“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 *takanot* (enactments), in Tannaitic sources.[[1]](#footnote-2) In the Talmuds, similarly and for the purpose of interpreting the expression, the opposite term, *mishum ’eyvah,* “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]](#footnote-3) 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]](#footnote-4) To date, however, no study has been carried out that investigates the Tannaitic sources per se, in an attempt to examine these two dimensions—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 halakhah?

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 these approaches by invoking concepts and theories from the history of Halakha, as well as theories of law and their application to halakhah. I employ a model proposed by Moshe Halbertal to demonstrate the ways in which halakhah emerges as a legal phenomenon.[[4]](#footnote-5) On the basis of this model, one can identify the ways in which the Sages expanded the areas to which they applied laws justified “for the ways of peace” and postulate the factors that caused or enabled them to do so. I then examine how the concept of “ways of peace” functions as a legal justification. In this part of the discussion, I analyze the characteristics of relevant halakhot on a scale spanning from legal rule to legal principle, as well as the relationship between explicit reasoning and the laws that such reasoning ostensibly explains. As we shall see, ideological approaches to the principle of “ways of peace” vary considerably, not only in the values and attitudes informing them, but also in the ways they employ this reasoning, and in the roles they ascribe to it within the legal system. Finally, I pose several additional questions about the construction of a textual aggregate incorporating many of the “ways of peace” enactments in M. Gittin[[5]](#footnote-6) for future discussion.[[6]](#footnote-7)

**I. The “With Misgivings” Approach: “Ways of Peace” as Justifying a Retreat from the Ideal *Halakhah***

Tractate Shekalim concerns itself with the half-shekel contribution and the organization of the financial system of the Temple. The half-shekel tax owes its origins to a Pharisaic ordinance[[7]](#footnote-8) associated with the Pharisees’ dispute with the Sadducees over how to fund the daily sacrifice in the Temple. The Oxford Mss. of the scholion of the *Megilat Ta’anit* scroll, despite being later than the Second Temple period, preserve, according to scholars, 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 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" \o "6213: taaSeh (V-Qal-Imperf-2ms) -- To do, make) [one](https://biblehub.com/hebrew/259.htm" \o "259: eChad (Number-ms) -- United, one, first) [lamb](https://biblehub.com/hebrew/3532.htm" \o "3532: hakKeves (Art :: N-ms) -- A lamb) [in the morning](https://biblehub.com/hebrew/1242.htm" \o "1242: vabBoker (Prep-b, Art :: N-ms) -- Dawn, morning) [and the other](https://biblehub.com/hebrew/8145.htm" \o "8145: hashsheNi (Art :: Number-oms) -- Second (an ordinal number)) lamb you shall offer [at](https://biblehub.com/hebrew/996.htm" \o "996: bein (Prep) -- An interval, space between) [twilight [Numbers 28:4]](https://biblehub.com/hebrew/6153.htm" \o "6153: HaarBayim (Art :: N-md) -- Evening), 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 *shekalim* 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-9)

This observance is interpreted in the scholion as a victory of the Pharisees over the Sadducees in the dispute over the daily sacrifice.[[9]](#footnote-10) That is, should the sacrifice be funded solely from *terumat ha-lishkah* (the public exchequer) or from the individual? According to the scholion, the Sages enacted the half-shekel rule in order to fund the daily sacrifices. By implication, Eyal Regev claims,[[10]](#footnote-11) the context in which the exchange of words appears is a sweeping Sadducee-Boethusian objection to the half-shekel enactment, by which all of Israel participates in funding the daily sacrifices.[[11]](#footnote-12) 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-13) Mira Balberg, who recently analyzed the redesign of the sacrificial system in the early Tannaitic literature, also shows how the Mishnah systematically rejects any possibility of personal donations for the funding of public sacrifices.[[13]](#footnote-14)

In view of these remarks, let us observe M. Shekalim. The first two chapters of the tractate deal with commandments relating to giving the half-shekel and the ways in which it is to be collected. The first chapter seems to be built on two textual strata. The *stam mishnah* describes a chronological sequence—“On the first of Adar they make a public announcement […] On the fifteenth they read the *megilah* [Esther] […].” Two notes by R. Yehudah 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 *kil’ayim* (1:2). In the second, R. Yehudah testifies about the dispute between Ben Bukhrei and R. Yoḥanan Ben Zakkai regarding the exemption of the priests from the half-shekel tax (1:4); and I discuss it below. Prior to this Mishnah—in Mishnah 3—we find the reason: “for the ways of peace.”

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 shekel for him, [the father] cannot stop paying the half-shekel on his behalf. They did not take mortgages from priests, for the sake of peace.[[14]](#footnote-15)

The Mishnah describes an assertive system that collected shekalim from the public, one that seemingly enjoyed social backing—the setting up of “tables.”[[15]](#footnote-16) 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. Furthermore, those who failed to donate their half-shekel mortgaged their property. Evidently, only the priests refrained from mortgaging.[[16]](#footnote-17) The historical documentation and previous scholarship on the half-shekel suggest that the priests, who may well have been Sadducees or vestiges of the same, objected to the half-shekel 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-shekel 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 Mishnah 5, which does not include the priests among those exempted from the pledge. The second is Mishnah 6, which determines who owes and who is exempt from the *kolobon* (κολοός), a small coin used as a desk fee for the moneychanger. Anyone who owes the half-shekel 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 Mishnah—Kaufmann, Parma (De Rossi 138), Cambridge (Ms. Add.470.1), and Naples—the word “priests” is missing. Obviously, if only Levites and Israelites are ordered to oblige, 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.[[17]](#footnote-18)

Contrary to the foregoing mishnayot, in which the priests’ exemption from the half-shekel 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-shekel tax, R. Yoḥanan ben Zakkai in Mishnah 4 takes an explicit position against exempting the priests from the tax:

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

Rabbi Yoḥanan ben Zakkai said to him: This is not true. In fact, any priest who does not give a half-shekel 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-shekel 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 Pharisaic eyes) because the priest is assumed to have presented his shekel to the public as a no-strings-attached gift. This subsumes his contribution to the total pool of donated shekalim, meaning that the public sacrifices are funded by the public and not by the individual priest.[[18]](#footnote-19) R. Yoḥanan 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 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 shekalim, 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-shekel tax and have no share in the public’s meal offerings (= sacrifices). By extension, a priest who gifts his shekel to the public relinquishes the shekel 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.[[19]](#footnote-20)

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-shekel payment among Jewish communities, they failed to realize the idea fully and to induce the priests to join the public in this pecuniary duty.[[20]](#footnote-21) Had the Sages managed to impose their straightforward religious-ideological stance, they would have formulated the matter as a halakhah, as R. Yoḥanan ben Zakkai proposed. Clearly, then, the explanation of “ways of peace” for exempting the priests from the half-shekel 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 certainly in the domain that the Torah bequeaths to them, the Temple service.

The “for the ways of peace” reasoning appears not in the words of R. Yoḥanan Ben Zakkai but in those of the *stam Mishnah*. However, the redaction of this reason at the end of Mishnah 3 (as an introduction to the dispute between Ben Bukhrei and Ben Zakkai in Mishnah 4) along with several other sources in the chapter that reflect (in various ways) the Sages’ resistance to exempting priests from the tax, hints that the Mishnah’s redactor understood the rationale on the basis of Ben Zakkai’s halakhic concept. If this is indeed the case, it becomes 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.[[21]](#footnote-22)

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.[[22]](#footnote-23)

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.[[23]](#footnote-24) 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.[[24]](#footnote-25)

These three halakhotare connected by their shared subject matter and all include a dispute between the Tannaitic tradition that quotes the halakhah (the *tanna kamma*) and the opinion of R. Yose. They regulateproperty rights in cases where ownership of the property is considered unclear. Halakhah 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.[[25]](#footnote-26) 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—but have yet to take possession of it (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). Hence, according to the usual laws of property, they have not yet acquired the object.[[26]](#footnote-27) 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—whether of “found objects,”[[27]](#footnote-28) an animal, or olives—is considered theft. The “ways of peace” justification, however, indicates that, in the mind ofthe *tanna 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, the *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 the *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.[[28]](#footnote-29) 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[[29]](#footnote-30)—thereby attaining a just outcome not only on the moral level but on the normative plane as well.[[30]](#footnote-31)

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 Mishnah to create a complete collection of halakhot that are explained on “ways of peace” grounds (M. Gittin 5:8–9) and to juxtapose it, complementarily, with the aggregate of halakhot reasoned on grounds of *tikkun ‘olam* (M. Gittin 4–5).[[31]](#footnote-32) 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 data one realizes that the redactor of the Mishnah 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.[[32]](#footnote-33) 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 Yoḥai* found in the Cairo Genizah.[[33]](#footnote-34) R. Shimon and additional sages interpret the words “his neighbor” in Exodus 12: (“But if the household is too small for a lamb, let him share one with a neighbor[[34]](#footnote-35) 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’ (Exodus 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’” (Proverbs 27:10).[[35]](#footnote-36)

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. Yehudah 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 *pesaḥ le-dorot,* the regular annual Passover ritual.[[36]](#footnote-37)

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 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 opposed 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 Proverbs 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 T. 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 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[Proverbs 27:1].”[[37]](#footnote-38)

Rabbi Shimon’s dictum here is linked closely 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, between R. Shimon’s statement that the commandment also applies to *pesaḥ le-dorot* and the exegetical treatment of the expression “his neighbor” 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 those 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.[[38]](#footnote-39) 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”[[39]](#footnote-40) 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

Extensive and fruitful scholarly efforts have been devoted in recent decades to the examination of Tannaitic halakhah from directions that are particularly relevant in relation to the phenomena we have seen in the first part of this article. One direction, more general in its nature, points to various characteristics of Tannaitic halakhah which make it a new legal phenomenon, distinct and different from the previous ways in which the legal world of the Second Temple period developed. Another direction is that which applies various legal theories and conceptualizations, developed especially in the study of Anglo-American law, to the halakhic system. From this angle, the main jurisprudential issues of relevance to our topic deal with halakhic rules and principles, as well as halakhic reasoning. Therefore, the jurisprudential study of the various approaches I reviewed in the first part of the article will be carried out in several steps. First, I will present a model, developed by Moshe Halbertal, which points out the main characteristics distinguishing the halakhah of the Sages from legal phenomena that preceded it. Next, I will examine the specific halakhot under discussion—as legal rules—in light of Halbertal’s model, alongside other conceptual distinctions, formulated by Elizabeth Shanks Alexander (regarding the casuistic structure of the Mishnah), and Jeffrey Rubinstein (regarding abstraction processes that occur within the halakhah in the Mishnah and the Talmudic period). My focus will then move to the *function* of the expression, “for the ways of peace,” as a legal justification within the law. This step will require the use of additional theoretical concepts, which I have pointed out above, and which relate to legal rules and principles, as well as to the place and role of legal reasoning within the law. As we will see, the concepts of “generality” and “abstraction” within the law in general—and the halakhah in particular—will emerge repeatedly, in different ways, in all areas of our examination.

1. **Central characteristics of the halakhah as a legal phenomenon**

In his articles, “David Hartman and the Philosophy of the Halakah”[[40]](#footnote-41) and “The History of Halakah and the emergence of Halakah,” [[41]](#footnote-42) Moshe Halbertal discusses founding moments in the development of the halakhic system during the period of the Mishnah. Halbertal proposes a methodology built on observation of three stages in which the inertial movement of the formal development of the halakhic system is undermined.[[42]](#footnote-43) In each of these stages, value perceptions, different interests, and preferences of the creators of halakhah may be revealed. These steps are: (1) Interpretive gaps that reveal attempts to create change in the inertial formal direction of the law; (2) the raw starting points at which the decisions underlying the standard law are evident; (3) observing the last stratum of the text, that is, organizing the textual materials and editing them in literary units. Clarifying the editorial considerations of the textual units reveals hermeneutic trends that give meaning and significance to the normative system. While the article, “David Hartman and the Philosophy of the Halakhah” deals with the redaction of the Mishnah as a moment belonging to the third stage, Halbertal’s other article points to the first and second stages, in which halakhah first appears as a legal system. This process is carried out by the Tannaitic sages, in what Halbertal defines as “a transition from ‘mitzvah’ to ‘halakhah’.”[[43]](#footnote-44) Most of the examples I have discussed in this article fall into the first and second stages described by Halbertal.[[44]](#footnote-45) I will, therefore, briefly address the characteristics of these stages, as outlined by Halbertal, after which I will examine the laws under discussion according to these criteria.

To illustrate the distinction between the different conceptions of law—“mitzvah” in the Torah and in Second Temple period halakhic texts, as opposed to “halakhah” among the Tannaitic sages—Halbertal likens the normative field to a topographical map, in which the density and distribution of elevation lines differ from region to region:

A layout of the law in the form of a map will make apparent that the level of proximity of rules is not uniform; there are sparse areas and there are areas where the normative activity is hectic and the area becomes saturated with instructions. In order to define a particular normative space correctly and not just as a mitzvah, it is necessary to cross a certain threshold of proximity of provisions whose condensation will mark an area saturated with rules.[[45]](#footnote-47)

The principle proposed by Halbertal for defining “halakhah” as a legal phenomenon is the creation of a thick network of decrees (in cases where the Sages make an existing mitzvah or duty into a “halakhic field”), or alternatively (in cases of emergence of a new duty), addition of normative volume, at high resolution levels, which defines and instructs its mode of execution.

Halbertal goes on to point out the mechanism that brings about normative condensation, which consists of the same factors that accelerate development and expand the “halakhic organism.” He identifies three areas into which halakhah extends. According to Halbertal, halakhah begins as an attempt to formulate a systematic conceptualization of the basic components of the mitzvah. Halakhic work in this area does not involve filling normative lacunae, but rather the conceptualization of customary practices, which in turn allows for a systematic understanding of their components. Thus, the halakhah establishes initial definitions that delimit the nature of the duty. Sometimes, once a conceptualization is formed, it may bring about a change in practice. The conceptualization, which by its very nature is abstract, makes it possible to produce a systematic structure incorporating a variety of halakhic contexts.[[46]](#footnote-49)

The areas that follow go beyond performance of the basic elements of the mitzvah. The second area deals with what are known in legal theory as “hard cases.”[[47]](#footnote-50) These cases involve questions or situations that do not arise in the normal performance of the mitzvah, and for which it is therefore likely that no guidance or even prior thinking were available. The formulation of instructions in such cases applies only to those relatively rare cases in which the question arises. Halbertal believes that the preoccupation with extreme situations was borne out of the halakhic discourse itself; that is, the impetus for the emergence of this normative field was an independent interest in the concept, regardless of its practical applicability. Halakhic discussion of this kind made it possible to formulate an imaginary substitute for the real world, by engaging in theoretical possibilities.[[48]](#footnote-51)

The third area to which halakhah extends is definition of aspects of performance of the mitzvah which were previously open and flexible, because the mitzvah could be performed even without defining these elements formally.[[49]](#footnote-52) However, once certain areas have been defined and formalized in a network of instructions, they are then interpreted for almost every application of the mitzvah. Unlike the previous area, here Halbertal finds an additional catalyst for the formation of halakhah: In this realm, the instructions are aimed at shaping the world of action. Their purpose is to alter the real world and shape it into proper patterns. The provisions extending to this area are meant to give expression to interests and values, to direct the nature of human activity and its consequences.[[50]](#footnote-53)

Alongside definitions of the areas to which halakhic law extends, Halbertal identifies three catalyzing factors that accelerated the growth of the “halakhic organism.” The first catalyst was the attempt to move from an unspoken custom to a formal, comprehensive definition. This experience gives rise to different attitudes, which move the halakhah in different directions (for example, disagreements over the very halakhic definition of duty).[[51]](#footnote-54) The second catalyst is related to authority. It stems from the fact that the process of establishing halakhah is carried out by means of a textual work—the Mishnah—which becomes authoritative. Since this text is positioned as bearing the authoritative status of halakhah, its interpretation has normative implications. Thus, the laws formulated in the Mishnah open up new questions in and of themselves.[[52]](#footnote-55) This is because the wording of the Mishnah, which offers answers to different questions, is itself open to different interpretive readings.[[53]](#footnote-56) The third catalyst stems from the fact that the attempt to produce a definition raises new questions, which concern the characteristics of the legal definition itself.[[54]](#footnote-57) In the end, Halbertal states, an observer of the vast phenomenon of the emergence of halakhah will recognize an internal ambiguity related to the two directions in which halakhah spread beyond the basic elements of execution. The thick web of instructions, themselves a constant object of observation and expansion, lays out an alternate world in which the Sages reside. At the same time, halakhah faces toward the world with the intention of rectifying and sanctifying it, by means of a tangle of provisions that concern proper action encompassing all modes of human life.[[55]](#footnote-58)

1. **“Ways of peace” in light of Halbertal’s model**

Before turning to examine the laws associated with the “ways of peace” in light of the processes pointed out by Halbertal (and, in various ways, by Rubinstein, Shanks Alexander, Moscovitz, and others), it is appropriate to note two fundamental distinctions regarding these halakhot. First, the expression “ways of peace” does not itself connote a mitzvah or duty defined in the Torah; rather, it is used as a form of explanatory legal reasoning, describing the cause or purpose of certain halakhot. Therefore, there is a gap between Halbertal’s model—which treats halakhah as rule-centered and regards the entire “halakhic organism” as a legal system—and the attempt to consider the function and purpose of this rationale, which requires further conceptualization of the affinity between rules and their reasons. Second, since the “ways of peace” rationale does not belong to a single area of law, we are not dealing with the creation of a “thickened halakhic field” around one specific mitzvah or one legal category. Rather, each of the laws deals with a different “duty,” for which the Sages create a “dense network of laws” with the intention of thickening its normative field.

The halakhic preoccupation with the half-shekel stems, ostensibly, from a mitzvah found in the Torah. It can apparently be claimed that the incorporation into the Mishnah of Tractate Shekalim—and, in particular, its first two chapters, which deal with the details of this mitzvah—corresponds to the first area defined by Halbertal. Here we observe the formation of a dense network of instructions, the purpose of which is to define the basic elements of performance of the duty: How is the tax collected? In which coins can the tax be paid? What is the discounted amount that represents the half-shekel? When is it to be given? Who is obligated to pay the tax and who is exempt from it? And so on. In fact, however, we have seen that payment of the half-shekel tax as financing for the perpetual sacrifices is an innovation of the Pharisees that came about during the Hasmonean period. The formation of this mitzvah, against the backdrop of controversy with other Jewish sects during the Temple period, obliged the Sages to present this tax as the continuation of a mitzvah given in the Torah. It is not surprising, therefore, that in this case the Sages needed to exercise increased effort to create a “dense network of laws” that would define the scope of the duty and the practices that applied it. The debate that took place between Jewish sects during the Second Temple period found its way, in more subtle form, into interpretive controversies over the verses in which the details of the newly established duty could be anchored. Thus we have seen the different positions in relation to the exemption of the priests—those of Ben Bukhrei, Rabban Yochanan ben Zakkai, and R. Yehuda—who are in dispute regarding the correct interpretation that should be given to the biblical verses and the very legitimacy of its halakhic outcome. But it is important to be precise. As we have seen, the rationale, “for the ways of peace,” was not cited in order to justify one particular position in the dispute, but rather as a justification for the actual practice itself. Its placement as a transitional unit, connecting the rule that exempted the priests from the pledge obligation with the preceding ideological-religious controversy over the inclusion of priests in the payment of tax (Mishnayot 3-4), frames the reason as an historical-political explanation of the practical halakhic conclusion: the half-shekel obligation applies to the priests, but is not enforced. The rule itself—the exemption of the priests from pledging—can be seen as one specific rule within the process of thickening the normative field of the half-shekel tax, in this case, defining the basic components of the obligation. However, this classification does not yet clarify the jurisprudential function of the reason in terms of legal reasoning: Does the mode of reasoning associated with the principle impact the nature of the halakhah and transform it from a specific rule to a legal principle (and perhaps even a non-legal principle)?

As for the disputes between the *tanna kamma* and Rabbi Yose regarding the definition of *gezel* in Tractate Gittin, it can be said that these regulations thicken the normative field of property law. However, this definition misses the mark in two respects. First, the position of the *tanna kamma*, which refuses to define these cases as “actual robbery,” points to the fact that we are dealing here with a “hard case.” Relying on studies done on casuistic systems of law in the Ancient Near East and in the Bible, Elizabeth Shanks Alexander analyzes and provides conceptual explanations for the casuistic pattern found in Mishnaic law.[[56]](#footnote-59) Shanks Alexander presents two types of cases that fall, as far as I understand, into the concept to which Halbertal refers in his remarks.[[57]](#footnote-60) One of them is the notion of “borderline cases.” As Shanks Alexander explains, “the borderline case is introduced because of its value for theoretical inquiry. Because borderline cases can plausibly be interpreted according to two different principles, they force clarity of thought about the commitments and values of the legal system.”[[58]](#footnote-61) Following Halbertal and Shanks Alexander (as well as Rubenstein, Moscovitz, and other scholars who have engaged in conceptualization of the halakhah), we can posit the creation of new duties, formed out of the intellectual drive operating within the theoretical discussions of the *beit midrash*. It seems, however, that the regulations before us, even though they can be described as “borderline cases,” do not seem to stem from “a world that is next to the world,” per the image Halbertal suggests. On the contrary, they fill a lacuna in the law, which aims to regulate cases that arise from lived reality itself. It thus seems that even in this case, the use of the “ways of peace” rationale indicates a more complex move which does not stem only from the intellectual urge of the Sages to refine theoretical legal concepts.

Precisely the latter example—the one that deals with the Passover offering—seems to be appropriate for a work that stems from a theoretical study whose purpose is to encompass and conceptualize the term “neighborhood,” by asking such questions as: Where does the offering take place physically? Over which areas of human activity does it extend? What are the social expectations of it? What sensitivities does it necessitate? And so on. Thus, it might seem that the catalyst for the creation of this halakhah was, to paraphrase Halbertal, an independent interest in the concept, for the sake of refining the notion of “neighborhood,” and without regard to any practical application.[[59]](#footnote-63) The teaching itself, which relates to the celebration of Passover with one’s neighbor, becomes a matter to be further expounded, regardless of the nature of the actions involved. However, R. Shimon carries out a fascinating double move, which diverts the discussion and returns it from a conceptual interpretive preoccupation with the concept of “neighborhood” to a discussion of practical significance. Unlike his colleagues, R. Shimon states that the commandment in the verse refers to “paschal sacrifice of the [subsequent] generations” and not only to the “paschal sacrifice of Egypt.” But observance of the commandment of the paschal sacrifice was no longer customary by the time of the Sages, as the practice ceased to take place following the destruction of the Second Temple. On the other hand, as we have seen, R. Shimon expanded the concept of “neighborhood” and applied it to the entire community, citing the “ways of peace” as a meta-halakhic concept expressing the purpose of the entire Torah. Therefore, it can be concluded that R. Shimon “utilized” the conceptual intellectual discussion to convey a practical, topical message regarding the relationship that should exist between members of the entire community. This being the case, it seems to me that the invoking of the “ways of peace” as a legal justification takes this case beyond the realm of theoretical study, returning it to what Halbertal defines as “instructions directed at shaping the world of doing, amending it and shaping it in proper patterns,” and as a “teaching that is supposed to express interests and values ​​and direct the nature of [human] activity and its results,” albeit in a manner more complex than legislation alone.

As we can see, positioning of the laws justified “for the ways of peace” according to Halbertal's model provides us with partial conceptual explanations regarding the way these laws are formed within the “Halakhic organism” of the Mishnaic period. However, we can also see that the rationale “for reason of ways of peace”—which is not a legal rule in itself, does not constitute a legal category in itself, is external to the rule it justifies, and works in different ways for each law—presents a somewhat more complex picture. This complexity obliges us to employ further conceptualizations in order to fully clarify the concept’s role and jurisprudential meaning. I will now propose such notions, grounding them in legal theory.

1. **Legal rules and principles in Anglo-American jurisprudence and Halakhah**

Yair Lorberbaum and Leib Moscovitz have both dealt with the place of rules and principles in Tannaitic halakhah.[[60]](#footnote-64) Lorberbaum utilizes the model of Ronald Dworkin[[61]](#footnote-65) to reexamine affinities between Aggadah and halakhah as two literary genres within Talmudic literature.[[62]](#footnote-66) Moscovitz, in his book *Talmudic Reasoning: From Casuistics to Conceptualization*,[[63]](#footnote-67) presents Dworkin's model as a conceptual theory through which he set out to examine the development of abstraction and conceptualization in the halakhah during the Tannaitic and Amoraic periods. In what follows, I will briefly outline the major differences between rules and legal principles according to Dworkin, and I will then present Moscovitz’s reservations about the full application of this model to what he calls “broad legal principles,” namely, a number of halakhic principles among which he includes the “ways of peace” enactments. Next, I will suggest another way to analyze the legal function of the “ways of peace” rationale, based on Joseph Raz's critique of Dworkin and using concepts proposed by Frederick Schauer (and, to some extent, Lorberbaum).

Dworkin argues that both rules and legal principles are directed to legal decisions in relation to legal obligations (and rights) in particular circumstances. They differ in the way they function within the legal system in fulfilling the purpose of charting a direction for the binding legal decision. Legal rules are applied in the form of “all or nothing.” That is, if the facts of the case described fall within the scope of the rule, then the rule applies to them and the legal answer it gives applies to them. On the other hand, if the facts do not fall within a rule’s scope, then the rule does not apply to them and does not contribute anything to the legal decision that should be made about them. Therefore, when rules conflict with each other, one of them must not be valid—not because it is not important within the wider framework of the entire legal system, but because it is less relevant to the case in question, and therefore it is considered “out of the game” for that case.

Principles, however, are more abstract, in the sense that they do not necessarily address any specific case or the facts associated with it. Consideration is not given by way of “all or nothing” but rather by way of apportioning weight—that is, measuring the weight and importance of the relevant principle with respect to all the considerations that must be taken into account by the “legal actor” (the legislator, judge, attorney, etc.) when discussing the case before him. When a principle conflicts with another principle, the relative weight of each of them in relation to the case in question must be taken into consideration. Dworkin acknowledges that that the judgment that a particular principle (or policy, which is a subcategory of principles for Dworkin) is more important than another principle cannot be a precise one, and such a decision may be controversial among litigants. That said, weight is an integral part of the concept of a “legal principle,” so the question that must be asked when considering a legal answer to a particular situation will relate to how important the principle is, or what weight it has with respect to all the considerations taken into account.[[64]](#footnote-68)

Moscovitz argues that, when dealing with the world of halakhah, we must treat the concept of a “legal principle” more flexibly than the way Dworkin speaks of it.[[65]](#footnote-69) At the same time, he chooses not to discuss what he calls “broad discretionary principles”—among which the enactments justified “for the ways of peace” are included[[66]](#footnote-70)—as legal principles. Moscovitz states that, in contradistinction to Dworkinian principles, “‘broad discretionary principles are […] goal- or policy-oriented laws, where the goals or policies are broad and indeterminate, and consequently capable of realization in different ways and to varying extents.”[[67]](#footnote-71) In addition, Moscovitz posits the following additional distinctions:

Broad discretionary principles [..] (1) usually function in an explanatory capacity rather than a prescriptive capacity. By contrast, Dworkinian principles usually function prescriptively, even if their prescriptive force is limited; (2) unlike Dworkinian principles, generally have absolute prescriptive force (even though they are usually invoked in an explanatory capacity[…]); the difficulties in applying such principles stem from the indeterminacy of the concepts they address, not from a lack of authority associated with such notions; (3) in contrast to Dworkinian principles, which generally aim at furthering particular policies or goals (e.g., equity), broad discretionary principles often reflect inner-halakhic considerations of an essentially formalistic, non-consequentialist nature, e.g., defining what constitutes a ‘house’ or ‘completion of a utensil.’[[68]](#footnote-72)

Although I agree with Moscovitz regarding the difficulty of comparing the “ways of peace” reasoning with legal principles as conceived by Dworkin, I think there is nevertheless room for a closer examination of this concept and the way it functioned in respect to legal rules and principles: First, because Moscovitz’s discussion of casuistics and conceptualization in the Mishnah does not distinguish between rules and reasons, nor between implicit and explicit reasons;[[69]](#footnote-73) and, as we have seen, “for reason of ways of peace” is not a rule but its reason. Second, I believe that the more refined formulations proposed by Joseph Raz can assist us in clarifying and better describing some of the inner fabric of the relationship between rules and principles as they are expressed in the laws justified “for the ways of peace.”

Joseph Raz has shown that legal rules and legal principles do not constitute a binary dichotomy but rather exist on a continuum within the legal system. Raz distinguishes between what he calls a “descriptive principle” and a “normative principle.”[[70]](#footnote-74) A “descriptive principle” is a kind of generalized, rather than detailed, abbreviation for various rules oriented toward similar ends. Raz cites as an example the principle of “freedom of speech,” which in fact refers to a variety of different rules aimed at ensuring freedom of speech.[[71]](#footnote-75) Alongside such a principle can also come a “normative legal principle,” which instructs the various authorities to act to ensure freedom of speech in any case brought for their decision, even when the case does not fall within the bounds of a defined rule. Such a principle is not an abbreviated description of an existing set of rules, but rather a principle that imposes an obligation, thus guiding the actions of the judicial authorities and administrative authorities in creating new rules—for the purpose of applying the principle.[[72]](#footnote-76) The difference between a rule and a normative principle lies, according to Raz, in the fact that rules determine relatively specific actions while principles determine very non-specific actions. An act is very non-specific if it can be performed on different occasions by carrying out many heterogeneous, generic actions. The distinction between rules and principles, according to this analysis, is based on hierarchy, since there is no sharp line distinguishing between acts that are specific and those that are non-specific. As a result, there will be many borderline cases in which it is impossible to say outright that we have before us a legal rule or a legal principle.[[73]](#footnote-77)

Raz points to several different purposes for which principles are used in the legal system. Some of them, as we will see below, seem to explain well the role played by the reasoning of the “ways of peace” in relation to the laws under discussion:

*Principles as grounds for interpreting laws.* […] Principles are used for the

interpretation of all laws, including other principles of a more restricted application. […] This role of principles is of the utmost importance since it is a crucial device for ensuring coherence of purpose among various laws bearing on the same subject. […]

*Principles as grounds for particular exceptions to laws*. Sometimes a law is not applied to a case on which it bears on the ground that to do so in those particular circumstances would sacrifice important principles; but the law is not thereby modified. […]

3. *Principles as grounds for making new rules.* When principles butnoother laws apply to a certain range of problems, courts act to regulate the area by making new rules.[[74]](#footnote-80)

**(D) Theories Relating to Legal Justifications: Application to Halakhah in General and to the “Ways of Peace” in Particular**

Among the many theoreticians and scholars who have tackled this topic, I find the research of Frederick Schauer[[75]](#footnote-81)—and in some cases also its application to the world of halakhah by Yair Lorberbaum—particularly relevant. Schauer’s central conceptualization relates to the phenomenon of attribution of explicit reasons to laws (as opposed to an unexpressed purpose that can be inferred implicitly from the law), as well as the outcomes and implications of this practice for the development of legal systems.[[76]](#footnote-82)

With the help of various theories and concepts in the philosophy of law, some of which are also applied in this article, Yair Lorberbaum has, in recent years, examined various halakhic approaches in several bodies of work.[[77]](#footnote-83) Lorberbaum utilizes the work of many theorists, including Dworkin, Hart, Raz, Gans, and Schauer, in constructing his concepts. [[78]](#footnote-85) Lorberbaum makes use of a central distinction proposed by Schauer—namely, the difference between “Jurisprudence of Rules” (“legal formalism”) and its extreme case, “rulism,” on one hand; and “Jurisprudence of Reasons,” on the other.[[79]](#footnote-87) Certain details of Lorberbaum’s important work are relevant to the present study, and I will return to these. However, the concepts addressed in the previous section, from Joseph Raz's work, as well as those I will mention here from Schauer's work, received very little attention from Lorberbaum, who dealt with other dimensions less directly relevant to the specific cases under discussion here. In what follows, I will employ Schauer’s distinctions, together with Raz’s conceptualization regarding legal rules and principles, in order to gain some additional insights.

In his article, “Giving Reasons,” Schauer begins 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, the supreme court, etc.) feel it necessary to explain their decisions (concerning legislation, a verdict, etc.):

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.[[80]](#footnote-88)

This description may well explain the very entry of the “ways of peace” justification into the halakhic discourse and why, in some of its 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-shekel tax was instituted against the Sages’ stance because the Sages’ socio-political weakness did not allow them to honor the halakhic imperative in full. Thus, following Schauer, I contend that in both cases—the half-shekel tax and the enactment in T. Pe’ah 3:1 mentioned in note 27—the Sages plainly sensed the need to justify a halakhah that represents a retreat from the proper halakhic idea due to lack of power to enforce it,[[81]](#footnote-89) and did so by putting forward an explicit reason: “ways of peace.” In Raz’s terms we can say that, in this case, the justification “for reason of ways of peace” functions as a legal principle in the category of “principles as grounds for particular exceptions to laws,” which he describes as follows: “Sometimes a law is not applied to a case on which it bears on the ground that to do so in those particular circumstances would sacrifice important principles; but the law is not thereby modified.”[[82]](#footnote-90) The law that stipulates the obligation to pay the half-shekel tax is not applied to priests, because in the specific socio-political circumstances prevailing during the period of the Mishnah, its application would harm other important principles, such as social solidarity, the status of priests in society, and even the social status of the Sages. And yet, the exclusion of the priests does not harm the law itself, since the binding law remains in force, and the justification is given for its actual non-enforcement only in this case. The same is true regarding the law in Tractate Pe’ah: The law itself is not violated or repealed, rather, the legal principle of the “ways of peace” makes it possible not to enforce it in certain cases.

Numerous halakhot that originate in the need to fill halakhic lacunae—those that I classify as belonging to the pragmatic approach—regulate matters in which the Sages allow those invoking the enactments to behave in a way that may carry some “risk” of transgressing the halakhah.[[83]](#footnote-91) 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.[[84]](#footnote-92)

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,” Schauer notes.[[85]](#footnote-94) That is to say, 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 considered when the rationale was devised and applied to the first case, as Schauer clarifies:

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 *y* as well. When put this way the claim seems trivially tautological, but its consequences are both interesting and problematic. [[86]](#footnote-95)

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.[[87]](#footnote-96) 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 the *tanna kamma* and R. Yose. As a “borderline case,” 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 have it, or does the act not square with the legal construction of this category and therefore entail the application of a different category—as in the *tanna kamma*’s thinking? This controversy can also be clarified in light of Schauer’s conceptual distinction between “Jurisprudence of Rules” and “Jurisprudence of Reasons,” which Lorberbaum applies to another controversy between Rabbi Yose and the Sages.[[88]](#footnote-97) The result of applying the halakhic rules of property law to these cases is that there is no halakhic prohibition against taking objects found by a deaf-mute, an idiot, or a minor; animals from a trap; or olives found under a tree from which a poor person is gleaning above, since these objects are not truly in possession of the individuals at hand. The *tanna kamma*, whose approach can be categorized as a “jurisprudence of rules” (legal formalism), is not prepared to apply a law to a case that does not fall within its scope. The *tanna kamma* is thus forced to enlist another halakhic rule, “for reason of ways of peace,” which is not actually appropriate to the circumstances, in order to reach the desired result—namely, the equation of taking these objects with “robbery.” The “ways of peace” justification functions here as a rule or legal principle motivating action, in line with Raz’s category of “principles as grounds for changing laws.” This principle, however, is not suitable for the cases at hand, because the evil involved in taking these objects lies not only in the provocation of disputes between people, but in that they are truly unworthy acts—that is, “robbery.” In contrast to the *tanna kamma*, R. Yose, who takes a “jurisprudence of reasons” approach, is not bound by the rigidity of the rules that determine what property is. R. Yose states, in deviation from the customary property rules, that these cases are “complete robbery.” Thus, he arrives at a just normative outcome, at the cost of possible violation of the law as a system. In other words, according to R. Yose, injustice in these cases prevails over methodological considerations that are reserved for adhering to the rules.

Is it possible to reach additional insights based on the concepts of Raz or Schauer in relation to the way in which R. Shimon uses the “ways of peace” rationale? As we have seen, R. Shimon sees the “ways of peace” justification as a meta-halachic principle that explains the purpose of the entire Torah. Accordingto the definitions proposed by Raz, it can be said that R. Shimon uses the “ways of peace” in the manner of “principles as grounds for interpreting laws.” R. Shimon’s innovative interpretation of the word “neighbor” in the verse from Exodus entails a new conception and contradicts the opinions put forward by the other Sages. While the other opinions interpreted the word “neighbor” in a physical sense—adjacent fields or residential entities separated by a roof, door, wall, etc.—R. Shimon renders it a more abstract concept, expanding the boundaries of neighborliness to incorporate everyone with whom a person comes into contact in daily life. What makes this definition possible is an innovative interpretation of the purpose of the law—that is, the proposing of a new reason for the rule, which changes the rule itself. In Schauer's terms, we can say that here, too, there is a difference between R. Shimon’s jurisprudential conception and the conception of the other Sages. While Ben Bag Bag and Rabbi act according to a “jurisprudence of rules,” and therefore attempt to refine the formal definition of the word “neighbor” in the verse to determine its applicability, R. Shimon acts according to a “jurisprudence of reasons.” Clarification of the purpose (i.e. the reason) of the rule as an integral part of the system of law in general (the Torah) leads him to propose an alternative definition of the rule, and as a result to change its outcome.

V. Conclusions

The expression, “for reason of ways of peace,” is used as a legal rationale for several laws in the Tannaitic literature. The expression itself does not originate either in the Torah or in Second Temple period literature. As we have seen, most of the laws it justifies—many of which are *takanot* (enactments)—were new laws that are not a commanded in the Torah. Among these laws, we found some to be created as part of a “normative thickening” of the basic components of a mitzvah from the Torah (e.g. the mitzvah of *pe’ah*, and ostensibly also the half-shekel tax, at least in the opinion of the Pharisees). Others were enacted to compensate for legal lacunae (such are most of the regulations in M. Gittin), or as a result of the development of the halakhic organism, which raised an increasing number of legal questions (some of which stem from lived reality—such as the disputes between the *tanna kamma* and R. Yose).

Although the rationale “for the ways of peace” appears in all of these halakhot, it has become clear to us that the conceptual attitude to this legal reason and the jurisprudential role it plays in the law differs from halakhah to halakhah. Our study of the various examples revealed that, among the Sages of the Mishnaic period, there were three ideological approaches with respect to the concept of the “ways of peace,” each of which also contains a different emotional dimension. The “with misgivings” approach uses it to justify a withdrawal from the religious idea due to socio-political power relations; the pragmatic approach sees in it a justification for creating new laws that would fill lacunae in the law regarding new situations; the positive approach conceives of it as a meta-halakhic idea that reflects the purpose of the normative corpus.

Along with the various ideological approaches, we have seen that the jurisprudential role of reasoning is also regarded differently by each of the different approaches. It is true that the laws which the reason “for the ways of peace” justifies serve for the most part as specific legal rules and not as an abstract principle. But the reasoning in itself is general in nature, and therefore it seems that the correct definition of its role—in terms of philosophy of law—would be the one which sees it as a legal principle that justifies binding rules. Yet, even as a legal principle, the reasoning does not function in the same way with respect to all of the rules. Each of the conceptual approaches we have seen employs this legal reasoning in a different jurisprudence manner. It is sometimes used to reinterpret an existing law, thereby reversing its legal outcome; sometimes it is used to justify the creation of a new rule; and sometimes it is invoked to exclude certain subjects to whom the law does not apply without the law itself being harmed. What was the factor that enabled such a diverse set of attitudes toward and functions of the same concept, within a single legal layer of the law (Mishnaic halakhah)? It seems to me that combined application of theoretical concepts taken from Halbertal, Shanks Alexander, Raz, Schauer, and Lorberbaum (who applies Schauer to halakhah), as delineated above, provides the necessary conceptual framework to answer this question. The characteristics of the concept as a “legal principle” which made it applicable to various functions within the legal system—according to Raz’s various categories—along with the directions of halakhic development and the catalysts for expansion of the halakhic organism in accordance with Halbertal’s model of halakhic development, explain the great diversity in cases and situations to which the Sages applied the concept as a justification for the halakhic solutions they created. Schauer’s distinctions regarding the constitutive moments that result from the use of explicit reason within the legal system and the way in which “generality”— which is one of the inherent characteristics of the use of legal reason—affects the internal development of the law, enabled us to uncover the processes that likely transpired in Tannaitic law over time. Despite the difficulty in determining the exact moment at which the “ways of peace” rationale was coined by the Sages, by following Schauer’s path we can speculate that concept was initially employed in the manner of the “with misgivings” approach, which needed this reason as an explicit justification to validate rulings. Along the way, and with the entry of this rationale into halakhic discourse, it was formalized and came to be perceived as justifying the creation of new laws—or reducing the scope of various existing laws—on the basis of the ideological principle it expresses—“ways of peace” between people and sectors in the community. The generality inherent in the concept, both as a principle and because of its specific content, qualified the reason, eventually, to be perceived as a meta-halachic principle underlying the entire legal system. As stated above, this proposal is a speculative one, but it coheres well with Halbertal’s characterization of the development of Halakha during the period of the Mishnah.

The method presented by Moshe Halbertal in relation to the study of Halakha as a legal phenomenon raises interesting questions that I have not discussed fully in this study. Halbertal calls for paying attention to the editing of literary units, such as chapters and tractates. The redaction of a collection of halakhot and its positioning relative to other halakhot or aggregates in the Mishnah may have theoretical and practical significance that transcends the content of each individual enactment.[[89]](#footnote-98) An investigation of the “ways of peace” unit in Tractate Gittin uncovering the underlying editorial considerations in the text may yield additional insights, both in relation to the ways in which the reasoning of “ways of peace” is perceived by the Sages, and as a representation of the general phenomenon of redacting halakhic units in the Mishnah. 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: Might the examination of the full set of enactments aggregated in M. 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*? On the other hand, does the fact that the reasoning “for the ways of peace”, as an explicit reason, is attached to almost every halakhah in the aggregate, and does not serve solely as an ideological framework that opens or closes the aggregate, have legal meaning or implications? 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 Mishnah, will be needed. I intend to devote further research to examining these questions.

1. . M. Shevi‘it 3:4 and 5:9, M. Shekalim 1:3, M. Gittin 8:9, M. Demai 4:2; T. 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, Kallah Rabbati 3:1; Mekhilta de-Rabbi Shimon Bar Yohai, Genizah fragment, New York, JTS ENA 1340.4. The fragment parallels the Epstein-Melamed edition of the *Mekhilta,* 9–10, and was published in Shraga Abramson, “A New Fragment of the Mekhilta De-Rabbi Shim‘on Bar Yoḥai,’” *Tarbiz* 41 (1971): 361–72; Menahem Kahana, *Manuscripts of the Halakhic Midrashim: An Annotated Catalogue* (Jerusalem: Israel Academy of Humanities and Yad Izhak Ben-Zvi, 1995), 46. For the entire fragment, see Shraga Abramson, *The Gnizah Fragments of the Halakhic Midrashim*, vol. 1. (Jerusalem: Magnes, 2005), 154–55. [↑](#footnote-ref-2)
2. . See Eliezer Bugard, “Mipenei darkhei shalom” (Master’s thesis, 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: Oxford University Press, 1997),238 n. 46. Würzburger argues the same way: Walter S. Würzburger, *Ethics of Responsibility: Pluralistic Approaches to Covenantal Ethics* (Philadelphia: Jewish Publication Society, 1994),49. See also Walter S. 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, NJ: Princeton University Press, 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 Ethics* 25 (2005): 55–77. [↑](#footnote-ref-3)
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., 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-4)
4. Moshe Halbertal, “The History of Halakah and the Emergence of Halakah” [Hebrew], *Dine Israel* 29 (2013): 1-23. [↑](#footnote-ref-5)
5. . 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. [↑](#footnote-ref-6)
6. . On the creative power of the redaction, see, for example: Avraham Walfish, “Shikulim sifrutiyim ba-arikhat ha-mishnah u-mashma‘uyoteyhem,” *Netu‘im* 1 (1994): 33-60; Avraham Walfish, “Misḥakey lashon ba-mishnah,” *Netu‘im* 2 (1995): 75–95; Moshe Halbertal, “David Hartman ve-ha-filosofiyah shel ha-halakhah,” in *Meḥuyavut Yehudit mitḥadeshet: ‘al ‘olamo he-haguti shel David Hartman*, ed. Moshe Halbertal and Moshe Idel (Tel Aviv: Shalom Hartman Institute and Hakibbutz Hameuchad, 2001), 13–35; Noam Zohar, *Be-sod ha-yeẓirah shel sifrut ḥazal* (Jerusalem: Magnes, 2007), esp. 6–17, 150–61, and the literature review there; Aaron Amit and Aharon Shemesh (eds.), *Melekhet Mahshevet: Studies in the Redaction and Development of Talmudic Literature* [Hebrew] (Ramat Gan: Bar-Ilan University Press, 2011). [↑](#footnote-ref-7)
7. . For an overview of research and various scholars’ views, see Vered Noam, *Megillat Ta‘anit: Versions, Interpretation, History* [Hebrew] (Jerusalem: Yad Izhak Ben-Zvi, 2003), 165–68. [↑](#footnote-ref-8)
8. . Ibid., 165. [↑](#footnote-ref-9)
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: Israel Academy of Sciences and Humanities, 2001), 72–76. For a reconstruction of MSS Parma, see Noam, *Megillat Ta‘anit*,165. [↑](#footnote-ref-10)
10. . Eyal Regev, *The Sadducees and Their Halakhah: Religion and Society in the Second Temple Period* [Hebrew] (Jerusalem: Yad Izhak Ben-Zvi, 2005), 132–37. [↑](#footnote-ref-11)
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 *Sifrei Bamidbar*. On *Sifrei Zuta* on Numbers, see Menahem I. Kahana, *Sifre on Numbers: An Annotated Edition* [Hebrew] (Jerusalem: Magnes, 2015), 67, 1176. [↑](#footnote-ref-12)
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], *Tarbiz* 31 (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: Clarendon Press, 1968), 6–9; Jacob Liver, “The Half-Shekel in the Scrolls of the Judean Desert Sect” [Hebrew], *Tarbiz* 31(1962): 20–21. [↑](#footnote-ref-13)
13. Mira Balberg, *Blood for Thought: The Reinvention of Sacrifice in Early Rabbinic Literature* (Oakland: University of California Press, 2017), 114–21. [↑](#footnote-ref-14)
14. . The translation follows the Hebrew text of Ms. Kaufmann. English translations of the Mishnah and Babylonian Talmud are based on Isidore Epstein (ed.), *The Soncino Talmud* [CD-ROM] (Chicago, IL: Davka Corp and Judaica Press, 1991-1995); and Michael Danby (trans.), *The Mishnah* (Oxford: Oxford University Press, 1933). [↑](#footnote-ref-15)
15. ; The term “tables”—*shulḥanot*—is derived from the Greek τραπεζίτη, 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. See Ze’ev Safrai, *Mishnat ’ereẓ yisra’el: masekhet shekalim* (Jerusalem: The E.M. Liphshitz College Publishing House, 2009), 70–74. [↑](#footnote-ref-16)
16. . Balberg, *Blood for Thought*, 120. [↑](#footnote-ref-17)
17. . 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*, ed. M. Benayahu,vol. 2 (Jerusalem: Yad ha-Rav Nissim, 1985), 126–27 and n. 84; and the discussion of Eliezer Pinczower, “Mishnah Masekhet Shekalim—A Critical Edition” [Hebrew] (PhD diss., Hebrew University of Jerusalem, 1998), 135–36. In conclusion, Pinczower 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 Pinczower, *Mishnah Masekhet Shekalim*, Appendix 11. [↑](#footnote-ref-18)
18. . See Hanoch Albeck, *The Six Orders of the Mishnah (Mo’ed)* [Hebrew] (Jerusalem: Bialik Institute and Dvir, 1958), 188. Moshe Assis believes that the Mishnah presents three views. See Moshe Assis, “Le-ferushah shel sugiyah aḥat be-yerushalmi shekalim,” in *Mehqerei Talmud: Talmudic Studies Dedicated to the Memory of Professor Eliezer Shimshon Rosenthal* [Hebrew], ed. Moshe Bar Asher and David Rosenthal (Jerusalem: Magnes, 1993), 397–98. [↑](#footnote-ref-19)
19. . A similar practice of Rabbi Yoḥanan Ben Zakai 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 Rabban 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, it is evident that Rabban Yoḥanan 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” [Hebrew] (Ph.D. Diss, Hebrew University of Jerusalem, 2019), 25–27. [↑](#footnote-ref-20)
20. . For additional disagreements between Sages and priests in the Temple era, see Daniel Tropper*,* “The Internal Administration of the Second Temple at Jerusalem” (PhD diss., Yeshiva University, 1970); Daniel Tropper, “Bet Din Shel Kohanim,” *Jewish Quarterly Review* 68 (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, “Polemics between Sages and Priests towards the End of the Days of the Second Temple,” *Moreshet Israel* 8 (2011): 37–53. [↑](#footnote-ref-21)
21. . Another halakhah that may be seen as a retreat by the Sages from their halakhic perception occurs in T. Pe’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 attempts to strike a balance between the landowner’s practical abilities and the requirements of the halakhah. 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’abad* Distinction” [Hebrew], *Dine Israel* 20–21 (2000–2001): 43–100. [↑](#footnote-ref-22)
22. . The following laws, for example, are reflects this approach: “An ‘Erub is placed in the room where it has always been placed” (M. Gittin 5:8); “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” (B. Ḥullin 141b). [↑](#footnote-ref-23)
23. . Another example may be seen in the passage in Y. 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 sieve or a hand mill or a stove, but she should not sift or grind with her.” R. Zeira harmonizes this halakhah 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 halakhah 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 Mishnah’s dispensation to lend implements to a woman who is suspected of not observing the sabbatical year. [↑](#footnote-ref-24)
24. . The order of these halakhotvaries in different manuscripts of the Mishnah; similarly, the opinion of R. Yose is missing in Halakhah 1 of the Kaufmann 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. [↑](#footnote-ref-25)
25. . For property acquisition by deaf-mutes, idiots, and minors, see M. Bava Kamma 4:4; 6:4. [↑](#footnote-ref-26)
26. . For property laws that deal with the acquisition of various objects, see M. Kiddushin 1:4–5. [↑](#footnote-ref-27)
27. . For a similar law concerning finding, see T. Ḥullin 10:13, in Moses S. Zuckermandel, *Tosephta* (Jerusalem: Wahrmann Books, 1970), 512. [↑](#footnote-ref-28)
28. . Y. Gittin 5:8 (47a–b), in Yaakov Sussmann (ed.), *Talmud Yerushalmi* (Jerusalem: Academy of the Hebrew Language, 2001), 1078; Y. Eruvin 7:6 (24c), idem., 485. In B. Gittin 61a, R. Hisda interprets the difference between the methods as follows: “What difference does it make? To reclaim [the object] in court.” [↑](#footnote-ref-29)
29. . The way rabbis in ensuing generations expressed R. Yose’s thinking—“The sages have made those who are not allowed—to be permitted” (see B. Gittin 30a, B. Bekhorot 18a, B. Bava Meẓia 12a–b)—indicates that, in their opinion, R. Yose does distort the letter of the law. [↑](#footnote-ref-30)
30. . On the place of “justice” in R. Yose’s halakhic view, see Avigdor Unna*, Itim Lamishnah: Studies in the Six Orders of the Mishnah* [Hebrew] (Jerusalem: Rubin Mass, 1982), 106–10. For an analysis of similar positions in a different disagreement between R. Yose and the *tanna kamma*, see Yair Lorberbaum, “On Rules and Reasons in Law and Halakhah” [Hebrew], *Jerusalem Studies in Jewish Thought* 26(2020):25–28. [↑](#footnote-ref-31)
31. . 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. [↑](#footnote-ref-32)
32. . 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. [↑](#footnote-ref-33)
33. . See n. 1 above. The exegesis is presented with small differences in Jacob Nahum Halevi Epstein and Ezra Zion Melamed (eds.), *Mekhilta D'Rabbi Sim‘on b. Jochai* (Jerusalem: Hillel Press, 1979), 10. [↑](#footnote-ref-34)
34. . 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-35)
35. . The translation is based on W. David Nelson, *Mekhilta De-Rabbi Shimon Bar Yohai: Translated into English, with Critical Introduction and Annotation* (Philadelphia: Jewish Publication Society, 2006), 16. I revised the translation in minor ways in accordance with Ms. Antonin 236.1. The translation is partly based on Genizah fragment New York JTS ENA 1340.4. [↑](#footnote-ref-36)
36. . 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. Yehudah 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 the *Mekhilta*, preceding those of R. Yehudah 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-37)
37. . 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. [↑](#footnote-ref-38)
38. . Liora Elias Bar-Levav, *The Mekhilta de­Rabbi Shimeon Ben Yohai on the Nezikin Portion* [Hebrew]*,* ed.Menahem Kahana (Jerusalem: Magnes, 2013), 147–48, 243–45, 318–38, especially 336. [↑](#footnote-ref-39)
39. . See Leib Moscovitz, *The Terminology of the Yerushalmi: The Principal Terms* [Hebrew] (Jerusalem: Magnes, 2009), 301–2. [↑](#footnote-ref-40)
40. . Moshe Halbertal, “David Hartman and the Philosophy of Halakhah” [Hebrew], in Avi Sagi and Zvi Zohar, eds., *Renewing Jewish Commitment: The Work and Though of David Hartman*, vol. 1 (Tel Aviv: Kibbutz Hameuhad, 2001), 13-36. [↑](#footnote-ref-41)
41. . Moshe Halbertal, “The History of Halakah.” [↑](#footnote-ref-42)
42. . Halbertal, “David Hartman”, 24. [↑](#footnote-ref-43)
43. . Halbertal, “The History of Halakah”, 1. [↑](#footnote-ref-44)
44. . The third stage—along with the methodological and jurisprudential questions that characterize it—is reflected, in our context, in the editing of the enactments “for the way of peace” as a legal unit in Tractate Gittin. I will deal with that stage elsewhere. [↑](#footnote-ref-45)
45. . Halbertal, “The History of Halakah”, 2-3 (translation mine). For differences between the characteristics of the sectarian laws that prevailed during the Second Temple period and the Halakhah of the sages, see idem, 6 n. 11. For a broader comparison between the two legal phenomena see idem, 3-8; for works dealing with the Halakhah of the Judean Desert sect (some of which also include a comparison with the halakhah of the Sages), see idem, 13, nn. 1-5. <\*\*I reversed the numbering here, please confirm> See especially Halbertal’s reference to the work of Yaakov Sussman on idem, 7, n. For Sussman’s study itself, see Yaakov Sussmann, “The History of Halakha and the Dead Sea Scrolls — Preliminary Observations on Miqṣat Ma'ase Ha-Torah (4QMMT)” [Hebrew], *Tarbiz* 59 (1990): 11-76. [↑](#footnote-ref-47)
46. . Halbertal, “The History of Halakah,” 11. It should be noted that the aspect of abstraction is related to questions that deal with the connection between law and generality, and more specifically to the jurisprudential field that deals with legal rules and principles and the field that deals with legal reasoning. Therefore, it will come up again in the discussions that follow. [↑](#footnote-ref-49)
47. . Ibid, 13. For the concept of ‘hard cases’ in legal theory, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), 131-149. Elizabeth Shanks Alexander analyzes and provides conceptual explanations for the casuistic pattern of the Mishnaic law. Shanks Alexander presents two types of cases that fall, as far as I understand, into the concept to which Halbertal refers in his remarks. One type is “highly improbable cases,” and a second type is “borderline cases.” Shanks Alexander’s remarks, to which I shall refer later in more detail, sharpen the distinctions proposed by Halbertal. See Elizabeth Shanks Alexander, “Casuistic Elements in Mishnaic Law: Examples from M. Shevu῾ot,” *Jewish Studies Quarterly* 10 (2003): 198-200. [↑](#footnote-ref-50)
48. . Halbertal, “The History of Halakah,” 14, 21-22. See also Halbertal, “David Hartman,” 21. Jeffrey Rubenstein also addresses some of the phenomena that Halbertal points out. Rubenstein deals with the processes of abstraction that take place within the framework of the formation of the world of Halakhah in the Mishnaic and Talmudic periods. See: Jeffrey L. Rubenstein, “On Some Abstract Concepts in Rabbinic Literature,” *Jewish Studies Quarterly* 4 (1997): 33-73. Like Halbertal, Rubenstein believes that one of the dominant reasons leading to these processes was the very theoretical study of the Beit Midrash (see idem, pp. 71-2). Although Rubenstein believes that the beginning of the process can be seen as early as the beginning of the Tannaitic period (in Yavneh), in his view it gains momentum towards the end of the Mishnaic period and during the Talmudic period. Such a conclusion also emerges in the work of Leib Moscovitz and those that followed him. See: Leib Moscovitz*, Talmudic Reasoning: from Casuistics to Conceptualization* (Tubingen: Mohr Siebeck, 2002). [↑](#footnote-ref-51)
49. . Halbertal, “The History of Halakah,” 15. [↑](#footnote-ref-52)
50. . Ibid, 23. [↑](#footnote-ref-53)
51. . Ibid, 16. [↑](#footnote-ref-54)
52. . Ibid, 17. [↑](#footnote-ref-55)
53. . Ibid. [↑](#footnote-ref-56)
54. . Ibid, 17-18. See also Rubenstein, “On Some Abstract Concepts,” 38. [↑](#footnote-ref-57)
55. . Halbertal, “The History of Halakah,” 23. [↑](#footnote-ref-58)
56. . Elizabeth Shanks Alexander, “Casuistic Elements in Mishnaic Law: Examples from M. Shevu*῾*ot,” *Jewish Studies Quarterly* 10 (2003): 189-243. [↑](#footnote-ref-59)
57. . Shanks Alexander, “Casuistic Elements,” 198-201. [↑](#footnote-ref-60)
58. . Ibid, 199. [↑](#footnote-ref-61)
59. . Halbertal, “The History of Halakah,” 22. [↑](#footnote-ref-63)
60. . See also Gerald Jacob Blidstein, “Moral Generalizations and Halakhic Discourse,” *S’vara* 2 (1991): 8-12. [↑](#footnote-ref-64)
61. . Ronald Dworkin, “The Model of Rules,” *University of Chicago Law Review* 35 (1967): 14-46. Dworkin developed his model from a critique of the positivist approach dominant in the philosophy of Anglo-American law, as formulated in Herbert Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961). 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 Review* 106 (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 14–15; and Frederick Schauer, *Playing by the Rules, A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Oxford: Clarendon Press, 1991). [↑](#footnote-ref-65)
62. . Yair Lorberbaum*,* “Reflections on the Halakhic Status of Aggadah,” *Dine Yisrael* 24 (2007): 29-64;Yair Lorberbaum, *In God’s Image: Myth, Theology, and Law in Classical Judaism* (New York: Cambridge University Press, 2015). Lorberbaum suggested that the Aggadah should be perceived as a genre that contains certain types of legal principles that are guided and applied in legal rules of the Halakhah; See also Yair 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. [↑](#footnote-ref-66)
63. . Moscovitz*, Talmudic Reasoning*. [↑](#footnote-ref-67)
64. . Against Dworkin's remarks, arguing that rules may indeed clash with each other, see Raz, “Legal Principles” 831-830. On precision in relation to the weighing of legal principles in each case on its own merits, when the same principle will necessarily be preferred in all cases of conflict between the same two principles, see idem, 833. [↑](#footnote-ref-68)
65. . Moscovitz, *Talmudic Reasoning*,34–35; 41–43. [↑](#footnote-ref-69)
66. . Ibid., 41-42 nn. 163–63. [↑](#footnote-ref-70)
67. . Ibid, n. 165. [↑](#footnote-ref-71)
68. . Ibid, n. 164. [↑](#footnote-ref-72)
69. . See also Lorberbaum, “On Rules and Reasons,” 46 n. 167. [↑](#footnote-ref-73)
70. . Raz, “Legal Principles,” 826-829. [↑](#footnote-ref-74)
71. . Such as the freedom to express different positions in public and the provision of information in public, which are limited only by rules prohibiting libel, non-disclosure of military secrets, etc. [↑](#footnote-ref-75)
72. . According to Raz, these are the principles to which Dworkin refers in his theory. [↑](#footnote-ref-76)
73. . Raz, “Legal Principles,” 838. [↑](#footnote-ref-77)
74. . Ibid, 839-841. [↑](#footnote-ref-80)
75. . Frederick Schauer, “Giving Reasons,” *Stanford Law Review* 47 (1995): 633–59; Frederick Schauer, “The Jurisprudence of Reasons,” *Michigan Law Review* 85 (1987): 847–70; Schauer, *Playing by the Rules*; Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, MA: Harvard University Press, 2009). [↑](#footnote-ref-81)
76. . See Schauer’s definition of “reason” in Schauer, “Giving Reasons,” 636. [↑](#footnote-ref-82)
77. # . Yair Lorberbaum, “What Would Please Them”; Yair Lorberbaum, “On the Rejection of Reasons in Halakhic Discourse: The Debate on the Reason for the Prohibitions on Marring the Corners of the Head and the Beard,” [Hebrew] *Jerusalem Studies in Jewish Thought* <Volume number should go here> (2017): 45-102; Yair Lorberbaum, “On Rules and Reasons.” <not forthcoming – you referred to the published version earlier>

    [↑](#footnote-ref-83)
78. . Chaim Gans, “Mandatory Rules and Exclusionary Reasons,” *Philosophia* 15 (1986): 373-394. [↑](#footnote-ref-85)
79. . Frederick Schauer, “Formalism,” *The Yale Law Journal* 97 (1988): 534-535. These distinctions relate to “hard cases,” in which the “jurisprudence of rules” usually tends to adhere to the rule and pay the price of injustice in the specific case, due to broad considerations such as legal system stability, legal clarity etc. In the same cases, “jurisprudence of reasons” would consider different reasons, and sometimes create additional rules to reach a just result. See Lorberbaum, “On the Rejection of Reasons,” 53. [↑](#footnote-ref-87)
80. . Schauer, “Giving Reasons,” 636–37. 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 Conceptual Observations,” *Melilah* 1 (2004): 1–61. Bernasconi does not deal with the underlying rationale of “ways of peace.” [↑](#footnote-ref-88)
81. . This contrasts with the stance in Moscovitz I quoted above. See “Talmudic Reasoning,” 42 n. 164. [↑](#footnote-ref-89)
82. Raz, “Legal Principles,” 840. [↑](#footnote-ref-90)
83. . 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. [↑](#footnote-ref-91)
84. . 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-areẓ* 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. [↑](#footnote-ref-92)
85. . Schauer, “Giving Reasons,” 638. See also Schauer, “The Jurisprudence of Reasons,” 864. [↑](#footnote-ref-94)
86. . Schauer, “Giving Reasons,” 636–42, 658–59, quotation at 641–42. See also Schauer, “The Jurisprudence of Reasons,” 864–65, for a condensed version of his remarks. Both articles highlight these issues. [↑](#footnote-ref-95)
87. . According to Halbertal’s description of the development of the halakhic organism, it can be seen that the formation of the normative field by adding new laws—within the category of “property” or outside it—raises new problems that are present within the implicit considerations of the two positions. Moreover, over time, as the Mishnah becomes a binding document, the disputed positions will become the subject of legal interpretation, which will raise more and more questions in relation to the meanings and practical implications of each. <not sure what you meant by ‘whiten’ here – check that the edit preserves your meaning.> [↑](#footnote-ref-96)
88. . Lorberbaum, “On Rules and Reasons,” 26-27 and n. 102. [↑](#footnote-ref-97)
89. . See also the studies referenced in n. 2 above. <This should be checked at the end to ensure it refers to the correct note.> [↑](#footnote-ref-98)