

On the Interplay of Rules, ‘Cases,’ and Concepts in Rabbinic Legal Literature: Another Look at the Aggadot on Honi the Circle-Drawer

Suzanne Last Stone

I. Introduction and Method

Those who encounter rabbinic legal texts for the first time are invariably surprised and often charmed by the editors’ interruption of a list of rules or of an intricate legal analysis with a well-developed story. Yet, were one sitting in an American legal classroom today, the discussion might well center almost exclusively on stories, whether the narratives of actually decided cases or invented stories, often playful or so improbable as to border on the absurd. This focus on both actual and hypothetical narratives remains one of the central features of American legal pedagogy today because the classroom aims to reconstruct the role of the ‘case’ in classical common law philosophy.

In formulating and transmitting legal information, legal systems ordinarily balance the competing demands of abstraction and concreteness, of rules formulated in precise and general terms and of cases involving factually detailed, specific situations. But the common law made such factually-specific narratives the exclusive centerpiece of its jurisprudence. In this other great oral law tradition, collective argument and debate over rules took place entirely through the device of the case – that is, through reflection on narrative accounts of social interaction, whether actual or fictional. The jurist drew on a stock of

Aggadot on Honi the Circle-Drawer

cases, employing an initial judgment of relevance, and then used the cases to test the validity, logic, or ambit of rules which emerged from the cases themselves. Thus, rules do not exist apart from cases nor are cases thought of as occasions for the application of prior, pre-existing rules, as is true in code-based systems. Instead, legal rules are discerned from the facts of the cases themselves – indeed, from the very case that calls for the application of a rule.¹ Moreover, actually decided cases are not embodiments of authoritative rules, or legally binding precedent, in classical common law thought. Cases function as examples rather than authoritative directives.² In classical common law, judges treated even decided cases as essentially hypotheticals, whether supporting hypotheticals, examples of a situation where the rule seems proper, or attacking hypotheticals, examples which suggest a potential exception to or modification of a rule by revealing its outer boundaries or challenging its inner logic or justice – and they used both to reason through the law.³

In past centuries, judges and theorists described the process of discerning rules from cases as one of discovering in them the unwritten, ‘long and immemorial’ law or ‘custom of the realm’ – that is, the law received from tradition.⁴ Thus, the cases were not themselves viewed as

- 1 See Frederick Schauer, “Is the Common Law Law?” *California Law Review* 77 (1989), 455-71.
- 2 See generally Gerald J. Postema, “Philosophy of the Common Law,” in Jules Coleman and Scott Shapiro (eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (New York: Oxford University Press, 2002), 588-622 (describing seventeenth-century common law philosophy).
- 3 See Arthur J. Jacobson, “Death of the Hypothetical,” *Stanford Literature Review* 9 (1992), 125-38 (describing the practice that existed until the mid-nineteenth century, when the doctrine of authoritative precedent developed); Melvin A. Eisenberg, *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1988), 99-103.
- 4 The relationship of common law to customary law is complex and cannot be discussed here. The notion captures the close relationship between law and the practices of the people. See generally J. W. Tubbs, *The Common Law Mind: Medieval and Early Modern Conceptions* (Baltimore: Johns Hopkins University Press, 2000).

Suzanne Last Stone

law but, rather, as evidence, pointing however indirectly or ambiguously, to the law. The transformation of the common law in the nineteenth century into a wholly written legal system, which gave rise to the doctrine of precedent,⁵ and the emergence of new jurisprudential theories,⁶ eventually led to the reclassification of decided cases as 'law' – although the common law method continued intact. Thus, today, common law reasoning is described as a reflective process, a form of collective legal reasoning, in which rules and concepts emerge from and are tested against real and hypothetical narrative situations.⁷ The story is pressed into service as a source of legal information and as a way to think through rules.

Needless to say, the common law method is inconsistent with fundamental premises of the theories of law known as positivism and formalism, giving rise to numerous counter-theories of law ranging from the legal realists⁸ to Ronald Dworkin's interpretive account of

- 5 On the reduction of the common law to a written legal system and, with it, the decline in treating prior-decided cases as hypotheticals, see Jacobson, "Death of the Hypothetical." The institutional setting of legal sources – not only oral versus written but also collaborative decisions (the American method) versus a ruling followed by diverse justifications by individual judges (the English method) – also bears on how authoritatively cases will be viewed within a common legal system. Thanks to Michael Dorf for putting this issue into a larger perspective.
- 6 In the eighteenth century, English philosophers such as Austin and Bentham rejected the idea that law was based on transcendent rational or moral principles and defined law, instead, as a social and empirical fact. Classical common law reasoning was a target of Bentham's critique. After the Civil War, jurisprudential positivism began to penetrate American legal culture, culminating in the late nineteenth century in Holmes's view of the common law as judicial law-making, enforced by the state.
- 7 The methodology of this reflective process has been analogized to John Rawls's description of 'reflective equilibrium' – the process of testing particular judgments against broader theories, and vice versa, with adjustments made along the way. See Brian Bix, *Jurisprudence: Theory and Context* (Durham, NC: Carolina Academic Press, 2004), 149.
- 8 See, e.g., Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930).

Aggadot on Ḥoni the Circle-Drawer

law⁹ to the theory of presumptive positivism.¹⁰ But it also provides an interesting challenge to the traditional view that fluid or ambiguous narratives, such as the aggadot, can enjoy no legal stature. Indeed, from the geonic period until today, one of the main objections to viewing aggadot as law is their lack of the precision so characteristic of rules.¹¹ Moreover, granting aggadot legal stature ran counter to the dominant conception of halakhah as a formalist and positivist legal system.¹²

Scholars are now challenging this received account by attempting to show that aggadot were viewed within the mishnaic and talmudic corpus itself as law and integrated with halakhic rules. Much of the innovative work has shown how the aggadot supply legal principles, organizing concepts, and values, around which the halakhot are formulated.¹³ Indeed, Anglo-American jurisprudential theories growing out of the common law tradition, such as that of Ronald Dworkin, who has been described as the best articulator of the reflective process of the classical common law period,¹⁴ figure large in this work.¹⁵ These new jurisprudential theories provide a conceptual model, unavailable until now, for classifying concepts, values, and principles as actual legal sources and not simply extra-legal material. Supplying concepts, values,

9 Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

10 Schauer, "Is the Common Law Law?"

11 See the statements of Rav Hai Gaon, cited in *Ṿtsar ha-Ge'onim* (B. M. Lewin, ed.; Haifa, 1928-1943), *Ḥagigah*, § 67, pp. 59-60.

12 See the discussion in Yair Lorberbaum's contribution to this volume.

13 Shlomo Naeh, "Creates the Fruit of Lips': A Phenomenological Study of Prayer According to Mishnah *Berakhot* 4:3, 5:5" (Hebrew), *Tarbiz* 63 (1994), 185-218, 206-13; Yair Lorberbaum, *Image of God* (Hebrew) (Tel-Aviv & Jerusalem: Schocken, 2004).

14 Postema, "Philosophy of the Common Law," 608.

15 See Yair Lorberbaum and Haim Shapira, "Iggeret ha-Shemad' la-Rambam: Vikuah Hartman-Soloveitchik Bir' ha-Filosofyah shel ha-Mishpat," in Avi Sagi and Tzvi Zohar (eds.), *Renewing Jewish Commitment: The Work and Thought of David Hartman* (Jerusalem: Shalom Hartman Institute, 2002), 345-73.

Suzanne Last Stone

and principles, however, does not exhaust the potential legal functions of aggadot and Anglo-American jurisprudential theories growing out of the common law tradition may be of use, as well, in understanding and describing these other functions. As Simon-Shoshan has noted in his study of narrativity in the Mishnah, the insertion of certain aggadot into the mishnaic legal corpus may reflect a conscious decision to transmit information about law through independent, alternative means – both through a rule and a personal exemplum (a factually specific ‘case’ of actual social interaction)¹⁶ – or to formulate law (as does the common law) “in a way that would allow maximum flexibility” for interpretation and application by later jurists.¹⁷

I want to build on this emerging scholarship by suggesting some conceptual parallels between the treatment of cases within the common law tradition and the treatment of certain aggadot in the rabbinic legal corpus which bear on two central issues in the study of the relationship of aggadah to halakhah:¹⁸ the legal authority of aggadot and the integration of aggadot with halakhic rules in the talmudic legal literature. I pursue these parallels here through a close study of the aggadot on

16 Moshe Simon-Shoshan, “Halachah Lema’aseh: Narrative and Legal Discourse in the Mishnah” (PhD diss., University of Pennsylvania, 2005), 181.

17 Ibid., 214.

18 The common law’s distinctive approach to the nature of law and legal reasoning has yet to be fully mined as a conceptual comparison by those who study rabbinic texts, despite several important structural similarities between these two traditions of debate about rules. The common law is essentially an oral law tradition engaged in for most of its long history by lawyers who occupied a role similar to that of clerics – direct appointees of the king who himself held authority from God – and who ate together, studied together, and debated together about the law. And it represents what is often referred to as a third way to understand law – differing in important respects from both natural law thought and classical legal positivism. In particular, the common law conception of rules as only presumptively binding until tested in the course of their application, in light of their congruence with social propositions, may provide a useful means for analyzing the distinction between ‘theoretical law’ (*halakhah*) and ‘law-to-be-applied’ (*halakhah le-ma’aseh*).

Aggadot on Ḥoni the Circle-Drawer

Ḥoni the Circle-Drawer. This aggadah is representative of a class of aggadot which resemble cases, but which Simon-Shoshan terms ‘ex-empla,’ because no clear-cut decision or ruling is attached to them.¹⁹ The class may be widened to include not only aggadot but also several biblical narratives which record the conduct of those who are viewed as participants in and carriers of the legal tradition, whether kings, rabbis, pious figures, or even sometimes the people. These stories are accompanied by an implicit judgment about the conduct reported – whether praise or blame – either in the narrative itself or by virtue of their inclusion, or sealing, in a canonical legal document such as the Bible or in the Mishnah. Indeed, it is common to classify these aggadot as a form of legal precedent, on the order of a judicial case, and the term *ma’aseh she-*, which introduces such aggadot, is often translated as case or precedent.²⁰

The legal authority of these aggadot in the rabbinic legal corpus is a scholarly puzzle. Were they viewed as an authoritative source of law; or as evidence pointing to the law, confirming or putting in question a legal conclusion resting on more conventional legal sources; or are they merely rhetorical ornaments to a legal conclusion derived independently? I suggest here that these aggadot occupy a role quite similar to that occupied by cases in the classical common law. There, cases occupied an interstitial role between examples – thus, constituting evidence pointing indirectly and ambiguously to the law – and a supporting or attacking hypothetical, a vehicle for reasoning through a rule. Thus, aggadic narratives are not directly authoritative; rather, they hint at a rule that has not been explicitly formulated. Moreover, once these narratives are juxtaposed to specific rules, as in the Mishnah, they often function like the case as hypothetical. A tension emerges that is

19 Simon-Shoshan, “Halachah Lema’aseh,” 109.

20 On the import of this term in the Mishnah, see Simon-Shoshan, “Halachah Lema’aseh,” 108-15; on the etymological extensions of the term, see Eliezer Segal, *Case Citation in the Babylonian Talmud: The Evidence of Tractate Nezikin* (Atlanta, GA: Scholars Press, 1990), 23.

Suzanne Last Stone

similar to the familiar one between rule and case, between an abstract formulation and a personal, particularist, concrete engagement with a fact situation, in which particular judgments are tested against broader propositions and vice versa. Thus, like the case as hypothetical, the aggadic incident often provides a means to illustrate, attack, or explore the outer boundaries, limitations, or conceptual underpinnings of a rule, which may contribute to the rule's later re-interpretation.²¹

Second, the 'rewriting' of cases in the common law, by subtle omission, extension, and elevation of certain details over others, so that a case can continue to serve as a precedent for or example of a rule, provides an interesting parallel to another puzzling phenomenon: the rewriting of earlier versions of aggadot, such as the mishnaic aggadah about Ḥoni, by amoraim or even the later talmudic editors so that the aggadah reflects and supports the legal conclusion reached in the Talmud about the scope of the mishnaic rule to which the aggadah originally was attached. The Ḥoni cycle of aggadot provides an excellent example of this process of harmonization. The original story in the Mishnah contributes to a particular reading by each Talmud of the mishnaic rule forbidding prayers for rain to cease to which the story was attached. Then the story is reworked in both Talmuds to reflect their respective re-interpretations of the scope of the mishnaic rule. The legal rule and the narrative 'case' are ultimately reconciled.

This effort to reconcile or harmonize the rule with the narrative 'case' resembles the common law method. Indeed, the reworking of rules and cases, one in light of the other, is an outgrowth of its reflective process. As with the Ḥoni example, this reflective process flows in two directions at the same time. Common law reasoning is a process

21 My argument centers on how the narrative functions over time. Whether this also reflects a conscious editorial policy of the Mishnah is impossible to determine. Nonetheless, the insertion of aggadot that seem to contradict the rule to which it is attached may be closely related to the editorial decision of the Mishnah to include dissenting opinions for future use. See discussion below, pp. 140-42.

Aggadot on Ḥoni the Circle-Drawer

that “allows judges to remake the existing doctrinal propositions in the process of applying them” and then announce that the rule really always was as it is now held to be and then apply it to the case at hand.²² At the same time that the import of a rule is subtly altered through reflection on the case at hand, the judge imaginatively re-reads and in essence re-writes prior cases in light of the newly formulated rule, by re-describing facts or subtly emphasizing certain facts over others, so that they can continue to be thought of as precedents. Thus, cases are transformed from attacking hypotheticals into supporting examples of the newly-formulated rule through a subtle re-reading of the facts of the case. In the common law, the process of rewriting cases is subtle; in the aggadot, it is blatant.

The reworking of the original aggadah in the later compilations so that the legal rule and the narrative report that relates to it are harmonized with one another is yet another piece of evidence bolstering the view that halakhah and aggadah are treated as an integrated unit in the talmudic literature.²³ This phenomenon is worthy of note in its own right because it contradicts a long history of scholarship insisting that halakhah and aggadah are divorced from one another or even that they go in opposite legal directions.²⁴ But this phenomenon also has implications for the study of aggadot as windows onto the cultural world of the redactors of these stories. Often, the multiple versions of aggadot appearing in rabbinic literature are studied as discrete literary units disconnected from the legal discussion on which they bear. Such external analyses tend to ascribe alterations in versions of a single story appearing in both the Palestinian and Babylonian Talmuds, for example, solely to the differing cultural contexts of the tradents or editors. Once

22 Schauer, “Is the Common Law Law?” 464.

23 See the discussion in Yair Lorberbaum’s contribution to this volume.

24 See, e.g., Shmuel Safrai, “The Attitude of the Aggada to the Halacha” (Hebrew), in Aryeh Kasher and Aharon Oppenheimer (eds.), *Dor le-Dor: From the End of Biblical Times up to the Redaction of the Talmud* (Jerusalem: Bialik, 1995), 215-34, 234.

Suzanne Last Stone

we see that the revisions are equally connected to the legal discussion of the rule on which the story bears, we must assess more carefully the precise role cultural context plays in explaining disparities between versions of an aggadah.²⁵ For example, Ḥoni is portrayed in a starkly critical light in the Palestinian Talmud, even more so than in the mishnaic account, while he is exalted in the Babylonian Talmud. Some scholars have interpreted the different portrayals of Ḥoni as a reflection of the differing attitudes in Palestine and Babylonia toward this type of charismatic figure who may have engaged in magic and performed miracles.²⁶ While it is possible that historical or cultural distinctions account for the differences between the two Talmuds, my analysis here suggests that the different portrayals of Ḥoni are connected to the respective positions each Talmud takes about the scope of the mishnaic rule to which the original story was attached. Finally, theology and social context itself are not solely external to the law but internal to it. First, as will emerge through analysis of the Ḥoni narrative in the next section, theological conceptions may shape the way in which the mishnaic rule to which the story was originally attached is later reinterpreted and, hence, plays a role in the way the aggadah is later reworked. Second, later reworkings of the Ḥoni aggadot by the talmudic editors also reflect the continued investigation into the larger theological and conceptual bases around which the mishnaic rules on

25 Cf. 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), 4 (noting how the historian's external point of view toward rabbinic halakhic literature often fails to take into account the internal viewpoint of the law). Her comment that historical and cultural information can only be extracted from rabbinic halakhic literature after taking into account the internal dynamic of the law is equally applicable to aggadic literature that is entwined with the legal discussion.

26 See, e.g., William Scott Green, "Palestinian Holy Men, Charismatic Leadership and Rabbinic Tradition," *ANRW II* 19.2 (1979), 619-47 (focusing on the disparity between the versions in the Mishnah and the Bavli).

Aggadot on Ḥoni the Circle-Drawer

prayers for rain were themselves formulated.²⁷ Accordingly, we need to recapture the legal factors that contribute to the shape aggadot about charismatic figures such as Ḥoni eventually take, as well as the legal significations of motifs embedded in such aggadot, before we can arrive at a balanced account of rabbinic attitudes towards them. In that sense, this essay is a companion piece to an earlier study of mine on one motif in the Ḥoni cycle of aggadot – his circle-drawing – in which I raised the question whether it is best understood as a magical rite or as a legal performance.²⁸

II. The Mishnah

The story of Ḥoni's prayer for rain has come down to us in at least three versions: in the Mishnah, the Palestinian Talmud, a baraita in the Babylonian Talmud, and possibly a fourth version in the Tosefta. Yet, despite the considerable attention given to the story,²⁹ scholars have not focused on its continuing relationship to the specific legal issue with

27 See below, pp. 144-47 and 153-54.

28 See Suzanne Last Stone, "Rabbinic Legal Magic: A New Look at Honi's Circle as the Construction of Legal Space," *Yale Journal of Law and the Humanities* 17 (2005), 97-123.

29 See, e.g., Green, "Palestinian Holy Men"; Gad B. Sarfatti, "Pious Men, Men of Deeds, and the Early Prophets" (Hebrew), *Tarbiz* 26 (1956-57), 126-48, 127-29; Menahem Hirschman, "Changing Foci of Holiness: Ḥoni and His Grandsons" (Hebrew), *Tura* 1 (1989), 109-18; Avraham Aderet, "Ha-Sippur be-Sefer ha-'Aggadah," *'Aleī Si'ah* 3 (1976), 170-81; Judah Goldin, "On Honi the Circle-Maker: A Demanding Prayer," *Harvard Theological Review* 56 (1963), 233-37; A. Buchler, *Types of Jewish Palestinian Piety from 70 B.C.E. to 70 C.E.* (New York: Ktav, 1968), 196-264; David Daube, "L'enfant terrible," *Harvard Theological Review* 68 (1975), 371-76; Gedalia Alon, *The Jews in their Land in the Talmudic Age* (trans. G. Levi; Jerusalem: Magnes, 1980), 199; M. B. Lerner, "Honi Ha-Me'aggel and Shimon b. Shetah," in *The World of the Sages* (I. B. Gottlieb, ed.; Tel Aviv: Everyman's University, 1983), Unit II; Saul Lieberman, "On Adjurations among the Jews" (Hebrew), *Tarbiz* 27 (1958), 183-89, 184; Shmuel Safrai, "The Teaching of the Pietists in Mishnaic Literature," *JJS* 16 (1965), 15-33.

Suzanne Last Stone

which it is entwined: when may one pray for an excess of rain to cease? In what follows, I trace the evolution of the Ḥoni story from the Mishnah through the two Talmuds, concentrating on how the story is successively reworked in light of the radically differing readings proffered in the two Talmuds of the Mishnah's puzzling rule that one may not pray for rain to cease.

They sound the shofar because of any public distress – may it never befall – but not because of too great an abundance of rain. Once they said to Ḥoni the Circle-Drawer, “Pray that rain may fall.” He answered, “Go out and bring in the Passover ovens that they be not softened.” He prayed, but the rain did not fall. What did he do? He drew a circle and stood within it and said before God, “O Lord of the world³⁰ your children have turned their faces to me, for I am like a member of the household before you. I swear by your great name that I will not move from this place until³¹ you have pity on your children.” Rain began falling drop by drop. He said, “Not for such rain have I prayed, but for rain that will fill the cisterns, pits, and caverns.” It began to rain with violence. He said, “Not for such a rain have I prayed, but for rain of goodwill, blessing, and graciousness.” Then it rained in moderation [and continued] until the Israelites went up from Jerusalem to the Temple Mount because of the rain. They went to him and said, “Just as you prayed for the rain to come, so pray that it may go away!” He replied, “Go and see if the Stone of the Strayers has disappeared.” Shimon b. Shetaḥ sent to him [saying], “Had you not been Ḥoni, I would have pronounced a ban against you. But what shall I do to you? For you importune God and he performs your will, like a son that importunes his father and he performs his will; and of you Scripture says, *Let your father and your mother be glad, and let her that bore you rejoice*” (Prov 23:25).³²

30 MS Kaufman has the words של עולם inserted interlineally.

31 Printed editions of the Mishnah read ער; MS Kaufman reads על.

32 mTa'an 3:8.

Aggadot on Ḥoni the Circle-Drawer

mTa'anit 3:8 states that the community cries out for any public distress other than an excess of rain. The context of the rule suggests that it forbids crying out even in situations of catastrophic rain. Crying out in cases of calamity is the very subject of this chapter of the Mishnah, which is concerned with the highest order of fasts,³³ and the rule not to cry out with respect to rain immediately follows a list of calamities for which crying out is obligatory. The narrative immediately follows the rule and is introduced with the standard formula *ma'aseh she-*. But what exactly is the relationship of the narrative report to the legal rule? Is the narrative report the source of or an illustration of the rule or does it, instead, contradict the rule? Both traditional commentators and academic scholars have sharply divided over this question,³⁴ in part because the narrative has gaps sufficient to render the facts themselves somewhat ambiguous. For example, did the people go up to the Temple Mount because the rain threatened to cause flooding?³⁵ And did Ḥoni accede to the people's request to pray? The text does not specify. Filling in the gaps in the text in either direction significantly alters the

33 See also *mTa'an* 1:6.

34 On the story as the source of or illustration of the rule, see Lerner, *World of the Sages*, 6-7 ("When the Mishnah cites a ruling and an incident together, it is almost certain the ruling has been derived from the case cited"); Simon-Shoshan, "Halachah Lema'aseh," 200. On the story as contradicting the rule, see E. Z. Melammed, "Ha-'Ma'aseh' ke-Makor la-Halakhah," in idem, *Essays in Talmudic Literature* (Hebrew) (Jerusalem: Magnes, 1986), 94-110, 104-105, and Maimonides in his commentary to this Mishnah. Still others have questioned whether the story bears any relationship to the legal rule at all. Thus Green ("Palestinian Holy Men," 628, 639-41), deemed it wholly irrelevant to its context, and sought other explanations for its insertion into the Mishnah rooted in rabbinic power struggles.

35 Thus, Simon-Shoshan ("Halachah Lema'aseh," 200) assumes that the people fled to the Temple Mount because the rain already caused significant flooding. And since Ḥoni refused to pray in response to the people's request, the narrative report illustrates the Mishnah's rule. The Mishnah cites the story, according to Simon-Shoshan, precisely to stress the importance of the rule against praying for even catastrophic rain to cease.

Suzanne Last Stone

relationship of Ḥoni's conduct to the rule, as the talmudic versions of the narrative later exploit.³⁶

If we refrain from filling in the gaps, however, the story reads quite clearly. Note that Ḥoni responds to an excess of rain twice in the story. First, when the rain falls torrentially, threatening to destroy the crops, he immediately prays for the rain to lessen. When the moderate rain arrives and continues to fall, Ḥoni is not reported to have prayed. Rather, he responds to the people's request that he pray for the rain to stop with the statement: "Go and see if the Stone of the Strayers has disappeared." The Stone of the Strayers was located in a high place. Its disappearance would signal the fall of torrential, life-threatening rain. Both these facts suggest that the continuing rain posed no immediate catastrophe for the people. The rain is specifically described as moderate, as opposed to the description of the initial rain as torrential, and the people may have simply sought shelter in the Temple's portico, rather than fleeing from a flood. Geographic realia, which play an important role in the later development of the Mishnah's rule, also reduce the likelihood that the continuing rain was immediately hazardous. Rather, the most straightforward description of Ḥoni's conduct, stated in rule-like terms, is that one may pray for rain to lessen so that it does not destroy the crops – as the torrents did – and one may pray for rain to cease if it is so violent that it erases the Stone of the Strayers, posing a danger to life and not only property, but one may not pray if the rain merely inconveniences and discomforts the people. In short, Ḥoni's law and that of the Mishnah are not the same.

Why then did the editor attach the story to the rule? From a literary and jurisprudential perspective, the inclusion of the narrative serves to underscore important conceptions around which the Mishnah's rules of

36 As Simon-Shoshan has observed ("Halachah Lema'aseh," 121-22), "Mishnaic stories often fail to explicitly articulate details that are crucial to the evaluation of the halakhic significance of a story. As a result, a given story can be alternatively interpreted as advancing two contradictory legal positions."

Aggadot on Ḥoni the Circle-Drawer

prayers for rain are structured.³⁷ For now, however, I wish to concentrate on the narrower doctrinal ramifications of the story's inclusion.

The simplest explanation is that the Mishnah, too, saw Ḥoni's conduct as a violation of the rule and turned the story into a precedent or illustration of the rule by attaching to it Shimon b. Shetaḥ's criticism of Ḥoni's conduct. Thus, the precedent attached to the mishnaic rule is not the exemplar of Ḥoni but, rather, Shimon b. Shetaḥ's rebuke. Another, related possibility is that the target of the Mishnah are the legal practices of the *ḥasidim*. Several scholars have identified Ḥoni as a *ḥasid*,³⁸ a member of the group of pietists known for their ethical

37 The entire tractate is structured around the conception of rain as curse or blessing and prayers and fasts as a dialogue between God and Israel motivated by the granting or withholding of divine blessing. See Avraham Walfish, "The Poetics of the Mishnah," in Alan J. Avery-Peck and Jacob Neusner (eds.), *The Mishnah in Contemporary Perspective* (Leiden: Brill, 2006), 2:153-89, 169-71. This dialogue between God and Israel is captured in the Ḥoni narrative "which is a kind of dialogue between Ḥoni and God, in which Ḥoni presents his demands before God and God responds with forms of rainfall that seem designed to express His unwilling acquiescence to these demands." *Ibid.*, 171. For further discussion, see below, pp. 145-46 and 153-54. On the post-destruction function of the narrative in transferring the power formerly located in the Temple to the location of where the holy man prays, see Hirschman, "Changing Foci of Holiness" and Stone, "Rabbinic Legal Magic."

38 See, e.g., Safrai, "Teaching of the Pietists"; Sarfatti, "Pious Men." One of the sources on which this identification is made is *tTa'anit* 2:13, which reads:

Once they said to one *ḥasid*: "Pray that rains may fall." He prayed and rains fell. They said to him: "Just as you prayed and they fell, so pray that they should cease." He said to them, "Go out and see. If a man stands at the summit of the Ofel and shakes his feet in the Kidron valley [stream], we will pray that the rains shall not fall, but we are certain that the Omnipresent will not bring a flood on the earth, as it says: *Never again shall the waters be brought as a flood* (Gen 9:11) and it says, *These days recall for me the days of Noah; as I swore that the waters of Noah's flood should never again pour over the earth, so now I swear to you never again to be angry with you or to reproach you*" (Is 54: 9).

Both the *ḥasid* and Ḥoni's prayers for rain succeed and both provide essentially the same response to the people's request to pray for the rain to

Suzanne Last Stone

behavior and intimacy with God, who had esoteric or special halakhot.³⁹ We do not have a record of the halakhah of the pietists; their laws are hinted at, rather, through the narrative accounts of their doings preserved in the legal literature. Indeed, a series of stories describes extraordinary figures, not only Honi but also Hanina b. Dosa, who safely approach God in prayer, in contravention of the rules of when and how one is allowed to pray.⁴⁰ Taken together, these stories implicitly recognize exceptions to the general rules of prayer for a certain class of people exemplified by Honi and Hanina b. Dosa, who are members of the divine household, the *ben bayit* of God, and can approach God at any time.⁴¹ In the context of prayer generally, Naeh has

cease: Go and see if the rain has reached very high and, hence, is catastrophic. The Toseftan passage contains one crucial addition missing in the Mishnah's story, which reappears in the Palestinian Talmud version: an explanation for the mishnaic rule. Catastrophic rain is a technical impossibility because God has promised never to revisit a flood and, hence, prayer for even seemingly catastrophic rain to cease impugns God's promise. See below, p. 145. The precise relationship of this Toseftan passage to the Mishnah is the subject of dispute. Sarfatti ("Pious Men," 126 n. 1) asserts that the passage is a later abridgment of the Mishnah, while others suggest that the Toseftan passage is independent from the Mishnah (Saul Lieberman, *Tosefta Kifshutah* [Jerusalem: The Jewish Theological Seminary of America, 1992], 5:1096) or, at least, a complete reworking of it. But cf. Shamma Friedman, "The Primacy of Tosefta to Mishnah," in Harry Fox and Tirzah Meacham (eds.), *Introducing Tosefta* (Hoboken, NJ: Ktav, 1999), 99-121, who stresses that Tosefta sometimes preserves earlier tannaitic traditions. Note that here the *hasid* seems to exemplify the mishnaic rule, unlike Honi in the Mishnah proper. If the Toseftan passage is not independent, it may reflect yet another attempt to reconcile the rule of the Mishnah with the narrative case. Alternatively, it may preserve an earlier version of the story, which lacks the details that transform the story into a challenge to the rule.

39 Berachyahu Lifshitz, "'Aggadah' and Its Role in the History of the Oral Law (*Torah She'Be'al Peh*)" (Hebrew), *Shenaton ha-Mishpat ha-Ivri* 22 (2003), 233-328; Naeh, "Creates the Fruit of Lips," 210-11.

40 Naeh, "Creates the Fruit of Lips."

41 Note that in the Bavli's expansion of the Hanina b. Dosa story on *bBerakhot* 34b, Hanina is also called a *ben bayit*.

Aggadot on Ḥoni the Circle-Drawer

shown that the rules of prayer are structured around certain assumptions limiting prayer to defined occasions when the sovereign permits it, which Ḥanina b. Dosa ignores. In the context of prayers for rain specifically, the rules of prayers and fasts are keyed, as Avraham Walfish notes, to rain as evidence of divine curse or blessing,⁴² which Ḥoni ignores. In his rebuke, Shimon b. Shetaḥ confirms Ḥoni's exceptional status as a member of the divine household. Whether his disapproval hinges on antipathy to such over-familiarity with God⁴³ or reflects a more general disapproval of recognizing exemptions from the general rule – that is, differential rules for different classes of people – is impossible to determine. Yet, a major motif emerging from stories featuring Shimon b. Shetaḥ is his insistence on one rule applicable to everyone, whether commoner or *ḥasid* or even king.⁴⁴ Thus, in citing the Ḥoni story together with the Shimon b. Shetaḥ lemma, which casts doubt on the legality of Ḥoni's conduct but, nonetheless, stops short of banning Ḥoni because God has signaled approval of Ḥoni's prayer, the Mishnah problematizes the practice of the *ḥasidim*. The Mishnah both underscores the general rule applicable to the masses – the community – while leaving as an open question the status of a disparate rule for exceptional people.

Alternatively, the Mishnah may have cited the exemplar of Ḥoni precisely in order to unsettle the rule and allow for limiting its ambit in the future. In this view, the story functions like an attacking hypothetical or an implicit dissent to the rule. Were the rule to be read in light of the narrative, rather than the other way around, the rule would not encompass immediately destructive rain. Rather, the rule would be

42 Walfish, "Poetics of the Mishnah," 169-71. See above, n. 37.

43 Note that in *bBerakhot* 19a Ḥoni is cited as one who behaves too familiarly with God (המגיס דעתו כלפי מעלה). See also Gedalia Alon's comment about the objection by the Sanhedrin to the intimacy of pietists, who were deemed to be like false prophets, in his *The Jews in their Land in the Talmudic Age*, 199-200.

44 See Lerner, *World of the Sages*, 64.

Suzanne Last Stone

limited to cases of burdensome rain that endures for too long, an interpretation which comports with moral, rather than theological, intuition. The use of aggadot to register implicit dissents to the rules is a common phenomenon. Indeed, narratives that contradict or challenge a rule appear in the Bible itself⁴⁵ and are interspersed throughout aggadic literature.⁴⁶ The precise function of such aggadot is a matter of speculation. Do they reflect a pedagogic agenda akin to the use of cases in the common law classroom to sharpen reasoning about rules⁴⁷ or akin to the common law philosophy of posing attacking hypotheticals to stimulate judicial consideration of alternative legal outcomes when applying the rule in concrete situations, or were they intended to form a basis for reformulation of the rule itself? In the specific context of the Mishnah, the inclusion of a narrative that conflicts with the rule may be in place of or hinting at an explicit dissent to the general rule.⁴⁸ The inclusion of dissents is part of the Mishnah's commitment to transmit a variety of sources which may be of later potential legal use and to allow

45 See, e.g., the examples cited by Robert Cover, "Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983), 4-68.

46 For a collection of examples from Genesis Rabbah, see Hanina Ben-Menahem, "Some Introductory Remarks on Genesis Rabbah and the Law," *Jewish Law Annual* 16 (2006), 135-53.

47 The role of legal pedagogy in the placement and reformulation of aggadot in the Bavli is worth further examination given Jeffrey Rubenstein's recent research situating the Bavli's redactors in a new form of social organization: the rabbinic academy – that is, in the *sitz im leben* of a 'legal classroom' – with its new emphasis on modes of argumentation. See Rubenstein, *The Culture of the Babylonian Talmud* (Baltimore: Johns Hopkins University Press, 2003), 16-38.

48 See Y. N. Epstein, *Introduction to the Mishnaic Text* (Hebrew) (3rd ed.; Jerusalem: Magnes, 2000), 1:595-606, suggesting that the Mishnah's insertion of a narrative conflicting with the general rule is intended to hint at an opposing view to the rule. Epstein explains the phenomenon in light of the Bavli's treatment of many such mishnaic narratives as abridged dissents lacking explicit attribution. (Thus, the Bavli questions: *ma'aseh listor?* and responds: *hassorei mehassera*, i.e., there is abbreviated language.) Melammed, "Ha-Ma'aseh' ke-Makor la-Halakhah," 102, following Epstein's general view, includes the Hōni narrative in this class.

Aggadot on Ḥoni the Circle-Drawer

for the possibility of redirection of the norm by future generations.⁴⁹ The editorial juxtaposition of the narrative to the mishnaic rule similarly enhances the flexibility of the law by allowing for re-interpretation of the rule itself in the future. As we shall see, the Bavli takes full advantage of this opening in the Mishnah.

This latter reading engenders other problems, however. If Ḥoni's conduct does not violate the mishnaic rule but, rather, serves to specify or limit the precise ambit of the rule, what occasions Shimon b. Shetaḥ's rebuke? It is possible, of course, that the original story about Ḥoni, including the Shimon b. Shetaḥ lemma, had nothing to do with this mishnaic rule. Thus, the editor may have drawn the Ḥoni narrative from a stock of stories and inserted it because of its relevance to the mishnaic rule, dragging with it the Shimon b. Shetaḥ lemma. In its original context, Shimon b. Shetaḥ's rebuke may have been aimed at other aspects of Ḥoni's conduct, as the later talmudic versions of the story suggest and as the rich scholarly literature on the topic has pursued.⁵⁰

In any event, the incorporation of this previous source into the context of the Mishnah now generates a tension between two conflicting precedents – that is, between two 'sage stories' or exempla collapsed into one narrative: Ḥoni's action and Shimon b. Shetaḥ's rebuke. The Palestinian and Babylonian Talmuds struggle with their bearing on the Mishnah's rule, the one adopting Ḥoni as the precedent and the other Shimon b. Shetaḥ, as they arrive at diametrically opposed understandings of the ambit of the mishnaic rule. The two Talmuds

49 m'Ed 1:5-6.

50 These include his initial, arrogant assumption of success, his demanding, coercive form of prayer, including the invocation of the name of God in his oath and the drawing of the circle, discussed in my "Rabbinic Legal Magic," and his assumption of intimacy with God. See also Goldin, "On Honi the Circle-Maker"; Daube, "L'enfant terrible"; Gidon Leibson, "Determining Factors in Herem and Nidui (Ban and Excommunication) During the Tannaitic and Amoraic Periods" (Hebrew), *Shenaton ha-Mishpat ha-Ivri* 2 (1975), 292-342, 299-300 (the crime of Ḥoni was using the name, citing Qumran parallels with punishment of banning).

Suzanne Last Stone

then rework the story in correspondingly different directions with Honi the villain of one and the hero of the other. Thus, the story is made to conform to the legal rule each Talmud endorses, so that, in the end, rule and case are reconciled again. Let us begin by examining the version of the Honi narrative in the Palestinian Talmud.

III. Palestinian Talmud

They once said to Honi the Circle-Drawer, "Pray for rain." He said to them, "Go, and take in the clay ovens used for Passover so that they may not be softened." The incident took place on the eve of Passover, and so it has been taught [in Megillat Ta'anit]: On the twentieth of that month [i.e., Adar], all the people fasted for rain and it came.

"And he prayed but it did not rain." [quotation from the Mishnah]: R. Yosé b. R. Bun said, "Because he did not come [before God] with humility." ...

"He said, 'This is not what I wanted, but rain for filling up cisterns, pits, and caverns.' It began to rain violently." [quotation from the Mishnah]: Shemuel taught, "[It poured out] as if from a wineskin."

"He said, 'This is not what I wanted, but rain of good will, blessing, and graciousness.' Now it rained the right way, until the Israelites had to flee from Jerusalem up to the Temple Mount because of the rain." [quotation from the Mishnah]: That implies that the Temple Mount was roofed over, and so it has been taught: There was a colonnade within the Temple portico.

"Now they said to him, 'Just as you prayed for it to rain, now pray for it to go away.' He said to them, 'Go, see whether the Stone of the Lost has disappeared.'" [quotation from the Mishnah]: What purpose did this Stone of the Lost serve? Whoever lost something would go and find it there, and whoever found something would bring it there.

He said, "Just as it is not possible for this stone to be blotted out of the world, so it is not possible to pray that the rain will go away.

Aggadot on Ḥoni the Circle-Drawer

Nevertheless, go and bring me a bullock for a confession.” They went and brought him a bullock for a confession. He put his two hands on it and said, “My Lord! You have brought evil upon your children, and they could not endure it. You brought good upon your children and they could not endure it. May it be your will to bring relief.”

The wind blew immediately, the clouds were scattered, the sun shone, and the earth dried out. They went out and found the wilderness full of truffles.

They asked R. Eliezer, “When may one pray that rain should go away?” He said to them, “If a man is standing on Keren Ofel and splashes his foot in the wadi of Kidron. [Then] we shall pray that the rain will stop. But we may be certain that the Lord of Mercy will never again bring a flood to the world, for it is said, *There will never again be a flood* (Gen 9:11), and it says, *For this is like the days of Noah to me: as I swore that the waters of Noah should no more go over the earth, so I have sworn that I will not be angry with you and will not rebuke you*” (Is 54:9).

Shimon b. Shetaḥ sent to him, “You should be placed under a ban, for if a punitive decree had been issued, as was the case in the time of Elijah, would you not have turned out to cause a public profanation of the Name? And all who cause a public profanation of the Name are subject to excommunication.”

Rabban Gamaliel sent to him, “If you place an obstacle before the public, you will turn out to bring a flood to the world. [That is to say,] will you not turn out to place an obstacle in the way of the public’s doing a religious duty? And whoever places an obstacle in the way of the public’s doing a religious duty is subject to excommunication.”

And [Ḥoni] said to [Rabban Gamaliel], “Does not the Holy One, blessed be he, annul his decree on account of the contrary decree of a righteous man?”

[Rabban Gamaliel] said to [Ḥoni], “Yes, the Holy One, blessed be he, does annul his punitive decree of the contrary decree of a righteous man. But he does not annul the decree of one righteous man on

Suzanne Last Stone

account of another righteous man who is his equal. But what shall I do to you? For you importune God like a son that importunes his father and he performs his will.”⁵¹

The Palestinian Talmud prefers a literal reading of the Mishnah and adopts Shimon b. Shetaḥ’s rebuke as the precedent pointing to the true import of the rule. After citing Ḥoni’s response to the people’s request, as reported in the Mishnah – “Go and see whether the Stone of the Lost has disappeared” – the Palestinian Talmud fills in the gap in the narrative. In this version, Ḥoni is made to say: “Just as it is not possible for this stone to be blotted out of the world, so it is not possible to pray that the rain will go away.” The rationale for this statement is supplied by the Palestinian Talmud immediately after describing Ḥoni’s conduct. Thus, the version continues: “They asked Rabbi Eliezer: ‘When may one pray that rain should go away?’” Rabbi Eliezer’s answer includes an explanation for the Mishnah’s counterintuitive rule (supplied also by the Tosefta).⁵² One can only pray for rain to cease when a man standing on the heights of Keren Ofel splashes his foot in the Kidron valley – that is, in a situation of extreme floods. Yet, “we may be certain that the Lord of Mercy will never again bring a flood to the world.” In short, that situation is a technical impossibility and, hence, praying for even seemingly calamitous rain to cease impugns God’s promise. Thus, the Palestinian Talmud eliminates the ambiguity launched by the citation of the Ḥoni story in the Mishnah, which might have led one to conclude that it is only legally problematic to pray for burdensome rain to cease.

The rationale for the mishnaic rule supplied here and in the Tosefta carries forward the theological-conceptual theme in the first chapter of the Mishnah that one only prays for rain when it is a sign of blessing and not a sign of curse. As Avraham Walfish has noted, “the times appointed [in the Mishnah] for reciting prayers for rain is not governed

51 yTa’an 3:9-11, 66d-67a.

52 See above, n. 38.

Aggadot on Ḥoni the Circle-Drawer

by the climatic and agricultural benefits that accrue from seasonal rain as much as by its theological overtones.”⁵³ Rather, by inserting the ‘sign of blessing/curse’ inclusio at the beginning and end of that chapter, the Mishnah’s redactor “indicates a connection between the prayer for rain and rain’s function as a barometer of divine pleasure and displeasure.”⁵⁴ This theme is continued here in the context of prayers for rain to cease.

The Palestinian Talmud also removes the ambiguity in the Mishnah about the legality of Ḥoni’s conduct altogether. In this version, Ḥoni accedes to the people’s request and prays for the rain to cease. But this is depicted as a knowing violation of the mishnaic rule. Ḥoni himself articulates the rule, filling in the ellipsis in the Mishnah, and then immediately asks for a bull of confession to be brought before praying for the rain to cease, arguably acknowledging in advance that his ensuing prayer is illegal. The Ḥoni narrative now becomes consistent with the mishnaic rule and his conduct once again serves as a precedent for the rule – but only because the judgment attached to Ḥoni’s conduct is now clearly blame. Indeed, the passage portrays Ḥoni throughout in a bad light, adding to the story that it did not rain at first because Ḥoni did not come before God in humility. Rebukes by various of his contemporaries are heaped on his head and these rebukes are phrased far more harshly than in the Mishnah’s version.⁵⁵

True, all the details in this version of the story which depart from the Mishnah’s narrative are not directed exclusively to the question

53 Walfish, “Poetics of the Mishnah,” 170.

54 Ibid.

55 PT has Shimon b. Shetaḥ explaining the basis for his criticism: Had the decree been punitive as in the days of Elijah, by swearing on God’s name, you would be forcing God to either rescind the decree or to violate Ḥoni’s oath, which binds the addressee of the oath, an act of impiety, bringing the public to a profanation of the name. Rabban Gamaliel’s criticism is enigmatic. See discussion below, p. 148. Ḥoni’s response and the counter-response seem to be an insertion with the subsequent response of Ḥoni addressed to Shimon b. Shetaḥ’s remarks and Shimon b. Shetaḥ’s reply.

Suzanne Last Stone

whether it is permissible to pray for rain to cease. Yet, on closer inspection, they all revolve around other legal and jurisprudential themes raised by the Mishnah's rules about prayers for rain. Thus, the specific grounds supplied in this version for Ḥoni's censure touch on yet another set of rules in the first chapter of *mTa'anit*: the respective obligations of the individual and of the community, the *yahid* and the *tsibbur*, to fast when the first rain doesn't fall. In stating the order of fasts, *mTa'anit* 1:4-7 specifies that individual people fast first, then the court enjoins a fast on the entire congregation, while single people resume fasting through the month of Nisan.⁵⁶ The order seems to be based on pragmatic considerations: not to overly burden the community unless an emergency situation is at hand. Yet, looked at through the lens of the Mishnah's aggadah about Ḥoni, the Mishnah's rules now read as support for turning not to mundane agents but, rather, to exceptional people of piety who have privileged access to God and whose merits may sway the divine judgment. Thus, the pitting of Ḥoni's oath against that of Elijah harks back to the notion of the exceptional, righteous individual with privileged access to God who may be able to lift the divine decree of drought. Yet, this turn to the exceptional individual itself is legally problematic because the Ḥoni story is attached to the chapter of the Mishnah detailing states of emergency when the Court decrees an immediate communal fast and the turn to individual agents is entirely dispensed with. This tension between the obligation of the individual versus that of the community underlies several of the additional details in the Palestinian Talmud's version of the Ḥoni narrative. The version emphasizes at the outset that the Ḥoni incident occurred on the eve of Passover – that is, at a time

56 Walfish ("Poetics of the Mishnah," 169) notes that this chapter of the Mishnah is composed of two pre-existent collections, 1:4-7 and 1:1-3. The latter deals with prayers for rain which take place every year while the former describes the fasts designed to bring rain during a year of drought. Different word-pairs mark off the two, with 'mention-ask' repeated throughout 1:1-3 and 'individual-community' throughout 1:4-7.

Aggadot on Ḥoni the Circle-Drawer

when the turn to individual agents is not operative.⁵⁷ And Rabban Gamaliel, in this version of the story, seems to suggest that Ḥoni's 'sin' lies precisely in acting as an agent of the people and thereby usurping the public's obligation to cry out.⁵⁸ Moreover, one of the key questions under the surface of the story is: Who has the authority to initiate prayers for rain – the people themselves by turning directly to exceptional individuals or the rabbis by decreeing a public fast? The contest between Ḥoni and Shimon b. Shetaḥ is also framed as a power struggle over who decrees or initiates the prayers. Thus, in the Palestinian Talmud, Rabban Gamaliel and Shimon b. Shetaḥ debate whether Ḥoni had authority to decree vis-à-vis God but, also, perhaps, vis-à-vis themselves.

IV. Babylonian Talmud

“It happened that the people said to Ḥoni the Circle-Drawer etc.” [quotation from the Mishnah]: Our Rabbis have taught: Once it happened that the greater part of the month of Adar had gone and yet no rain had fallen. The people sent a message to Ḥoni the Circle-Drawer, “Pray that rain may fall.” He prayed and no rain fell. He thereupon drew a circle and stood within it in the same way as the prophet Habakkuk had done, as it is said, “I will stand upon my

57 And even if this is a case where the *yahid* resumes praying until the end of Nisan, it still would no longer apply once drops of rain are produced. *mTa'anit* 3:1-2 states that this order is only used when the first rainfall is withheld and has not fallen by the 17th of Ḥeshvan. In cases of emergency, however – if the crops fail or the rain ceases for forty days between rainfalls – they immediately cry out. That is, the court immediately declares a public crying out and no individuals fast first because it is a state of emergency.

58 In the Palestinian Talmud, Rabban Gamaliel states enigmatically that Ḥoni has caused the people to sin by preventing them from performing a religious obligation. The relationship of Ḥoni's acts to the question of communal agency deserves further study.

Suzanne Last Stone

watch, and set upon me the tower” (Hab 2:1). He exclaimed before God, “Master of the Universe, your children have turned to me because [they believe] me to be a member of your household. I swear by your great name that I will not move from here until you have mercy upon your children!” Rain began to drip and his disciples said to him, “We look to you to save us from death; we believe that this rain came down merely to release you from your oath.” Thereupon he exclaimed before [God], “It is not for this that I have prayed, but for rain [to fill] cisterns, ditches, and caves.” The rain then began to come down with great force, every drop being as big as the opening of a barrel and the Sages estimated that no one drop was less than a *log*. His disciples then said to him, “Master, we look to you to save us from death, we believe that the rain came down to destroy the world.” Thereupon he exclaimed before [God], “It is not for this that I have prayed, but for rain of benevolence, blessing, and bounty.” The rain fell normally until the nation [in Jerusalem] were compelled to go up [for shelter] to the Temple Mount because of the rain. [His disciples] then said to him, “Master, in the same way as you have prayed for the rain to fall pray for the rain to cease.” He replied, “I have it as a tradition that we may not pray on account of an excess of good. Despite this, bring unto me a bullock for a confession.” They brought unto him a bullock for a confession and he laid his hands upon it and said, “Master of the Universe, your people Israel whom you have brought out of Egypt cannot endure an excess of good nor an excess of punishment; when you were angry with them, they could not endure it; when you showered upon them an excess of good they could not endure it; may it be your will that the rain may cease and that there be relief for the world.” Immediately the wind began to blow and the clouds were dispersed and the sun shone and the people went out into the fields and gathered for themselves mushrooms and truffles. Thereupon Shimon b. Shetaḥ sent this message to him, “Were you not Honi I would have placed you under a ban; for were the years like the years [of famine in the time] of Elijah, in whose hands are the keys of rain, would not the name of Heaven be profaned through

Aggadot on Ḥoni the Circle-Drawer

you? But what shall I do to you, who acts petulantly before the Omnipresent yet He grants your desire, as a son who acts petulantly before his father and he grants his desires; thus he says to him, 'Father, take me to bathe in warm water, wash me in cold water, give me nuts, almonds, peaches, and pomegranates,' and he gives them unto him. Of you Scripture says, *Let thy father and thy mother be glad and let her that bore thee rejoice*" (Prov 23:25).

Our Rabbis have taught: What was the message that the Sanhedrin sent to Ḥoni the Circle-Drawer? [It was an interpretation of the verse], *You shall also decree a thing, and it shall be established unto thee, and light shall shine upon thy ways* (Job 22:28). "*You shall also decree a thing: You have decreed [on earth] below and the Holy One, Blessed be He, fulfills your word [in heaven] above. And light shall shine upon thy ways. You have illumined with your prayer a generation that has sunk low. For the humble person He saves. You have saved by your prayer a generation that is not innocent. Yea, He shall be delivered through the cleanness of thy hands. You have delivered it through the work of your clean hands.*"⁵⁹

By contrast, the Babylonian Talmud eventually concludes that the Mishnah's report of Ḥoni's conduct reflects the true import of the mishnaic rule. The Bavli assumes that Ḥoni's conduct reflects the halakhah⁶⁰ and it discerns this halakhah both by reformulating the basis for the mishnaic rule and by locating support in a baraita. The underlying assumption driving the Bavli is that the mishnaic rule cannot possibly mean to include catastrophic rain. Unlike the land of Israel, where extreme flooding is unlikely given the mountainous terrain,

59 bTa'an 23a.

60 The Bavli's approach here should be compared to its treatment of other mishnaic narratives conflicting with the general rule as hinting at previously-stated, but omitted, alternative formulations of the rule. See n. 48. See also Simon-Shoshan ("Halachah Lema'aseh," 181), who notes that the exempla cited in the Mishnah are not viewed as independent modes of transmitting halakhah by the Bavli. Rather, they must somehow embody a previously stated halakhah.

Suzanne Last Stone

Babylonia is a low-lying area. Indeed, any excess rain, not only torrential rain, is potentially hazardous. Thus, the Bavli, in the legal discussion that precedes the citation to the story, states: “In the Diaspora, we cry out” and cites a baraita as support. At the same time that the Bavli confines the literal import of the Mishnah’s rule to place, it transforms the Mishnah’s rule into a larger abstraction capable of general application.⁶¹ The Mishnah mentions rain as but one example of a more general rule not to cry out for an excess of good, a rule the Bavli finds support for in a scriptural verse, and rain is not an excess of good in Babylonia. Because the Bavli has replaced the rationale offered in the Palestinian Talmud (and the Tosefta) for the Mishnah’s rule – catastrophic rain is a technical impossibility and thus praying for rain to cease impugns God’s promise never to revisit a flood (a rationale applicable everywhere) – with an alternative rationale – not to pray for an excess of good – the Bavli is able to reformulate the Mishnah’s rule as follows: One may pray for torrential rain to cease everywhere; praying for merely burdensome rain to end is forbidden; and one may pray for abatement of any excessive rain in Babylonia (22b). In short, the Bavli adopts Ḥoni’s alternate version of the rule, as narrated in the Mishnah.

The baraita version of the Ḥoni narrative coincides with the Bavli’s reinterpretation of the Mishnah’s rule. Although it is impossible to determine with certainty whether the baraita version the Bavli possessed is a major stimulus for this reinterpretation or whether the baraita itself was reworked by the Bavli’s redactors to coincide with the Bavli’s reinterpretation of the Mishnah’s rule, the latter seems far more likely here.⁶² The Bavli’s reformulation of the Mishnah’s rule is now

61 On whether such talmudic attempts to identify the implicit conceptual underpinnings of tannaitic casuistic rulings reflect actual tannaitic legal reasoning, see Leib Moscovitz, *Talmudic Reasoning: From Casuistics to Conceptualization* (Tübingen: Mohr Siebeck, 2002), 68, and 47-97.

62 On the reworking of baraitot by the redactors of the Bavli, see Rubenstein, *Culture of the Babylonian Talmud*, 10, and sources cited on p. 165.

Aggadot on Ḥoni the Circle-Drawer

reported by Ḥoni himself: “I have it as a tradition that we may not pray on account of an excess of good.” The Bavli also removes all the ambiguities in the Mishnah’s narrative in order to make Ḥoni the carrier of the true legal rule. In this version, Ḥoni explicitly states that it is improper to pray for merely burdensome rain to end because such rain is an excess of good. Thus, the true import and ambit of the Mishnah’s legal rule was transmitted, according to the Bavli, through the report of Ḥoni’s deed. In other words, the Bavli assumes that the Ḥoni narrative exemplifies the precise rule that the Bavli extracts from the Mishnah. By having Ḥoni violate the reformulated mishnaic rule he himself articulates (by, nonetheless, praying for the burdensome rain to cease), the Bavli is also able to account for the counter-precedent of Shimon b. Shetaḥ’s rebuke. (The Shimon b. Shetaḥ lemma is also reworked to supply alternative explanations for the rebuke.)

Because Ḥoni faithfully transmits through example the true import of the Mishnah’s rule, he is the hero of the Bavli’s version of the story. And despite Ḥoni’s formal transgression of the rule, the Bavli portrays him as a great man. Indeed, the Bavli’s portrayal of the character of Ḥoni contrasts sharply with the version in the Palestinian Talmud. In the Palestinian Talmud, the failure of Ḥoni’s initial prayer for rain is due to his lack of humility; in the Bavli, Ḥoni’s conduct is compared to that of the prophet Habakkuk, whose circle-drawing is held to be the precedent for Ḥoni’s action. In the Palestinian Talmud, Rabban Gamaliel joins Shimon b. Shetaḥ in rebuking Ḥoni; in the Bavli, the Sanhedrin approve of Ḥoni’s conduct and the Sanhedrin has the last word in the story. Thus, Ḥoni’s act is seen from their viewpoint, unlike in the Mishnah and in the Palestinian Talmud, where Ḥoni’s act is seen from the viewpoint of Shimon b. Shetaḥ. The Palestinian Talmud sharpens the language of Shimon b. Shetaḥ’s original rebuke. The Bavli not only softens the rebuke, but the Sanhedrin also plays on its words, turning it into praise.⁶³ Thus, both the rule and the case become reconciled and the details of the story are fully compatible with the legal analysis.

63 The Mishnah has Shimon b. Shetaḥ declare that Ḥoni must be

Suzanne Last Stone

Finally, the Bavli also seems intent on undermining here the theological focus of the Mishnah's rules regarding prayers for rain altogether. The Bavli unsettled the specific mishnaic rule forbidding prayers for rain to cease by suggesting a naturalistic explanation for the Mishnah's rule keyed to geographic realia – in contrast to the theologically-driven explanation proffered in the Jerusalem Talmud and Tosefta. Similarly, the Bavli adds details to the Ḥoni story and invokes other related aggadot throughout the tractate, which put in question the basic theological-conceptual principles that seem to underlie the mishnaic rules. As noted, the Mishnah's rules seem keyed to God's pleasure and displeasure – in which man's rituals below respond to heaven's acts above. Implicit in this conception is the further notion that man's rituals below also can determine heaven's acts above. The thrust of numerous aggadot in this tractate of the Bavli seem aimed at unsettling the connection between man's acts below and God's acts above by stressing that rain ultimately comes through an act of mercy from God and not as a result of the legal mechanics of praying and fasting.⁶⁴ Thus, parts of the reworked story emphasize that Ḥoni is not coercing God but invoking his mercy. Indeed, the very opening of the tractate in the Bavli prefigures this problem by citing R. Yoḥanan's teaching that there are three keys, including that of rain, which are not entrusted to human agents (2a). In other words, no human has mastery over the rain. Nonetheless, this and the other stories in the Bavli preserve a certain tension centering on the question whether certain exceptional people – the *ben bayit* – might somehow, nonetheless, control the rain. Thus, in the background of the statement in this tractate about the key for rain is

excommunicated: (*tsarikh `attah linaddot*), while here, Shimon b. Shetaḥ merely says he would have decreed excommunication (*gozerni `alekha nid-dui*). The Sanhedrin turns this phrase from rebuke to praise. The scriptural verse the Sanhedrin cites reads: *ve-tigzar `omer ve-yakom lakh*. In other words, Ḥoni is the one who issues decrees, not Shimon b. Shetaḥ, and these decrees are worthy of praise.

⁶⁴ See, e.g., the story of Nakdimon, *bTa'anit* 19b-20a, and the stories of Ḥoni's grandsons, *bTa'anit* 23a-b.

Aggadot on Ḥoni the Circle-Drawer

the story of the prophet Elijah's possession of the key for rain,⁶⁵ which is alluded to explicitly in this version of the Ḥoni story.

V. Conclusion

As we have seen, both Talmuds treat the mishnaic narrative as an example of the Mishnah's rule, although the rule itself is interpreted differently by each Talmud. How much the Mishnah's version of the narrative itself contributed to the legal conclusion each Talmud eventually reaches is open to question. Certainly, neither the Palestinian nor the Babylonian Talmud presents the narrative report as an independent, conclusive legal source. Yet, the narrative is not merely a rhetorical ornament. Rather, the narrative seems to function as confirming or negative evidence for a legal conclusion about the true import of the mishnaic rule which rests on more conventional legal sources, such as the baraita invoked in the Bavli; on different conceptions of rain as potential curse or blessing; and, from a legal realist perspective, on different geographic realia. Thus, like cases in classical common law, the narrative is seen as pointing, ambiguously and indirectly, to the law. And, like the common law, at the same time that the doctrinal proposition is remade in light of the case, the narrative case is imaginatively re-read so as to preserve the narrative as a precedent for the reformulated mishnaic rule. This reworking of rules and cases, one in light of the other, is, as I suggested earlier, part and parcel of the reflective process of the common law. At common law, the judge remakes the existing doctrinal proposition and then treats the reformulation as if it were the original import of the rule. At the same time, the judge 're-writes' prior cases in which the original doctrinal proposition was set so that the case now more clearly supports the newly formulated version of the rule. Prior cases are transformed into supporting examples of the newly-formulated rule through a subtle re-

⁶⁵ See bSan 113a.

Suzanne Last Stone

reading of the facts of the case in order to allow the cases to continue to serve as precedents. The motivations for this practice at common law are complex, ranging from maintaining the appearance of the rule of law by suggesting that newly-formulated rules really were implicit in and are merely continuing the true thrust of prior legal sources;⁶⁶ entrenching a legal tradition through narrative accrual; and preserving as much law as possible for later use.⁶⁷ Some of these motivations also may be at work in the 'rewriting' of aggadot so that they continue to be integrated with the legal rule to which they were originally attached. Indeed, we might see this process of harmonization, which is quite striking in the baraita version of the Hōni narrative presented in the Bavli, as part of a larger trend in Babylonian circles to smooth out disparate sources and narrow controversy.⁶⁸

66 On rare occasion, the United States Supreme Court itself has called attention to these common law maneuvers. In elaborating how to distinguish 'new law,' which cannot be challenged on a habeas corpus petition, from 'old law' – that is, a rule implicit in or controlled by prior precedents, which can form the basis for a petition – the Court noted that judicial opinions describing a rule as controlled by prior precedent are not determinative of the issue. There must be an independent investigation of the status of the rule because judicial opinions frequently present rules as continuations of prior law even where they are not. See *Butler v. McKellar*, 494 U.S. 407 (1990).

67 Jack Balkin, "Constitutional Interpretation and the Problem of History," *NYU Law Review* 63 (1988), 911-54.

68 See Avraham Goldberg, "Derakhim shel Tsimtsum Maḥlokot 'Etsel 'Amora'e Bavel," in Yaacov Sussman and David Rosenthal (eds.), *Mehqerei Talmud 1* (Jerusalem: Magnes, 1990), 135-53 (referring to the Bavli).