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NATURAL LAW AND RELIGIOUS PHILOSOPHY IN R. SHIMON SHKOP'S SYSTEM

R Shimon Shkop was one of the outstanding roshei yeshiva of the early decades of the twentieth century and a key member of the analytic movement which swept through the yeshivot.¹ Born in 1860, he studied in the yeshivot of Mir and Volozhin, where he was influenced by R. Hayyim Soloveitchik, before marrying a niece of R. Eliezer Gordon, the rosh yeshiva in Telshe, and joining his faculty. He remained at Telshe for 18 years, before moving on to lead yeshivot in Moltsh, Bransk, and finally in Grodno; the last of which is the most closely associated with his legacy. During this final period he was widely considered one of the leading roshei yeshiva in Eastern Europe and highly regarded by such colleagues as R. Hayyim Ozer Grodzenski and the Hafets Hayyim.²

¹ The standard academic work on this topic, despite some flaws, remains Norman Solomon, *The Analytic Movement: Hayyim Soloveitchik and his Circle* (Atlanta: Scholars Press, 1993). An important resource is the collection of essays *Lamdut: The Conceptual Approach to Learning*, ed. Yosef Blau (New York: Yeshiva University Press, 2006). This volume includes Mosheh Lichtenstein's important article, "What' Hath Brisk Wrought: The Brisker Derekh Revisited," originally printed in *The Torah u-Madda Journal* 9 (2000): 1-18; and the extensive debate between Elyakim Krumbein and Avraham Walfish.

² For hagiographical biographical material see Aharon Sorski, *R. Shimon and his Torah* [in Hebrew] (Bnei Brak: Netsah, 1971); and Hayim Shelomo Rozental, *Torah They Will Seek From his Mouth* [in Hebrew] (Jerusalem: Rozental, 1999). Much biographical information is recorded in *Sefer ha-Yovel*, a 1936 fundraising project put together by R. Shkop's students, which contains halakhic novella as well as biographical and first person accounts of his relationships with his students. This volume is available online at <http://hebrewbooks.org/22056>. R. Shkop's approach was spread orally through many prominent students, including R. Elhanan Wasserman, R. Yosef Shlomo Kahaneman, R. Isser Yehuda Unterman, R. Chaim Shmuelevitz, R. Shmuel Rozovsky, R. Yisrael Gustman, R. Moshe Shatzkes, and R. Moshe Avigdor Amiel. The only, and by extension, the primary, academic work on R. Shkop is Shai Wozner, *Legal Thinking in the Lithuanian Yeshivot: Studies in the Thought of R. Shimon Shkop*

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In addition to his scholarly standing, he was a pleasant person who maintained relationships even with those who rejected halakhic Judaism, which led to some complicated, interesting, and historically significant relationships. As an example, the Israeli politician and historian Ben Tsion Dinur told of his years in *Telshe* yeshiva and his relationship with R. Shkop. When he left the yeshiva, partly because he was drawn to *baskalah*, R. Shkop accompanied him, blessed him that his love for Torah would not leave him, and offered personal help if he ever wanted to return:

I was so emotional in my conversation with R. Shimon, that I could barely hold back tears. I did not want to cry while with him, but when I returned home I cried: I felt I was at a turning point... R. Shimon's image accompanied me my whole life. When I turned fifty and in *Beit Hakerem* they threw me a party, I recalled his name gratefully, and I was glad to receive a letter from Grodno in the name of R. Shimon, with his signature, showing that he had not forgotten his former student.³

Another example is R. Shkop's relationship with his granddaughter Faigye Eilonit who was raised in his home after the death of her mother and remarriage of her father, and later joined the secular *ba-Shomer ha-Tsair* and served in the first Knesset. Her son was the famed Israeli soldier Uri Ilan who committed suicide rather than risk providing his Syrian captors with information.⁴ Despite his granddaughter's rejection of his religious ethos, his interactions with her were warm. When Faigye married a secular *kibbutz*nik, Shlomo Ilan, R. Shkop sent her a beautiful letter, now housed at Bar-Ilan University, wishing her well in her future marriage and life.⁵

There are other aspects of his life which are historically significant and further illustrate his moderate personality. For example, R. Shkop repeatedly attempted to gain a position at *Yeshivat Mercaz ha-Rav*, under the leadership of Rav Kook – something which would have been unthinkable

[in Hebrew] (Jerusalem: Magnes Press, 2016), an earlier dissertation copy is available online at http://asif.co.il/?wpfb_dl=2405. This study focuses primarily on the halakhic methodology of R. Shkop, as opposed to his biography and philosophy, though it does have material on those areas as well. Wozner's study will be used and referenced extensively throughout this article. Other sources of information about R. Shkop's life include his letters to his granddaughter and interviews with her, see Akiva Zimmerman's three newspaper articles in *Ha-tsofe*, 10/15/2002, 12/20/2004, and 1/5/2005; and also the memoirs of former students, including the Israeli historian Ben Tsion Dinur and Israeli politician Haim-Moshe Shapira.

³ *In a World that Submerged* [in Hebrew] (Jerusalem: Bialik, 1958), 76.

⁴ *Wikipedia: The Free Encyclopedia*, s.v. "Shimon Shkop," (accessed January 3, 2017) https://he.wikipedia.org/wiki/Shimon_Shkop [in Hebrew].

⁵ Zimmerman articles, see n. 2.

to many Agudist leaders.⁶ Similarly, during his time in America, R. Shkop entertained the possibility of staying as rosh yeshiva at RIETS, and had to be dissuaded by his European colleagues.⁷ These intriguing anecdotes have led to historical interest in R. Shkop's life and attitudes.

R. Shkop has also piqued interest by his unique methodology of Talmudic analysis. Despite his placement within the broader school of the analytic tradition, he occupies a distinct position, very different from the dominant "Brisker spirit" of the figures in this school. One of the defining features of R. Hayyim Soloveitchik's method was the lack of interest he and his followers exhibited in their analyses of any discussion as to "why" the halakha dictates such an action. The entire focus is on understanding the internal consistency and organization of the halakha, the "what" being commanded.⁸ This attitude stems from ideological reasons: the law of God is Divine wisdom and cannot be understood by mere human minds.⁹ The dominant model of the analytic school is to qualify the halakha under discussion in order to dissect its fundamental categories, but the method stops short of wondering why these categories are as given.

R. Shkop, by contrast, did engage in the question of "why" and in this way fundamentally differentiated his model from the dominant one of R. Hayyim.¹⁰ In his Talmudic discussions, he addresses the issue of "why"

⁶ Shemaryahu Gershuni, "Rav Shimon Shkop ZTL and his appointment as Rosh Yeshiva of Yeshivat Mercaz HaRav – myth and fact," *Ha-Ma'ayan* 50:1 (2009), 79-96. See on all these anecdotes the discussion in Wozner, *Legal*, 19-23.

⁷ Aaron Rothkoff, *Bernard Revel: Builder of American Jewish Orthodoxy* (Philadelphia: JPS, 1972), 119-20; Wozner, *ibid.*, 18n25. There are a number of different versions of this story, see Nathan Kamenetsky, *Making of a Godol*, vol. 1 pt. 1 (Jerusalem: P. P. Publishers, 2004), 1100-2.

⁸ Mosheh Lichtenstein, "What," 167-73; Walfish, "Brisker," 313-314; R. Joseph B. Soloveitchik's *Halakhic man*, trans. Lawrence Kaplan, (Philadelphia: JPS, 1983), is the supreme philosophical statement of this school of thought. For R. Soloveitchik, the physical world is processed by the "halakhic man" as a world of pure halakhic thought. The chasm between halakha and reality is celebrated and glorified. See also his eulogy for his uncle, "Mah Dodekh mi-Dod," in *Words of Thought and Appreciation* [Hebrew] ed. Shlomo Schmidt, (Jerusalem: Ha-Histadrut ha-Tsiyonit ha-Olamit, 1981), 76, that R. Hayyim's method rejects history, psychology, and common sense in the study of halakha.

⁹ Lichtenstein, "What," 172.

¹⁰ On this distinction there is a large, and growing literature, see Solomon, *Analytic*, 59, 190-3; Sorski, *R. Shimon*, 85-9; Rozental, *Torah*, 48-53; Krumbein, "Evolution," 283n4; Rav Shagar, *In His Torah They Will Study: Studying Talmud as a Quest for God* [Hebrew] (Alon Shvut: Makhon Kitvei ha-Rav Shagar, 2008), 96; Wozner, *Legal*, 40-57, 65-80. In other articles Wozner has expanded on the "why" analysis with regard to broader methodological issues in halakha, see "On the Duty to Obey the Law in Halakhic Thought: Reflections on the Thesis of R. Shimon Shkop," *Jewish Law Association Studies* 22 (2010): 353-360; "What is loyalty to the Halakhah?" in *The*

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as a core component of the halakhic analysis. Put differently, R. Shkop's innovation is to combine the Talmudic-analytic school methodology together with philosophy, in contrast to the Brisker style which eschewed any philosophical speculation in halakhic discussion. This led him to ask questions which other Talmudic commentators would not have considered, and his answers often introduced creative new ideas into the corpus of Talmudic scholarship. R. Avraham Yitzchak Bloch, in a eulogy for R. Shkop, compared this method to Newtonian physics:

The strength of Rav Shimon Shkop זת"ל was that he left no principle, even widely accepted ones, which he did not explore in depth and try to fully understand. As a youth, when he studied in Volozhin, people criticized him, saying, "he's knocking on an open door" – but, in truth, that was his greatness! It is known that [Isaac] Newton came to his discoveries in physics by posing a strange question: why does an apple fall downwards from the tree and not rise upwards? Through this "why," which [Newton used to] uncover layers of understanding in what had seemed obvious and simple to everyone, revolutions in a number of scientific areas were enabled, and almost all scientific disciplines were recreated anew on the foundation of this question.¹¹

R. Shkop's method was hugely influential in the yeshivot in which he taught, which led to a fissure between two groups in the analytic study of Talmud – the Brisker tradition and Telsher one. In fact, R. Shkop himself acknowledged this reality in his preface to his major work of halakhic analysis, *Sha'arei Yoshor*, where he comments, "I know that my *sefer* will not be accepted by all, because many scholars are not accustomed to think analytically, because there are many paths to Torah, and every person finds

Quest for Halakhah – Interdisciplinary Perspectives on Jewish Law ed. Amichai Berholz, (Jerusalem: Yediot Aḥaronot, 2003), 83-101; he has since retracted some of this, see *Legal*, 230-1. For a similar methodology in one of R. Shkop's colleagues, see Yitzchak Cohen, *The Or Same'ah – Halakah and Jewish Law: R. Meir Simcha ha-Kohen's Writings on Maimonides' Code* [in Hebrew] (Be'er Sheva: Ben Gurion University of the Negev, 2012), 247-60.

¹¹ *Shi'urei Da'at* (Jerusalem: Feldheim, 2009), 94 [hebrew lettering]. R. Bloch's claim that R. Shkop's method is "scientific" glorifies the connection between nature and halakha. Just as the scientist asks "why," and this aids his discovery, so too, R. Shkop's Talmudic discussion is enhanced by asking "why." As noted above (n8), this view is the very opposite of R. Soloveitchik's, who attempts to create further rift between the physical world and halakha, in keeping with the Brisker method; in keeping with this, see Lichtenstein, "What," 170-7, who links the scientific method to "what" and not to "why."

favor in their approach.”¹² Still, whatever detractors he may have had, his work has become a classic, and given the philosophical nature of R. Shkop’s method, it has attracted attention in contemporary Jewish philosophical discussions. One of these examples is the issue of natural law and its relationship to the halakhic system. This discussion has occupied a number of modern Jewish thinkers, and two Israeli scholars, Avi Sagi and Shai Wozner, have debated R. Shkop’s view on this topic.

The key distinction that R. Shkop proposes is between “*torat ha-mishpatim*,” financial laws, and the rest of the halakhot of the Torah. In financial laws, the Torah relies on the legal decisions of society as part of its legislation of these matters, as opposed to all other halakhot where Torah law alone is taken into account. Utilizing this idea, R. Shkop proposes a solution to a famous Talmudic problem. A popular principle of Talmudic jurisprudence is the power of majority to determine the practical ruling in cases of halakhic doubt. For example, if one is uncertain as to the kosher status of a found piece of meat, but the majority of butchers from which it may have come are kosher, it can be assumed to be kosher. This principle is so powerful as to be the deciding factor even to impose the death penalty (*Sanhedrin* 69a). The only exception is in financial cases, where the principle of majority cannot remove money from someone else’s ownership (*Bava Batra* 93b). In other words, if one litigant has the power of “majority” on their side, while the other is actually holding the object in question, the former cannot remove the object from the latter’s possession purely based on the power of majority. This raises the question of how could financial situations be treated more severely than even capital cases? Generally monetary issues are less severe than capital cases, but with regard to the majority principle the contrary seems to be true.¹³

R. Shkop resolves this issue through recourse to his distinction between financial matters and other Torah laws. With regard to financial matters the key factor is the legal decision, and in that system the assumption is that until someone has proven their ownership of an object it remains with the current owner. Majority is not sufficient, from a legal perspective, to transfer ownership status. Therefore, the principle of majority does not

¹² This pluralistic attitude towards Talmudic methodologies found even more radical expression in R. Shkop’s belief that one has to feel the logic of the halakha in their heart, see *Sefer ha-Yovel*, 29, quoted in Wozner, *ibid.*, 66n64. This is a particularly extreme formulation, which would have been questionable to many halakhic scholars.

¹³ This question is dealt with by Tosafot in a number of places, see *Sanhedrin* 3b, s.v. “Dinei Mamonot,” and *Bava Kama*, 27b, s.v. “km’l,” and the sources referenced in those two places. R. Hayyim Soloveitchik’s resolution is recorded in his glosses to the Talmud, *Bava Kama*, *ibid.*

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suffice to change the ownership status of an object. But with regard to all other Torah commandments, even capital cases, the principle of majority is defining. In the Torah's autonomous system, majority is always a defining factor.¹⁴ Even though generally capital cases are more severe than monetary ones, the principles guiding each area are determined based on differing factors, and regarding the factor of majority, capital cases are determined less rigidly.

This idea resolves another Talmudic problem. The Talmudic principle is that "one who removes from [another], upon him is the burden of proof" (*Bava Kama* 46b). If, for example, Reuben is uncertain if he has repaid a loan he took from Simon, the halakha decides in Reuben's favor that he need not repay the loan again out of doubt. Talmudic commentators asked a basic question: another Talmudic principle teaches that any case involving a Biblical prohibition is ruled stringently (*Beitsa* 3b). If so, all cases of monetary doubt involve a possibility of the Biblical prohibition of theft, and should be decided stringently, not leniently? These two principles seem to contradict each other.

A number of commentators offered resolutions to this problem, but the one favored by R. Shkop is R. Yehudah Kahane Heller's, who suggested that "the Torah only forbade theft in a situation where it belongs to his friend [i.e. Simon] legally, but in a case where [legally] it belongs to him [i.e. Reuben] the Torah never forbade it."¹⁵ Therefore, in this case, where he is legally awarded the money, there is no Torah obligation to return it. This idea of R. Heller provides the basis for R. Shkop's reflections and he develops it further. According to R. Shkop:

Monetary issues between people differ from all other mitsvot of the Torah. [With regard to] all other mitsvot the key factor is what the Torah commanded us to do or not to do, and our obligation to perform them is in order to fulfill God's command. But monetary matters are not so because prior to our being obligated by God's command to pay or return [money], there exists upon us a legal obligation... Furthermore, another fundamental principle is that wherever we are deciding someone's rights to or acquisition of property or a lien, we are not dealing with the performance of a particular mitsva, but rather with the legal reality of who rightfully owns this property. Therefore, when the Sages declared the principle regarding matters of doubt in monetary cases, certainly they considered it reasonable from a legal perspective. (5:1)

¹⁴ *Sha'arei Yoshov* 3:3.

¹⁵ *Kuntras ha-Sefeikot* 1:6. For other treatments of this issue in traditional commentators, see Wozner, *Legal*, 247n63.

For this reason, R. Shkop suggests there is no violation of the prohibition of theft in a case where the legal decision, which comes through reason and legal obligation, considers the property to belong to someone. One need not be concerned that there is a violation of Torah law because the laws of the Torah in financial matters are based around the legal decisions which reason and society ordain. If reason says that Reuben owns the money, the laws of the Torah regarding theft accept that conclusion and do not obligate him to repay his loan out of doubt. In sum, R. Shkop suggests a sweeping distinction between financial laws, which are rooted in legal theory and reason, as opposed to other Torah laws, which are the word of God. He also insists that in financial situations where the law of reason comes to a conclusion, the Torah respects that decision with regard to its own legislation.

R. Shkop then proceeds to add an even more radical conclusion to this basic distinction. He proposes that just as ownership status is determined by legal standards, so too the financial obligation to pay back loans is also independent of Torah law. A person is obligated, purely through logic, to return the money they borrowed from someone else. Regarding this idea R. Shkop raises a question:

Even if it seems perplexing, what obligation does a person have to obey a law without the Torah's command? But if we will delve into the matter we will understand it, because even the obligation to obey and serve God and fulfill His wishes, is also obligated through the laws of logic and understanding. Similarly, the obligation to repay money is a reasonable one. (5:2)

In this last passage, R. Shkop makes the astounding leap that not only are financial obligations of the halakha rooted in reason, but in fact the entire system of halakhic observance and Torah command is based on reason. People obey the word of God because it is logical and reasonable. This new passage greatly modifies the distinction he has been suggesting between financial laws and other halakhot of the Torah. Now R. Shkop argues that, in fact, everything is based on autonomous human reason, both monetary matters and all other laws of the Torah. Reason is the fundamental obligation for all halakha; the distinction between financial situations and other halakhot is primarily in the realm of the practical. Financial laws have the external reality of legal systems to deal with in their construction, as opposed to other halakhot which are purely autonomous creations of Torah law.

This last step resembles another claim R. Shkop puts forward with regard to the power of Rabbinic legislation. A number of medieval halakhists

dealt with the source for rabbinic legislation in the Torah. Maimonides believed that it was rooted in Biblical law, based on the verse in Deut. 17:11, “You shall act in accordance with the instructions they give you and the rulings handed down to you; you must not deviate from the verdict that they announce to you either to the right or to the left.”¹⁶ Nahmanides argued that Rabbinic law cannot be rooted in Biblical law as that would collapse the distinction between the two of them, while in fact there are many practical halakhic differences.¹⁷ R. Shkop questions Nahmanides position: if there is no Biblical command to obey the Sages, than what could possibly give them legislative power? If God did not command it, then why must someone obey Rabbinic law? He suggests:

I found an answer for this, that according to Ramban we must obey Rabbinic law because of the recognition of our reason, that since they found it fitting to decree and establish this – it is true and good for us. Just as reason [forces] agreement to obey the word of God, so too reason decrees obedience to all the injunctions of the Sages and our holy rabbis. (1:7)

Thus, R. Shkop extends the obligations of reason to include also the power of rabbinic legislation. In sum, for R. Shkop, reason obligates three distinct categories: God’s law, Rabbinic law, and financial legal obligations.

These passages have led to a major contemporary debate between two scholars, Avi Sagi and Shai Wozner, as to how they should be interpreted.¹⁸ Both Sagi and Wozner agree that there is philosophical value to the ideas R. Shkop is articulating, particularly as it relates to the philosophical question of natural law; but their interpretations lead them to polar opposite conclusions with regard to his position. The issue these

¹⁶ JPS translation (Philadelphia: JPS, 1999), 413.

¹⁷ Maimonides, *Mishna Torah*, Laws of Rebels, 1:1-2; translated in Isadore Twersky, *A Maimonides Reader* (New York, Behrman House, 1972), 207-8. Nahmanides, *Glosses to Sefer ha-Mitsvot* (Frankel edition, 1995), 18-28.

¹⁸ Avi Sagi, “Religious Command vs. Legal System – a Chapter in the Thought of Rabbi Shimon Shkop” [in Hebrew], *Da’at* 35 (1995): 99-114; republished in his *Judaism: Between Religion and Morality* [in Hebrew] (Tel Aviv: Ha-kibbutz ha-me’uchad, 1998), 335-349. Shai Wozner, *Legal*, see above n2. While Sagi and Wozner are the two main commentator’s on these passages, there are other minor treatments of them in Menachem Elon, *Jewish Law: History, Sources, Principles*, trans. by Bernard Auerbach and Melvin Sykes, vol. 1 (Philadelphia: JPS, 1993), 119, 136-7; Ronnie Warburg, “May One Destroy a Neighbor’s Property in Order to Save One’s Life?” in *Turim*, ed. Michael Shmidman, vol. 1 (New York: Touro College Press, 2007), 352-9; R. Amiel, *Sefer ha-Yovel*, 43-4, fully accepts this distinction and finds analogies to it in his own work; Rozenal, *Torah*, 212-3, records a story about R. Menachem Zemba’s mixed reaction to this idea.

commentators link with the above passages in *Sha'arei Yoshov* is that of natural law vs. positivism. Positivism is the theory that laws derive the source of their strength from the authority of the judicial system which commands them. Natural law theory, on the other hand, teaches that laws follow from and reflect the values which are inherent in morality. This issue has been dealt with at length by scholars of halakha and there is a well-established debate as to whether halakha is closer to a positivist legal system or a natural law one. Some thinkers, including Izhak Englard and Menachem Elon, and in a less legalistic way, Marvin Fox and Yeshayahu Leibowitz, have argued that halakha more closely resembles positivist models of laws.¹⁹ Opposing them is another group, including David Novak and Avi Sagi, who argue that halakha incorporates natural law systems.²⁰

Sagi's interpretation of R. Shkop places the latter firmly in the natural law theory of halakha. The idea that Torah obligations are rooted in reason means that he is advocating a kind of natural law theory, even though he does not use that phrase. This natural law differs from the classical philosophical model, which views natural law as a metaphysical concept embedded into the structure of creation and nature. R. Shkop's version of natural law is more moderate and reflects the importance of basic common sense, without being interested in the metaphysical truths of nature.²¹ It is "common sense," as reflected in legal systems and societal decisions, which R. Shkop holds up as the basis for all Torah law.

One might counter Sagi's reading with the argument that all R. Shkop has suggested is that the basis for obedience to the Torah is reason, but the actual detailed laws of the Torah are required because of Divine command. Sagi responds to this by pointing to the passages where R. Shkop collapses the distinctions between Divine law, Rabbinic law, and financial laws. In these passages, according to Sagi, R. Shkop indicates that obeying God is

¹⁹ Izhak Englard, "The interaction of morality and Jewish law," *Jewish Law Annual* 7 (1988): 114-124. Menachem Elon, *Jewish Law: History, Sources, Principles*, translated by Bernard Auerbach and Melvin Sykes, vol. 1 (Philadelphia: JPS, 1993), 228-34. Marvin Fox, "Maimonides and Aquinas on Natural Law," in *Collected Essays on Philosophy and on Judaism*, ed. Jacob Neusner, vol. 1 (Binghamton: Global Publications, 2001), 183-208. Yeshayahu Leibowitz, "Religious Praxis: The Meaning of Halakah" in *Judaism Human Values, and the Jewish State*, ed. and trans. Eliezer Goldman et al., (Cambridge: Harvard University Press, 1995), 3- 29; *ibid.* "Lishmah and Not-Lishmah," 61-78.

²⁰ David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998); *The Image of the Non-Jew in Judaism* (Oxford: Littman, 2011), 153-94; see also Matthew Lagron, *ibid.*, 230-40. Avi Sagi, *Judaism*; and "Natural law and Halakah - a Critical Analysis" *Jewish Law Annual* 13 (2000): 149-195.

²¹ Sagi, "Religious," 104-5.

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part of the broader reason-based obligations of halakha. There is no clear distinction between the power which Divine law, Rabbinic law, and financial law hold; all interact together in a complex interrelated web, at the root of which is the obligations to obey common sense.²²

Sagi finds support for this natural law reading of R. Shkop in his attempt to universalize halakha. In a number of places, R. Shkop minimizes any differences between Jews and non-Jews with regard to financial decisions in halakha. The halakha states that a Jew can avoid repaying a non-Jew's loan (Rema, *Hoshen Mishpat* 348:2). R. Shkop modifies this to mean only that there is no Torah command to repay a non-Jew, but the financial obligation, which is independent of Torah law, continues to obligate a Jew to repay a non-Jew. Meaning, with regard to repaying a Jew there is a Divine obligation, which does not exist for the non-Jew; but there is no practical or financial difference between Jew and non-Jew. Similarly, even according to the opinion that theft from non-Jews is not forbidden by Torah law (*Bava Kama* 113b), this is only in the realm of the Torah's legislation, but there is still the legal prohibition to take a non-Jew's property. "With regard to financial matters, there is no difference between Jews and non-Jews"(5:5). According to Sagi this universalizing trend is a reflection of "natural law theory" which makes differences due to ethnicity irrelevant.²³

Wozner notes a key problem with Sagi's reading, that R. Shkop's moderate idea of "common sense" obligation is not analogous to the metaphysically charged notion of natural law.²⁴ This undercuts a major component of Sagi's argument, since R. Shkop does not suggest that the moral law creates legal obligation. Instead, he claims that "common sense" obligates one to follow the dictates of the Torah, which are presumed to

²² Ibid., 111-2.

²³ Ibid., 103-4. The issue of discrimination against non-Jews in halakha has been a major source of difficulty for halakhic authorities. One popular solution to this problem has been adopting the position of the medieval Talmudic commentator, Me'iri, who argued that the Talmudic discussions relate only to non-Jews who do not maintain a legal system, but a non-Jewish nation which does legislate itself would in turn receive halakhic protection, see David Berger, "Jews, Gentiles, and the Modern Egalitarian Ethos: Some Tentative Thoughts," in *Formulating Responses in an Egalitarian Age*, ed. Marc Stern (Lanham: Rowman, 2005), 93-101. The above position of R. Shkop provides an even more radical and satisfying approach from a humanistic perspective. See also Cohen, *Or Same'ah*, 291-317; translated in Cohen, "Rabbi Meir Simcha of Dvinsk and His Attitude toward Gentiles," *The Review of Rabbinic Judaism* 17 (2014): 218-51, that R. Meir Simcha likewise minimized the halakhic discrimination against non-Jews, though in a far more circumscribed way. This dovetails with what was noted above (n. 10), that R. Meir Simcha's approach bears similarity to R. Shkop's.

²⁴ Wozner, *Legal*, 226-7.

be good. This is a distinct notion from natural law theories. Furthermore, R. Shkop uses this idea to obligate rabbinic rituals, which are certainly not moral laws rooted in natural law. Also, the fact that there is a distinction between financial laws and rituals implies that this “natural law” is a much modified theory, which does not affect large areas of halakha.²⁵ In sum, the argument that R. Shkop’s theory is a modified version of natural law has a number of fundamental problems.

These issues cause Wozner to fundamentally disagree with Sagi’s interpretation and conclusion, and he regards R. Shkop as a positivist thinker.²⁶ According to Wozner, R. Shkop’s category of *torat ha-mishpatim* does not entail any obligation. It serves only to create the situation which the Torah’s commandments then regulate. In other words, the concepts of rights and ownership are created by *torat ha-mishpatim*, but that alone is not normative law. The Torah commands halakhot which then dictate how one is to act with regard to the secular categories of ownership. This is a theory of positivism, not natural law. It is the Torah that commands obedience to the laws of money, but the mitzvot alone do not create the situational context of monetary issues. This broader context must be provided by the reality of man-made legal systems, and only then can the Torah legislation make sense and be activated.²⁷

This means that ownership rights are not defined as the obverse to the violation of theft. Theft and ownership are two distinct areas of halakha. Ownership exists even in a situation where there is no violation of theft, and likewise the Torah is needed to decree a violation of theft even in cases where ownership already exists. Wozner uses his approach to reinterpret many of Sagi’s sources. For example, Wozner understands halakha’s recognition of non-Jews’ ownership rights, not as creating any normative legal obligation, but rather as creating pure ownership status with no legal obligations in its wake. Obligation to repay is distinct from the status of ownership, and therein lies R. Shkop’s major discovery.²⁸

Both of these commentators assume that R. Shkop’s ideas should be read in light of philosophy of law, specifically the discussions surrounding natural law theories. This is a valid assumption considering the brevity of R. Shkop’s remarks and the clearly broader philosophical questions he hints at, without developing at any length. The commentator can only hope to recreate the philosophical basis for his remarks by turning to more in-depth

²⁵ Sagi casually notes this problem, *ibid.*, 113.

²⁶ *Ibid.*, 228-30.

²⁷ *Ibid.*, 232-47.

²⁸ *Ibid.*, 274-5.

analyses from other areas of philosophy. Sagi and Wozner, in keeping with the legal themes discussed in *Sha'arei Yoshor*, attempt to recreate R. Shkop's philosophy by turning to legal theorists, such as H. L. A. Hart, Hans Kelsen, and Ronald Dworkin. Both of their studies have shed much light both on R. Shkop's thought and the relationship between natural law and halakha. This study will suggest that there is a better philosophical model to turn to in order to recreate R. Shkop's thought and that is the religious philosophy of Telshe thinkers – R. Shkop's tradition.²⁹

What we will see in this section is that the unique synthesis of philosophy and halakha in Telshe developed out of and reinforced a radical philosophical version of autonomy. This philosophy was developed by R. Yosef Leib Bloch and his sons, who succeeded him at the helm of Telshe yeshiva, and closely resembles the ideology of R. Shkop's terse comments, thus shedding much needed light on the discussion in *Sha'arei Yoshor*. For purposes of clarity, this study will use the writings of R. Yosef Leib in tandem with *Sha'arei Yoshor* to articulate the common ideology they are promoting. This section will survey the remarkable synthesis of individualism and halakhic observance that these Telshe thinkers articulated, and how they view observance of the mitsvot as functioning in perfect synchronicity with the individual's personality. It is these values which R. Shkop reflects in his halakhic analysis in *Sha'arei Yoshor*.

The Telshe method, as discussed earlier, synthesizes philosophy and halakhic study. In doing so, it rejects the Brisker ideology that Torah is divine wisdom and so far beyond our human minds that we cannot even begin to fathom its reasoning.³⁰ For these Torah scholars, one is meant to study Torah only in order to understand what it commands and the internal reasoning involved in the halakhic discussion. However, any personal bias

²⁹ A similar approach has already been suggested by R. Shagar, *Torah*, 96-104 who suggests a similar comparison to R. Bloch's thought as that which will be advanced further on. The present study should be seen as a more detailed, systematic, and halakhic reading of *Sha'arei Yoshor* in the spirit of R. Shagar's less textual and more overtly mystical reading. R. Shagar points to R. Eliyahu Meir Bloch's introductory essay, "The Way of Torah," to his father's (R. Yosef Leib) *Shi'urei Da'at* [in Hebrew] vol. 1 (Jerusalem: Feldheim, 2010), 11-30, as the programmatic Telshe essay supporting the program of R. Shkop, in opposition to Brisk. He relies primarily on this essay, as well as the collected lectures of R. Yosef Leib in his study. These sources will be used in this study, as well as the eulogy for R. Shkop by R. Avraham Yitzhak, another son of R. Yosef Leib, see above n.14; an outstanding presentation of R. Bloch's philosophy is given in R. Dov Katz, *The Mussar Movement* [in Hebrew] vol. 5 (Tel-Aviv: Avraham Tsiyoni, 1963), 70-109. For clarity purposes, R. Yosef Leib Bloch will be referred to as R. Bloch, and his sons by their first names.

³⁰ R. Eliyahu Meir, *Shi'urei*, 11-3. On the centrality of reason for R. Bloch, see also Katz, *Mussar*, 70-4.

and interests are to be left out of Torah study. The Telshe method rejects this bifurcation between Divine wisdom and human reason. Instead it sees the mundane, physical world we live in as reflective of the spiritual realm and its “thicker” reality. This means there is nothing in the physical realm which is not rooted in the spiritual realm and vice versa – there is nothing in the spiritual realm which does not appear in the physical realm.³¹

The outcome of this “cosmology” is that there is an intense connection between the physical realm and the spiritual. The Torah, which comes from the spiritual realm, reflects the deepest aspects of the human soul; in the same way a human being contains within their soul a “miniature universe” of all the values of the Torah. This Torah-human synthesis must mean that the reasons for Torah law reflect the deepest components of the human experience of reality:³²

If we can properly understand the reasons for the Torah which are revealed, it is true also according to the hidden Torah... Even though the reasons [for Torah] are distant and exceedingly amazing and their holiness is frightening, still there is a connection, which is felt in the human soul, because they are all unified as one... and he who understands how all the worlds combine and are one and the connection between the reasons of the Torah and all the worlds, each one according to his height and holiness, will see wonders!³³

From this follows an even more radical proposition: “a person can only find the truth of Torah, its reason and logic, in themselves (!)... if [Torah] is aligned with his inner ‘self,’... he can intuit Divine wisdom.”³⁴ The inner “self” is discussed by R. Shkop in his preface to *Sha’arei Yoshor*, where he deals with the apparent clash between self-love and love of others. He proposes that someone who appreciates the full breadth of their inner self realizes that it organically includes love of others. This process of appreciating the self continues until one realizes that “all of the universe is included in his ‘self,’ and he is only one small limb in creation, and

³¹ R. Bloch, 8-10, 13-4, 29-31 [Hebrew lettering]; R. Eliyahu Meir, *ibid.*, 13-4; Katz, *Mussar*, 86-90.

³² R. Eliyahu Meir, *ibid.*, 15-6; R. Bloch, *ibid.*, 144-45, 212-3, R. Avraham Yitzhak, *Sbi’urei* (see above n14), 95-6, 102-5; Katz, *Mussar*, 90-2, 100-2.

³³ R. Bloch, *ibid.*, vol. 2, 113 [Hebrew lettering].

³⁴ R. Eliyahu Meir, *ibid.*, 16-7; on R. Bloch’s inner “self,” see Katz, *Mussar*, 76, 85; these ideas lead to R. Bloch’s very different *mussar* model from the standard *mussarniks*, as described by Katz.

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then even his self-love helps him to help all of the Jewish people and all of the universe.”³⁵

Every person as an individual with their own unique perspective and soul, must connect with the study of Torah by trying to understand its reasons:

Sometimes one hears a reason in halakha, and understands it, but when he delves further into the soul of that explanation, to understand its basis and true reason, he will feel that exact same explanation in a new way, and it will appear to him differently and innovatively. If he will delve even deeper into the reason of the halakha and its root, he will arrive at an even higher level [of understanding], and so on.

This is the entire goal of Torah students: to penetrate deeper into the soul [of Torah]. Each person, according to their abilities, in every area they are studying, whether halakha or aggadah. Only then can one elevate [themselves] and understand the truth of Torah, and through this is found the beauty and sweetness of Torah.³⁶

Or as a student of R. Shkop’s put it: he “put feelings too into the halakha.”³⁷

The synthesis which these Telsers create between the study of Torah and the individual personality of the Torah student is nearly unequalled in Torah literature. The very essence of Torah study and observance is transitioned from the classical heteronomous system, based on the command of God, to an autonomous theory in which the experiences and personal understanding of the student reflect the inner truth of the text and command. In order to fully comprehend the observance of a mitzva, the person must connect with it in their own core being:

The agreement of human reason with that of the Torah does not indicate an abandonment of natural, inborn reason. On the contrary, the closer one comes to living their entire life through the lens of Torah, and feeling that all of life’s challenges are really formulated in relationship to the life of Torah, [through this] they relieve themselves of many of the burdens which weight them down and prevent them from seeing properly, and they come closer to the straight truth which is contained deeply within their soul.³⁸

³⁵ See *Sefer ha-Yovel*, 25.

³⁶ R. Bloch, *ibid.*, vol. 1, 203. See R. Avraham Yitzhak, *ibid.*, 55-6.

³⁷ See above n19. See R. Avraham Yitzhak, *ibid.*, 116.

³⁸ R. Avraham Yitzhak, *ibid.*, 104, Katz, *Mussar*, 107-8.

The Telsers were aware of the antinomian possibilities inherent in this idea, and they clarified that not every personal feeling is acceptable. One must work hard to make themselves the type of person whose deepest feelings and thoughts reflect Torah values.³⁹ This ties in with R. Bloch's concept of "*shiuur komah*" – the notion that every person has a spiritual status; recognition of their specific standing on the spiritual spectrum is important for Torah study and religious growth. The greater the person the more in-tune they are with the deepest levels of Torah and reality.⁴⁰ This process is not easy, but it is doable, and the clear ideal is that the person's inner values and subjective feelings reflect the deepest understanding of Torah which this person is capable of. The growth of the individual's personality is not opposed to their growth in Torah observance, but a necessary step forward. One should harness all of their unique talents and potentials to access ever greater level of Torah living. In a particularly insightful passage, R. Bloch writes:

Truthfully, not only is it impossible for a person to remove their personal strengths, and they are compelled to contain all of them. But it is beneficial and worthy, that all of their strengths exist in them. The will of God in creating man is that he will be and live specifically in this form. Only someone whose strengths are all alive and vibrant, is called a complete human being. The Torah demands that the complete person, with all his strengths, live as he should, and do what is required of him. But the Torah does not demand from man that he destroy one of his strengths, and live without it. Aside from the fact that he will not be able to accomplish this, because man does not have the ability to uproot a strength of his soul and remove it, and if he will subdue it in one place it will rise up after a time somewhere else even more powerfully. Additionally, as much as he succeeds in uprooting a personal strength, his soul will be diminished, and he is not a complete person, because he is not following the form God willed for him. On the contrary, as much as a person grows, his strengths and emotions grow with him.⁴¹

Similarly, in the words of his son, R. Avraham Yitzchak:

Not only the lofty emotions of man occupy an important place in his world, but even the mundane and simple feelings which he feels from his surroundings are crucial for man and of great importance. The Torah

³⁹ R. Eliyahu Meir, *ibid.*, 18-21, R. Avraham Yitzchak, *ibid.*, 95-6.

⁴⁰ R. Bloch, *ibid.*, 231-2, 145; Katz, *Mussar*, 92-4.

⁴¹ R. Bloch, *ibid.*, vol. 2, 99-100.

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does not demand from man that he capture his emotions, without giving them expression to color the various moments of his life, so that he's always even-keeled. On the contrary, man has to live his life with all of his strengths, in every moment he should apply the proper feeling and the talents which are appropriate for that moment. When one lives in this way the different events and experiences which one encounters in life help him grow his "*shiur komah*."⁴²

It seems likely that these ideas stand in the background of *Sha'arei Yoshor* and are what R. Shkop refers to in the cryptic passage cited above, "even the obligation to obey and serve God and fulfill his wishes, is obligated through the laws of logic and understanding." Or again, "reason agrees to obey the word of God." The meaning of these terse lines is difficult. Why do we ultimately perform the commands of God according to R. Shkop? Since R. Shkop accepts the ideology of Telshe that the Torah reflects the deepest convictions of the human soul, there is no bifurcation between Divine command and human reasoning. Instead, human beings in their inner recesses feel that the truth of the Torah is perfectly in consonance with their own subjective experience of reality, and this deep unity is what leads to the deepest obedience to God's commandments. The Torah is thus a fully autonomous, and heteronomous, system; these distinctions have been collapsed when it comes to the human-Divine interaction.

This also provides insight into the entire methodology of *Sha'arei Yoshor*, which is the most prominent halakhic work to emerge from the broader Telshe school. R. Shkop's reason for synthesizing halakha and philosophy is a reflection of the Telsher ideology. R. Shkop rejects the Brisker claim that reasons are irrelevant to halakhic study because Divine wisdom is unfathomable. In contrast, R. Shkop claims that Divine wisdom, at its core, must reflect the human experience. Only through offering reasons in halakhic study can one hope to arrive at the truth of Torah. *Sha'arei Yoshor* includes philosophical speculation in order to validate the halakhic discussion's authenticity.

Having clarified the place of reason, autonomy, and individualism in R. Shkop's thinking, let us proceed to understand what he does with this in his halakhic discussion. R. Shkop insists that this synthesis between the subjectivity of the individual and halakhic observance is at play throughout the halakhic system. The feelings which one has dictate their obligations from a Torah perspective; the collapse of different categories between Divine and human, heteronomy and autonomy, and natural law and positivism

⁴² R. Avraham Yitzhak, *ibid.*, 39.

do not exist in the Torah system. This is true both for ritual laws and financial matters. But there is one distinction between ritual laws and financial matters, and that is in process. In ritual matters one has no experience outside of the Torah's dictates; the entire category of ritual law exists only due to the Torah's command. Therefore, whatever one feels to be correct must reflect their personal connection with Torah. R. Shkop's outstanding realization is that this is not true with regard to financial matters.

Financial matters have a reality independent of the Torah and therefore one's deepest subjective experience of financial matters is also developed in response to the existing reality. This is, according to Telshe ideology, not distinct from the experience of financial matters that the Torah discusses. All these experiences reflect ultimately the same truths. If so, R. Shkop argues there must also be halakhic ramifications to the external concepts of property which exist outside the Torah. Unlike ritual, which has no existence outside the Torah, money does; in this, it is different from other areas of halakha. The halakha, collapsing distinctions between Divine wisdom and human experience, takes into account the rules of property as human beings subjectively experience them. R. Shkop's method is then seen to embrace human reason both as the motivator to study the reasons of the halakha, as many have noted, but reason also plays another role as the creator of new halakhic legislation.

This raises a practical question. If Torah is based on the individualism of its adherents, and each person is different, than how does one establish the communal halakha in a way which will include everyone's differing connections to Torah?⁴³ R. Shkop again insists that rabbinic legislation is based on autonomous reasoning. He argues that rabbinic power is based on the same principle as Biblical law, "it is true and good for us." Just as one who is on a worthy spiritual level can fully understand the organic connection between God's word and the universe, so too one who truly understands the sages' commands will see their organic connection to their inner "self."

We have shown that R. Shkop's halakhic discussion in *Sha'arei Yoshor* reflects the philosophical ideology of Telshe, both in methodology and in content. This ideology was a radically individual one, which glorified the personality and unique contributions every person brings to their

⁴³ R. Eliyahu Meir is particularly aware of this issue, and attempts to modify the Telshe approach in light of this problem. His answer is that one should explore the reasons of halakha as much as possible, but practically one must obey the sages' decisions and rulings, see *ibid.*, 23-30. I believe that R. Shkop does not follow him on this final point but continues to adhere to the supreme Divine-human connection which R. Eliyahu Meir himself espoused.

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observance and study of Torah. It magnificently collapsed the distinctions between Divine wisdom and human wisdom and defied those who hold creativity and individualism at the door of the bet midrash. These ideas are beautifully echoed and reflected in R. Shkop's work. Telshe was one of the greatest European yeshivot before the war, and one suspects it was in large measure because of their ideology of recognizing the uniqueness of each and every student.⁴⁴

⁴⁴ On the unique pedagogical methodology which existed in Telshe, established by R. Yosef Leib Bloch, see R. Mordechai Gifter, "Telshe Yeshiva," [in Hebrew] in *Jewish Institutions of Higher Learning in Europe: Their Development and Destruction*, ed. Samuel Mirsky, 171-9 (New York: Ogen Publishing, 1956); Shaul Stampfer, *Lithuanian Yeshivas of the Nineteenth Century*, trans. Lindsey Taylor-Guthartz (Oxford: Littman, 2012), 303-7. Immanuel Etkes, "Authority and Autonomy: The Rosh Yeshiva in the Lithuanian Yeshiva and his Disciples" in *Yeshivot and Battei Midrash* [in Hebrew] (Jerusalem: Merkaz Zalman Shazar, 2006), 215, offers a different perspective on the reason R. Bloch adopted a more modern approach to pedagogy.