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Deborah Barer  
*Towson University*

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# WHEN LOSERS WEEP: INTERPERSONAL RESPONSIBILITY IN BAVA METZI'A 24B

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DEBORAH BARER

*Towson University*

Discussions of ethics often gravitate toward cases of heroism or outrageous moral transgressions. But the ways that we conceive of and care for others are often revealed most clearly in far more mundane interactions, encounters that may be muddied by minor prejudices, personal interests, fatigue, or inattention. The messy, commonplace nature of these interactions makes them a prime target for exploring the ways that people work through competing priorities and exhibit (or fail to exhibit) care and concern for others—in other words, the ethics of everyday life.

In this essay, I explore these questions of everyday ethics<sup>1</sup> through the lens of a lost property case in Bava Metzi'a 24b. My approach to the text is

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<sup>1</sup> This focus tends to be central in the field of applied ethics, which centers on the study of real-life moral problems rather than on theoretical questions about how to determine what is right or wrong. Applied ethics includes various subfields and foci, such as business ethics, environmental ethics, and medical ethics, and scholars within the field may hold different theoretical commitments. See, for example, Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1979), and Thomas Beauchamp and James Childress, *Principles of Biomedical Ethics* (New York: Oxford University Press, 1979).

shaped by my experience teaching rabbinic literature and Jewish ethics at a public university to both undergraduate and graduate students from diverse backgrounds. In my classroom, students tend to highlight one of two challenges when approaching this text. Those with experience studying Talmud balk at the content; while they grasp the basic ideas of the text, its intricate arguments over lost objects do not command their moral attention or excite them intellectually. Those with no previous exposure to Talmud, on the other hand, find it bewildering, archaic, and inaccessible. They struggle to find a foothold within the text, to follow its arguments or identify points of connection with their own lives.

To address both concerns, I approach teaching this text with three different but complementary goals in mind. First, I want students to understand the core issues and questions that shape discussions of lost property. I begin by discussing contemporary examples of items they might lose or find in our own classroom. My goal is for students to become aware of their own processes of moral reasoning around lost objects, so that they can put their own ideas into conversation with those they find in the text.<sup>2</sup> While the two rabbis in this *sugya*, Mar Shmuel<sup>3</sup> and Rav Nachman, seem to share an understanding of many of the legal principles at play, they offer diametrically opposed instructions about what to do with the lost item under discussion. Having already clarified their own thinking about lost property, students are better prepared to engage the rationale behind each rabbi's argument.

Second, I want students to be able to identify different voices within the text and understand how they correspond to different historical layers. Bava Metzi'a 24b provides a concrete case study that raises broader questions about emotion, "reasonable" expectations, social obligations,

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<sup>2</sup> For a helpful comparison of Talmudic ideas about lost property with those in American law and society, see Michael J. Broyde and Michael Hecht, "The Return of Lost Property according to Jewish and Common Law: A Comparison," *Journal of Law and Religion* 12.1 (1995–1996): 225–253.

<sup>3</sup> In other passages, he is simply referred to as Shmuel. "Mar" means "master" and is a term of respect.

and the (often unspoken) assumptions that guide our interactions with others. It not only charts different responses to these issues, but it models the process of entering into dialogue with a text by illustrating how one set of readers—the Talmudic editors—were in conversation about these issues with earlier generations of rabbis, whose teachings they inherited, challenged, and reinterpreted. Tracing these different historical layers provides students with multiple points of entry into the text.

Finally, I want students to engage with the ethical conundrum that lies at the heart of *Bava Metzi'a* 24b, the implications of which extend far beyond this specific lost property case: many of our behavioral norms, whether they are articulated as legal, moral, or social obligations, are based on a set of assumptions about how others will experience and respond to a given situation. When these assumptions turn out to be incorrect, do our obligations change as a result, and if so, how?

The *sugya* offers three possible answers to this final question, each articulated by a different voice in the passage. I argue that this multivocality invites the reader into an ethical dialogue with the text, giving us the opportunity to think both with and against the different positions articulated by the Talmud and to add our own voices, perspectives, and options to that debate.<sup>4</sup> Because of the context in which I teach, I do not assume that my students have any religious connection or commitment to the Talmud, or that they accept it as an authoritative source of moral teaching. Furthermore, the various voices represented on the Talmudic page emerge from a very different historical and cultural reality than the one my students occupy. While I do not expect my students to look to the Talmud for normative ethics, I suggest to them that

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<sup>4</sup> This orientation is deeply influenced by my participation in a series of conferences and workshops on “Thinking With the Talmud,” organized by Dana Hollander, Randi Rashkover, and Chaya Halberstam. I am grateful to the organizers and participants for helping me to develop both my pedagogy and my scholarship around these questions. Louis Newman describes this way of reading as entering into a “dialectical relationship” with the text, one in which it becomes impossible to draw a sharp distinction between the voice of the text and that of the reader. Louis Newman, “Of Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics,” *Modern Judaism* 10.1 (1990): 17–42, at 37.

reading with the rabbis across difference can be illuminating. Using the activity of the Talmudic editors as a model, I argue that contemporary readers are not required to accept the different moral and legal positions offered by the text, nor does the text necessarily offer a singular “correct” answer to the questions it raises. Instead, the *sugya* challenges us to engage with the fundamental questions it raises, to clarify our commitments and assumptions in dialogue with these different voices, and to seek our own resolutions to the problems it highlights. In our classroom conversations, we shuttle between the text of the *sugya* and the world we inhabit as readers, testing out the possible implications of ideas raised in the text for our contemporary reality.

## Understanding the Case

I chose the *sugya* from Bava Metzi’a 24b as our primary text for multiple reasons. First, it is a relatively brief and self-contained passage centered around a concrete scenario that students can easily envision. Second, it clearly differentiates between different layers or voices within the text, so students can trace the disputes between these voices and their implications. Finally, despite its brevity and despite dealing with the apparently mundane situation of a lost purse, the *sugya* raises profound questions about subjectivity and interpersonal responsibility.

The passage presents parallel conversations between two student-teacher pairs—Rav Yehuda and Mar Shmuel, and Rava and Rav Nachman—as they pass through a marketplace. Both students seize on the outing as an opportunity to ask about matters of rabbinic law, and each presents his teacher with the same theoretical scenario: if a person found a lost purse in the market, what should they do with it? Is this a “finders, keepers” scenario, or does the finder have some obligation to try and locate the original owner and return the purse to them?

Both rabbis initially agree that the finder can keep the purse. Below, I present an initial excerpt from the *sugya*, so that the reader can see these parallels clearly. For the full text, please see the appendix.

Rav Yehuda was following Mar Shmuel in the market for pounded grain. He said to him: "If a person found a purse here, what is the ruling?" He replied: "It is his."

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Rava was following Rav Nachman in the leatherworkers' market—and there are those who say [they were in] the marketplace of the rabbis. He said to him: "If a person found a purse here, what is the ruling?" He said to him, "It is his."

To understand why both rabbis say the purse belongs to the finder, it is necessary to understand some of the underlying principles that govern rabbinic thinking about lost property. The first is a concept known as *ye'ush*. *Ye'ush* literally means despair, but in the context of property law, it refers to a person relinquishing their claim to a lost item—that is, they objectively "despair" of finding it. While this abandonment of property is thought to proceed from the subjective experience of despair, it is nevertheless distinct from it, and this distinction is central to how rabbinic property law operates. When dealing with lost items, the main challenge the rabbis confront is determining whether the item in question has been abandoned by its previous owner. If so, it is ownerless (*hefker*) and available for the taking; if not, the finder must try to return the item to its owner. But how is the finder to know if the item has been abandoned or not? Since the owner is absent, the finder cannot ask them, so they need some other way to make this determination. This is where the idea of *ye'ush*, or presumed abandonment, comes in.

The Talmud tries to define the circumstances in which the finder can assume *ye'ush* has occurred and ultimately concludes two things. First, the owner must be aware of the loss in order to abandon the item.<sup>5</sup> The rabbis

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<sup>5</sup> There is a long debate between Abbaye and Rava (Bava Metzi'a [BM] 21b–22b) about whether abandonment can occur without the original owner being aware of the loss (a concept known as *ye'ush she-lo mi-da'at*). This possibility is rejected, but the Talmud argues that in many instances, awareness of the loss can be assumed (see below).

expect that in many cases this will happen quickly.<sup>6</sup> Second, the Talmud assumes that in at least some cases, once the owner realizes their loss, they will give up any hope of getting their item back and abandon their claim to it. Whether or not this happens depends on the type of item in question, but in such cases, a person who finds a lost object can treat it as ownerless and claim it for herself, even though she has no way of knowing for certain whether the owner is aware of the loss or has given up their claim to it.<sup>7</sup>

There are a few general types of cases where *ye'ush* can be assumed. One is in the case of generic items, or items that lack any unique feature or identifying mark (referred to in the Talmud as a *siman*, or sign). To understand this logic, consider the following example: a woman goes to a shop or marketplace and buys a purse. The purse is one of several that the vendor sells, and all of them are identical. On her way out of the market, she rummages around in her shopping bag looking for something and the purse falls out. When she arrives home and begins to unpack her purchases, she realizes her loss.

The Talmud assumes that although the woman may be upset, she will give up on getting her purse back. To understand why, consider a counterfactual. Imagine she goes back to the marketplace and sees a man picking up a purse from the ground. She hurries over to claim it, but the man stops her. How does she know that this purse is the same one she lost? Since the purse is generic and identical to several others sold in that market, she will have no way to prove it was hers and thus no way to convince the man to give it to her. The same problem would be true for any generic item. The Talmud assumes that the woman will realize this

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<sup>6</sup> For example, a person will soon notice if they have dropped a heavy item. Similarly, people frequently check on valuable items, like a purse or a wallet, and thus are likely to realize if they have lost them. Cf. BM 21b.

<sup>7</sup> Although the Talmud rejects the idea of *ye'ush she-lo mi-da'at*, or abandonment without awareness, the finder is able to act because she can determine whether both awareness and abandonment are *likely* to have happened. For a more complete discussion of the criteria that enable her to make this assessment, see BM 21b–22b.

difficulty, and therefore it expects her to abandon her purse as soon as she realizes it has been lost.<sup>8</sup>

Initially, one might assume that this is why both Mar Shmuel and Rav Nachman say that the finder can keep the lost purse. If the purse is generic, *ye'ush* can be assumed and anyone can claim it. The next step in the discussion shows, however, that this cannot have been their rationale. Both students go on to ask their teachers about a related, but different, scenario: what if the purse had an identifying mark of some kind (a *siman*) and the original owner showed up to claim it? I present the continuation of each conversation below, with the different responses of each rabbi highlighted.

Rav Yehuda was following Mar Shmuel in the market for pounded grain. He said to him: "If a person found a purse here, what is the ruling?" He replied: "It is his." "And if a Jew came and showed him an identifying mark, what is the ruling?" **He replied, "He is obligated to return it."**

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Rava was following Rav Nachman in the leatherworkers' market—and there are those who say [they were in] the marketplace of the rabbis. He said to him: "If a person found a purse here, what is the ruling?" He said to him, "It is his." "And if a Jew came and showed him an identifying mark, what is the ruling?" **He said to him, "It is his."**

If the reason the finder could originally take the purse had to do with it being generic, we would expect both Mar Shmuel and Rav Nachman to say that the finder must give the purse back in the second case, but this is

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<sup>8</sup> Some later commentators complicate this idea. The *Tosafot* on Chullin 44b (אִיזוֹהוּ תַלְמִיד חֲכָם) argues that a *talmid hakham* (i.e., a sage; literally, a "wise student") can identify an object without a *siman* as his own through a process called *tevi'at ayin*. As a result, unlike the women in our theoretical case, he would be able to accurately identify whether the found purse was the same as the one he lost, and his determination is considered trustworthy. Under *tevi'at ayin*, the Torah scholar has a reasonable expectation of recovering the generic item he lost, while others do not. While this is only true for a certain status of Torah scholar and not for the average person, who is expected to abandon generic items, the comments of the *Tosafot* here represent an acknowledgement that different individuals will respond to the loss of their property in different ways and that they might have good reasons for doing so. This acknowledgement will have important implications for our *sugya*.



not what happens. Instead, Mar Shmuel says the finder must return the purse, but Rav Nachman says he can keep it. This suggests that their reasoning in both cases has nothing to do with the purse being generic, but rather with the location in which it was found.

The *sugya* describes the student–teacher pairs as being in either the market for pounded grain or the leatherworkers’ market when the discussion takes place, both of which are public and predominantly non-Jewish spaces.<sup>9</sup> As with generic items, the Talmud thinks that *ye’ush* can be assumed when an item has been lost in a predominantly Gentile area.<sup>10</sup> Since the item is likely to be found by a Gentile, and since Jews cannot expect non-Jews to follow rabbinic teachings about when and how to return lost property, the owner will despair of recovering their item as soon as they realize where they lost it.<sup>11</sup>

On this rationale, Rav Nachman’s statement that the finder can keep the purse in both cases makes sense. If the reason the owner is expected to have *ye’ush* has to do with the location in which the purse was lost, then the fact that it has a *siman* is irrelevant. A Jew would not expect a non-Jew to return the purse, whether it had an identifying mark or not. Although the finder happens to be a Jew in this case, she can still expect that the owner will treat the lost purse as unrecoverable and abandon his claim to it. And yet, if this is the case, why does Mar Shmuel say that the finder is required to return the purse?

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<sup>9</sup> The *sugya* records an alternate tradition that Rava and Rav Nachman were in the marketplace of the rabbis (and some manuscripts only record this version), which would be a predominantly Jewish space, so the same logic would not hold. However, according to the Talmud, it is still possible that the purse would belong to the finder because it was lost in such a public place. The owner would realize the likelihood that the purse would be kicked about and its *siman* would be trampled and destroyed, making it impossible for them to reclaim it, and thus they would have *ye’ush* and abandon it (see BM 23a).

<sup>10</sup> Cf. BM 23b–24a. In most cases, the Talmud treats the location that the item was found as identical to the location in which it was lost.

<sup>11</sup> For a discussion of the difference between losing property in a predominantly Jewish space or a predominantly Gentile space, see BM 24a–b.

The key twist in the second scenario is not the presence of the *siman*, but rather the sudden appearance of the original owner, who demands the return of his purse. His actions make it clear that, contrary to all expectation, he has not despaired over reclaiming his purse and has not relinquished his claim to it. From his perspective, the purse is still his. Indeed, he may think, “What luck! Even though I lost my purse in a Gentile marketplace, a fellow Jew has found it. Surely, when I show her my *siman*, she will return my purse to me!” In this case, the owner’s actual experience of loss and despair (or lack thereof) flies in the face of rabbinic assumptions about how he will (or should) respond to loss. This brings us to the legal question at the heart of this *sugya*: if the owner is aware of the loss but has not personally experienced despair and given up on his item, has *ye’ush* still legally occurred?

Mar Shmuel argues that it has not. We can understand the logic of his position as follows: the legal category of *ye’ush* exists because the finder needs to know what to do with the lost item. Without having recourse to the original owner, she must make her determination based solely on the lost item itself. As a result, the rabbis rely on features of the object—such as whether it is generic or distinctive, and where it was found—to draw inferences about how it was lost and how the owner is likely to respond to the loss. These inferences are the product of necessity and of limited knowledge. In a case where the original owner shows up, however, such inferences are not needed. The owner’s actions make it clear that he has not abandoned his item and therefore the purse must be returned to him.

Rav Nachman disagrees. For Rav Nachman, the legal category of *ye’ush* is not dependent on the emotional experience of the owner. Separating the two is essential for the law to operate effectively since the experience of the owner cannot be discovered in most cases. The finder needs to be able to rely on inferences drawn from characteristics of the item itself, and to be confident in her conclusions about what she can do with it. If the law were subject to the owner’s experience, it would undermine her ability to make these assessments in his absence. As a result, *ye’ush*, or legal abandonment, must depend on how the *average or*

*typical person* would react, and not on an individual's actual experience of despair (or lack thereof).

While the primary difference in Mar Shmuel and Rav Nachman's positions can be attributed to their respective understandings of *ye'ush*, it is also notable that each rabbi pays more attention to one party in the exchange. Mar Shmuel's primary concern is for the original owner, who has experienced a loss. He wants to redress that loss if possible. As we will see, the Talmudic editors suggest that this orientation is based on the influence of his father, who once returned lost donkeys to their original owner even after he had cared for them for a long period of time and was entitled to keep them.<sup>12</sup> Based on his father's example, Mar Shmuel concludes that the finder of the lost purse is not required to seek out the original owner (as she would be in a case where *ye'ush* is not presumed to have occurred), but that if she is presented with an unexpected opportunity to return the item, she must take it.

By way of contrast, Rav Nachman's primary concern is for the finder. As the example of Mar Shmuel's own father attests, returning lost items can be burdensome. A purse may be relatively easy to keep, but some lost items (such as a donkey or other livestock) require care and expense to maintain until their owner is located.<sup>13</sup> And the simple act of trying to locate the owner requires an investment of time and energy, even for a small item such as a purse. It is important, therefore, to make it clear which items she must return and which items she can take, so as not to burden the finder unnecessarily. If this determination were to change when the original owner shows up, it would undermine the entire system. Furthermore, the finder presumably wants to keep the purse (since there would otherwise be no issue). To require her to return to the purse is to change the rules of the game and to take away property to which she is

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<sup>12</sup> Bava Metzi'a 28b specifies that the finder must care for the lost animal for a period of 12 months. Notably, this statement is attributed to Rav Nachman in the name of Shmuel, the same two rabbis that appear in our *sugya*.

<sup>13</sup> BM 28b–29a.

entitled. If the law required her to return the purse once the owner shows up, as Mar Shmuel suggests, the finder now endures a loss of her own.

Both rabbis' responses to the case of the theoretical lost purse can be seen as an effort to balance the burdens that lost property places on losers and finders alike, but the *sugya* does not end by simply presenting these competing opinions. Instead, it introduces a third voice, that of the Talmudic editors, which complicates each position and introduces new options.

### The Editors Respond

The Talmudic editors are responsible for compiling the Talmud as we have it today. In addition to collecting and arranging the teachings of earlier rabbis, they also added their own statements, which now comprise a significant portion of the Talmud. Unlike the teachings of earlier rabbis, these statements are made anonymously. For this reason, many scholars refer to the editorial layer of the text as the *stam*, or anonymous layer.<sup>14</sup> In our *sugya*, the editorial voice provides a window into how one set of readers responded to the teachings of Mar Shmuel and Rav Nachman, and to their disagreements about how to address the case of the lost purse.

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<sup>14</sup> This anonymous layer makes up roughly one third of the text of the Babylonian Talmud. Scholars disagree about precisely which sages authored this layer and when it was written. Most scholars, including myself, follow a theory of post-amoraic redaction, meaning that the editors lived and were active in a later period than the sages who are named in the text. Within this school of thought, many, but not all, refer to the editors as the *stammain*, or "anonymous ones," because their contributions are unattributed. Since this term is not universally used, however, I prefer to simply refer to "the editors." For those interested in learning more about the different theories of the redaction and editing process, see David Weiss Halivni, *The Formation of the Babylonian Talmud* (Oxford: Oxford University Press, 2013); Richard Kalmin, "The Post-Rav Ashi Amoraim: Transition or Continuity? A Study of the Final Generations of Amoraim in the Redaction of the Talmud," *AJS Review* 11.2 (1986): 157–187; and Richard Kalmin, *The Redaction of the Babylonian Talmud: Amoraic or Saboraic?* (Cincinnati: Hebrew Union College Press, 1989). For an alternative view, see Moulie Vidas, *Tradition and the Formation of the Babylonian Talmud* (Princeton: Princeton University Press, 2009). Vidas argues that much of the editing of the Talmud was completed by some of the same sages who are named in the text, the *amoraim*, and that the decision to attribute some of their teachings and not others was an intentional literary choice.

The editors intervene in the discussion of the lost purse in two main ways. First, they significantly reframe Mar Shmuel's teaching, changing its actual content. While Mar Shmuel says the finder is *obligated* to return the purse when the owner shows up to claim it, the editors reinterpret his teaching to mean that the finder has the *option* to return the purse. If the finder chooses to do so, she will be acting *lifnim mi-shurat ha-din*, literally "within the line of the law." (I explain this phrase and its significance in greater detail below.) Second, the editors call attention to the problems raised by each rabbi's position. They present Mar Shmuel's rulings on the two scenarios as logically inconsistent, while they present Rav Nachman's rulings as logically consistent but ethically troubling. The structure of the *sugya* suggests that the editors ultimately side with Rav Nachman: they offer a defense of his view, and they present it last, giving him the final say on the matter. It is therefore especially notable that the editors go to significant lengths to highlight the shortcomings of Rav Nachman's position and to offer the alternative of acting *lifnim mi-shurat ha-din*.

To better understand the activity of the editors, it will be helpful to consider their responses to each rabbi in turn. Below, I present the portion of the *sugya* centering on Mar Shmuel's interaction with Rav Yehuda in full, with the editorial commentary highlighted in bold.

Rav Yehuda was following Mar Shmuel in the market for pounded grain. He said to him: "If a person found a purse here, what is the ruling?" He replied: "It is his." "And if a Jew came and showed him an identifying mark, what is the ruling?" He replied, "He is obligated to return it." **Both?! *Lifnim mi-shurat ha-din*,<sup>15</sup> because the father of [Mar] Shmuel once found donkeys in the desert and returned them to their owner after twelve months had already passed<sup>16</sup> *lifnim mi-shurat ha-din*.**

The editors' initial question highlights a logical inconsistency in Mar Shmuel's teachings. When read together, Mar Shmuel's decisions seem to

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<sup>15</sup> The meaning of this Hebrew phrase has been widely debated. As a result, I do not translate it here, but discuss different possible meanings below.

<sup>16</sup> In other words, he chose to return the donkeys even though he had no legal obligation to do so.

suggest that the found purse is somehow ownerless (since he initially states that the finder can take it) but also owned (since he says the finder must return it to the original owner when he appears). How, the editors ask, can both be true? They resolve this apparent problem by dramatically reframing Mar Shmuel's position. Although Mar Shmuel uses language that makes it very clear that the finder is legally obligated to return the purse,<sup>17</sup> they argue that this cannot be what he means. Rather, Mar Shmuel is counseling the finder to act *lifnim mi-shurat ha-din*.

Precisely what it means to act *lifnim mi-shurat ha-din* has been the topic of much debate. Some argue that it means to ethically supersede the requirements of law.<sup>18</sup> In other words, although the finder may be under no legal obligation to return the purse, legal rules are not solely responsible for determining the right course of action. Morality dictates that she should return the purse, and it would be right and praiseworthy to do so. Others argue that to act *lifnim mi-shurat ha-din* means to waive one's rights under the law.<sup>19</sup> In other words, although the finder is legally entitled to the purse, that does not mean she has to take it. She can choose to waive her rightful claim to it and give it back to the original owner instead. Although different in orientation,<sup>20</sup> this interpretation also highlights the fact that simply because one *can* do something does not mean one *should*. Thus, both schools of thought agree on what it means to act

<sup>17</sup> He uses the term *hayyav*, which indicates obligation or requirement.

<sup>18</sup> For examples and discussion of this view, see Aaron Kirschenbaum, *Equity in Jewish Law: Beyond Equity: Halakhic Aspirationism in Jewish Civil Law* (Hoboken, NJ: KTAV Publishing House, Inc., 1991), 109, and Louis Newman, "Law, Virtue, and Supererogation in the Halakha," *Journal of Jewish Studies* 401 (1989): 61–88, at 61.

<sup>19</sup> For examples of this view, see Shmuel Shilo, "On One Aspect of Law and Morals: Lifnim Mishurat Hadin," *Israel Law Review* 13 (1978): 359–390, and Christine Hayes, *What's Divine About Divine Law? Early Perspectives* (Princeton: Princeton University Press, 2015), 178.

<sup>20</sup> Proponents of the supererogation model tend to view ethics as a separate domain from halakhah, or Jewish law. When a person acts *lifnim mi-shurat ha-din*, it is an instance of ethics overruling law. Proponents of the waiver of rights model tend to view ethics as part of halakhah. When a person acts *lifnim mi-shurat ha-din*, their ethics guide them to exercise certain legal options. While these options are always available, they are not the standard course of action and are only activated in unusual circumstances.

*lifnim mi-shurat ha-din* in this case: although the finder is legally entitled to the purse and can keep it if she so chooses, the ideal course of action is to return it.

I argue for a different understanding of *lifnim mi-shurat ha-din*. While the two interpretations discussed above pit ethical and legal judgments against one another, I argue that the phrase does not signal a switch from law to ethics, but rather a switch from one way of making decisions to another.<sup>21</sup> More specifically, it signals that, in the mind of the editors, Mar Shmuel did not rely on general legal rules and principles to make his decision, but instead focused on case-specific factors to try and determine the best outcome in this scenario.<sup>22</sup> On this view, Mar Shmuel agrees with Rav Nachman that the general rule is that the finder can keep a lost purse found in a Gentile marketplace (as he explicitly says when Rav Yehuda first poses the question), but argues that in *this particular case*, this rule should not be applied. The rule is based on assumptions about human experience—namely, that a person who loses an object in a Gentile marketplace will abandon their claim to it—that are not accurate in this case. This does not mean those assumptions are necessarily or inherently flawed; rather, it means that in cases where those assumptions are demonstrated to be false, a person will need to approach their decision in the case differently. This explains why Mar Shmuel changes his instruction about what to do if the purse owner shows up and demands his property back.

To be clear, this is how the *editors* understand Mar Shmuel's decision. Although they present themselves as simply interpreting or explaining Mar Shmuel's decision, in practice they are changing it. Mar Shmuel says

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<sup>21</sup> For more on my own understanding of this phrase, as well as a more detailed discussion of the other main views, see Deborah Barer, "Ethics and Halakhah: Reframing the Question," *Journal of Jewish Ethics* 5.2 (2019): 180–206.

<sup>22</sup> In ethics, this focus on outcomes is often described as consequentialism. For a classical articulation of this view and the related idea of utilitarianism, see Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), and John Stuart Mill, *Utilitarianism* (1861). In law, the focus on outcomes tends to be associated with legal realism. For a classical articulation of this view, see Oliver Wendell Holmes Jr., "The Path of Law" (1897).

the finder is legally obligated to return the purse when the original owner appears to claim it, but acting *lifnim mi-shurat ha-din* is optional. On the editors' reframing, both Mar Shmuel and Rav Nachman agree that the finder can keep the purse, although Mar Shmuel points out that it is perfectly permissible to return it and there might be good reasons to do so in this case.

This reframing accomplishes several things for the editors. First, it resolves the logical inconsistency in Mar Shmuel's position. Once the purse has been lost in a Gentile marketplace, it becomes ownerless, regardless of what happens next and whether the finder ultimately chooses to keep it (as is their right) or return it (*lifnim mi-shurat ha-din*). Second, it resolves the legal conflict between Mar Shmuel and Rav Nachman. On this reading, both rabbis agree that since the purse is ownerless, the finder is entitled to it. Although they continue to disagree about the ideal course of action should the original owner show up to reclaim it, this difference is less destabilizing, since the legal status of the purse remains clear. Third, this reframing clarifies the implications of Mar Shmuel's view beyond the specific case of the purse. In the minds of the editors, Mar Shmuel not only clarifies the options available to the finder in this case, but he highlights the fact that following the rule or default course of action may not always be best. Individuals may want to evaluate the specific scenario they face and think about which course of action will lead to the best outcome for all involved in that case. Although rabbinic rules will establish an expected or default course of action (in this case, keeping the purse), if a different course of action seems better (in this case, returning the purse) and there is no rule prohibiting it, then a person should feel free to do that instead. Seen in this light, Mar Shmuel's teaching provides an example that others might imitate, just as the editors suggest that Mar Shmuel was inspired by the example of his own father. It does not, however, create any obligation for a person who finds themselves in a similar situation to relinquish what is rightfully (legally) theirs for the sake of another.

Having established clearly that the purse legally belongs to the finder, whether they elect to return it *lifnim mi-shurat ha-din* or not, one might



expect that the editors would simply present Rav Nachman's teaching and end the discussion there. It is therefore notable that they object as immediately to Rav Nachman as they did to Mar Shmuel, although on significantly different grounds. I present this section of the *sugya* below with the editorial comments once again in bold.

Rava was following Rav Nachman in the leatherworkers' market—and there are those who say [they were in] the marketplace of the rabbis. He said to him: "If a person found a purse here, what is the ruling?" He said to him, "It is his." "And if a Jew came and showed him an identifying mark, what is the ruling?" He said to him, "It is his." **Wouldn't he [the original owner] stand and shout in protest? Such behavior is like one who protests against his house falling, or his ship sinking at sea.**

While Rav Nachman's position is legally consistent—in both cases, he says the purse belongs to the finder—his decision in the second case nonetheless strikes the editors as callous. They identify with the emotional experience of the original owner, asking, "Wouldn't he stand and shout in protest?" The question is rhetorical—of course the owner will object!

In raising this question, the editors legitimate the owner's anger, and they anticipate that many readers' sympathies may lie with the owner. A person's attachments to their property are not always logical or dispassionate. I think of my purse as *my* purse whether it is in my closet, in my hand, or accidentally dropped by the side of the road. From my perspective, it only ceases to be my purse once I intentionally discard or abandon it.<sup>23</sup> Since the owner in our *sugya* clearly has not done this, many readers may intuitively feel that the lost purse is still his property, even though most people in his position would have abandoned it.

As soon as they have voiced these objections, however, the editors immediately quash them. Unlike in the case of Mar Shmuel, the editors do not substantively change or reframe Rav Nachman's position; instead,

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<sup>23</sup> This aligns with what Chaya Halberstam describes as the biblical view of property, which assumes a "stable relationship between an original owner and his or her property in the absence of any documentation or other evidence." Chaya Halberstam, *Law and Truth in Biblical and Rabbinic Literature* (Bloomington: Indiana University Press, 2009), 43.

they present it in a more emotionally sensitive way, adding an acknowledgement of the costs that come with it. And yet, even as they acknowledge those costs and the pain they cause to the original owner, they present that pain as unavoidable. The owner's unhappiness at being unable to reclaim his purse is analogous to the person who "protests against his house falling, or his ship sinking at sea." Such events are unfortunate and cause understandable distress, but it is fruitless to protest, because such cases are rare, and it would be impossible to design a legal system that fully prevents them from occurring.<sup>24</sup> The analogy to the sinking ship illustrates this clearly. A ship cannot sail at all without winds, even if those winds sometimes become dangerous and cause the ship to capsize. So too, the law cannot function without rules, even if those rules will sometimes have unintended or undesirable consequences. Although the owner may be upset at the loss of his purse, he has no legal recourse. One may sympathize with him, but it does not change the facts of the situation. The purse belongs to the finder, and it is her right to keep it.

### Entering the Dialogue

We have seen how the *sugya* presents three distinct voices commenting on the case of the lost purse and the questions it raises. Each voice emphasizes the plight of a different actor and offers its own approach to the situation. Mar Shmuel foregrounds the loss to the owner, arguing that this is a loss that the law must redress. Rav Nachman foregrounds the position of the finder, arguing that the law must provide stability and protect her rights: it cannot change simply because the

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<sup>24</sup> Legal theorist Frederick Schauer describes this problem as the "open texture" of rules; he argues that "even the *least* vague, the most precise, term will turn out to be vague as a consequence of our imperfect knowledge of the world and our limited ability to foresee the future" (emphasis original). Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, 2nd ed. (Oxford: Clarendon Press, 2002), 32. No matter how carefully one designs the system, it is inevitable that a situation will arise in which applying the existing rule will fail to realize the goal that rule was designed to achieve and may even directly undermine it.

original owner appears and force her to relinquish a found item that is properly hers. The editors sharpen the plight of owner but also introduce a new option: in cases like the lost purse, where the existing rules raise problems or may not lead to the best outcome, a person can elect to act *lifnim mi-shurat ha-din*. Although the editors resolve the conflict between Mar Shmuel and Rav Nachman, making it clear that the purse technically remains the property of the finder, their resolution leaves open a broader question: what is the *best* course of action in this case, and how should that be determined?

Beneath the case of the lost purse and its attendant challenges lies the fact that we frequently rely on assumptions about other people's experiences in order to navigate our social world. Although these assumptions can generate challenges, they also form the cornerstone of many types of moral instruction. For instance, modern parenting guides often suggest that we should ask our children, "How would you feel if someone treated you that way?" to teach them empathy and proper behavior. Similarly, both the modern proverb that you should not judge someone before you "walk a mile in his shoes" and the classical rabbinic admonition "do not do to another that which is hateful to you"<sup>25</sup> depend on the idea of empathically projecting ourselves into the experience of another person. We rely on assumptions about other people's experiences, including how they will respond to certain experiences (such as loss) or to our own actions and behaviors, precisely so that we can treat them fairly and kindly. And we base those assumptions on the ways we think that *we* would respond to the same situation.

The challenge inherent in this reliance is that each person is different. Even within the context of a given culture or subculture where basic norms and expectations are shared, people have different histories and

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<sup>25</sup> This teaching is attributed to Hillel the Elder in b. Shabbat 31a and can be understood as a derivation of Leviticus 19:18, which commands the reader to "love your neighbor as yourself" (NRSV trans.) Some version of this teaching is found in many religions and cultures; it is articulated by Jesus in the New Testament as "do to others as you would have them do to you" (Matt. 7:12, NRSV trans.) and is often known in Western culture as the "golden rule."

experiences of the world. Our expectations of how a typical person will react to a given situation, or of what a “reasonable” response is, may therefore be highly inaccurate when applied to a given individual. To illustrate this, let us return to the example of the lost purse and consider the following scenarios. Sarah buys a small black purse at a large commercial store, and it accidentally falls out of her bag while she is waiting for her bus home. When she discovers her loss, she is upset—after all, the purse was not free!—but she decides the only thing to do is simply go buy a new one. She therefore gives up her claim to the original purse, just as the rabbis expect. On the other hand, Amy buys the same purse at the same store while on a shopping trip with her grandmother, who passes away shortly thereafter. Because the shopping trip was one of their last outings together, in Amy’s eyes, the purse became a symbol of their relationship, and she has a strong attachment to it. Despite this, she accidentally leaves her purse at the same bus stop on her way home from work.

Most readers would not be surprised if Amy was more upset over the loss of her purse than Sarah and might expect that she would try harder to get her original purse back. Because of its sentimental value, to Amy the purse may feel irreplaceable, while to Sarah, it is easily substituted for another one. And yet, to anyone else, Sarah and Amy’s purses will look identical. Whoever finds the purse will have no way of knowing the backstory. All they will see is a small, generic, inexpensive purse.

Now let us imagine that Chelsea finds a small black purse at the bus stop. She checks the purse for any identifying information or content, like a wallet with an ID card inside, but she does not find anything. Since she has been wanting a new purse, she decides to keep it. Is Chelsea’s decision morally acceptable? What if one of the other women suddenly showed up at the bus stop and asked for the purse back? Should she return it in that case? Does it matter whether the purse Chelsea found originally belonged to Sarah or to Amy, or which woman shows up to reclaim it?

I offer this illustration because it highlights how we might think it is morally acceptable for Chelsea to take the purse *and also* think that it would be reasonable for Amy to show up and demand that Chelsea gives

her the purse back. Given this, how should we balance their competing claims? While Bava Metzi'a 24b offers us some possible responses, it does not answer such questions definitively, at least not for the diverse group of readers in my classroom. But what the *sugya* can do for all readers, regardless of background, is provide us with the groundwork to better articulate these questions and think through them.

The process of thinking with Mar Shmuel, Rav Nachman, and/or the editors about the specific cases raised in the Talmud gives us an opportunity to observe our own reactions. Is there a position that I intuitively agree with, or one that I instinctively reject? Can I articulate what is behind these intuitions? Do I agree with one rabbi's conclusion, but for different reasons than those provided? Do I think there is a potential solution that all the voices in the *sugya* have overlooked, or information that the *sugya* has not considered? My reactions will help me to become aware of my own (often unspoken) assumptions and commitments and articulate them explicitly.

Second, once I have become more aware of my own responses and intuitions, I can start to take on the role of the students in the *sugya*. What happens if we alter some detail of the case in question, as both Rav Yehuda and Rava do in the passage we read, or as I did in the example of Sarah, Amy, and Chelsea above? Does my thinking about the best course of action change? Here, I am not only entering into dialogue with ideas from the text, but also adopting strategies for ethical reflection from it. This process will enable me to defend the rationale behind my judgments more clearly as well as to apply my conclusions about this *sugya* and the challenges it presents to other cases that the Talmud may not consider.

## Implications

Some readers may object that this is a lot of energy to spend on something as insignificant as a lost purse. Losing and finding objects is, after all, a commonplace experience. If we want to know how the Talmud can help us think about pressing moral problems today, should we not focus on "big" issues like structural injustice, gender, race, or class? Can

the Talmud help us think about some of the major ethical and political debates of the current moment, like policing and the prison system? If these are the kinds of questions we hope to answer, why spend our time on lost property?

These criticisms are important, and I have two responses to them. First, as I noted at the outset of this essay, I am committed to the idea that our ethics are fundamentally shaped and expressed in mundane, everyday interactions, such as how we deal with lost and found items. The ethical questions I raise here are precisely the kinds of questions most of us are likely to encounter on an everyday basis. If ethics is the study of moral *behavior*, then it makes sense to focus on the types of problems that we tend to act on most frequently and most directly. This is where the rubber first hits the road, so to speak.

Second, the ways we respond to the case of the lost purse and to the broader ethical questions it raises ultimately shape how we think about broader structural questions, like gender or racial inequality. While the question of what to do with a lost purse may seem minor or mundane, the problems that arise when we make inaccurate assumptions about other people's experiences are not. In fact, the ways in which we fundamentally misunderstand one another and our respective experiences of the world often lead to a breakdown in moral discourse, because these misunderstandings can render our decisions mutually incomprehensible.

Bava Metzi'a 24b both illustrates this problem and offers a path toward beginning to address it. First, as Mira Balberg notes in her study of rabbinic purity law, "Rabbis put forth principles that accord with what they consider to be reasonable states of mind and mental dispositions that are common (in their view) to most people, and they apply these principles to all persons, whether their individual states of mind and attitudes are commensurate with the rabbinic standard or not."<sup>26</sup> In other words, the rabbis make assumptions about how *all* people experience the world based on how *they* experience the world. While the rabbis were

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<sup>26</sup> Mira Balberg, *Purity, Body and Self in Early Rabbinic Literature* (Berkeley: University of California Press, 2014), 70.

diverse in some ways,<sup>27</sup> they were a highly educated and elite group of men. The “reasonable states of mind and mental dispositions” that they viewed as “common ... to most people” may not have been common at all, and likely overlooked the experiences of many. Consciously or not, the same is true of our own experiences of empathic projection. Despite our best intentions, the assumptions we make about how others experience the world are often wrong. They may be wrong because of differences between individual dispositions, or they may be wrong because of cultural differences or structural inequities that shape the experiences of the communities in which we each participate.

This does not mean that we can or should avoid making assumptions about other people’s experiences. On the contrary, such assumptions cannot be avoided. They form the bedrock of our social world and, as the various examples of lost purses discussed in this essay illustrate, even assumptions that may prove problematic in certain cases can help guide us toward proper behavior on many other occasions. The challenge that the *sugya* presents to us is not how to avoid making these assumptions altogether, but how to attend to the possibility that they will prove to be inaccurate, and how to respond when that turns out to be the case.

Entering into dialogue with Bava Metzi’a 24b does not provide us with easy answers to these problems, but it does provide us with fertile ground to explore them, and it prompts us to think through different ways of addressing them. Doing so can help us become aware of the ways in which we make assumptions about other people’s experiences of the world and prepare us to respond to those inevitable moments when the demands of others confront us in ways we do not expect. Just like the different voices in our *sugya*, we may not agree about what our obligations are in such moments. Nevertheless, thinking through these questions can help train our intuitions and prepare us to respond in these moments in ways that accurately reflect our values and commitments.

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<sup>27</sup> For example, they came from a variety of socio-economic backgrounds.

## Appendix: Bava Metzi'a 24b

רב יהודה הוה שקיל ואזיל בתריה דמר שמואל דבי דיסא. אמ' ליה: מצא כאן ארנקי, מהו? אמר ליה: הרי אלו שלו. בא ישראל ונתן בה סימניה, מהו? א"ל: חייב להחזיר. תרתי?! לפנים משורת הדין, כי הא דאבוה דשמואל אשכח חמרא במדברא ואהדרינהי למאריה לבתר תריסר ירחי שתא. לפנים משורת הדין.

רבא הוה קא אזיל בתריה דרב נחמן בשוקא דגלדאי-ואמרי לה בשוקא דרבנן. אמ' ליה: מצא כאן ארנקי, מהו? אמ' ליה: הרי אלו שלו. בא ישראל ונתן בה סימן, מהו? אמ' ליה: הרי אלו שלו. והלא עומד וצווח? נעשה כצווח על ביתו שנפל ועל ספינתו שטבעה בים.

Rav Yehuda was following Mar Shmuel in the market for pounded grain. He said to him: "If a person found a purse here, what is the ruling?" He replied: "It is his." "And if a Jew came and showed him an identifying mark, what is the ruling?" He replied, "He is obligated to return it." Both?! *Lifnim mi-shurat ha-din*,<sup>28</sup> because the father of [Mar] Shmuel once found donkeys in the desert and returned them to their owner after twelve months had already passed, *lifnim mi-shurat ha-din*.

Rava was following Rav Nachman in the leatherworkers' market—and there are those who say [they were in] the marketplace of the rabbis. He said to him: "If a person found a purse here, what is the ruling?" He said to him, "It is his." "And if a Jew came and showed him an identifying mark, what is the ruling?" He said to him, "It is his." Wouldn't he stand and shout in protest? Such behavior is like one who protests his house falling, or his ship sinking at sea.

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<sup>28</sup> Lit., "within the line of the law." Since the meaning and conceptual scope of this phrase remains contested, I leave it untranslated here, but it is discussed in detail in the body of the essay.