“Ways of Peace” in the Tannaitic Era: Value-based Approaches and Jurisprudential Explication

The expression mipnei darkhei shalom, “for reason of ways of peace,” is invoked as a rationale for various halakhot, mainly taqanot (enactments), in Tannaitic sources.[[1]](#endnote-4) In the Talmuds, similarly and for the purpose of interpreting the expression, the opposite term, mi-shum eiva*,* “for reasons of enmity,” is encountered. Several studies are devoted to the examination of these enactments, including some that do not differentiate among rationales.[[2]](#endnote-5) Others do distinguish between the Tannaitic stratum and the Amoraic and even point out different characteristics of the use of this term in each.[[3]](#endnote-6) Thus far, however, no study has yet been carried out that investigates the Tannaitic sources per se, in an attempt to examine these twined aspects--value and jurisprudence. The question in such a study would be: Is there only one value-based approach toward the halakhot that are explained by the “ways of peace” rationale, or may more be detected? If the answer is that there are indeed more than one, is the multiplicity rooted in the outlooks of different personalities or does it originate in more profound changes in the world of the Sages? Further, insofar as different approaches come to light, would this finding have jurisprudential meanings or implications? For example, what is at stake--rules, a principle, or perhaps a meta-halakhic concept? What meanings, if any, accompany this? Finally, does the perception of the rationale also affect the normative outcome of the halakha?

My purpose in this article is to explore these questions. First, I specify three different value-based approaches toward halakhot that are justified on the grounds of “ways of peace.” Next, I explain the differences among them in view of intra-halakhic development by invoking concepts and theories from the history and theory of law. Concluding, I ask additional questions about the formation of a textual aggregate that includes many of the “ways of peace” enactments in the Mishnaic Tractate Gittin[[4]](#endnote-7) for future discussion.[[5]](#endnote-9)

I. 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 organization of the financial system of the Temple. The half-sheqel tax owes its origins to a Pharisaic ordinance[[6]](#endnote-11) associated with the Pharisees’ dispute with the Sadducees over how to fund the daily sacrifice in the Temple. The Oxford Ms. of the scholion of the Megilat Ta’anit scroll, despite being late to the Second Temple period, preserve, according to scholars, the crux of the dispute between the sects:[[7]](#endnote-13)

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

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) [one](https://biblehub.com/hebrew/259.htm) [lamb](https://biblehub.com/hebrew/3532.htm) [in the morning](https://biblehub.com/hebrew/1242.htm) [and the other](https://biblehub.com/hebrew/8145.htm) lamb you shall offer [at](https://biblehub.com/hebrew/996.htm) [twilight [Num. 28:4]](https://biblehub.com/hebrew/6153.htm), 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.

This observance is interpreted in the scholion as a victory of the Pharisees over the Sadducees in the dispute over the daily sacrifice.[[8]](#endnote-14) That is, should the sacrifice be funded solely from terumat ha-lishka*,* i.e., 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,[[9]](#endnote-15) the context in which the exchange of words appears is a sweeping Sadducee-Boethusian objection to the half-sheqel enactment, by which all of Israel participates in funding the daily sacrifices.

Why did the Sadducees object to the half-sheqel tax? Note that immediately after the Bible gives the commandment concerning the daily sacrifice, God promises that the tabernacle and the altar shall be sanctified with His glory, that He will dwell among the Children of Israel, and that He will be for them a God (Ex. 29:43–45). According to Regev,[[10]](#endnote-16) 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. According to the scholion, the Sadducees bas their stance on the exegetic treatment of Num. 28:4:[[11]](#endnote-18) “You shall offer one lamb in the morning and the other lamb you shall offer at twilight.” They interpreted this as indicating that the daily sacrifice should be individually funded because the verse uses the word ta’ase (in the singular) and not ta’asu (in the plural). For the Pharisees, in contrast, the plural imperative tishmeru in Num. 28:2--“Command the Israelite people and say to them: Be punctilious [tishmeru] in presenting to Me at stated times the offering of food due Me, as offerings by fire of pleasing odor to Me”--is addressed to the public and not to an individual.[[12]](#endnote-19) 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.[[13]](#endnote-20)

This being the case, how was the Temple rite funded until the Pharisees established their ordinance? In the First Temple era, the sacrifices were financed from the royal exchequer.[[14]](#endnote-21) At the time of Nehemia, the early Second Temple era, a tax in the sum of one-third of a sheqel, charged to everyone, was introduced for the funding of sacrifices and meal (minha) offerings (Nehemia 10:33–34).[[15]](#endnote-22) In the Hellenistic age, non-Jewish kings subventioned the ritual.[[16]](#endnote-23) All testimonies about the remittance of the half-sheqel, in contrast, date from the last years of Hasmonaean rule and, in the main, the first century CE.[[17]](#endnote-24) Therefore, the Pharisees’ victory and the introduction of the half-sheqel tax were revolutionary.[[18]](#endnote-25) Mira Balberg, who recently analyzed the redesign of the sacrificial system in the early Tannaitic literature, also shows how the Mishna systematically rejects any possibility of personal donations for the funding of public sacrifices.[[19]](#endnote-26)

In view of these remarks, let us observe Mishna Sheqalim. The first two chapters of the tractate deal with commandments relating to the giving the half-sheqel and the ways of its collection. The first chapter seems to be built on two textual strata. Stam mishna 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 the chronological sequence and add a dimension of historical depth to the description. The first speaks of changes that occurred in relation to the kilayim (1:2). In the second, R. Yehuda testifies about the dispute between Ben Bukhrei and R. Yochanan Ben Zakkai regarding the exemption of the priests from the half-sheqel tax (1:4); and I discuss it below. Prior to this Mishna--in Mishna 3--we find the reason: “for the ways of peace.”[[20]](#endnote-28)

On the 15th [of Adar] tables would be set up [in order to exchange money] throughout the land. On the 25th they would set up in the Temple. When they moved to the Temple, they began to mortgage [property and other valuables for coins]. From whom did they take mortgages? Levites, Israelites, converts, and freed slaves. They did not take mortgages 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 take mortgages from priests, for the sake of peace.

The Mishna describes an assertive system that collected sheqalim from the public, one that seemingly enjoyed social backing--the setting up of “tables.” The term “tables”--shulhanot--is derived from the Greek ςτραπεζῖτη, which, in the Hellenistic-Roman world, related mainly to the function of moneychanger. Various sources indicate that moneychangers sat permanently at the Temple to serve incoming pilgrims. In the Mishnaic passage at hand, however, one may see 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.[[21]](#endnote-29) Furthermore, those who failed to donate their half-sheqel mortgaged their property. Evidently, only the priests refrained from mortgaging.[[22]](#endnote-30) The historical documentation and previous scholarship on 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. This conclusion is reinforced by additional sources in this chapter. The first is Mishna 5, which does not include the priests among those exempted from the pledge. The second is Mishna 6, which determines who owes and who is exempt from thekolobon(κολοός), a small coin used as a desk fee for the moneychanger. Anyone who owes the half-sheqel owes also 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), and Naples--the word “priests” is missing. Obviously, if only Levites and Israelites are ordered to oblige, priests are exempt. However, there seemed to be someone who did not wish to state this explicitly, probably as part of the controversy surrounding the issue.[[23]](#endnote-31)

Contrary to the foregoing Mishnayiot, in which the priests’ exemption from the half-sheqel tax is rationalized 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. Yehuda in Mishna 4 takes an explicit position against exempting the priests from the tax:

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

Rabbi Yochanan 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 lehem 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. By so doing, he may show that public sacrifices are funded by personal voluntary contributions--the very thing that the Pharisees oppose. Nevertheless, Ben Bukhrei does not see this as a sin (in Pharisee 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 the individual priest.[[24]](#endnote-32) R. Yochanan ben Zakkai objects to this vehemently, unwilling to leave the decision to donate to the priest’s personal (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 Lev. 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” (Ex. 25:30, Lev. 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. Yochanan ben Zakkai takes exception to this exegesis: “Rather, the priests interpreted the verse for their own benefit,” i.e., their self-interest.[[25]](#endnote-33)

Thus, 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 the Jewish communities, they failed to realize the idea fully and to induce the priests to join the public in this pecuniary duty.[[26]](#endnote-34) Had the Sages managed to impose their straightforward religio-ideological stance, they would have formulated the matter as a halakha, as R. Yochanan ben Zakkai proposed. Clearly, then, the explanation of “ways of peace” for exempting the priests from the half-sheqel tax--by de facto non-enforcement--is not a rabbinical halakhic principle. On the contrary: it serves as a justification for the Sages’ retreat from the principle of universal participation in remitting the tax to the Temple and flows entirely from the realia of the political balance of forces. This retreat may have originated in the Sages’ concern that a more determined struggle against the priests would have shredded the internal fabric of Jewish society. It may also reflect their understanding of the limits of their political power in confrontation with the priests, who enjoyed broad public prestige generally and, in the domain that the Torah bequeaths to them, the Temple service, certainly.

I conclude this part of the discussion by proposing that although the “for the ways of peace” reasoning appears not in the words of R. Yochanan Ben Zakkai but instam Mishna and that it is indeed difficult to determine exactly when this reasoning entered into the halakhic discourse, it is probably not much later than the time of R. Yochanan Ben Zakkai. The redaction of this reason at the end of Mishna 3, as an introduction to the dispute between Ben Bukhrei and Ben Zakkai in Mishna 4, and the existence of several other sources in the chapter that reflect in various ways the Sages’ resistance to exempt priests from the tax, teach us that the redactor of the Mishna also understood the rationale on the basis of Ben Zakkai’s halakhic concept. Therefore, it is clear that in this chapter the “ways of peace” reasoning issued not as an expression of a value attitude but rather as a justification for the Sages’ retreat from their halakhic opinion.[[27]](#endnote-35)

II. The Pragmatic Approach: “Ways of Peace” as Justification for Enactments That Fill Halakhic Lacunae

In other Tannaitic sources, different attitudes toward the “ways of peace” rationale are expressed. One of them sees the rationale as justification for 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.[[28]](#endnote-42)

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 the “ways of peace” reasoning cannot impose a sanction on its transgressor.[[29]](#endnote-43) In Mishna Gittin 5:9, the following halakhot (among others) are presented[[30]](#endnote-44):

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.

These three halakhotare connected by their shared subject matter and all include a dispute between the Tannaitic tradition that quotes the halakha (tanna kamma) 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 bearing witness, marrying, and holding property.[[31]](#endnote-46) Halakhot2 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 (note that the individuals at issue in these halakhot are poor people who are gathering pe’ah or forgotten fruit, and not the actual owner of the tree)--but have yet to take possession of it. Hence, according to the usual laws of property, they have not yet acquired the object.[[32]](#endnote-47) 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 item. The appropriation of an object by another--“found objects,”[[33]](#endnote-48) an animal, or olives--is considered theft. The “ways of peace” justification, however, indicates that, in the mind oftanna kamma (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, tanna kamma does not assign these cases to the legal category of acquisition 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 the first person who has made an effort to obtain them. One may assume that R. Yose, by reasoning that an active move to obtain an object totally excludes the case from mere “intent,” transfers this move to the category of an “act” that confers ownership (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 tanna kamma, 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 acquisition law, allows the aggrieved party to seek restitution in rabbinical court.[[34]](#endnote-49) 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 acquisition law by creating an additional rule[[35]](#endnote-50)--thereby attaining a just outcome not only on the moral level but on the normative plane as well.[[36]](#endnote-51)

Thus, it is found in these cases that the Tannaim--all of them--believe that the “ways of peace” legal category, evidently 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.

III. A Positive Approach to the “Ways of Peace” Enactments

A third approach to halakhot enacted “for reason of ways of peace” 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 create a complete collection of halakhot that are explained on “ways of peace” grounds (Gittin 5:8–9) and to juxtapose it, complementarily, with the aggregate of halakhot reasoned on grounds of tikkun ‘olam(Gittin 4–5).[[37]](#endnote-52) As noted above, I intend to discuss these aggregates elsewhere and for this reason will not treat them here. I will emphasize, however, that by examining the file one realizes that the redactor of the Mishna chose to omit laws that are reasoned in an essentially apologetic manner, and that he gathered together those laws that are rationalized on what appear to be pragmatic or value grounds.[[38]](#endnote-54) 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 an exegesis offered by R. Shimon and presented in a passage in Mekhilta de-Rabbi Shimon Bar Yohai found in the Cairo Geniza.[[39]](#endnote-55) R. Shimon and additional sages interpret the words “his neighbor” in Ex. 12:4: “But if the household is too small for a lamb, let him share one with a neighbor[[40]](#endnote-56) who dwells nearby…”) as follows:

“And his neigh[bor”: Ben Bag Bag says, “I might assume [this includes] his neighbor] in a field. His neighbor 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’ (Ex. 12:4), [meaning the one who dwells next] to his house door to door.”

[Rabbi says three types of neighbors] are mentioned [here in Scripture]: “his neighbor”--this [refers to] his neighbor in the fields; “his neighbor”--this [also refers to] his neighbor 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 neighbor” [mean] he who dwells near his house, whereas [for] the paschal sacrifice of the [subsequent] generations “his neighbor” does not [mean] he who dwells near his house.

Rabbi Shimon says “‘His neighbor” [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 neighbors, acquaintance, close ones, or one of his town’s citizens and go off and perform the paschal sacrifice with others. As to fulfill what Scripture says: ‘A close neighbor is better than a distant brother’” (Prov. 27:10).[[41]](#endnote-57)

The Sages ask to whom the expression “his neighbor who dwells nearby” applies. What troubles them, apparently, is the situation per se and not the wording of the verse. 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 neighbor in the fields,” “his neighbor on the roof,” and “he who dwells near his house, close to his door.” However, they resolve the difficulty by having the verse speak of the eating of the paschal sacrifice that took place upon the Exodus and not the pesah le-dorot, the regular annual Passover ritual.[[42]](#endnote-58)

R. Shimon takes issue with his colleagues, arguing that the commandment also applies to pesah le-dorot. However, he proposes a different way of resolving the difficulty. The expression “his neighbor,” 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 beloved, his neighbors, acquaintance, close ones, or one of his town’s citizens”--as oppose to the inhabitants of another town, whom he calls collectively--in a manifestation of emotional estrangement--“others.” The purpose is to fulfill the adage in Prov. 27:10: “Better a close neighbor 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.

It should be noted that R. Shimon's exegesis also appears in Tosefta Pesahim 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 that in the Mekhilta[[43]](#endnote-59):

R. Simeon 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 neighbor, who lives next door, and go and prepare his Passover-offering with his friends. Thus is fulfilled the following verse: Better a close neighbor than a distant brother [Prov. 27:1]”

Rabbi Shimon’s dictum here is closely linked to the version of the expression “his neighbor” that is contrasted to “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 of the Mekhlita, cited above, expands the word “neighbor” into a category that includes, as we have seen, all members of the community. In addition, in the Mekhilta between R. Shimon’s statement that the commandment also applies to pesah le-dorot and the exegetical treatment of the expression “his neighbor” as an argument of principle, establish 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 such as the cases presented by Liora Elias Bar-Levav, in which the redactor of the Mekhilta takes a tradition in his possession--in the Tosefta--and processes it according to his worldview.[[44]](#endnote-60) First, he combines the expression “And why is all this so?” with another locution in the Talmudic literature--“the [verse/Mishna/Rabbi […]did not speak but…” which usually reduces the meaning of the verse “to this case only”[[45]](#endnote-61) while converting the word of the source into the word “Torah.” Second, as mentioned above, he expands the word “neighbor,” 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 invests the exegesis with 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.

IV. Discussion

Thus far, I have delineated three value-based approaches to halakhot that Tannaitic sources explain on the grounds of “ways of peace”. Now I wish to argue that these differences reflect not only specific individuals’ personal outlooks but also fundamental changes that occurred in the world of the Sages during the Mishnaic period. This argument rests on various pieces of information that surfaced in the analysis above. Although one cannot always say exactly when and by whom the halakhot that I examined were created, below I offer an example of each of the aforementioned approaches, in which some details may edify us about the proximate time in which it was common among the Sages. Thus, R. Yochanan ben Zakkai and the politico-theological background of the late Second Temple period and the early Mishnaic era are mentioned in the context of introducing the half-sheqel enactment (the “with misgivings” stage); this is adduced from the remarks of R. Yose, who took issue with tanna kamma on the halakhot of theft and was active in the Usha generation. An enactment that should be seen as a manifestation of the pragmatic approach is that dealing with relations between the wife of a haver and the wife of an ‘am ha-arets, resembling additional sources that regulate life vis-à-vis this population group in the Usha period.[[46]](#endnote-62) Thus, I reason that the preponderance of anonymous enactments that respond to halakhic lacunae reflects this stage in the perception of “ways of peace.” Finally, I noted the redaction of the aggregation of “ways of peace” enactments in the late Mishnaic period and demonstrated R. Shimon’s outlook, which elevated “ways of peace” to the stature of a meta-halakhic principle as shaped by the redactor of the Mekhilta de­Rabbi Shimeon Ben Yohai at the end of the Mishnaic period.[[47]](#endnote-63) Notably, even if the underlying perspective in the redaction of the enactments in Tractate Gittin is not as radical as in the Mekhilta, the redactor of the Mishna surely considered them worthy and necessary rules for the establishment of the community’s sustainability and welfare.

How can one explain these changes? As I wrote in the introduction, I believe that concepts and insights from the fields of legal history and jurisprudence may be applied to the cases at hand in order to help elucidate their precipitants and processes. The main jurisprudential issues of relevance to our topic concern legal rules and principles and their underlying reasons.[[48]](#endnote-64) Among the many theoreticians and scholars who have tackled the topic, I find two research approaches particularly relevant for the matter at issue. One was put forward by Frederick Schauer[[49]](#endnote-65) in regard to the phenomenon of assigning explicit reasons to laws and the outcomes and implications of this practice for the development of legal systems (as opposed to an unexpressed purpose that arises implicitly from the law that it explains).[[50]](#endnote-66) The second is that of Duncan Kennedy, who dwells on the nature of internal changes that have occurred in American jurisprudence.[[51]](#endnote-67)

I begin with Schauer. In his article “Giving Reasons,” Schauer starts by characterizing the field of discourse that yields and sustains the meanings and implications of explicit reasons within the legal world. “The practice of giving reasons,” he says, “is part of the larger topic of the role of generality in law. The institution we call ‘law’ is soaked with generality, for one of its central features is the use of norms reaching beyond particular events and individual disputes.” Schauer then identifies events or moments in which various players in the legal ecosystem (legislators, judges, lawyers, supreme court, etc.) feel it necessary to explain their decisions (concerning legislation, a verdict, etc.):[[52]](#endnote-68)

It will be useful in further setting the stage to note the variety of legal modes in which reason-giving is absent. Consider first the voice of a statute, regulation, or constitution. The voice is not one of persuasion or argument, but one of authority, of command. Statutes say, “Do it!”; they do not say, “Do it because ....” The bare assertion characteristic of statutes suggests a relationship between the authority implicit in a statute and the nonuse of reasons in statutes. Only rarely do statutes offer reasons to justify their prescriptions, and then usually out of concern about potential interpretive problems in difficult cases. Typically, drafters of statutes, like sergeants and parents, simply do not see the need to give reasons, and often see a strong need not to: The act of giving a reason is the antithesis of authority. The voice of reason emerges. Or vice versa. But whatever the hierarchy between reason and authority, reasons are what we typically give to support what we conclude precisely when the mere fact that we have concluded is not enough. And reasons are what we typically avoid when the assertion of authority is thought independently important.

This description may well explain the very entry of the “ways of peace” justification into the halakhic discourse and why, in its first occurrences, it seems apologetic, reflecting the Sages’ misgivings toward the legal content of the halakhot that it explains. As I have shown, the priests’ exemption from the half-sheqel tax was instituted against the Sages’ stance because the Sages’ sociopolitical weakness did not allow them to honor the halakhic imperative in full. Thus, following Schauer, I contend that in both cases the Sages plainly sensed the need to justify a halakha that represents a retreat from the proper halakhic idea due to lack of power to enforce it,[[53]](#endnote-69) and did so by putting forward an explicit reason: “ways of peace.” No few halakhot that originate in the need to fill halakhic lacuna--those that I classify as belonging to the pragmatic approach--regulate matters in which Sages allow those invoking the enactments to behave in a way that may carry some “risk” of transgressing the halakha.[[54]](#endnote-70) Here, too, the Sages evidently reinforce their ruling by giving it an explicit rationale that serves a broader cause than offering a specific explanation that might be attached to each case separately.[[55]](#endnote-71)

Here we find another typical aspect of the use of the “ways of peace” reasoning: its externality from the halakhic zone in which the enactment operates. “Reasons are typically propositions of greater generality than the conclusions they are reasons for.”[[56]](#endnote-72) Namely, wherever the rationale is used--and, in my humble opinion, *a fortiori* when it is external to the specific legal context of the statute *ab initio*--an element of “generality” exists with which the incidence of the rule (or the legal principle) may be extended to cases and settings other than those of the first rule. The application of this rationale may impact the normative outcomes of other legal rules that may not have been taken into account when the rationale was devised and applied to the first case, as Schauer clarifies[[57]](#endnote-73):

The process of providing a reason is ordinarily nothing more than (but nothing less than) the process of locating a result within a greater degree of generality. Reasons, therefore, are commonly results, rules, principles, maxims, standards, or norms taken to the next level of generality. But regardless of the level of generality, and whether we are seeking to justify a result or a rule, the central point is that to say "x because y" is not only to say x, but to say as well. When put this way the claim seems trivially tautological, but its consequences are both interesting and problematic.

These remarks may explain how, once the “way of peace” rationale entered the halakhic discourse, the Sages “exploited” its quintessential inclusiveness to take it to what Schauer calls “the next level of generality.” Thus, they used it to regulate more and more fields in which halakhic clarity was lacking. Concurrently, in certain cases, the normative implications of applying the rationale to new rules and domains created difficulties that the Sages may not have foreseen when they applied it to the initial regular law. Alternatively, outcomes came about that would have been avoided had the Sages explained enactments in ways inherent to the legal category of the rule in question. I provided an example of such a process in the dispute between tanna kamma and R. Yose. The question of principle that arises from this dispute is: To which of the legal categories should the enactment be attributed? Namely, should the laws of acquisition be broadened by adding another rule, as R. Yose would, or does the act not square with the legal construction of this category and therefore entail the application of a different category--as in tanna kamma’s thinking? The normative outcome, consequential to assigning the case to the “ways of peace” category, excludes legal sanctioning of the thief--the result that R. Yose apparently wished to avoid.

From a different theoretical direction--that of Kennedy--one may regard this legal determination as a moment of change in the integration of the various elements into the Sages’ legal consciousness. The new integration is the outcome of an endogenous process that unfolds from the world of the legal system, unlike processes and changes animated by extralegal pressures and forces--political,[[58]](#endnote-74) economic, governmental, and so on[[59]](#endnote-75)--as Kennedy explains[[60]](#endnote-76):

Integration refers to an aspect of legal consciousness at a particular moment in time: the manner in which the different elements that are in it (e.g., the doctrine of consideration and the rule against perpetuities) fit together into subsystems. The notion is that we can compare and contrast states of consciousness with respect to this aspect. One way to do this is to attempt a kind of map of the subsystems composing a consciousness. We construct a map by asking whether a legal actor experiences a particular rule or doctrine as a possibly useful analogy in an argument about some other particular rule or doctrine. When we feel that an argument for X can draw on the arguments for Y, then, by definition, these two are parts of a subsystem. If the arguments for Y would never come to mind or would be dismissed as absurd in the argument for X, then they are parts of different subsystems. Another way of putting the same idea is that if your position about X puts a good deal of moral and intellectual pressure on you to take a particular position with respect to Y, then the two are part of a subsystem. If you experience no such pressure, they are not.

In other words, each of the protagonists in the Mishna--the tanna kamma and R. Yose--brings to mind a different statute (or legal category) that may be analogized to the new case, and even the other way around: one that does not “bring to mind” the propriety of likening the new case to the domain proposed by the opposite player.[[61]](#endnote-77) Acceptance of the decision as tanna kamma rules--theft “for reason of ways of peace”--is an applied-law definition of the “ways of peace” subsystem in terms of both the statutes that it includes (thus far) and, more so, the normative implications of the inclusion of this statute in it.

Such processes of comparison, in which concrete laws are incorporated into a legal subsystem on the basis of partial similarity between them, may also explain, ostensibly, the motive behind the creation of the “ways of peace” aggregate of enactments in Tractate Gittin. Kennedy asks: What does a suite of rules that are bundled in a given subfield have in common? and answers: they are aggregated simply for reason of convenience and efficiency. The implications of their aggregation do not flow, as he sees it, from their being grouped in a certain category--e.g., “for reason of ways of peace”--because the category itself can expand or contract (by adding or subtracting rules) without surrendering any of its characteristics. In his opinion, the operative meaning of the category originates in the ability of the outcome (or the normative-operative implication) of one rule to serve as a solution to problems that are treated by a different rule, whereas the category itself--the totality of its rules--simply documents the outcomes of these solutions.[[62]](#endnote-78) Is it correct to understand the collection in Gittin in this manner? May R. Shimon’s approach be comprehended similarly? That is, should one see it as embodying not a meta-halakhic principle but a legal subsystem that provides ways of forestalling confrontations in the community in order to solve an additional problem not included in it thus far (averting possible affront to neighbors, acquaintances, and participants in the Passover rite)? This may indeed be the intention of R. Shimon in his exegesis, as evidenced in the original core of the exegesis in Tosefta, although it does not include the explicit reason “for ways of peace.” In contrast, I see the manner in which the redactor of the Mekhilta processed it as straying from Kennedy's legal development picture.

V. In Lieu of a Conclusion

The challenge that Kennedy presents by exposing the jurisprudential outlook (or outlooks) that underlie the creation of subsystems in a legal system--in our case, the redaction of a rather large aggregate among the totality of halakhot and enactments rationalized on the grounds of “ways of peace”--adds, I believe, to other tactics that some researchers have employed in an attempt to explain the possible meanings and implications of the use of this rationale. The answer, I think, is more complex than Kennedy proposes but also more than what has been suggested by my predecessors, most of whom deal with the “ways of peace” enactments without paying distinct attention to the questions that stem from the redaction of this collection in Tractate Gittin; or in comparison with Dworkin’s model.[[63]](#endnote-79) This is because the redaction of a collection of halakhot and its positioning relative to other halakhot or aggregates in the Mishna may have theoretical and practical significance that transcends the content of each individual enactment.[[64]](#endnote-80) Therefore, here I attempt to formulate the questions that, from my perspective, still remain unanswered--at both the conceptual and the jurisprudential levels--with the intent of devoting separate research to them: May the examination of the full set of enactments aggregated in Tractate Gittin teach us something new and additional about the value outlook toward the “ways of peace” in the late Mishnaic period? And a parallel question: What, if anything, can one learn from the decision to omit from this aggregate older halakhot and enactments that are preserved in other Tannaitic sources (Mishnaic or other)? The latter question is a theoretical one that I addressed less than exhaustively above: What meanings are created by attaching the “ways of peace” aggregate to that of tikkun ‘olam? From the jurisprudential standpoint, I ask the following: Is Kennedy’s observation about the creation of a legal category valid for aggregates of enactments, or is it the other way around, as propounded by other thinkers such as Hart and, alternatively, Dworkin--do the enactments take on a new status, that of a legal principle, in this manner? And if so--does this status have meanings and implications other than those originating in the perception of halakhot as legal rules only? Perhaps the exogenous legal conceptions will prove to make no contribution to elucidating the Tannaitic halakhic system in respect of the relations that evolve between legal rules and principles and the reasons for them. Be this as it may, an effort to understand the reasons for the Sages’ use of this method, which is different from the composition of most sections of the Mishna, will be needed.

1. . mShevi’it 3:4 and 5:9, Sheqalim 1:3, Gittin 8:9, Demai 4:2; tPe’ah 3:1; ‘Eruvin 5:11, Nedarim 2:7, Gittin 3:13:14, ‘Avoda Zara 1:3, Hullin 10:13; among the minor tractates, Kalla Rabbati 3:1; Mekhilta de-Rabbi Shimon Bar Yohai, Geniza fragment, New York, JTS ENA 1340.4. The fragment parallels the Epstein-Melamed edition of the *Mekhilta,* 9–10, and was published by Shraga Abramson, “A New Fragment of the ꜤMekhilta de Rabbi Shim`on Bar Yohai,’” Tarbiz 41 (1971) 361–72; Menahem Kahana, Manuscripts of the Halakhic Midrashim: An Annotated Catalogue (Jerusalem: The Israel Academy and Humanities and Yad Izhak Ben-Zvi, 1995), 46. For the entire fragment, see Shraga Abramson, The Gnizah Fragments of the Halakhic Midrashim, I (Jerusalem: Magnes, 2005), 154–5. [↑](#endnote-ref-4)
2. . See Eliezer Bugard, “Mipenei darkhei shalom.” Master’s Thesis, Bar Ilan University, 1977 (in Hebrew). 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: Oxford University Press, 1997),238, n. 46. Würzburger argues the same way: Walter S. Würzburger, Ethics of Responsibility: Pluralistic Approaches to Covenantal Ethics,1 set ed. (Philadelphia: The Jewish Publication Society, 1994),49. See also Walter S. Würzburger, “Darkei Shalom,” Gesher: Bridging the Spectrum of Orthodox Jewish Scholarship6 (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, Cincinnati, 1987; Jennie Rosenn, *“*Mipnei Darhei Shalomin Rabbinic Tradition.” Rabbinic thesis, Hebrew Union College--Jewish Institute of Religion, New York, 1997; David Novak, Covenantal Rights: A Study in Jewish Political Theory(Princeton, NJ: Princeton University Press, New Forum Books, 2000). Jonathan K. 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 Ethics25 (2005): 55–77. [↑](#endnote-ref-5)
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.” PhD diss., The 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. [↑](#endnote-ref-6)
4. . Unfortunately, length limitations prevent me from analyzing here the totality of the Tannaitic halakhot concerning “ways of peace.” I address some of them briefly or in the notes only. [↑](#endnote-ref-7)
5. . On the creative power of the redaction, see, for example, Avraham Walfish (a): “Literary Considerations in the Redaction of the Mishnah and Their Implications”; (b): “Plays on Words in the Mishnah,” Netu’im: Journal for the Oral Law1 (1994): 33–60; 2 (1995): 75–95; Moshe Halbertal, “David Hartman and the Philosophy of the Halakha,” in Renewing Jewish Commitment: the Work and Thought of David Hartman, Vol. 1, ed. Moshe Halbertal and Moshe Idel (Tel Aviv: Shalom Hartman Institute and Hakibbutz Hameuchad, 2001), 13–35; Noam Zohar, The Secret of the Creation of the Rabbinical Literature: Redaction as the Key to Meaning (Jerusalem: Magnes, 2007), esp. 6–17, 150–161, and ibid., Literature Review (all sources thus far in Hebrew); Melekhet Mahshevet: Studies in the Redaction and Development of Talmudic Literature, ed. Aaron Amit and Aharon Shemesh (Ramat Gan: Bar-Ilan University Press, 2011). [↑](#endnote-ref-9)
6. . For an overview of research and various scholars’ views, see Vered Noam, Megillat TaꜤanit: Versions, Interpretation, History, Critical Edition (Jerusalem: Yad Izhak Ben-Zvi, 2003), 165–8. [↑](#endnote-ref-11)
7. . Ibid., 165. [↑](#endnote-ref-13)
8. . The scholion traditions switch between the Pharisees and the Boethusians. See Vered Noam, “Rediscovered Fragments of Variant Biblical and Midrashic Texts,” Issues in Talmudic Research: Conference Commemorating the Fifth Anniversary of the Passing of Ephraim E. Urbach (Jerusalem: The Israel Academy of Sciences and Humanities, 2001), 72–76. For a reconstruction of MSS Parma, see Noam, Megillat TaꜤanit*,* 165. [↑](#endnote-ref-14)
9. . Eyal Regev, The Sadducees and Their Halakhah: Religion and Society in the Second Temple Period (Jerusalem: Yad Izhak Ben-Zvi, 2005), 132–7. [↑](#endnote-ref-15)
10. . Regev, Sadducees, 134. [↑](#endnote-ref-16)
11. . The English translations of the Hebrew Bible used here are from Tanakh: The Holy Scriptures: A New Translation of According to the Traditional Hebrew Text (Philadelphia/New York/Jerusalem: The Jewish Publication Society, 1985). [↑](#endnote-ref-18)
12. . Similar hermeneutics occur in Sifre on Numbers. On Sifre Zuta on Numbers, see Menahem I. Kahana, Sifre on Numbers: An Annotated Edition (Jerusalem: Magnes, 2015), Part I: The Edition, 67; Part IV: A Commentary on Piska’ot, 107–161 (The Portions of Shelah-Masei), 1176. [↑](#endnote-ref-19)
13. . 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), Tarbiz 31 (1962): 299. [↑](#endnote-ref-20)
14. . II Chron. 31:3. In Ezekiel (45:16:17), it is explained that the nasi was responsible for bringing the regular sacrifices to the Temple. In the early Return to Zion period, the daily sacrifices were funded from the property of Darius II; in Ezra’s time, Artaxerxes discharged this duty. [↑](#endnote-ref-21)
15. . Researchers disagree about whether this tax was implemented from then until the destruction of the Second Temple or whether it was a nonrecurrent enactment meant to solve a temporary funding problem that arose after Persia ceased to subvention the rite. [↑](#endnote-ref-22)
16. . Jacob Liver, “The Edict of the Half-Shekel” (Hebrew), in The Yehezkel Kaufman Jubilee Volume,ed.Menahem Haran (Jerusalem: Magnes, 1961), 54–67; Regev, Sadducees, 136. [↑](#endnote-ref-23)
17. Ibid., n. 15. [↑](#endnote-ref-24)
18. 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): 71–3; John M. Allegro, Qumran Cave 4, I, 4Q158-4q186 (Discoveries in the Judean Desert, V), Oxford 1968, 6–9; Jacob Liver, “The Half-Shekel in the Scrolls of the Judean Desert Sect” (Hebrew), Tarbiz31(1962): 20–1. [↑](#endnote-ref-25)
19. Mira Balberg, Blood for Thought: The Reinvention of Sacrifice in Early Rabbinic Literature(Oakland: University of California Press, 2017), 114–21. [↑](#endnote-ref-26)
20. . The Hebrew text of the Mishnah is taken from the Kaufman manuscript. English translations of the Mishnah and Babylonian Talmud are based on the Soncino Press Edition (CD-ROM Judaica Press, NY: 2001); and The Mishnah, trans. Herbert Danby (Oxford: Oxford University Press, 1933). [↑](#endnote-ref-28)
21. . Ze’ev Safrai, Mishnat Eretz Israel: Tractate Shkalim (Jerusalem: The E.M. Liphshitz College Publishing House, 2009), 70–4. [↑](#endnote-ref-29)
22. . Balberg, Blood for Thought, 120. [↑](#endnote-ref-30)
23. . See Moshe Assis, “On the Jerusalem Talmudic Version of Rabbi Shlomo Syrilio in Tractate Shkalim” (Hebrew), in *Studies in Memory of the Rishon Le-Zion R. Yitzhak Nissim* (vol. 2), 126–7 and n. 84; and discussion of Eliezer Pinczower, “Mishna Masekhet Shekalim--A Critical Edition,” PhD diss., The Hebrew University of Jerusalem, 1998, 135–6. In conclusion, Assis states: “It does not appear that the kohen [priest] 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 formulas between the manuscripts, see Appendix 11. [↑](#endnote-ref-31)
24. . See Hanoch Albeck, The Six Orders of the Mishnah(Mo’ed) (Hebrew) (Jerusalem/Tel Aviv: Bialik Institute and Dvir, 1958), 188. Moshe Assis believes that the Mishna presents three views. See Moshe Assis, “On the Meaning of One Sugya in [Talmud] Yerushalmi Shekalim,” Mehqerei Talmud: Talmudic Studies Dedicated to the Memory of Professor Eliezer Shimshon Rosenthal, 2, ed. Moshe Bar Asher and David Rosenthal (Jerusalem: Magnes, 1993), 397–8. [↑](#endnote-ref-32)
25. . A similar practice of Rabbi Yochanan Ben Zakai emerges from the Mishna in Tractate Eduyiot 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 Yochanan 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 Rabban Yochanan ben Zakkai opposes the priests' divergent position, he refuses to hold court hearings for the specific purpose of imp;osing the Sages’ halakhic law on the priests. In this case, too, it is evident that Rabban Yochanan ben Zakkai's concession stems from his recognition of the limits of the political power of the Sages and not as a result of agreement with the priests' approach. See also David Sabato, “The Teachings of Rabbi Joshua Ben Hanania,” Ph.D. Diss, The Hebrew University in Jerusalem, 2019, 25–7. [↑](#endnote-ref-33)
26. . For additional disagreements between Sages and priests in the Temple era, see Daniel Tropper*,* The Internal Administration of the Second Temple at Jerusalem*,* Ph.D. Diss., Yeshiva University, New York, 1970; Daniel Tropper, “Bet Din Shel Kohanim,” Jewish Quarterly Review68 (1973): 204–21; Ellis Rivkin, A Hidden Revolution (Nashville: Abingdon, 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: State University of New York Press, 1991), 69–121; Meir Bar-Ilan, dissertation; Meir Bar-Ilan, “Polemics between Sages and Priests towards the End of the Days of the Second Temple,” Moreshet Israel 8 (2011): 37–53; Regev, “Traditions,” 24–7. [↑](#endnote-ref-34)
27. . Another halakha that may be seen as a retreat by the Sages from their halakhic perception occurs in tPe’ah 3:1: “If there are [in the field] poor people 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 is] not [able to prevent them from gleaning, then] he should leave them alone [and let them glean anyway] because of peaceful relations [between people].” Plainly the enactment is attempts to strike a balance between the landowner’s practical abilities and the requirements of the halakha. 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 “peaceful relations” 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. 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. In cases where the law proscribessomething ab initio--as in our case: the undeserving poor should not be allowed to glean--the law ex post relates to the situation following a forbidden act, in which the primary rule of conduct that the halakhic norm established has been violated. See Shay Wozner, “Consistency and Effectiveness in the Halakhah, as Reflected by the Lekhat’hila–Bede’abadDistinction,” Dine Israel20–21 (2000–2001): 43–100. [↑](#endnote-ref-35)
28. . The following laws, for example, are reflects this approach: “An ‘Erub is placed in the room where it has always been placed” (mGitt. 5:8); “The pit which is nearest the [head of the] watercourse is filled from it first.” (mGitt. 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” (Tb Hulin 141:2). [↑](#endnote-ref-42)
29. . Another example may be seen in the sugya in Tp Shevi’it 5, 9, 36a, concerning mShevi’it 5:9: “A woman may lend to another who is suspected of not observing the Sabbatical year a fan or 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 Seventh 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 “ways of peace” rationale, and he limits the Mishna’s dispensation to lend implements to a woman who is suspected of not observing the sabbatical year. [↑](#endnote-ref-43)
30. . The order of these halakhotvaries in different manuscripts of the Mishna; similarly, the opinion of R. Yose is missing in Halakha 1 of the Kaufman manuscript but is found in other manuscripts. See David Weiss Halivni, Sources and Traditions: A Source Critical Commentary on Seder Nashim (Hebrew) (Toronto: Otsreinu, 1968), 678. [↑](#endnote-ref-44)
31. . For property acquisition by deaf-mutes, idiots, and minors, see mB. Qam 4:4; 6:4. [↑](#endnote-ref-46)
32. . For property laws that deal with the acquisition of various objects, see mQidd 1:4–5. [↑](#endnote-ref-47)
33. . For a similar law concerning finding, see Hul 10:13, ed. Zuckermandel (Jerusalem: Wahrmann Books, 1970), 512. [↑](#endnote-ref-48)
34. . tP Gittin 5:8, 47a–b (Jerusalem: Academy of the Hebrew Language, 2001), 1078; Eruvin 7:6, 24c (idem, 485); in bGit 61a, R. Hisda interprets the difference between the methods as follows: “What difference does it make? To reclaim [the object] in court.” [↑](#endnote-ref-49)
35. . The way rabbis in ensuing generations expressed R. Yose’s thinking--“The sages have made those who are not allowed--to be permitted” (see bGit. 30a, bBek. 18a, bB. Metzi’a 12a–b)--indicates that, in their opinion, R. Yose does distort the letter of the law. [↑](#endnote-ref-50)
36. . On the place of “justice” in R. Yose’s halakhic view, see Avigdor Unna*,* Itim Lamishnah: Studies in the Six Orders of the Mishnah (Jerusalem: Rubin Mass, 1982), 106–10. For an analysis of similar positions in a different disagreement between R. Yose and tanna kamma, see Yair Lorberbaum, “Rules and Reasons: A New Conceptual Framework for Examining the Reasons for the Mitzvot and Halakhot” (forthcoming): 22–6. [↑](#endnote-ref-51)
37. . See Sagit Mor, “‘Tiqqun ‘Olam’ (Repairing the World) in the Mishnah: From Populating the World to Building a Community,” Journal of Jewish Studies 62 (2011): 262–83. [↑](#endnote-ref-52)
38. . However, see my remarks in the Discussion and the questions that I intend to take up in future research, presented at the end of this article. [↑](#endnote-ref-54)
39. . See n. 1 above. The exegesis is presented with small differences in Mekhilta D'Rabbi Sim‘on b. Jochai, ed. Jacob Nahum Halevi Epstein and Ezra Zion Melamed (Jerusalem: Hillel Press, 1979), 10. [↑](#endnote-ref-55)
40. . 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. [↑](#endnote-ref-56)
41. . The translation is based on W. David Nelson, Mekhilta De-Rabbi Shimon Bar Yohai: Translated into English, with Critical Introduction and Annotation (Philadelphia: The Jewish Publication Society, 2006), 16. I revised the translation in minor ways in accordance with Manuscript Antonin 236.1. The translation is partly based on Geniza fragment New York JTS ENA 1340.4. [↑](#endnote-ref-57)
42. . The location of the verse in Exodus indicates that the Passover at issue is pesah Mitsrayim, 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 pesah Mitsrayim.See also Tosefta Pesahim 8:12: “Pesah Mitzrayim: of this is it stated, “And he and his neighbor shall take …,” as is not the case in pesah le-dorot. [↑](#endnote-ref-58)
43. . Saul Lieberman*,* The Tosefta: According to Codex Vienna, with Variants from Codices Erfurt, London, Genizah Mss. and Edition Princeps(Venice 1521) (New York: The Jewish Theological Seminary of America, 1962), 187. The English translation is from Jacob Neusner, The Tosefta--Translated from the Hebrew (Moed) (New York: Ktav, 1981), 156. [↑](#endnote-ref-59)
44. . Liora Elias Bar-Levav, The Mekhilta de­Rabbi Shimeon Ben Yohai on the Nezikin Portion,ed.Menachem Kahana (Jerusalem: Magnes, 2013), 147–8, 243–5, 318–38, especially 336. [↑](#endnote-ref-60)
45. . See Leib Moscovitz, The Terminology of the Yerushalmi: The Principal Terms (Jerusalem: Magnes, 2009), 301–2. [↑](#endnote-ref-61)
46. . As Yair Furstenberg shows in “Am Ha-Aretz in Tannaitic Literature and Its Social Context” (Hebrew), Zion 78 (2013): 287–319, and Furstenberg, Purity and Community in Antiquity: Traditions of the Law from Second Temple Judaism to the Mishnah (Hebrew) (Jerusalem: Magnes, 2016) 208–55, 313–59. For additional laws that reflect the pragmatic approach, see above, n. 27. [↑](#endnote-ref-62)
47. . Liora Elias Bar-Levav, The Mekhilta de­Rabbi Shimeon Ben Yohai, 338. [↑](#endnote-ref-63)
48. . In legal philosophy, Ronald Dworkin is noteworthy for instigating a fruitful debate over legal constructions composed of legal rules and principles originating in criticism of the dominant philosophy of Anglo-American legal positivism as presented by H. L. A. Hart in The Concept of Law (Oxford: Oxford University Press, 1961). See Ronald Dworkin*,* Taking Rights Seriously (Cambridge, MA: Harvard University Press, 1978, first edition 1977). Pursuant to this, see Joseph Raz, “Legal Principles and the Limits of Law,” Yale Law Journal 81 (1972): 823–54; Kathleen Sullivan, “The Supreme Court, 1991 Term--Foreword: The Justice of Rules and Standards,” Harvard Law Review106 (1992): 22–123; and J. W. Harris*,* Law and Legal Science (Oxford: Clarendon, 1979). A revised edition of Dworkin’s book, published in 1978, includes a lengthy reply by Dworkin to his critics. For a review of the philosophical and jurisprudential literature on rules and reasons for them, see, in particular, W. Twinning and D. Miers*,* How to Do Things with Rules (5th Edition) (New York: Cambridge University Press, 2010), particularly 14–5, and F. Schauer, Playing by the Rules, A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (Oxford: Clarendon Press, 1991). On research in these matters in the context of halakha, see Yair Lorberbaum*,* In God’s Image: Myth, Theology, and Law in Classical Judaism (New York: Cambridge University Press, 2015), and Lorberbaum, “‘What Would Please Them Most is that the Intellect Would Not Find a Meaning for the Commandments and the Prohibitions’: On Transcending the Rationales of the Commandments--A Close Reading of ‘The Guide of the Perplexed’ III 31” (Hebrew), *Daat: A Journal of Jewish Philosophy & Kabbalah* 77 (2014): 17–50. In addition, see Lorberbaum’s conceptual article: “Rules and Reasons: A New Conceptual Framework for Examining the Reasons for the Mitzvot and Halakhot” (Hebrew, the title is my translation) (in press; I thank Lorberbaum for allowing me to read it). Also noteworthy in this context is Leib Moscovitz*,* Talmudic Reasoning: from Casuistic to Conceptualization (Tübingen: Mohr Siebeck, 2002). In his introduction, Moscovitz notes similarities and differences between concepts in the philosophy of law (Dworkin’s “legal rules and principles”) and those that he takes up in halakhic research; see 34–5, 41–3. Moscovitz chooses not to discuss what he calls “broad discretionary principles,” among which enactments “for reason of ways of peace” are included (see, in particular, 42, n. 163–166). [↑](#endnote-ref-64)
49. . Frederick Schauer, “Giving Reasons,” Stanford Law Review 47 (1995): 633–59; “The Jurisprudence of Reasons,”Michigan Law Review 85 (1987): 847–70; Playing by the Rules; Thinking Like a Lawyer: A New Introduction to Legal Reasoning (Cambridge, MA: Harvard University Press, 2009). [↑](#endnote-ref-65)
50. . See Schauer’s definition of “reason” in his article “Giving Reasons,” 636. [↑](#endnote-ref-66)
51. . Duncan Kennedy, “Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940,” Research in Law and Sociology 3 (1980): 3–24. I thank Suzanne Last Stone for calling this interesting source to my attention. [↑](#endnote-ref-67)
52. . “Giving Reasons,” 636–637. On giving explicit reasons at the Tannaitic level, see Moscovitz, “Talmudic Reasoning,” 52–60, and Rocco Bernasconi, “Reasons for Norms in Mishnaic Discourse: Some Formal, Functional, and Observation,” Melilah 1 (2004): 1–61. Bernasconi does not deal with the underlying rationale of “ways of peace.” [↑](#endnote-ref-68)
53. This contrasts with Moscovitz’ stance (ibid. n. 48, 42 n. 164). [↑](#endnote-ref-69)
54. Here I refer to enactments that regulate conduct vis-à-vis neighbors who are lax on ritual purity and the observance of sabbatical-year halakhot, as well as theft-related enactments that deviate from the acquisition laws. Apparently, such a procedure should also be seen as explaining at least some of the enactments pertaining to relations with non-Jews. [↑](#endnote-ref-70)
55. . For example: One may lend an implement to a person suspected of sabbatical-year violations as long as the borrower does not intend it to be put to forbidden use; one may work with an ‘am ha-arets as long as water is not mixed into the flour, because at that stage there is no concern about breaching an injunction specified in the Torah. One who shakes an olive tree at its top (and so on) has, by so doing, “revealed his intention” to acquire the object at issue; this gives one legal preference over a person who has not revealed his/her intent and bothered to consummate the acquisition. [↑](#endnote-ref-71)
56. . “Giving Reasons,” 638; see also “The Jurisprudence of Reasons,” 864. [↑](#endnote-ref-72)
57. . Schauer, “Giving Reasons”: 636–42, 658–9, quotation at 641–2. See also Schauer, “The Jurisprudence of Reasons”: 864–5, for a condensed version of his remarks. Both articles highlight these issues. [↑](#endnote-ref-73)
58. . As seen in the first stage of the use of this rationale. [↑](#endnote-ref-74)
59. . Kennedy does not deny that the statutory system also reacts to exogenous influences and forces; see Kennedy, “Toward an Historical Understanding,” 22. However, he focuses on exposing the mechanisms that facilitated and generated, at least for a while, internal changes in the system that he analyzes. [↑](#endnote-ref-75)
60. . Ibid.: 14–15. [↑](#endnote-ref-76)
61. . A particularly caustic example of “would never come to mind” may be seen in the Amoraic way of expressing R. Yose’s view. See n. 35 above. [↑](#endnote-ref-77)
62. . Kennedy, “Toward an Historical Understanding”: 18–19. Here, perhaps, one may see something of an interface between Kennedy’s analyses and Moscovitz’ argument against applying the Dworkinian model, which would have us see the “ways of peace” enactments as legal principles that reflect an exogenous policy imposed on the halakha. [↑](#endnote-ref-78)
63. See Pitkowsky and Moscovitz, each in his own way. [↑](#endnote-ref-79)
64. See also the studies referenced in n. 2 above. It bears emphasis that alongside description of the legal system as being composed of parallel sub-domains, the so-called “horizontal dimension,” Kennedy describes a process of internal organization of rules within the sub-domain: “the ‘vertical’ dimension of a subsystem within legal consciousness.” The point, he claims, “is that between the operative rule and the more particular subrule, there is structure, direction, influence, finally compulsion.” See Kennedy, “Toward an Historical Understanding”: 18–21. [↑](#endnote-ref-80)