***Mipenei Darkhei Shalom* in Tannaitic Halakha—One *Nomos*, Different Narratives**

The expression *mipenei darkhei shalom,* ‘for the sake of the ways of peace’ (hereinafter: ‘ways of peace’), is invoked as the legal reasoning for various *halakhot* (legal rules), mainly *taqanot* (enactments), in Tannaitic sources composed in Roman Palestine during the second and third centuries CE.[[1]](#footnote-1) Several studies examine these enactments,[[2]](#footnote-2) including studies that distinguish between the Tannaitic and the Amoraic strata and even point out different characteristics of the use of this term in each.[[3]](#footnote-3) Still lacking, however, is a study that investigates the Tannaitic sources per se. Admittedly, even though one might expect to find uniformity in the use of the rationale in a single legal stratum—from the conceptual sense, in terms of the jurisprudential definition that fits the *halakhot* that it justifies within the world of the law (as legal rules and as legal or meta-legal principles), in terms of the legal solution that *halakhot* rationalised by the ‘ways of peace’ and its attendant implications provides; and in terms of the value invested in it by the legislator—its use turns out to be highly varied. As I show below, Tannaitic halakha displays three attitudes toward *halakhot* that are rationalised on the grounds of ‘ways of peace’. Among them are differences—some minor—in reference to the components I noted above: with misgivings, using the rationale to justify *halakhot* that mark a retreat by the Sages from the rules that they wish to establish but cannot due to weakness (mainly political); pragmatic, attached to *halakhot* meant to respond to spot lacunae in the halakha; and positive, viewing ‘ways of peace’ as a meta-halakhic principle that expresses the aim of the entire Torah.

Since the expression ‘ways of peace’ serves as a legal justification, which, by nature, is of a narrative character, the narrative that supplies a reason or a purpose, i.e., meaning, for the norm that it justifies—in terms borrowed from Robert Cover’s famous essay *Nomos and Narrative*[[4]](#footnote-4)— we may say, that even though the normative universe within which the rationale was created is the same universe—the *nomos* of the Mishnaic era—the contexts within which it operates reflect more than any single narrative that nourishes it.

Therefore, this article is devoted to revealing the different narratives that surround the ‘ways of peace’ rationale in the Tannaitic era and the legal nuances associated with them. It will, I hope, contribute to several research communities. It may be of interest to scholars of rabbinical literature by offering greater precision in the Sages’ use of the ‘ways of peace’ idea in the Mishnaic era (and also, to some extent, in the Talmudic era). By tracking this idea, the article also appeals to scholars of religion, given the subsequent application of the ‘ways of peace’ idea to growing numbers of contacts between Jewish communities and the religious cultures within which they dwelled. In this context, it is of interest to examine the rationale as representative of a narrative of minority groups that explain to themselves the normative choices they make in their lives alongside and within the majority culture. The article addresses itself to law historians and law theoreticians alike by demonstrating the role and functioning of explicit legal rationales as a narrative element in the legal system generally and in the halakha particularly. Its main contribution in this context is the realisation that when one examines a component of a given legal system that, ostensibly, should display the same conceptual, narrative, and jurisprudential aspects in all its occurrences, the picture may prove richer than it seems at first glance.

The article has six sections. In the first three, I present the various approaches and demonstrate each by analysing several representative *halakhot*.[[5]](#footnote-5) The research in these sections is based on philological historical, sociological, and literary analysis of the textual sources. In Part 4, I briefly review Robert Cover’s thesis in his essay *Nomos and Narrative* and the map of concepts that it offers.[[6]](#footnote-6) Pursuant to Part 4, I examine in Part 5 the linkages that exist in each approach between the narrative and the specific norm that it justifies, and between the narrative and the entire *nomos*, thus creating a better-focused and emphasised view of the separate characteristics of the three approaches. In the last part, I summarise my main conclusions and present questions for further research.

# The ‘With-Misgivings’ Approach: ‘Ways of Peace’ as Justifying a Retreat from the Ideal Halakha

Tractate Sheqalim concerns itself with the half-*sheqel* contribution and the organisation of the financial system of the Temple. The half-*sheqel* tax owes its origins to a Pharisaic ordinance[[7]](#footnote-7) associated with the Pharisees’ dispute with the Sadducees over how to finance the daily sacrifice in the Temple. According to scholars, the Oxford Mss. of the scholion of the *Megilat Ta’anit* scroll, although postdating the Second Temple period, preserve the crux of the dispute between the sects:

From the beginning of the month of Nisan until the eighth of it the daily sacrifice was settled—one is not to eulogise.

For the Sages used to say: daily sacrifices come from public [funds]. The Boethusians say: from private, as is written: [You [in the singular] shall offer](https://biblehub.com/hebrew/6213.htm%22%20%5Co%20%226213%3A%20taaSeh%20%28V-Qal-Imperf-2ms%29%20--%20To%20do%2C%20make) [one](https://biblehub.com/hebrew/259.htm%22%20%5Co%20%22259%3A%20eChad%20%28Number-ms%29%20--%20United%2C%20one%2C%20first) [lamb](https://biblehub.com/hebrew/3532.htm%22%20%5Co%20%223532%3A%20hakKeves%20%28Art%20%3A%3A%20N-ms%29%20--%20A%20lamb) [in the morning](https://biblehub.com/hebrew/1242.htm%22%20%5Co%20%221242%3A%20vabBoker%20%28Prep-b%2C%20Art%20%3A%3A%20N-ms%29%20--%20Dawn%2C%20morning) [and the other](https://biblehub.com/hebrew/8145.htm%22%20%5Co%20%228145%3A%20hashsheNi%20%28Art%20%3A%3A%20Number-oms%29%20--%20Second%20%28an%20ordinal%20number%29) lamb you shall offer [at](https://biblehub.com/hebrew/996.htm%22%20%5Co%20%22996%3A%20bein%20%28Prep%29%20--%20An%20interval%2C%20space%20between) [twilight [Numbers 28:4]](https://biblehub.com/hebrew/6153.htm%22%20%5Co%20%226153%3A%20HaarBayim%20%28Art%20%3A%3A%20N-md%29%20--%20Evening), implying a single [offerer]. And the Sages say: Be punctilious [in the plural] in presenting to Me at stated times the offering of food due Me, implying the many. They enacted that the individual weighs his *sheqalim* and donates them each and every year, and the daily sacrifice shall be offered using public funding**,** as is said: the daily sacrifice was settled.[[8]](#footnote-8)

This observance is interpreted in the scholion as a victory of the Pharisees over the Sadducees in the following dispute over the daily sacrifice:[[9]](#footnote-9) Should the sacrifice be funded solely from *terumat ha-lishka* (the public exchequer) or from the individual? According to the scholion, the Sages enacted the half-*sheqel* rule in order to fund the daily sacrifices. By implication, Eyal Regev claims,[[10]](#footnote-10) the exchange of words appears in the context of a sweeping Sadducee-Boethusian objection to the half-*sheqel* enactment, by which all of Israel participates in funding the daily sacrifices.[[11]](#footnote-11) The dispute had practical implications for the performance of the daily rite in the Temple and for the symbolic public meaning of the sacrificial service.[[12]](#footnote-12)

In view of these remarks, let us observe M. Sheqalim. The first two chapters of the tractate deal with commandments relating to giving the half-*sheqel* and the ways in which the contribution is to be collected. The first chapter seems to be built on two textual strata. The *stam Mishna,* the passage not attributed to any particular sage, describes a chronological sequence—‘On the first of Adar they make a public announcement […] On the fifteenth they read the *megila* [Esther] […]’. Two notes by R. Yehuda are arranged inside this sequence and add a dimension of historical depth to the description. In the second of these remarks, R. Yehuda testifies about a dispute between Ben Bukhrei and R. Yoḥanan ben Zakkai regarding the exemption of the priests from remitting the tax (1:4); I discuss it below. Prior to this Mishna—in Mishna 3—we find the reason for the exemption: ‘ways of peace’.

On the fifteenth [of Adar] tables would be set up [in order to exchange money] throughout the land. On the twenty-fifth, they would set up in the Temple. When they moved to the Temple, they began to seize [property and other valuables] as collateral [for the payment of the half-*sheqel*]. From whom did they seize collateral? Levites, Israelites, converts, and freed slaves. They did not seize collateral from women, slaves and children. Any child whose father has begun to pay the *sheqel* for him, [the father] cannot stop paying the half-*sheqel* on his behalf. They did not seize collateral from priests, *mipenei darkhei shalom*.[[13]](#footnote-13)

The Mishna describes an assertive system that collected *sheqalim* from the public and seemingly enjoyed social backing—the setting up of ‘tables’.[[14]](#footnote-14) It may be seen that the Jewish institutions did not settle for ‘tables’ that taxpayers should approach on their own; instead, they also sent tax collectors into the public domain. Furthermore, those who failed to donate their half-*sheqel* could have their property seized. Apparently, this property was not seized as collateral only from the priests.[[15]](#footnote-15) The historical documentation and previous scholarship regarding the half-*sheqel* suggest that the priests, who may well have been Sadducees or vestiges of the same, objected to the half-*sheqel* tax and therefore refrained from cooperating with the Sages and the public institution that enforced payment. The existence of Sages who believed that priests, too, should remit the half-*sheqel* is insinuated by the absence of an exemption for priests at the beginning of the Mishnaic passage. Additional sources in this chapter reinforce this conclusion. The first is Mishna 5, which omits the priests from those exempted from the pledge. The second is Mishna 6, which determines who owes and who is exempt from the *kolobon* (κολοός), a small coin used to pay the moneychanger’s fee, i.e., a surcharge. Anyone who owes the half-*sheqel* also owes the *kolobon*, but those whose duty is not clearly established are exempt from it:

The following are liable [to pay] the *kolobon* (surcharge): Levites and Israelites and converts and freed slaves; but not priests or women or slaves or minors.

However, in most manuscripts of the Mishna—Kaufmann, Parma (De Rossi 138), Cambridge (Ms. Add.470.1), and Naples—the word ‘priests’ is missing. Obviously, if only Levites and Israelites are obliged, priests are exempt. However, there seems to have been someone who did not wish to state this explicitly, probably as part of the controversy surrounding the issue.[[16]](#footnote-16)

Contrary to the foregoing Mishnaic passages, in which the priests’ exemption from the half-*sheqel* tax is rationalised on the grounds of ‘ways of peace’, or in which one finds, albeit implicitly, that the Sages believe the priests should also remit the half-*sheqel* tax, R. Yoḥanan ben Zakkai in Mishna 4 takes an explicit position against exempting the priests from the tax:

Rabbi Yehuda said: Ben Bukhrei testified in Yavne saying that a priest that contributes the half-*sheqel* is not sinning.

Rabbi Yoḥanan ben Zakkai said to him: This is not true. In fact, any priest who does not give a half-*sheqel* is sinning. Rather, the priests interpreted the verse for their own benefit, ‘And every meal-offering of a priest shall be wholly made to smoke; it shall not be eaten’ (Leviticus 6:16): If the *‘omer* [barley measure] offering and the *leḥem ha-panim* [the showbread, displayed in the Temple] offering are ours, how can they be eaten?

Ben Bukhrei’s testimony indicates that a priest who remits the half-*sheqel* although exempt from doing so makes the donation voluntarily. In this manner, he may show that public sacrifices should be funded by personal voluntary contributions—the very thing that the Pharisees oppose. Nevertheless, Ben Bukhrei does not see this as a sin (in Pharisaic eyes) because the priest is assumed to have presented his *sheqel* to the public as a no-strings-attached gift. This subsumes his contribution to the total pool of donated sheqalim, meaning that the public sacrifices are funded by the public and not by individual priests.[[17]](#footnote-17) R. Yoḥanan ben Zakkai objects to this vehemently, unwilling to leave the decision to donate to each priest’s own (voluntary) inclination. He reformulates the argument and reconciles it with that of the Sages: The priests’ tax avoidance and non-participation in the public’s practice, he says, is a sin. In the same breath, he presents the rationale behind the priests’ way of thinking: The priests interpret Leviticus 6:16—‘So, too, every meal-offering of a priest shall be a whole offering: it shall not be eaten’. According to the verse, priests’ meal offerings that are funded by public sheqalim, e.g., ‘the first sheaf of your harvest’, ‘the two loaves of bread’, and ‘the bread of display’ (Exodus 25:30, Leviticus 23:10–11, 16–17), may be eaten by the priests. The fact that the verse defines these public sacrifices as intended for priests’ consumption is, by their reasoning, proof that priests need not pay the half-*sheqel* tax and have no share in the public’s meal offerings (= sacrifices). By extension, a priest who gifts his *sheqel* to the public relinquishes the *sheqel* and therefore, according to the thinking of the Sages*,* does not sin (by eating a priestly meal-offering, which should be totally ‘made to smoke’ on the altar). R. Yoḥanan ben Zakkai takes exception to this exegesis: ‘Rather, the priests interpreted the verse for their own benefit’, i.e., in their self-interest.[[18]](#footnote-18)

These Mishnaic passages reflect the fact that, even though the Pharisees defeated the Sadducees and introduced public funding for public sacrifices, and despite their success in entrenching the half-*sheqel* payment among Jewish communities, they (or their successors, the Sages) failed to realise the idea fully and induce the priests to join the public in carrying out this pecuniary duty.[[19]](#footnote-19) Had the Sages managed to impose their religious-ideological stance verbatim, they would have couched the matter in halakhic terms, as R. Yoḥanan ben Zakkai proposed. Clearly, then, the explanation of ‘ways of peace’ for the priests’ exemption from the half-*sheqel* tax—by means of de facto non-enforcement—serves as a justification for the Sages’ concession on the principle of universal participation in remitting the tax to the Temple, originating solely in the realia of the political balance of forces. This retreat may have traced to the Sages’ concern that a more determined struggle against the priests might shred the internal fabric of Jewish society. It also may have reflected their understanding of the limits of their political power in confrontation with the priests, who enjoyed broad public prestige generally and, certainly, in the domain that the Torah bequeathed to them, the Temple service.

As noted above, the ‘ways of peace’ reasoning does not appear in the name of R. Yoḥanan ben Zakkai but rather is part of an unattributed passage. Assuming that it was inserted by a later redactor, how should we understand this redaction? One possibility is to assume that the redactor invoked a familiar phrase in order to soften the harshness of R. Yoḥanan ben Zakkai’s criticism of the priests by invoking a broad halakhic principle—‘ways of peace’⸺ as a justifiable reason to bend the law that requires priests to pay the half-*sheqel*. Another possibility is to interpret the tone that accompanies the use of the expression as a criticism or, at least, as involuntary acquiescence to the need to deviate from the letter of the law. However, the insertion of this rationale at the end of Mishna 3, right before the dispute between Ben Bukhrei and ben Zakkai in Mishna 4, along with the fact that several other passages in the chapter reflect the Sages’ resistance to exempting priests from the tax, indicate that the redactor introduced the ‘ways of peace’ rationale for not seizing the priests’ propery in the context of Rabbi Yoḥanan ben Zakkai’s insistence that priests are obligated in the tax. If this is indeed the case, the ‘ways of peace’ reasoning in this chapter is not a halakhic principle of positive value, the rationale for a new enactment, but rather the principle used to justify the Sages’ retreat from their halakhic opinion. For the sake of the ways of peace, the priests’ obligation to pay the half-*sheqel* was not enforced through seizure of the their property.

Another rule that reflects this nuance in the perception of the ‘ways of peace’ rationale may be seen in the following example from T. Pe’ah 3:1. Here, too, there is a halakha so worded—corresponding to the wording of the halakha in Tractate Sheqalim—that one can sense the apologetic tone of the Sages in view of the concession they have made in their concept of the halakha:

If there are [in the field] poor who are not fit [to be allowed] to glean [the gifts to the poor, then] if the owner of the field can prevent them [from gleaning], he is allowed to do so, but if [he cannot prevent them from gleaning, then] he should leave them alone [and let them glean anyway] *mipenei darkhei shalom*.

Unlike the exemption for priests, which regulated the operation of a public institution, this enactment serves the private individual, stipulating that a landowner must try to bar unworthy people from his field so that the poor may claim the gifts to which they are entitled. The expression ‘unworthy’ was interpreted in two ways: poor but dishonest, or having 200 *zuz* in their possession and therefore not qualifying as ‘poor’. Either way, such people are enjoined against gleaning because by doing so they would be robbing the ‘decent’ (or genuine) poor of what is rightly theirs. Plainly, the enactment attempts to strike a balance between the landowner’s practical abilities and the requirements of the halakha. If a landowner had to audit the moral character or financial situation of each person who comes to glean in his field, he would lose valuable work time, potentially embarrass both sides, and perhaps even bring about a violent confrontation. For these reasons, it seems, the halakha stipulates that if the landowner lacks the power to protest against these people, he must let them glean in his field. The enactment, however, does not totally set aside the Sages’ halakhic reasoning (which allows only the deserving poor to glean) because it states explicitly that if the landowner can prevent abuse of the gleaning privilege, he should do so. Thus, here, too, the rationale of maintaining ‘ways of peace’ explains the waiving of a halakhic principle for realpolitik reasons and not for the sake of a value that the Sages are interested in promoting.[[20]](#footnote-20)

The Pragmatic Approach: Using ‘Ways of Peace’ to Justify Enactments That Fill Halakhic Lacunae

In other Tannaitic sources, different attitudes toward the ‘ways of peace’ rationale are expressed. One approach used the rationale to justify enactments that fill halakhic lacunae. In a large majority of these *halakhot*, unlike those reviewed above, no explicit theological or ideological dispute exists; the Sages appear to take a pragmatic and practical approach to them.

A conspicuous example is an enactment concerning the rules of the *‘eruv* (mingling or sharing), halakhic enactments and arrangements that pertain to the way the sanctity of the Sabbath is preserved. The Sages forbade carrying objects on the Sabbath from one rashut (domain) to another (e.g., from a personal domain to a public domain) and attributed the authority of this injunction to the Torah. In contrast, they saw the removal an object from a house to a courtyard as a lesser prohibition[[21]](#footnote-21) that traces to *divre soferim* (part of a set of enactments from the early Second Temple era, sustained by oral transmission).[[22]](#footnote-22) For many in antiquity, whose homes were arrayed around a spacious courtyard, this prohibition gravely burdened daily life. The hardship originated in the condominium nature of the courtyard, meaning that residents could not move objects from their homes into the courtyard, which was part of their living space. To eliminate this inconvenience, an enactment was made that allowed people to carry objects from their homes and place them in the courtyard and vice versa provided they put up an *’eruv*, a ‘mingling’ or ‘sharing’ of the courtyard. This act had the symbolic effect of making the courtyard the joint property of everyone living around. It found expression in the placement of food—given by each of the homes that shared the courtyard—in the courtyard or in one of the homes abutting it. This made the food the ‘common property’ of all the residents and symbolically merged the homes and the courtyard in one domain, the personal domain of all the residents together. Thus objects could be removed from house to courtyard and back without, as it were, crossing into the public domain.

Notably, the entire *‘eruv* method is a Pharisaic one. Other groups that were active in the historical realia of the late Second Temple period and during the Mishnaic era forbade the practice outright and dismissed the very possibility of the *’eruv*.[[23]](#footnote-23)

Against this background, it is correct to point out that the enactment discussed below does not pertain to situations in which joint tenants differ in their halakhic or religious views.[[24]](#footnote-24) On the contrary: its wording indicates that people who keep the *‘eruv* in their homes benefit from social capital, and it is precisely this that may create the conflict that the enactment is meant to prevent. So in M. Gittin 5:8: ‘They prepare an *‘eruv* in the house where it was first placed, “for reason of ways of peace”’.

Around exactly what does the conflict revolve? The Mishna itself offers no explanation. The two Talmuds, however, present different situations that may be the background for the enactment. First, the Babylonian Talmud (BT):[[25]](#footnote-25)

An *‘eruv* should be placed in the room where it has always been placed, *mipenei darkhei shalom*. What is the precise reason? Shall we say it is out of respect?[[26]](#footnote-26)

Then what about the *shofar* that at first was in the house of Rab Judah and later in that of Rabbah and then in the house of R. Joseph and then in the house of Abaye and finally in the house of Rava?

The real reason is so as not to arouse suspicion.

BT offers two possible reasons for the enactment: ‘out of respect’ and ‘so as not to arouse suspicion’.[[27]](#footnote-27) According to the first explanation, the *‘eruv* confers much public honor on the home where it is placed. When a new resident enters, a dispute may break out among the co-tenants of the courtyard as to who is worthy of keeping the *‘eruv* in his home. The enactment establishes that the *‘eruv* should remain in the house where those living around the courtyard had habitually placed it, so as not to dishonor the new homeowner. BT rejects this explanation by presenting as an example the migrations of a *shofar*—an instrument used for ritual purposes or to carry charitable donations (as was the practice in the Temple—from the home of a sage who headed the academy in Pumbedita to the home of his successor [posthumously]), and so on.[[28]](#footnote-28) The description of the migrating shofar attests that there were cases in which the object moved from house to house without being accompanied by struggles over honor. BT adduces from this that the food used for the *‘eruv* may move from house to house without the development of a conflict (or, perhaps, without the new homeowner’s feelings and frustration necessarily entitling him to retain the *‘eruv*). After rejecting the first explanation, BT offers another one: the migration of the *‘eruv* may stir unfounded suspicion among members of the community as to the religious fitness of the inhabitants of the house (i.e., that they move objects from one domain to another without an *‘eruv*)[[29]](#footnote-29) or their moral probity (that they stole the shared food for themselves).[[30]](#footnote-30) Thus, according to the thinking in BT, the enactment is meant to preclude the possibility of unjustified shaming.

In the Palestinian Talmud (PT), R. Abin proposes a more exacting reading of the Mishna:[[31]](#footnote-31) ‘Rabbi Abin said, the Mishna speaks of a prior dweller.’

Why should the Mishna be read in this more exacting way? The explanation is that the enactment appears in two parallel *sugiyot* [issues for Talmudic debate, sing. *sugya*], one in Tractate Gittin and the other in Eruvin. In Eruvin, the word used in the enactment is *diyur* (residence); the word *dayar* (resident) was added to it by the redactor. The difference in wording determines whether a residence or person is at issue. What situation, however, does R. Abin have in mind? The commentators on PT suggest two possibilities. According to the *Korban ha-‘Eda* commentary,[[32]](#footnote-32) R. Abin understands the situation as creating the suspicion that the homeowner is pilfering the food. The specification of the ‘prior dweller’ (*be-dayar yashan)* is needed because when a new dweller arrives, there is no reason to place the *‘eruv* specifically with him. (It may even present a good opportunity to move it elsewhere without this measure being associated—for better or worse—with the other co-tenants). In the *Pene Moshe* commentary, in contrast, R. Abin’s comment is construed differently in each of its two sources. In Gittin, the commentator understands that if people do not see the *‘eruv* in its usual place, they would suspect the dwellers of carrying objects without an *‘eruv*, thus transgressing the Sabbath law. In Eruvin, he construes the Mishna as meaning that one should not place the *‘eruv* in a different house because those who host the *‘eruv* need not contribute any food to it. If the *‘eruv* is now placed in a different house, the prior dweller would now have to contribute food.[[33]](#footnote-33) This would create a financial loss that might trigger power struggles over the placement of the *‘eruv*.

The profusion of potential situations that underlay the enactment and the revision of the rationale in BT from ‘ways of peace’ to ‘for reason of suspicion’ raise the possibility that the ‘ways of peace’ rationale was not part of the enactment as originally set forth but was added to it by the redactor of the Mishna.[[34]](#footnote-34) Regardless of whether this supposition is correct, it is worthwhile to attend to the differences between this case and the one discussed above concerning both the tone in which the ‘ways of peace’ rationale is used and the jurisprudential characteristics of the enactment in the halakhic system. Like in tractate Sheqalim, here too the enactment is part of a broad halakhic category that generated a new legal conception that conflicted with the religious approaches of various groups at the end of the Second Temple period and the Mishnaic period. In the Sheqalim context, ‘ways of peace’ served as justification, perhaps *ex post facto*, of laws that amounted to the relinquishment, to a degree, of the halakhah according to the Sages and therefore the tone is qualified. In Eruvin, the purpose of the enactment is to close a lacuna in the law for those who already accept the laws of *‘eruv* and live accordingly. The tone is therefore more businesslike and neutral as part of the explanation of the enactment.

My next example also reflects a pragmatic and unapologetic approach toward using the ‘ways of peace’ rationale. From the jurisprudential standpoint, however, the practical power of these *halakhot* seems limited relative to other legal categories. As the following example demonstrates, the Sages believed that an enactment based on ‘ways of peace’ reasoning imposes a sanction on its transgressor.[[35]](#footnote-35) In M. Gittin 5:9, the following *halakhot* are presented, *inter alia*:

1. [Taking] objects found by a deaf-mute, an idiot, or a minor is reckoned as a kind of robbery—in the interests of peace. R. Yose says: it is actual robbery.
2. [Taking] beasts, birds and fishes from snares [set by others] is reckoned as a kind of robbery—in the interests of peace. R. Yose says: it is actual robbery.
3. If a poor man gleans on the top of an olive tree, [taking the fruit] beneath him is counted as a kind of robbery. R. Yose says: it is actual robbery.[[36]](#footnote-36)

These three *halakhot* are connected by their shared subject matter and their inclusion of a dispute between the Tannaitic tradition that quotes the halakha (the *tanna qamma*) and the opinion of R. Yose. They regulateproperty rights in cases where ownership of the property is considered unclear. Halakha 1 deals with people—a deaf-mute, an idiot, or a minor—whom the Sages often considered incompetent to uphold halakhic norms including the acquisition of property.[[37]](#footnote-37) *Halakhot* 2 and 3, in contrast, concern situations in which a person acts to obtain some object—by setting traps to catch animals or by shaking olive branches to gather the olives that fall from the tree—but have yet to take possession of it.[[38]](#footnote-38) Hence, according to the usual laws of property, they have not yet acquired the object.[[39]](#footnote-39) During this liminal phase, the object is seized by another. Now the question is: Did this second person steal the object, or is he or she now its legal owner? In all three cases, the Sages, including R. Yose, rule that the object belongs to the first person, even if he or she is not competent to hold various property rights or has not yet obtained the object. The appropriation of an object by another—whether these are of ‘found objects’,[[40]](#footnote-40) an animal, or olives—is considered theft. The ‘ways of peace’ justification, however, indicates that, in the mind ofthe *tanna qamma* (the first opinion in each of the three *halakhot*), the material (ontological) definition of possession of the object (olives, fowl, fish, etc.) has not changed; the object essentially remains ownerless. In other words, the *tanna qamma* does not assign these cases to the legal category of property rights; instead, he acknowledges them for reasons of ethics or public policy. R. Yose, in contrast, believes that found objects should become the legal property of the deaf-mute, etc., or of the first person who has made an effort to obtain them. One may assume that, by reasoning that an active effort to take possession of an object totally excludes the case from mere ‘intent’, R. Yose transfers this act to the category of an act that confers possession (at a stronger level, at least, than that of those who have not actually taken possession).

Do these divergent definitions have divergent normative outcomes? The Talmudic discourse answers this question in the affirmative. In both Talmuds, it is argued that, according to the *tanna qamma*, one who appropriates these objects should not be sanctioned because one has not transgressed Torah law (evidently because the objects have not ontologically changed hands). R. Yose, in contrast, placing the case in the legal category of property law, allows the aggrieved party to seek restitution in rabbinical court.[[41]](#footnote-41) It is likely, then, that in these cases, according to R. Yose, adherence to the formal rule (i.e., absent ontological acquisition, no offense exists) would result in an injustice (not only an offense to the victim’s feelings or to the public welfare). Accordingly, he broadens the category of property law by creating an additional rule[[42]](#footnote-42)—thereby attaining a just outcome not only on the moral level but on the normative plane as well.[[43]](#footnote-43)

Thus, it is found in these cases that the Tannaim—all of them—believe that the ‘ways of peace’ legal category, seemingly based on a rationale external to the legal category of the *halakhot* of which it is composed, has less normative force than have legal categories predicated on judicial rules and structures of Torah origin, at least where applying legal sanctions is concerned.[[44]](#footnote-44)

**A Positive Approach to the ‘Ways of Peace’ Enactments**

A third approach appears to have taken shape as the Mishnaic era wound down. From the value perspective, this approach considers these *halakhot* consistent with the Sages’ halakhic ‘should’. I base this conclusion on two aspects. The first is the decision of the redactor of the Mishna to assemble an entire aggregate of *halakhot* that are explained on ‘ways of peace’ grounds (M. Gittin 5:8–9).[[45]](#footnote-45) The second aspect is the existence of a perspective on ‘ways of peace’ as a meta-halakhic principle that reflects the purpose and worldview of the entire Torah. This radical point of departure may be detected in a *midrash* offered by R. Shimon and presented in a passage in *Mekhilta de-Rabbi Shimon Bar Yoḥai* (hereinafter: the Mekhilta) found in the Cairo Geniza.[[46]](#footnote-46) R. Shimon and additional Sages interpret the words ‘a neighbour in Exodus 12: (‘But if the household is too small for a lamb, let him share one with a neighbour[[47]](#footnote-47) who dwells nearby…’) as follows:

‘And his neigh[bor]’: Ben Bag Bag says, ‘I might assume [this includes] his neighbour] in a field. His neighbour on a ro[of] [he who dwells near his house, close to {his} door—whence [in the biblical text do we learn this]? Scripture states ‘next’ (Exodus 12:4), [meaning the one who dwells next] to his house door to door’.

[Rabbi says three types of neighbours] are mentioned [here in Scripture]: ‘a neighbour—this [refers to] his neighbour in the fields; ‘his neighbour—this [also refers to] his neighbour on [a roof; ‘who dwells near’]—this [refers to] he who dwells near his house, close to [his] door.

[But only for] the paschal sacrifice of Egypt [does] ‘his neighbour’ [mean] he who dwells near his house, whereas [for] the paschal sacrifice of the [subsequent] generations ‘his neighbour does not [mean] he who dwells near his house.

Rabbi Shimon says: ‘His neighbour [means] he who dwells near his house even for the paschal sacrifice of the [subsequent] generations. For above all, the Torah spoke only because of the ways of peace [as illustrated here, where the Torah’s intention is] that one should not leave his beloved, his neighbours, acquaintance, close ones, or one of his town’s citizens and go off and perform the paschal sacrifice with others. As to fulfil what Scripture says: ‘A close neighbour is better than a distant brother’ (Proverbs 27:10).[[48]](#footnote-48)

The Sages ask to whom the expression ‘his neighbour who dwells nearby’ applies. What troubles them, apparently, is not the wording of the verse but the situation per se and. Namely, convening for the paschal meal may result in the exclusion of certain people, precipitating tension and offense. Ben Bag Bag and R. Yehuda ha-Nasi interpret the words as accommodative of different modes of neighborship: ‘his neighbour in the fields’, ‘his neighbour on the roof’, and ‘he who dwells near his house, close to his door’. They resolve the difficulty that this causes by having the verse speak of the eating of the paschal sacrifice that took place upon the Exodus and not the *pesaḥ le-dorot,* the regular annual Passover ritual.[[49]](#footnote-49)

R. Shimon takes issue with his colleagues, arguing that the commandment also applies to *pesaḥ le-dorot*. However, he proposes a different way of resolving the difficulty. The expression ‘his neighbour’, he says, should be construed inclusively, referring to the individual’s residential environment, i.e., those of his community with whom he interacts on a daily basis—‘his friends, his neighbours, acquaintances, relatives, or townspeople’—as opposed to the inhabitants of another town, whom he calls collectively—in a manifestation of emotional estrangement—‘others’. The purpose is to fulfil the adage in Proverbs 27:10: ‘Better a close neighbour than a distant brother’. Thus R. Shimon transforms the verse from the description of a situation or a point of practical advice in life into a binding norm.

Notably, R. Shimon’s exegesis also appears in BT Pesaḥim 8:13. There it appears without the rationale of ‘For above all, the Torah spoke only because of the ways of peace’ and is more concise than the version in *the Mekhilta*:

R. Shimon says, ‘I say, “Also in regard to the Passover observed by the coming generations the same thing is stated”.

‘And why is all this so?

‘So that a man should not leave his neighbour, who lives next door, and go and prepare his Passover-offering with his friends. Thus is fulfilled the following verse: Better a close neighbour than a distant brother’[Proverbs 27:1].[[50]](#footnote-50)

R. Shimon’s dictum here is linked closely to the version of the expression ‘his neighbour’ that contrasts with ‘his friend’. The question ‘and why is all this so?’ is used to introduce the reasoning behind the interruption: ‘so that a man should not leave […]’. In contrast to the Tosefta, the text in the Mekhilta, cited above, expands the word ‘neighbour’ into a category that includes, as we have seen, all members of the community. In addition, between R. Shimon’s statement that the commandment also applies to *pesaḥ le-dorot* and the midrashic treatment of the expression ‘his neighbour as an argument of principle, the Mekhilta establishes the exegesis as such, and its support in Proverbs, as part of the purpose of the entire Torah: ‘For above all […]’. Here, evidently, is another case akin to the ones presented by Liora Elias Bar-Levav, in which the redactor of the Mekhilta takes a tradition in his possession—in the Tosefta—and reworks it according to his worldview.[[51]](#footnote-51) First, he combines the expression ‘And why is all this so?’ with another locution in the Talmudic literature—‘the verse/Mishnah/Rabbi […] did not speak but […]’ which usually reduces the meaning of the verse ‘to this case only’[[52]](#footnote-52) while converting the word of the source into the word ‘Torah’. Second, he expands the word ‘neighbour’, elaborates on it in various ways, and turns it into a category: ‘community’. Therefore, it appears that R. Shimon's granular homily omits the sentence ‘For above all, the Torah spoke only because of the ways of peace’. To the best of my understanding, the redaction changes the common meaning of the term ‘[the verse] did not speak but [that…]’ and gives the *midrash* a broader and more radical meaning. The new assertion, which turns the gaze from a specific verse (in Proverbs) to the entire work (the Torah) and from a specific rule (on how to celebrate Passover) to the ultimate goal of all the Torah’s commandments, reflects a new and positive perspective, perhaps even a meta-halakhic one, on the concept of ‘ways of peace’, seeing it as a crucial fundament for the society that the Torah seeks to establish.

Another example of a positive approach may again be seen in the context of the *’eruv*, the shared courtyard. Here a far-fetched argument is made, stating the purpose of the *’eruv* not as Sabbath observance but as the creation of opportunities to repair testy relations among neighbours. In PT, a *sugya* is encountered in regard to M. Eruvin 3:2 that pertains to the rules both of the *‘eruv* and of property that we dealt with in the previous section. The Mishna reads as follows:

[If] one sends his *‘eruv* in the hands of a deaf-mute, an imbecile, or a minor or in the hands of one who does not accept [the principle of] *‘eruv*, it is not [a valid] *‘eruv*.

[But] if one told another to receive it from him it is a [valid] *‘eruv*.

Reflected in this Mishna is the reality in which not every Jewish community assented to the Sages’ halakhic solution of the *‘eruv*, as attested in the definition of ‘one who does not accept [the principle] of the *‘eruv*’. The Mishna also reflects the realia behind the enactment of the *‘eruv* by showing that the tenants sent the *‘eruv* food to the home of one of their number as the Sabbath approached. Shmuel and Ze’ev Safrai [המקור של ספראי מופיע בשמו של זאב בלבד] suggest that the *‘eruv* enactment, generally speaking, seems to have gone through several stages. First, it involved an actual meal in which everyone living around the courtyard, on the model of on an extended family, took part (as I showed in the previous section). Next, the family structure was destabilised but a joint meal as a group event remained. In this case, shortly before the Sabbath, everyone living around the courtyard sent some food to the home where they would be dining and brought the rest of the meal at mealtime. In the third stage, the meal became symbolic; everyone sent a symbolic meal to one of the dwellings. Fourth, one resident put together an *‘eruv* and imparted it to all residents of the courtyard. Our Mishna deals with the third stage, in which small quantities of food were sent to the specified resident’s home.[[53]](#footnote-53) For the food to cross from the sender’s domain to that of the dweller with whom the *‘eruv* was kept, the messenger had to be lawfully entitled to possess it and transfer its ownership to another. As I showed below, the deaf, the mentally deficient, and minors do not have the power to legally acquire property. Therefore, according to the thinking in this Mishna, those who sent the symbolic *‘eruv* food by means of such people did not impart them to the recipient and, in effect, did not establish their partnership in the *‘eruv*. (They even denied the *‘eruv* to the other dwellers by having left the courtyard ‘non-joint’ among the dwellers). A parallel halakha in Tosefta Eruvin b[c] 11, however, seems to indicate that it was a widespread practice to have the *‘eruv* delivered by children, of all people:

Said R. Meir: Jewish women did not hesitate to send their *‘eruv* by means of their young sons and daughters in order to train them in the performance of mitzvot.

Said to him R. Yehuda: is that proof [that the messenger may be underage]?! Rather, this is so [only] in a case of one woman saying to another, receive it from me [i.e., via the child], or one man saying to another, receive it from me [i.e., via the child].

R. Meir describes the settled practice of women sending *‘eruv* food to the collection point by means of a young son or daughter. A woman makes her child a messenger, according to this tanna, in order to train him or her in mitzvot.[[54]](#footnote-54)

R. Yehuda attacks R. Meir’s formulation. A minor, he says, is not sent along but rather his or her mother—or father, i.e., an adult—is at their side, telling her counterpart: ‘receive it from me’, and thus entitles the recipient to the food. From additional rabbinical remarks in both Talmuds, it appears that not only can one have a minor deliver *‘eruv* food but this is the preferred way.[[55]](#footnote-55) In a *sugya* in PT,[[56]](#footnote-56) in which our rationale appears, remarks by R. Yehoshua are cited. It is hard to determine the exact identity of this sage, in particular, whether he is a *tanna* or an *amora*, since the Leiden ms. version of PT refers to him as R. Yehoshua without further identification.[[57]](#footnote-57) In Geniza fragments and in a parallel text in PT,[[58]](#footnote-58) however, he is identified as R. Yehoshua b. Levi, an *amora* noted for his exegesis.[[59]](#footnote-59) Thus we read in this *sugya*:

R. Yehoshua said: Why do we make an *‘eruv*? ‘for the sake of ways of peace’. There was an incident involving a woman who was antagonistic to her neighbour and sent her son to the neighbour with their share of the *’eruv*. The neighbour hugged and kissed the son, who then related this back to his mother. She said to herself, ‘How warmly my neighbour feels about me and I never knew’. Through this, they made peace. Thus it is written [Prov. 3:17], ‘Its ways are ways of pleasantness and all its paths are to peace’.

These sources are instructive of two processes. One reflects a change in the perception of the purpose of the *’eruv* rule; the other, the multiple narratives that surround the use of the ‘ways of peace’ justification. As Elisheva Fonrobert shows and as Shmuel and Ze’ev Safrai [המקור של ספראי מופיע בשמו של זאב בלבד] note, the *’eruv* acquired a different meaning over time, additional to its primary purpose as a halakhic construct meant to make Sabbath observance easier.[[60]](#footnote-60) At this level, the *‘eruv* laws serve as a symbolic political resource for the creation of a religious community and the specification of its boundaries. This meaning gained further depth as various minutiae of the commandments were shaped in order to optimise interpersonal relationships in the community. As for the way the ‘ways of peace’ rationale was perceived, it is noteworthy that the method of having the *‘eruv* delivered by a child, as in the *sugya* in PT,[[61]](#footnote-61) is justified by exactly the method that R. Shimon invokes in the Mekhilta. First, instead of seeing the expression ‘ways of peace’ as an explanation that justifies a halakhic concession (tolerable but unworthy) or a neutral and pragmatic description of the purpose of the rule, each sage sees it as the broad purpose of a legal category to which the case that he discusses belongs (the rules of the Passover sacrifice/meal for R. Shimon; the rules of the *‘eruv* for R. Yehoshua). Second, each sage (or the redactor of the *sugya* in PT) traces this goal to a verse of Scripture (from Proverbs in both cases). And third, the verse itself is seen as expressing a meta-halakhic principle that reflects the broad goal of the entire Torah. Thus ‘ways of peace’ as a positive meta-halakhic value acquires its identity.

\*

To bring the differences among the three approaches into even finer focus, I now turn to the essay *Nomos and Narrative*. In the next section, I briefly present the gist of Cover’s thesis and then examine the types of nexuses that exist within each approach between the narrative and the specific norm (the halakha) that it explains, and between the narrative and the entire *nomos*.

**A Summary of Robert Cover’s Thesis in *Nomos and Narrative***

Cover predicates his approach on a unique understanding of the concept of law: not as a set of rules geared to behaviour but as a ‘*nomos*’— a normative universe, a complete and comprehensive system in which right and wrong, lawful and unlawful, and valid and void are assessed.[[62]](#footnote-62)

The official fundaments of the law—statutes and judicial rulings—are but a small part of this *nomos*, the regime of meaning and values under which we live, and they lack the strength to exist separately from the narrative from which they draw their meaning. Cover explains this as follows:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution, there is an epic, for each decalogue, a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed but a world in which we live.[[63]](#footnote-63)

In this world, legal meaning is created and re-created in an incessant process that has a purpose: to link the reality of life with the vision of an alternative life that sustains the values and meanings inherent in the *nomos*.[[64]](#footnote-64) This vision, Cover emphasises, is not a utopia; it has validity only when it offers a life to which a commitment can be made and a basis on which people are willing to live, in accordance with the specific interpretation that their community imparts to its constitutive texts. Therefore, an interpretive commitment is the glue that binds the segments of the normative universe.[[65]](#footnote-65)

The creation of legal meaning—the law-generating process that Cover calls *jurisgenesis*— is a collective and social process that unfolds continually in a cultural context.[[66]](#footnote-66) Although a community is needed for this to happen, it need not be a state. Cover shows how, alongside the state, subnational communities create and preserve normative orders of their own[[67]](#footnote-67) and how, in such cases, the emphasis is placed on the legal understanding shared by members of the community and on the community’s commitment to its ways.[[68]](#footnote-68)

What is the social basis of jurisgenesis? To answer, Cover isolates—by analysing the writings of Joseph Caro, author of the great sixteenth-century halakhic code *Shulḥan ‘Arukh*[[69]](#footnote-69)—two fundaments typical of normative worlds: ‘world-creating’ and ‘world-maintaining’. He demonstrates this by means of two Mishnaic passages from the Chapter 1 of Tractate Avot. The first is:

Simeon the Just [circa 200 B.C.E.] said: Upon three things the world stands: upon Torah; upon the Temple worship service; and upon deeds of kindness.[[70]](#footnote-70)

According to Cover, the world described by Simon the Just is the ‘*nomos*’, the normative Jewish world in the late Second Temple era. The three fundaments that he specifies—Torah; the Temple worship service; and deeds of kindness—are world-creators. This is the ‘paideic’ pattern,[[71]](#footnote-71) so-called because it includes a shared narrative, shared norms, and a shared way of educating and being educated on their basis.[[72]](#footnote-72) These forces create the normative world in which law is, foremost, a system of meaning and not one of imposition of rules of behaviour.[[73]](#footnote-73) After the destruction of the Second Temple, it was no longer possible to engage in these three fundaments properly. From then on, the normative world continued to exist by dint of other, weaker forces reflected in the concluding Mishna of the chapter:

Rabbi Simeon ben Gamaliel said: Upon three things the world [continues to] exist […]: upon justice, upon truth, and upon peace.[[74]](#footnote-74)

Unlike powerful forces that create a world ex nihilo, the forces that R. Simeon ben Gamaliel mentions merely preserve what already exists. In this mode, which Cover calls ‘the imperial pattern’, norms are universal and enforced by institutions; they are ‘world-maintaining’.[[75]](#footnote-75) The imperial characteristic is needed in order to regulate the proliferation of meanings. Certain jurisgenerating cultural forces (in the case of the *Tannaim*: ‘Torah; the Temple worship service; and deeds of kindness’) may create violent and unstable normative worlds that do not act in harmony with the worlds of law that are parallel to them. According to Cover, the purpose of the imperial mode is to create a framework that thwarts violence and abets coexistence with the different normative worlds that thrive under it. Cover invokes the imperial mode to characterise the judicial act: Courts of law are needed in order to settle conflicts between rival *nomoi* of different normative communities and between them and the state’s demand for social control in its quest for uniformity. By carrying out this function, Cover claims, courts not only create law but also, as they confront the abundance of diverse legal traditions, ‘destroy’ one of the rival norms and declare one norm and none other as the law. This violent act also assures peace among these clashing normative worlds.[[76]](#footnote-76)

**Discussion: The Three Approaches to ‘For the Sake of the Ways of Peace’ in View of *Nomos and Narrative***

Here I take a look at the three approaches toward the ‘ways of peace’ reasoning in view of Cover’s concepts, starting with the ‘with-misgivings’ approach. In the *halakhot* that follow this path, we see the Sages dispense with their halakhic stance in some manner. In the case of the *sheqalim*, the concession is made to the priests, a social group outside the rabbinical class that apparently preserved the Sadducees’ outlook from the Second Temple era. In the rules of gleaning, in turn, the concession—if it occurred—originated in the landowner’s inability to enforce “correct” gleaning, as the rabbis construed it, due to the behaviour, possibly violent, of ‘unfit’ paupers. In the case of gleaning, it is hard to identify the narrative that disciplines the behaviour of those who enter the field.[[77]](#footnote-77) In the case of exempting the priests from the half-*sheqel* tax, however, an ideological collision between the groups occurred, as seen explicitly in R. Yoḥanan ben Zakkai’s indictment of the priests for interpreting verses of Torah for their personal gain. In this case, two rival interpretations of the constitutive text of the Jewish normative world are juxtaposed. Seeing the matter through Cover’s concepts, one may therefore view these two interpretations—that of the priests and that of the Sages—as ‘jurisgenerating’, namely, as paideic. Although both draw on the same normative universe—the Torah—each belongs to a different sub-community within this universe that creates its own laws on the basis of the narrative that lends meaning to its existence.[[78]](#footnote-78) The Sages, perceiving the Temple as belonging to the public at large, ‘create’ the half-*sheqel* tax as an expression of the commitment and partnership of each and every individual to sustaining the Temple. The priests, in contrast, from their privileged outlook that flows from the powers and entitlements given them by the Torah in the context of the Temple service, deny the applicability of the tax to them (and the very legitimacy of the tax itself).

Whence does the ‘ways of peace’ rationale enter here? As I showed, it is not part of R. Yoḥanan ben Zakkai’s lexicon; it evidently comes from the redactor of the Mishna and in any event appears to belong to a later stratum. R. Yoḥanan ben Zakkai’s dicta still establish no law that would determine who is liable to the half-*sheqel* contribution and who is not. What does exist is a description of an alternative life that sustains the values and meanings of the *nomos* in accordance with the vision of the Sages as against with an account of life as it really is due to their inability to implement the law—the ‘bridge,’ to use Cover’s term[[79]](#footnote-79)—that will move the community toward this alternative life. In contrast, ‘*mipenei darkhei shalom*’ functions as a justification for an existing rule that determines, judicially, who is liable to the half-*sheqel* tax and who is not. The ‘ways of peace’ rationale gives legal sanction to the priests’ actual behaviour and becomes a valid norm within the legal category of the ‘half-*sheqel* contribution’ that comes into being. A similar demarche takes place with regard to gleaning: If the landowner does not manage to implement the *nomos* as set forth in the Sages’ narrative, the intruder’s behaviour receives *ex post facto* sanction by means of the halakhic rule. Thus, viewed in Cover’s concepts, ‘ways of peace’ serves to justify a rule harvested from the ‘imperial’ pattern. It does so, first, because the imperial characteristic is needed to establish order among the multiple meanings that are created by the specific jurisgenerating cultural forces (the priestly force and the rabbinical force), and second, in that the law justified by the rationale is a framework that prevents violence and allows the different narrative worlds that thrive under it to coexist. Third, in a certain sense, this coexistence is engendered by the need for a lawmaker (whose role resembles that of the judge, as Cover describes it) who will settle the conflict that arises among rival *nomoi* of different normative communities. The lawmaker satisfies this necessity by ‘destroying’ one narrative—that of the Sages. The ‘destruction’ in this case, however, is attained not by repealing the Sages’ law and accepting that of the priests (or, in the case of the gleaning, the intruder’s behaviour) as is, but by converting the Sages’ law into a new law: exempting the priests from the contribution or exempting the landowner from protesting against the pauper. The new law acquires its meaning through a new narrative that the Sages themselves created: ‘*mipenei darkhei shalom*.’

Other qualities that reflect the imperial mode may be observed in the *halakhot* that reflect the pragmatic approach. Here we find rules that settled lacunae in the existing law, in which the relevant cases did not originate in ideological clashes among different *nomoi*. These rules came about due to the need to resolve quotidian conflicts among people who lived in neighbourly proximity to each other—events properly viewed as belonging to the civil domain. One type of conflict that emerges from a struggle over physical resources (over water, in the halakha that establishes a queue for the use of water[[80]](#footnote-80); olives, or animals hunted by means of traps in the disputes between R. Yose and the Sages; or over money, as emerges in some interpretations of the rule that the *‘eruv* should be left in the old house). Other conflicts came about due to struggle over social capital (‘honor’ in the case of the laws of the *‘eruv* on the basis of another interpretation that we presented above; or in determining the order of reading from the Torah in the synagogue in another enactment rationalised on the grounds of ‘ways of peace’[[81]](#footnote-81)). A third kind of conflict (not discussed in this article) need not go so far as violence and may trace to personal (inner) uncertainty among members of the rabbinical stratum: To what extent can neighbourly relations that involve the togetherness of encounter and quotidian work exist with people who do not observe religious commandments (sabbatical year, tithing) with the same degree of stringency, and with Gentiles?[[82]](#footnote-82) Even though *halakhot* of the third kind ostensibly regulate “clashes” among different *nomoi*, their emphasis (much like the *halakhot* of the two other kinds—struggles over physical resources and honor) is not on rejecting the other *nomos* or the need to reconcile different narratives, as in the with-misgivings approach (certainly not by ‘destroying’ one narrative) but rather on an attempt to find a legal way, which does not impair the Sages’ *nomos* and narrative, to maintain pleasant ‘civil’ life.[[83]](#footnote-83)

Furthermore and differently, the nexus of ‘*nomos*’ and ‘narrative’ in the foregoing dispute between the *tanna qamma* and R. Yose sheds light on two additional aspects that relate to ‘ways of peace’ in the context of the pragmatic approach. The first aspect concerns the way the interpersonal conflict comes about. As I showed, the *tanna qamma* and R. Yose agree about the halakhic norm that entitles one who beats an olive tree to gather them up and one who has set traps to what he snares. The olives and the traps are ‘extreme cases’ that apparently emerged from real life and not from legal hairsplitting. In the cases described, one person took an action meant to establish possession, but the reality of the situation—a time gap—did not allow him to fulfil his intent by so doing. (One cannot simultaneously knock olives out of a tree when one is in the crown of the tree and gather the olives that land on the ground; the moment of placing the trap is not that in which the prey is captured.) In the meantime, someone else may lay claim to the results. The way this formally correct possibility, which may lead to violence between the two, is negated reflects the way the imperial mode functions in the following manner:

The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.[[84]](#footnote-84)

While observing the consensus among the Sages about the rule itself, however, we saw them disagree about the narrative that invests them with meaning. This is because the narrative loads the legal norm onto additional contexts. Namely, the insistence on whether to invest meaning in the legal norm as ‘outright possession’ or ‘ways of peace’ projects on and shapes the entire normative universe—the *nomos*—within which the specific norm, not only the norm itself, will exist.[[85]](#footnote-85) This apparently explains why the Sages oppose the ‘possession’ narrative, which projects onto the legal interpretation of the entire category by expanding the legal ways of establishing possession—imposing legal sanctions even in legal cases not defined as ‘transgressions’ of Torah law—and prefers to load the norm onto a narrative that lacks such implications. The ‘ways of peace’ narrative leaves the specific norm in place as an ‘extreme case’ that creates ‘justice’ on a spot basis by responding to the victim’s subjective feelings and answering a general social need for ‘peace’.[[86]](#footnote-86) In a reverse mirror image, R. Yose wishes to attribute meaning to the norm in the ‘outright possession’ narrative for exactly the same reason.

The approach that relates positively to ‘ways of peace’ is better suited than the other approaches discussed above to being interpreted as representative of the jurisgenerative approach, namely, as expressing a paideic pattern. In these *halakhot*, ‘ways of peace’ serves neither as an explanation meant to reconcile different *nomoi* nor as a means or an end to the resolution of specific interpersonal conflicts. This stands out in the close reading of the *midrash* in the Mekhiltaand in the structure of the *sugya* in PT.[[87]](#footnote-87) In the Mekhilta*,* the concept of a ‘neighbour’ is examined and re-shaped as the manifestation of a group within which the Passover meal should take place (an affiliation-community in lieu of an extended family); in PT, it is the legal category of the *’eruv* that finds its justification— in the remarks of R. Yehoshua—in the ‘ways of peace’ rationale. In both cases, this rationale is adduced from (or supported by) a verse that turns it into a meta-halakhic explanation of the entire *nomos*, the Torah. This shaping gives rise to the claim that while the ‘ways of peace’ narrative is realised in the rules and legal categories to which the legal norms that it justifies belong, it does the same in other categories and rules, because ‘Its ways [those of the Torah, the *nomos*] are ways of pleasantness and all its paths are to peace’.

Another aspect of this positive approach is the absence of any clear sanction attached to rule justifies as ‘ways of peace’, both *ab initio* and *ex post* *facto*. In this sense, ‘ways of peace’ ‘*create* the normative worlds in which law is predominantly a system of meaning rather than an imposition of force’.[[88]](#footnote-88) Furthermore, the conversion of the ‘ways of peace’ rationale from one that justifies a specific rule to one that upholds an entire category and, by major expansion, the entire *nomos*, portrays it as a paideic narrative in the pedagogical sense as well, as Cover explains:

I shall call [it] ‘paideic’, because the term suggests: (1) a common body of precept and narrative, (2) a common and personal way of being educated into this corpus, and (3)a sense of direction or growth that is constituted as the individual and his community work out the implications of their law. Law as Torah is pedagogic. It requires both the discipline of study and the projection of understanding onto the future that is interpretation. Obedience is correlative to understanding. Discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic. Interpersonal commitments are characterized by reciprocal acknowledgment, the recognition that individuals have particular needs and strong obligations to render person-specific responses.

The texts typified by the positive approach are plainly more elaborate and complex than the *halakhot* typical of the two other approaches. In the two previously mentioned approaches, one encounters tersely expressed rules, usually in the form of enactments. Here, in contrast, is a text composed of several components: the rule or the legal category; the rationale, i.e., the narrative; a story (in PT); and a *midrash* on biblical verses (in the case of the Mekhilta, even two *midrashim*, one to determine the specific rule [his neighbour=his community] and another to apply ‘ways of peace’ to the entire *nomos*). This textual complexity creates ‘a discourse [that] is initiatory, celebratory, expressive, and performative, rather than critical and analytic’[[89]](#footnote-89) and plots ‘a sense of direction or growth that is constituted as the individual and his community work out the implications of their law’[[90]](#footnote-90) concerning the goal of upholding the spot rule, the legal category, and the entire *nomos* to which they belong. En passant, it is of interest to note that the paideic quality that the positive approach lends to the rules, at least where the *’eruv* is concerned, also comes to fruition in the real personal training that R. Meir describes: ‘Jewish women did not hesitate to send their *‘eruv* by means of their young sons and daughters in order to train them in the performance of *mitsvot*’ (BT Eruvin 2 [3] 11).

**Summary**

‘*Mipenei darkhei shalom*’ is a term created in the Tannaitic halakha for use as a legal rationale. As shown in this article, even though one would expect the rationale to function identically in all its occurrences, its usages prove to be more diverse. The diversity comes into sight, foremost, when one pays attention to the different narratives that have been linked to the term and that reflect changes in the value attitude toward the *halakhot* that it explains (with-misgivings, neutral-pragmatic, or positive). By elucidating the nature of the *nomos* and narrative nexus in terms of the relationship of narrative to both the specific norm and the entire *nomos*, additional and finer differences between them are found. One such difference manifests in the legal implications of the use of the justification. Insofar as approaches typified by the imperial pattern are invoked, the use of the ‘ways of peace’ expression demonstrates with emphasis that the norm that it justified lacked the strength to impose legal sanctions. Namely, in the with-misgivings approach, the use of the term justified a retreat from a worthy norm and ruled out the possibility of sanctioning transgressors. In the pragmatic approach, too, the ‘ways of peace’ rationale establishes that a norm perceived as worthy lacked the strength, *ab initio*, to impose a legal sanction on its violators. Another difference pertains to the place and purpose of the norm within the normative world at large, i.e., within the *nomos*. While the *halakhot* that evince the imperial mode (the with-misgivings approach and the pragmatic-neutral approach) were legal rules that shaped specific actions, the *halakhot* generated from the positive perspective, typified by the paideic pattern, expressed a meta-halakhic principle that has pedagogical qualities and generates a sense of direction and growth of the entire *nomos*.

Did these approaches exist coevally in the *nomos* of the Mishnaic era, or should they be seen as evolving or successive along the timeline of the Mishnaic era? First, observing the particulars that accompany the ‘ways of peace’ *halakhot*, it is hard to indicate a “point in time” at which the Sages began to use it as a legal justification. The large majority of *halakhot* explained by ‘ways of peace’ are anonymous enactments, tersely expressed and devoid of background information that would establish exactly when in the Mishnaic era they were legislated. Generally speaking, it seems that the rationale was not put to use before the generation of Usha (mid-second century CE). This conclusion rest on the fact that the rationale as presented in the halakha relating to the half-*sheqel* contribution at the very least, post-dates the time of R. Yoḥanan ben Zakkai; furthermore, sources in which Sages’ names do appear apparently date from the generation of Usha onward. Can one attribute each of these approaches to different eras? Here I can only note that the *halakhot* that use the positive approach appear to post-date the others. In the course of this article, I observed that R. Shimon’s *midrash* in the Mekhilta appears to be a development of the rule in the Tosefta (in which the meta-halakhic stratum is missing), whereas in PT the use of the rationale may prove to be later both as seen in the speaker’s identity (if it is the *amora* R. Yehoshua b. Levi) but especially in the way the *eruv ḥaẓerot* is presented as a known and distinct halakhic category. If this is indeed the case, the ‘ways of peace’ rationale may have undergone changes in the course of the Mishnaic era and particularly at its end, pertaining chiefly to new narratives associated with it: ‘ways of peace’ as representing the goal (or one of the main goals) of the *nomos*, ‘ways of peace’ as one of ‘our visions of alternative futures’[[91]](#footnote-91) in the sense of a value aspired to and not as the tolerated reality of conceding on norms. Therefore, investigation of the historical relations among the various approaches awaits further research.

1. . The expression *mipenei darkhei shalom* appears in the following sources: M. Shevi‘it 3:4 and 5:9, M. Sheqalim 1:3, M. Gittin 8:9, M. Demai 4:2; Tosefta. Pe’ah 3:1; T. Eruvin 5:11, T. Nedarim 2:7, T. Gittin 3:13:14, T. Avodah Zarah 1:3, T. Ḥullin 10:13; among the minor tractates, Kalla Rabbati 3:1; *Mekhilta de-Rabbi Shimon Bar Yoḥai*, Geniza fragment, New York, JTS ENA 1340.4. The fragment parallels the Epstein-Melamed edition of *Mekhilta,* 9–10, and was published by Shraga Abramson, ‘A New Fragment of the Mekhilta De-Rabbi Shim‘on Bar Yoḥai’, 41 *Tarbiz* (1971), 361–372; Menahem Kahana, *Manuscripts of the Halakhic Midrashim: An Annotated Catalogue,* Jerusalem, 1995, 46. For the entire fragment, see Shraga Abramson, *The Gnizah Fragments of the Halakhic Midrashim*, Jerusalem, 2005, vol. 1, 154–155. [↑](#footnote-ref-1)
2. . Some of these studies compare the rationale of ‘for the sake of the ways of peace’ with the rationale provided for other enactments, *meshum ’eva*, ‘because of enmity’. See Eliezer Bugard, ‘Mipenei darkhei shalom’ [Hebrew], thesis submitted for the degree of Master of Arts, Bar-Ilan University, 1977. For Hayes, the two justifications are representative of two opposite situations: Christine Elizabeth Hayes, *Between the Babylonian and Palestinian Talmuds: Accounting for Halakhic Difference in Selected Sugyot from Tractate Avodah Zarah,* New York, 1997,238, n. 46. Würzburger argues the same way: Walter S. Würzburger, *Ethics of Responsibility: Pluralistic Approaches to Covenantal Ethics,* Philadelphia, 1994,49. See also Würzburger, ‘Darkei Shalom’, *Gesher: Bridging the Spectrum of Orthodox Jewish Scholarship,* 6 (1978), 82. For similar argumentation, see Daniel L. Schiff, ‘Principles of Power: The Application of Ethical Norms within the Halacha’, Rabbinic thesis, Hebrew Union College—Jewish Institute for Religion, 1987; Jennie Rosenn, *‘Mipnei Darhei Shalom* in Rabbinic Tradition’, Rabbinic thesis, Hebrew Union College—Jewish Institute of Religion, 1997; David Novak, *Covenantal Rights: A Study in Jewish Political Theory,* Princeton, 2000. Crane limits his study to enactments concerning Jewish–Gentile relations. See Jonathan K. Crane, ‘Because... : Justifying Law/Rationalizing Ethics,’ *Journal of the Society of Christian Ethics* 25 (2005), 55–77; Baruch Roth, ‘Analysis of the Rabbinic Usage of ‘Because of the Ways of Peace’, thesis submitted for the degree of Master of Arts, Towson University, 2014. [↑](#footnote-ref-2)
3. . Michael Matthew Pitkowsky, ‘“*Mipenei Darkei Shalom”* (Because of the Paths of Peace) and Related Terms: A Case Study of How Concepts and Terminology Developed from Tannaitic to Talmudic Literature’, thesis submitted for the degree of Doctor of Philosophy, Jewish Theological Seminary of America, 2011. Pitkowsky observes changes that occurred in the transition from the Tannaitic to the Amoraic level. His conclusions about the former level (171) are very general and do not explain the phenomena that he observes in his overview. [↑](#footnote-ref-3)
4. Robert M. Cover, ‘The Supreme Court, 1982 Term—Foreword: Nomos and Narrative’, *97 Harv. L. Rev.* (1983), 4. Cover’s study has had a major impact on constitutional legal theory, yielding copious interdisciplinary and non-legal research, e.g., Reva BT Siegel, ‘Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA’, 94 *Calif. L. Rev.* (2006), 1323; Robert C. Post, ‘Who’s Afraid of Jurispathic Courts? Violence and Public Reasonin *Nomos and Narrative’*, 17 *Yale J.L. & Human.* (2005) 9; Judith Resnik, ‘Living Their Legal Commitments: Paideic Communities, Courts, and Robert Cover’, 17 *Yale J.L. & Human.* (2005), 17; Larry D. Kramer, ‘Popular Constitutionalism, circa 2004’, 92 *Calif. L. Rev.* (2004), 959, 975; Perry Dane, ‘The Public, the Private, and the Sacred: Variations on a Theme of *Nomos and Narrative*’, 8 *Cardozo Stud. L. & Literature* (1996), 15, 18; Franklin G. Snyder, ‘Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law’, 40 *Wm. & Mary L. Rev.* (1999), 1623, 1632; Ronald R. Garet, ‘Judges as Prophets: A Coverian Interpretation’, 72 *S. Cal. L. Rev.* (1998), 385; James Gray Pope,‘Labor’s Constitution of Freedom’, 106 *Yale L.J.* (1997), 941, 954; Suzanne Last Stone, ‘In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory’, 106 *Harv. L. Rev.* (1993), 813; Joseph Lukinsky, ‘Law in Education: A Reminiscence with Some Footnotes to Robert Cover’s *Nomos and Narrative*, 96 *Yale L.J.* (1987), 1836; Robert A. Burt, ‘Constitutional Law and the Teaching of the Parables’, *93 Yale L.J.* (1984), 455. [↑](#footnote-ref-4)
5. . Unfortunately, length limitations prevent me from analyzing all the Tannaitic sources. Some of the laws that are discussed here only briefly or in a footnote I discuss in greater detail in an article that investigates the redaction of the ‘ways of peace’ aggregation in M. Gittin: ‘Editorial Considerations for Halakhic Aggregates: A Literary-Jurisprudential Study of the “For Reason of Ways of Peace” Aggregate in the Mishna (Gittin 5, 9-10)’. This article will be published in 37 *Dine Israel* (2022). [↑](#footnote-ref-5)
6. . Cover’s article has inspired several works in halakhic studies. By and large, they apply the terms ‘nomos’ and ‘narrative’ to the principled binary of ‘halakha’ (the legal corpus) and ‘aggada’ (which includes conceptual aspects in a broad range of literary genres) in the rabbinical literature. Other studies examine the nexuses of ‘nomos’ and ‘narrative’ by analyzing stories, or aggadic units, that are integrated into the sages’ halakhic corpuses (the Mishnah and the Talmuds). Examples of such studies are the following: Samuel J. Levine, ‘Halacha and Aggada: Translating Robert Cover’s Nomos and Narrative’, *Utah Law review* 465 (1998): 465-504; Shulamit Almog, ‘One Young and the Other Old: Halakha and Agada as Law and Story’, *Canadian Journal of Law and Society* 18 (2003): 27-43; Steven Fraade, ‘Nomos and Narrative Before Nomos and Narrative’, *Yale Journal of Law and Humanities* 17 (2005): 81–96*; Legal Fictions : Studies of Law and Narrative in the Discursive Worlds of Ancient Jewish Sectarians and Sages*, Leiden; Boston, 2011; Barry Scott Wimpfheimer, **‘“But It Is Not So”:** Toward a Poetics of Legal Narrative in the Talmud’, *prooftexts* 24 (2004): 51–86; Talmudic Legal Narrative: Broadening the Discourse of Jewish Law, *Dinei Yisrael* 24 (2007): 157-196; *Narrating the Law: A Poetics of Talmudic Legal Stories*, Philadelphia, 2011. [↑](#footnote-ref-6)
7. . For an overview of research and various scholars’ views, see Vered Noam, *Megillat Ta‘anit: Versions, Interpretation, History* [Hebrew], Jerusalem, 2003, 165–168. [↑](#footnote-ref-7)
8. . Ibid., 165. [↑](#footnote-ref-8)
9. . The scholion traditions switch between the Pharisees and the Boethusians. See Vered Noam, ‘Rediscovered Fragments of Variant Biblical and Midrashic Texts’ [Hebrew], *Issues in Talmudic Research: Conference Commemorating the Fifth Anniversary of the Passing of Ephraim E. Urbach,* Jerusalem, 2001, 72–76. For a reconstruction of Mss. Parma, see Noam, *Megillat Ta‘anit*,165. [↑](#footnote-ref-9)
10. . Eyal Regev, *The Sadducees and Their Halakha: Religion and Society in the Second Temple Period* [Hebrew], Jerusalem, 2005, 132–137. [↑](#footnote-ref-10)
11. . Regev, Sadducees, 134. According to Regev, at issue here are two conflicting attitudes toward the way God’s act of ‘dwelling’ should take place: via personal contributions or through equal participation by all. Similar hermeneutics occur in Sifre Bamidbar. On Sifre Zuta on the Book of Numbers, see Menahem I. Kahana, Sifre on Numbers: An Annotated Edition [Hebrew], Jerusalem, 2015, 67, 1176. [↑](#footnote-ref-11)
12. . Regev, *Sadducees*, 134. Moshe Beer notes the Pharisees’ economic interest in enacting a permanent tax. See Moshe Beer, ‘The Sects and the Half Sheqel’ [Hebrew], 31 *Tarbiz* (1962), 299. The Judean Desert sect also objected to paying the tax. See John M. Allegro, ‘Unpublished Fragment of Essene Halakha (4Q Ordinances)’, *Journal of Semitic Studies,* 6 (1961), 71–73; John M. Allegro, *Qumran Cave 4, I, 4Q158-4q186*, DJD 5, Oxford, 1968, 6–9; Jacob Liver, ‘The Half-Sheqel in the Scrolls of the Judean Desert Sect’ [Hebrew], 31 *Tarbiz* (1962), 20–21. From the opposite direction, see Mira Balberg, *Blood for Thought: The Reinvention of Sacrifice in Early Rabbinic Literature,* Oakland, 2017, 114–121. Balberg shows how the Mishna systematically rejects any possibility of personal donations for the funding of public sacrifices. [↑](#footnote-ref-12)
13. . The translation follows the Hebrew text of Ms. Kaufmann. English translations of the Mishna and Babylonian Talmud are based on Isidore Epstein, ed., *The Soncino Talmud* [CD-ROM], Chicago, 1991–1995; and Michael Danby, trans., *The Mishnah,* Oxford, 1933. [↑](#footnote-ref-13)
14. . The term ‘tables’—*shulḥanot*—is derived from the Greek τραπεζίτη, which, in the Hellenistic-Roman world, related mainly to the function of moneychanger. See Ze’ev Safrai, *Mishnat Ereẓ Yisra’el: Masekhet Sheqalim* [Hebrew]*,* Jerusalem, 2009, 70–74. [↑](#footnote-ref-14)
15. . Balberg, *Blood for Thought*, 120. [↑](#footnote-ref-15)
16. . See Moshe Assis, ‘On the Jerusalem Talmudic Version of Rabbi Shlomo Syrilio in Tractate Shkalim’ [Hebrew], in M. Benayahu, ed., *Studies in Memory of the Rishon Le-Zion R. Yiẓhak Nissim*, vol. 2, Jerusalem, 1985, 126–127 and n. 84; and discussion in Eliezer Pinczower, ‘Mishnah Masekhet Sheqalim—A Critical Edition’ [Hebrew], thesis submitted for the degree of Doctor of Philosophy, the Hebrew University of Jerusalem, 1998, 135–136. In conclusion, Pinczower states: ‘It does not appear that the *kohen* [priestly] rule was accidentally omitted from the first part of this Mishna. Many witnesses to the text testify to this version, which Maimonides, too, did not find to be complete’. For details of the switching of formulae between the manuscripts, see Pinczower, *Mishna Masekhet Sheqalim*, Appendix 11. [↑](#footnote-ref-16)
17. . See Hanoch Albeck, *The Six Orders of the Mishnah (Mo’ed)* [Hebrew], Jerusalem, 1958, 188. Moshe Assis believes that the Mishna presents three views. See Moshe Assis, ‘On the Interpretation of One Issue in Tractate Sheqalim of the Jerusalem Talmud [Hebrew]’, in Moshe Bar Asher and David Rosenthal, eds., *Mehqerei Talmud: Talmudic Studies Dedicated to the Memory of Professor Eliezer Shimshon Rosenthal* [Hebrew], Jerusalem, 1993, 397–398. [↑](#footnote-ref-17)
18. . A similar practice of Rabbi Yoḥanan Ben Zakkai emerges in M. Eduyyot 8:3: ‘Rabbi Joshua and Rabbi Judah ben Bathyra testified concerning the widow of [a man belonging to] a family of doubtful lineage [an issa], that she was fit to marry into the priesthood, [and that those of] a family of doubtful lineage are fit to declare who was unclean and who was clean, who was to be put away and who was to be brought near. Rabban Gamaliel said: we accept your testimony, but what can we do since Rabban Yoḥanan ben Zakkai ordained that courts should not be commissioned for this purpose? The priests would listen to you concerning those who might be put away, but not concerning those who might be brought near!’ Here too, although R. Yoḥanan ben Zakkai opposes the priests' divergent position, he refuses to hold court hearings for the specific purpose of imposing the Sages’ halakhic law on the priests. In this case, too, his concession plainly stems from his recognition of the limits of the Sages’ political power and not from his assent to the priests' approach. See also David Sabato, ‘The Teachings of Rabbi Joshua Ben Hanania’ [Hebrew], thesis submitted for the degree of Doctor of Philosophy, the Hebrew University of Jerusalem, 2019, 25–27. [↑](#footnote-ref-18)
19. . For additional disagreements between Sages and priests in the Temple era, see Daniel Tropper*,* ‘The Internal Administration of the Second Temple at Jerusalem’ (thesis submitted for the degree of Doctor of Philosophy, Yeshiva University, 1970; Daniel Tropper, ‘Bet Din Shel Kohanim’, 68 *Jewish Quarterly Review* (1973), 204–221; Ellis Rivkin, *A Hidden Revolution,* Nashville, 1978. On polemics between sages and priests, see Steven D. Fraade, *From Tradition to Commentary: Torah and Its Interpretation in the Midrash Sifre to Deuteronomy,* Albany, 1991, 69–121; Meir Bar-Ilan, ‘Polemics between Sages and Priests towards the End of the Days of the Second Temple’, 8 *Moreshet Israel* (2011), 37–53. [↑](#footnote-ref-19)
20. . Another way of explaining the structure of the enactment (in a manner that does not negate its precursor) is to consider it an individual case of the legal distinction between *ab initio* and *ex post*, i.e., between a state of affairs that exists or should exist from the outset and one that eventuates after a given action is taken. See Shay Wozner, ‘Consistency and Effectiveness in the Halakhah, as Reflected by the *Lekhat’hila–Bede’abad* Distinction’ [Hebrew], 20–21 *Dine Yisrael* (2000–2001): 43–100. [↑](#footnote-ref-20)
21. . M. Shabbat 1:1; 7:2. [↑](#footnote-ref-21)
22. . BT Shabbat 14b; Eruvin 21b. [↑](#footnote-ref-22)
23. . So in the Book of Jubilees, the Qumran literature, and the late Samaritan code. The Sadducees tended toward stringency in rulings, especially concerning the laws of the Sabbath; thus, like the Qumran sect and the Samaritans, they presumably banned the *’eruv*. See Book of Jubilees 2:30: ‘And they shall not bring in nor take out from house to house on that day’. See Cana Werman, *‏The Book of Jubilees: Introduction, Translation and Interpretation,* Jerusalem 2015, 163–166, 167–177; The Damascus Document 11: 7-8: ‘No man shall carry anything from the house to the outside or from the outside into the house’. See Elisha Qimron, *The Dead Sea Scrolls: The Hebrew Writings* (Vol. 1), Jerusalem 2010, 46; H. Weiss, ‘The Sabbath among the Samaritans’, 25 *Journal for the Study of Judaism in the Parsian, Hellenistic and Roman Period* (1994), 252–273; Regev, *Sadducees*, 59–66. [↑](#footnote-ref-23)
24. . Even though such confrontations are described in other sources in the Talmudic literature, e.g., M. Eruvin 3:2, 6:2. [↑](#footnote-ref-24)
25. . BT Gittin 60b. [↑](#footnote-ref-25)
26. . In some BT mss, ‘for the owner of the room’ is added. [↑](#footnote-ref-26)
27. . The latter expression is found only in BT and occurs in the following locations: Berakhot 43b, Shabbat 23a, Shabbat 130a, Pesaḥim 13a, Rosh ha-Shannah 24b, Gittin 60b, Avodah Zarah 43b, and Ḥullin 44b. It pertains to a certain suspicion about a person/s, possibly for licentiousness (see Berakhot 43b, Rashi, s.v. *mishum ḥashda*), nonperformance of a commandment (Shabbat 23a), transgressing a prohibition (Shabbat 130a), inappropriate business dealings (Pesaḥim 13a), idolatry (Rosh ha-Shannah 24b and Avodah Zarah 43b), and taking advantage of position of authority (Ḥullin 44b). [↑](#footnote-ref-27)
28. . R. Sherira Gaon used this tradition to determine the order of the sages who headed the academies of Babylonia. See Joel Florsheim, “The Establishment and Early Development of the Babylonian Academies Sura and Pumbedita” [Hebrew], 39 *Zion* (1974), 196; and Epistle of Rav Sherira Gaon 97. [↑](#footnote-ref-28)
29. See Rashi, s.v. *‘ela mishum ḥashda’*. [↑](#footnote-ref-29)
30. See Tosefot (in the name of Rabbenu Tam), s.v. ‘*’ela mishum ḥashda*’. [↑](#footnote-ref-30)
31. PT Gittin 5:9, 47b, Eruvin 6:7, 23:4. Translation: *The Jerusalem Talmud, Tractates Gittin and Nazir*, Berlin and New York, 2007, 237. [↑](#footnote-ref-31)
32. *Korban ha-‘Eda,* s.v. *u-ve-diur yashan*. [↑](#footnote-ref-32)
33. . *Pene Moshe,* s.v. *teman taninan.* This interpretation is based on a Mishna in Tractate Eruvin 6:7: ‘Brothers in partnership who ate at the table of their father but who slept in their respective houses require an *‘eruv* for each one. Therefore, if one of them forgot and did not prepare an ‘eruv, he annuls his right. Under what circumstances? When they bring their *‘eruv* [food] to some other place. But if the *‘eruv* was brought to them, or if there were no [other] residents with them in the courtyard, they do not have to prepare an *‘eruv*. Shmuel and Ze’ev Safrai explain the family structure that underlies the expression ‘brothers in partnership’. For our purposes, it is important to realise that this is neither a full partnership nor a partial one (as indicated by the emphasis in the Mishna on the fact that the brothers sleep in their own homes). By implication, each brother has his own home and is somewhat independent. Farther on, the Mishna establishes that if the *‘eruv* of this courtyard is placed is the father's home, or if all the residents there are family members, then the family's shared meal, which is also that of all residents of the courtyard, is in fact an *‘eruv* (shared) meal; therefore, they do not need to set aside any food other than this. See *Mishnat Ereẓ Yisra’el,* Eruvin 203–204, and Eruvin 5:11: ‘A house where an *‘eruv* is placed does not need to set aside a loaf of bread [for the ‘eruv]’. [↑](#footnote-ref-33)
34. . Bugrad, 22–24. Bugrad was influenced by the comments of Menachem ha-Meiri on BT. Ha-Meiri notes that BT offers a different reason for the law and nearly overlooks the reason that the Mishna itself gives. According to ha-Meiri, while the reason of ‘ways of peace’ may not be the strongest explanation, it is the one the Mishna gives and is therefore the one to prefer. For ha-Meiri’s comments, see Kalman Shlezinger, ed., *Bet ha-Beḥira on Tractate Gittin* [Hebrew], New York, 1956, 248–249. For a discussion of ha-Meiri’s commentary, see Sagit Mor, ‘“Tikkun HaOlam” in the Thought of the Sages’ [Hebrew], thesis submitted for the degree of Doctor of Philosophy, the Hebrew University of Jerusalem, 2003, 211, n. 29. [↑](#footnote-ref-34)
35. . Another example may be seen in the passage in PT Shevi‘it 5:9 (36a), concerning M. Shevi‘it 5:9: ‘A woman may lend to another who is suspected of not observing the sabbatical year a fan or a sieve or a hand mill or a stove, but she should not sift or grind with her’. R. Zeira harmonizes this halakha with previously established rules following the school of Hillel (5:7–8) ‘This is the general rule: any implement is forbidden whose sole use is one that transgresses, but it is allowed if its use may be either one forbidden or one permissible. […] One may sell him produce even in time of sowing. […] But if [it is known that these are required] expressly [to transgress the law of the sabbatical year] they are forbidden’. Thus, R. Zeira obtains two outcomes. He bases the halakha on a rule inherent to the legal category in which it deals and obviates the need for the ‘for the sake of ways of peace’ rationale, and he limits the concession in the Mishna on lending implements to a woman who is suspected of not observing the sabbatical year. [↑](#footnote-ref-35)
36. . The order of these halakhotvaries in different mss of the Mishna; similarly, the opinion of R. Yose is missing in Halakhah 1 of the Kaufmann ms. but is found in other mss. See David Weiss Halivni, *Sources and Traditions: A Source Critical Commentary on Seder Nashim* [Hebrew], Toronto: Oẓreinu, 1968, 678. [↑](#footnote-ref-36)
37. . For the acquisition of property by deaf-mutes, idiots, and minors, see M. Bava Kamma 4:4; 6:4. [↑](#footnote-ref-37)
38. . Note that the individuals at issue in these halakhot are paupers who are gleaning from the unharvested corner of the field or gathering forgotten fruit; they do not actually own the trees. [↑](#footnote-ref-38)
39. . For property laws that deal with the acquisition of various objects, see M. Kiddushin 1:4–5. [↑](#footnote-ref-39)
40. . For a similar law concerning finding, see Ḥullin 10:13 in Moses S. Zuckermandel, *Tosephta,* Jerusalem, 1970, 512. [↑](#footnote-ref-40)
41. . PT Gittin 5:8 (47a–b), in Yaakov Sussmann, ed., *The Palestinian* *Talmud* [Hebrew], Jerusalem, 2001, 1078; PT Eruvin 7:6 (24c), Sussmann, 485. In BT Gittin 61a, R. Ḥisda interprets the difference between the methods as follows: ‘What difference does it make? To reclaim [the object] in court’. [↑](#footnote-ref-41)
42. . The way rabbis in ensuing generations expressed R. Yose’s thinking—‘The sages have made those who are not allowed—to be permitted’ (see BT Gittin 30a, BT Bekhorot 18a, BT Bava Meẓia 12a–b)—indicates that, in their opinion, R. Yose does distort the letter of the law. [↑](#footnote-ref-42)
43. . On the place of ‘justice’ in R. Yose’s halakhic thinking, see Avigdor Unna*, Itim la-Mishna: Studies in the Six Orders of the Mishnah* [Hebrew], Jerusalem, 1982, 106–110. For an analysis of similar positions in a different disagreement between R. Yose and the *tanna qamma*, see Yair Lorberbaum, ‘On Rules and Reasons in Law and Halakhah’ [Hebrew], 26 *Jerusalem Studies in Jewish Thought* (forthcoming). [↑](#footnote-ref-43)
44. . Additional laws that reflect the pragmatic approach are not discussed here. For example: ‘The pit which is nearest the [head of the] watercourse is filled from it first’ (M. Gittin 5:8); ‘The Sages taught [in a baraita]: Pigeons of a dovecote and pigeons of an attic are subject to the obligation of sending away the mother bird, because they are ownerless and therefore not considered readily available. But nevertheless, they are subject to the prohibition of robbery due to a rabbinic ordinance to maintain the ways of peace’ (PT Ḥullin 141:2). These halakhot deal with relations among women neighbors in view of different halakhic stringencies (relations between an *eshet ḥaver*,a woman who belongs to the rabbinical community, and *eshet ‘am ha-areẓ,* who does not strictly observe the menstrual and tithing laws, and a woman who does not observe the laws of the sabbatical year) and halakhot that concern relations with non-Jews. Interestingly, in these halakhot, the ‘ways of peace’ rationale is expressed without a critical or resentful tenor even though, ostensibly, they “cleanse” non-halakhic (in rabbinical eyes) conduct. As for the halakhot concerning pigeons and relations among women within the Jewish community, see my article, n. 5. Given that other scholars have devoted much attention to halakhot concerning ‘ways of peace’ in relations with non-Jews, I will not discuss them here. [↑](#footnote-ref-44)
45. . As noted above, I discuss these aggregates elsewhere and for this reason will not treat them here. I will emphasize, however, that by examining the data one realizes that the redactor of the Mishna chose to omit laws that are reasoned in an essentially apologetic manner, and that he aggregated those laws that are reasoned on what appear to be pragmatic or value grounds. [↑](#footnote-ref-45)
46. . See n. 1 above. The midrash is presented with small differences in Jacob Nahum Halevi Epstein and Ezra Zion Melamed, eds., *Mekhilta d'Rabbi Sim‘on b. Jochai,* Jerusalem, 1979, 10. [↑](#footnote-ref-46)
47. . In the Hebrew, the expression is ‘his neighbor’. Here I depart from the Biblical translation in favor of the wording in *Mekhilta,* which is more accurate relative to the wording of the verse that matters most for our purposes. [↑](#footnote-ref-47)
48. . The translation is based on W. David Nelson, *Mekhilta de-Rabbi Shimon Bar Yohai: Translated into English, with Critical Introduction and Annotation,* Philadelphia, 2006, 16. I revised the translation in minor ways in accordance with Ms. Antonin 236.1. The translation is partly based on Geniza fragment New York JTS ENA 1340.4. [↑](#footnote-ref-48)
49. . The location of the verse in Exodus indicates that the Passover at issue is *pesaḥ miẓrayim*, the one-off festival celebrated in Egypt. Nevertheless, R. Yehuda ha-Nasi considers it necessary to emphasize this. Ben Bag Bag does not address himself to the ‘which Passover?’ question. The redaction of his words in *Mekhilta*, preceding those of R. Yehuda ha-Nasi, gives the impression that he is speaking of *pesaḥ miẓrayim*.See also T. Pesaḥim 8:12: ‘*Pesaḥ miẓrayim*: of this is it stated, ‘And he and his neighbor shall take …’, as is not the case in *pesaḥ le-dorot*. [↑](#footnote-ref-49)
50. . Saul Lieberman*, The Tosefta: According to Codex Vienna, with Variants from Codices Erfurt, London, Genizah Mss. and Edition Princeps (Venice 1521),* New York, 187. The English translation is from Jacob Neusner, *The Tosefta—Translated from the Hebrew (Moed),* New York, 1981, 156. [↑](#footnote-ref-50)
51. . Liora Elias Bar-Levav, *Mekhilta de-Rabbi Shimon Bar Yoḥai on the Nezikin Portion* [Hebrew]*,* ed.Menahem Kahana, Jerusalem, 2013, 147–148, 243–245, 318–338, especially 336. [↑](#footnote-ref-51)
52. . See Leib Moscoviẓ, *The Terminology of the Yerushalmi: The Principal Terms* [Hebrew], Jerusalem, 2009, 301–302. [↑](#footnote-ref-52)
53. Safrai, *Mishnat Ereẓ Yisra’el*, Eruvin 93. [↑](#footnote-ref-53)
54. . See Judith Hauptman, ‘The Talmud's Women in Law and Narrative’, *Nashim: A Journal of Jewish Women's Studies & Gender Issues,* 8 (2015), 39-40: ‘It is not surprising that women would deal with the *‘eruv haẓerot* since they were the ones who cooked the food’.. [↑](#footnote-ref-54)
55. Saul Lieberman reached the conclusion that most of the Palestinian sages in sugyot associated with this Mishna saw no need for an adult to stand with the child as the latter hands over the *‘eruv* food; an adult should, however, make sure (at a later time) that the food has really reached its destination. Saul Lieberman, *Tosefta Ki-Fshutah Part III*, New York, 1962, 331-332. In BT (Eruvin 31b), the Talmud distinguishes between an *‘eruv teḥumin* (which increases the distance that one may walk beyond town limits) and an *’eruv ḥatserot*, in which a child may indeed carry out the delivery. [↑](#footnote-ref-55)
56. . PT Eruvin 3:2, 20b; Eruvin 7:9, 24b.There are numerous textual differences between the different versions of this story. See Saul Lieberman, *Ha-Yerushalmi ki-Fshuto* [Hebrew]*,* Jerusalem, 1935, 262–263, 336–337, for a discussion of this source and its variants. This story is also found in Tanḥuma, Noaḥ, 58:22, Buber ed., 26. [↑](#footnote-ref-56)
57. . Leiden, Scaliger, 3. [↑](#footnote-ref-57)
58. PT Eruvin 7:9 (24c). [↑](#footnote-ref-58)
59. . Cairo Geniza: Cambridge, T-S 16, 326; Manchester, 49; so, too, in MS Leiden concerning the parallel in Eruvin 7:9 24b. [↑](#footnote-ref-59)
60. . See also Bugard, ‘Mipenei darkhei shalom’, 24. [↑](#footnote-ref-60)
61. As I argued above, the *sugya* is constructed such that R. Yehoshua may have said the entire passage presented above. (Shmuel and Zeev Safrai interpret it this way, arguing that R. Yehoshua uses the story to explain the practice of having a child deliver the *‘eruv* food.) It is possible, however, that R. Yehoshua said only the first sentence: ‘R. Yehoshua said: ‘Why do we make *‘eruvei ḥaẓerot*? For the sake of ways of peace’. If so, then the redactor of the *sugya* took matters another step forward and created an even more inclusive demarche by demonstrating R. Yehoshua’s statement with a story and attaching an exegetic comment to it. If so, a *sugya* built of three components may be at hand: R. Yehoshua’s statement or dictum; a story; and a midrash that originally may have been wholly unrelated to the rules of the *’eruv* or the expression ‘for the sake of the ways of peace’ but instead geared to the overall purpose of the Torah. If such is the case, then it is the structure of the story and the midrash as sequelae of R. Yehoshua’s words that link the *’eruv* to the broad purpose of the Torah as ordaining peace. Thus, the ‘ways of peace’ rationale acquires its meta-halakhic importance as the fulfilment of the whole purpose of the Torah—and not only of the rules of the ‘eruv. [↑](#footnote-ref-61)
62. . Cover, *Nomos and Narrative,* 4. [↑](#footnote-ref-62)
63. . Ibid., 4–5. [↑](#footnote-ref-63)
64. . Ibid., 9. [↑](#footnote-ref-64)
65. . Ibid., 9. [↑](#footnote-ref-65)
66. . Ibid., 11. [↑](#footnote-ref-66)
67. . Thus, Cover offers insular Anabaptist Christian groups as paradigmatic examples of communities that live in accordance with all-embracing ethical systems. The thesis of *Nonos and Narrative,* however, is not limited to them alone; it is applied in the literature to communities of varying levels of cohesiveness and commitment and even pertains to the international community. See, mainly, Jeffrey L. Dunoff, “A New Approach to Regime Interaction,” inMargaret A. Young, ed., *Regime Interaction in International Law: Facing Fragmentation* 136 (2012), 144–156; Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* 152 (2012). [↑](#footnote-ref-67)
68. . Cover, *Nomos and Narrative,* 28–29. [↑](#footnote-ref-68)
69. . Ibid., 12. [↑](#footnote-ref-69)
70. . M. Avot 1:2. [↑](#footnote-ref-70)
71. . Paideia (paideic) means, in ancient Greek culture, the cultural and educational shaping of citizens of the polis. [↑](#footnote-ref-71)
72. . Cover, *Nomos and Narrative,* 12–13. [↑](#footnote-ref-72)
73. . Ibid., 12. [↑](#footnote-ref-73)
74. . M. Avot 1:17. [↑](#footnote-ref-74)
75. . Cover, *Nomos and Narrative,* 13. [↑](#footnote-ref-75)
76. . Ibid., 53. [↑](#footnote-ref-76)
77. . One may assume, of course, that the motive of such a person is economic (and not undifferentiated vandalism or revenge against the estate owner, for example), but this is not stated explicitly, in other words, the possibility exists of saying that the person who enters the field basis themselves on the broad nomos of ‘gifts for the poor’ (of which the gleaning is one) that is anchored in the constitutive text of all of Jewish society (the Torah), and also that he interprets the underlying shared nomos differently from the way the rabbis see it (i.e., his definition of ‘pauper’ is different from that of the sages), and therefore they see themselves entitled under Torah law. It is also however possible, equally realistic, of assuming that a person takes advantage of the moment when the paupers are allowed to enter the field and used their power to enter and gather up some of the crop. In this case, the nomos is relevant as a context that creates the legitimate time interval in which one may enter the field in society's eyes, but the narrative that accompanies the person entering is not part of the nomos (i.e., a-normative). [↑](#footnote-ref-77)
78. See Cover’s description (pp. 15–16) of how a paideic legal order—such as the Torah, with its unified narrativity, rituality, and normativity—is threatened from within: ‘The unification of meaning that stands at its [the paideic] center exists only for an instant, and that instant is itself imaginary. Differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters. But even the *imagined* instant of unified meaning is like a seed, a legal DNA, a genetic code by which the imagined integration is the template for a thousand real integrations of corpus, discourse, and commitment. [...] The “Torah” becomes two, three, many Toroth as surely as there are teachers to teach or students to study. The radical instability of the paideic *nomos* forces intentional communities whose members believe themselves to have common meanings for the normative dimensions of their common lives to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning’. [↑](#footnote-ref-78)
79. Ibid., 9. [↑](#footnote-ref-79)
80. M. Gittin 5:8. [↑](#footnote-ref-80)
81. Ibid. [↑](#footnote-ref-81)
82. M. Shevi’it 3:4 and 5:9; Gittin 5.9. [↑](#footnote-ref-82)
83. I also attribute halakhot that regulate relations with groups that adhere to a different nomos (gentiles, the *eshet ‘am ha-areẓ*, transgressors of the sabbatical-year restrictions) to this group. [↑](#footnote-ref-83)
84. . Cover, *Nomos and Narrative*, 16. [↑](#footnote-ref-84)
85. . In this context, it is of interest to read the dispute between the tanna kama and R. Yose in view of Frederick Schauer’s description of the moments in which the legislator feels it necessary to explain explicitly the rule it has created, and the implications of fitting an explicit rationale to a legal rule for the continued formation of the entire legal organism (implications associated with the ‘generality’ imbued in the legal system at large and in legal rationales specifically). See Frederick Schauer, ‘Giving Reasons’, 47 *Stanford Law Review* (1995), 633–659, esp. 638; Schauer, ‘The Jurisprudence of Reasons’,85 *Michigan Law Review* (1987), 847–870, esp. 864; Schauer, *Playing by the Rules*; Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning,* Cambridge, MA, 2009. [↑](#footnote-ref-85)
86. This leads us back to an example of the imperial rule that Cover himself presents (by means of Joseph Caro) from the Mishna: ‘Upon three things does the world exist: upon justice, upon truth, and upon peace’. See above. [↑](#footnote-ref-86)
87. See n. 78 for possible ways of understanding the *sugya*. [↑](#footnote-ref-87)
88. . Cover, *Nomos and Narrative*, 12. [↑](#footnote-ref-88)
89. . Ibid., 13. [↑](#footnote-ref-89)
90. . Ibid. [↑](#footnote-ref-90)
91. . Ibid., 9. [↑](#footnote-ref-91)