Tur Yoreh Deah* 148.
31. *Chinuchi HaRitba*. *Avodah Zarah* 9a. *v'etna'ad d'achil manush*.
32. BT *Baba Metzia* 32b; Rashi on BT *Baba Metzia* 32b. *i amarta lau d'oraita*. Steinsaltz agrees, saying that if *etrah* were the only plausible rationale, such action would not be commanded. Steinsaltz edition of BT *Baba Metzia* 32b. *batam* . . .
33. MT. *Kotzetzach U'Shmirat Nafesh*. 13:9. See also *Midrash Tanugim* to Deuteronomy. 22:4; SA. *Choohen Mishpat* 282:8–9; Pinchas Zivchi's, *Ateret Paz Responsa* 1:3 *Choohen Mishpat* 7:3; Ovadia Yossef's *Yechavech Da'at Responsa*. 5:65: *v'me'ata ntr'e*.
34. *Mishnah Avodah Zarah* 2.1; BT *Avodah Zarah* 26a.
35. Tosafot. BT *Avodah Zarah* 26a. *savar rav yosef*; MT. *Avodah Zarah* 9:16.
36. *Mishnah*. *Ta'anit* 4:3; Rashi on BT *Ta'anit* 27b. *mipnei hanotrim*; see *Yamani* at the bottom of Steinsaltz edition there; *Ra'avyah Ch'ag*. *Hilkhot Ta'anit*. 860. *v'ushen rabbeinu*.
37. See BT *Avodah Zarah* 8a. *Encyclopedia Talmudit*. *Eruvah*. Column 493. Note 59a. See also Exodus 34:15; BT *Avodah Zarah* 8a; MT. *Avodah Zarah* 9.15; SA. *Yoreh Deah* 152.1; *Shakh* on SA. *Yoreh Deah* 152.1.
38. *Tosafot*. BT *Avodah Zarah* 3:2. Selling religious objects is permitted to a population called *'am ha'aretz*—the common folk—who are not suspect of using these objects for idolatrous purposes. *Minhag Biehorim* 3:2. *Iam ha'aretz*. See also BT *Berachot* 47b where *'am ha'aretz*

- are described as Jews who are not punctilious in their observance of certain religious practices; *Makhorit Responsa Chadolshot* 123. *ela nomar labahin*. *Be'er Sheva Responsa*. 36; *She'iltat Ye'avez Responsa*. 11:122.
39. *Mishnah Avodah Zarah* 2.1.
40. MT. *Avodah Zarah* 10:2. See also SA *Yoreh Deah* 158.1.
41. BT *Avodah Zarah* 26a; *Chinuchi HaRitba* on BT *Avodah Zarah* 26a. Commentary to Ritba offers this interpretation: "If a gentile wants to give money to [a Jewess], this is permitted because of possible enmity, even if the Jewess does not accept the money." That is, a Jewess need not necessarily take the money offered for her services, but money must be offered so that the gentile would not think the Jewess serves for free. See note 125, page 105. See also *Shakh* on SA. *Yoreh Deah*. 154:2.
42. BT *Avodah Zarah* 26a. Shas edition. See also Rashi on BT *Avodah Zarah* 26a. *nakia li zimma l'nei d'arov*; *Beit Yosef Yoreh Deah* 158.1.
43. See *Chinuchi HaRitba*. *Avodah Zarah* 26a.
44. SA. *Choohen Mishpat* 425.5. See also MT *Avodah Zarah* 10.1.
45. Wurzburger, "Darkei Shalom," 80; see also page 83. Emphasis added.
46. Wurzburger mentions Hoffmann, Lazarus, and Lauterbach. See Wurzburger, *Ethics of Responsibility*, 48; see also 50–52.
47. Psalms 145:9. See MT *Melachim* 10:12; MT *Eruvin* 9:8.
48. Wurzburger, *Ethics of Responsibility*, 125, note 55.
49. Novak, *Conventional Rights*, 151–52.
50. *Ibid.*, 152.
51. Yitzhak Blau, "The Implications of a Jewish Virtue Ethic," *The Torah U-Madda Journal* 9 (2000): 27, and note 45 there.
52. *Ibid.*
53. Jacob Katz, *Exclusionism and Tolerance: Studies in Jewish-Gentile Relations in Medieval and Modern Times*, Scripta Judaica 3 (London: Oxford University Press, 1961), 59–60.
54. Rosen, "Mipnei Darkei Shalom in Rabbinic Tradition."
55. Christine Elizabeth Hayes, *Between the Babylonian and Palestinian Talmuds: Accounting for Halachic Difference in Selected Sugyot from Tractate Avodah Zarah* (New York: Oxford University Press, 1997), 238, note 46.
56. Schiff, "Principles of Power," 40.
57. *Chinuchi HaRitba*. *Avodah Zarah* 8b. *v'etna'ad d'achil manush*.
58. *Chinuchi HaRitba*. *Avodah Zarah* 6b. *habuh*. See also his note on 8b #292 on page 30.
59. *Chinuchi HaRitba*. *Avodah Zarah* 26b. *yehobal ymanim leih*.
60. Elion, "Takkanot," 76.
61. *Ibid.*, 75.
62. The quote continues: "The question was raised whether one should care for the animal of a gentile in the same way one tends the animal of a Jew. The sages ruled that if caring for animals is a Toraitic law, one must surely care for the animal of a gentile. Even if it is only rabbinic in origin, one should still care for the animal 'to prevent enmity' (BT *Baba Metzia* 37b)." Moshe Zemer, *Enacting Halakha: A Progressive Approach to Traditional Jewish Law* (Woodstock, VT: Jewish Lights Pub., 1999), 15. Wurzburger contends that *mipnei etrah*, for the most part, "usually is employed in the Gemara when Amoraim seek to explain the

- reasons for decrees enacted by the Tamaim." Wurzburger, *Ethics of Responsibility*, 124, note 50.
63. Blau, "Jewish Virtue Ethic," 39, note 40.
64. Hayes, *Between the Babylonian and Palestinian Talmuds*, 141.
65. *Ibid.*, 143.
66. Blau, "Jewish Virtue Ethic," 27.
67. Hayes, *Between the Babylonian and Palestinian Talmuds*, 238 note 46.
68. Wurzburger, *Ethics of Responsibility*, 49.
69. *Ibid.*, 49, Emphasis mine. See also Wurzburger, "Darkei Shalom," 82.
70. *Responsa Sprider Eish*, 3:101 (1885–1966, Lithuania/Germany).
71. Novak, *Covenantal Rights*, 151.
72. He bases this assertion on two Talmudic and Tosafist discussions of assisting at childbirth and whether Israelites should heal gentiles for pay.
73. Novak, *Covenantal Rights*, 151–52.
74. Here he cites two *meinhayot*—one on not preventing poor gentiles access to sustenance and the other on greeting gentiles during the sabbatical year—as well as the Palestinian Talmud on the same topic.
75. Novak, *Covenantal Rights*, 152.
76. *Seder HaMibragim* (Tyrna), *Hagahot Minhagin Purim*, 6.
77. Novak, *Covenantal Rights*, 152.
78. Deuteronomy 6:18; 12:28.
79. Elliot N. Dorff, *To Do the Right and the Good: A Jewish Approach to Modern Social Ethics*, 1st ed. (Philadelphia: Jewish Publication Society, 2002), 249, Emphasis in original.
80. *Ibid.*, 253, Emphasis in original.
81. *Ibid.*, 254–55, Emphasis in original.
82. *Ibid.*, 257.
83. *Ibid.*, 243.
84. *Ibid.*, 248 and 260.
85. We should note that the duty to perform is distinct from the right to expect such behavior. That is, to the degree that *takkanot mipnei ervah* require Jewish behavior to attend to the betterment of certain gentiles or personal concerns, these laws do not extend to these recipients the right to expect such attention.
86. MT, *Mattenot Aniyim* 10:7–14.
87. See Dorff, *To Do the Right and the Good*, 244.
88. This appeal to authority appears in the discussion of *mitshum tzar ha'vlei choyim, mitshum tzar Israel, and mipnei ervah*.
89. The Bible also puts forward the goal of being worthy of God's blessing.
90. MT *Melaḥim* 10:12.
91. MT *Rozzaḥ U'Shimrit Nafesh*, 13:9.
92. MT *Evel* 14:12; Rosh on BT *Gittin*, 5:23; *Seder Kallo*, 114, *ein mefamin*.
93. *She'ilat Ye'avetz Responsa*, II:122.
94. MT *Mamrim* 2:2.

95. *Haagat HaRabad, Mamrim* 2:2. See also BT *Beitzah* 5a-b; Rashi on 5b, s.v. *ta'ama*.
96. *Radbaz, Mamrim* 2:2. Translation from Central Conference of American Rabbis (CCAR) *Responsa* 5759:7.
97. CCAR *Responsa* 5759:7, "The Second Festival Day and Reform Judaism."
98. *Chidushei HaRitva, Avodah Zarah* 6b, *babuh*. And *Avodah Zarah* 26b, *yibodah l'matmar leib*.
99. Hayes, *Between the Babylonian and Palestinian Talmuds*, 238 note 46.
100. *Ibid.*, 140–43.
101. Zemer, however, thinks both rationales "involve the loosening of rabbinic prohibitions"—which glosses over these nuances. *Evolving Halakhab*, 15–16.
102. See Hayes, *Between the Babylonian and Palestinian Talmuds*, 238 note 46.
103. R. Y. Unterman, "Darkei Shalom Vehagadararam," *Or HaMezrah* 15:4 (1966), 231.
104. Wurzburger, "Darkei Shalom," 84.
105. Because *ervah* always reflects a pragmatic concern, the laws to which they are attached are what Dworkin calls policies. Similarly, when *mipnei darkei shalom* reflects a realpolitik concern, those laws are also policies; otherwise, laws linked to *darkei shalom* are principles. Both policies and principles, according to Dworkin, admit exceptions and are subject to alteration. See Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977), cited in Elliot N. Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics*, 1st ed. (Philadelphia: Jewish Publication Society, 1998), 408–9.
106. MT *Avodah Zarah* 9:2; SA *Yoreh Deah* 148:5; *Chidushei HaRitva Avodah Zarah* 9a, v. *eiema vad d'achil memash*.
107. David Novak, "Natural Law, Halakhab, and the Covenant," in *Contemporary Jewish Ethics and Morality*, ed. Elliot N. Dorff and Louis E. Newman (New York: Oxford University Press, 1995), 42.
108. *Moreh Nebukim*, III:26.
109. JT *Gittin* 5:9; Tosefia BT *Gittin* 3:18.
110. *Responsa Da'at Kohen*, 13: *umatzari l'naḥon*.
111. On *takkanot ha-kahal*, see Elliot N. Dorff, Arthur I. Rosert, and Jewish Theological Seminary of America, *A Living Tree: The Roots and Growth of Jewish Law* (Albany: State University of New York Press, 1988), 404–7.
112. Dorff, *Matters of Life and Death*, 404.
113. Leviticus 19:2.
114. *Moreh Nebukim* III:28. See also MT *Yevodeh haTorah* 4:13.