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The theme of the English section of this volume grows out of a conference on “The Relationship Between Halakhah and Aggadah” held at Harvard Law School in May 2005. The conference proceedings presented here, supplemented by several essays solicited for this volume, share a common perspective. Each, in different fashion, challenges the view, long dominant in the academy, that halakhah and aggadah are two separate discourses – the one legal and the other literary. Thus, the essays reflect a significant re-conception of the relationship between halakhah and aggadah, which might be termed ‘aggadah as halakhah.’ Before offering a brief summary of the contributions to this volume, it is important to place this methodological turn in an appropriate perspective.

Aggadot appear in the heart of the classical rabbinic legal corpus – in the Mishnah, Tosefta, halakhic Midrashim, and the two Talmuds – and, according to the Palestinian Talmud, are one of the components of the oral law transmitted to Moses at Sinai.¹ Yet, the most common definition of aggadah is a negative one: everything that is not halakhah.² This definition can be traced to the post-talmudic geonim.³ The geonim are also responsible for the classic statement of the legal import of the aggadot, namely that “aggadah should not be relied upon.”⁴ Hai Gaon explains that the aggadot enjoy no legal authority because they

1 See yPe'ah 2:6, 17a.

2 See, e.g., Leopold Zunz, *Ha-Derashot be-Yisra'el ve-Hishtalshelutan ha-Historit* (trans. M. Zak; Jerusalem: Bialik, 1954), 32-34.

3 See Shemuel ha-Nagid, *Mevo ha-Talmud* (Bat-Yam: Sh. Kohen-Duras, 1991), s.v. “Haggadah.”

4 See, e.g., the statement of Hai Gaon in *’Otsar ha-Ge'onim, Berakhot* (B. M. Lewin, ed.; Haifa, 1928-1943), Responsa Section, § 357, p. 131.

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are not clear-cut, decisive statements; they are no more than guesses.⁵ In other words, they lack concreteness or rule-like form. The geonic approach is largely responsible for the standard view that the classical rabbinic period produced two entirely separate discourses, law and narrative, which may complement one another but do not overlap. Aggadah was, at best, an explanatory system that accompanied the law, a unique cultural form supplanted in the medieval period by philosophy and kabbalah. The editorial decision to place aggadot within the legal corpus remained a scholarly puzzle. Scholars have suggested that they were placed in the legal corpus to convey religious ideals beyond those reflected in the rules;⁶ as rhetorical ornaments; as a result of loose associative connections to the halakhic discussion; or even in order to provide interludes.⁷ As a result of this viewpoint, the academic study of halakhah and of aggadah proceeded along entirely separate paths. Aggadah was mined first for its window onto the history, culture, and worldview of the sages and then approached as a distinct narrative form in its own right which has enjoyed renewed attention under the impetus of post-structuralist theory.

The geonic formula, repeated down the centuries, cannot be found in the talmudic literature itself, however. Thus, one of the main questions addressed in this volume is whether the geonic conception perpetuates the inner-talmudic viewpoint or, instead, transforms it. Put otherwise, were aggadot viewed as lacking legal import even within the classical rabbinic period or were they, rather, a means of transmitting law, or of registering an implicit dissent to a legal rule, or of supplying concepts, principles, and values to be coordinated with the legal rules? It seems remarkable in retrospect that so fundamental a question did not

5 *’Otsar ha-Ge’onim, Hagigah*, § 67, pp. 59-60.

6 See Louis Jacobs, *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (New York: Oxford University Press, 1984), 9-19.

7 That is, “relaxation from mental strain,” as Judah Goldin once put it; see his “The Freedom and Restraint of Haggadah,” in Geoffrey H. Hartman and Sanford Budick (eds.), *Midrash and Literature* (New Haven: Yale University Press, 1986), 57-76, 62.

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come to the forefront until recently. The reason for this lies in a variety of factors, canvassed in greater detail in Yair Lorberbaum's contribution to this volume. But, undoubtedly, a major contributing factor was the absence of a conceptual apparatus scholars could draw on in order to explain, on the one hand, how stories – or the concepts, principles, and values embedded in them – could function as law, despite their lack of rule-like form, and, on the other, how legal texts could include a narrative dimension. In short, those who studied rabbinic texts lacked general legal and literary models which would enable them to re-describe the inter-relationship of halakhah and aggadah.

During the past two decades, however, a rich interaction has taken place between legal and literary theory in the larger academy. Legal theorists have turned to literary theory and literary theorists to legal theory for potential insight into common questions about genre, interpretation, and authority. One result of this interaction has been the flourishing of major new jurisprudential theories, including that of Ronald Dworkin, who offers a 'third' theory of law as interpretation, in which law does not consist solely of rules but also of more open-ended values and principles which must be integrated with the rules,⁸ and of Robert Cover, who highlights the central role of narrative in grounding law and transforming it into a system of meaning and not solely a system of social control.⁹ Another result is the deployment of literary theory to better understand the aesthetic, "expressive and compositional power of legal thought and practice."¹⁰ This interdisciplinary project is now enriching the field of Jewish studies by providing

8 See Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986). For the characterization of Dworkin's approach as a third theory of law that differs in important ways from both legal positivism and natural law theories, see John Mackie, "The Third Theory of Law," *Philosophy and Public Affairs* 7 (1977), 3-16.

9 See Robert M. Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983), 4-68.

10 Guyora Binder & Robert Weisberg, *Literary Criticisms of Law* (Princeton, NJ: Princeton University Press, 2000), 19.

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methodological tools with which to redescribe not only the character and function of narratives traditionally labeled aggadot but also the character and function of the legal texts in which these narratives appear. The result of this cross-disciplinary collaboration can be seen in the contributions to this volume which draw on different theoretical approaches, ranging from jurisprudence to literary theory, in order to go beyond the law-narrative distinction inaugurated by the geonic approach.

The articles in the first section, “Terminology and Methodology,” directly confront the geonic approach, arguing either that it has been misunderstood or that it departs from the rabbinic conception. Bera-chyahu Lifshitz investigates the meaning of the terms “aggadah” and “haggadah” both in rabbinic literature and in the geonic corpus. According to Lifshitz, they are terms of art referring to specific categories, and do not encompass all the literature commonly referred to as aggadah. Indeed, Lifshitz argues that the two terms are not synonymous but, rather, opposites. Aggadah deals with mysteries and is etymologically related to the root *ʾa.g.d.*, meaning “tied,” hence “hidden.” The hidden material is knowledge of God and His ways. Thus, the term hinges on the content of the material – the secrets and hidden acts of God – and not its form. The geonic interdiction on using aggadot to illuminate the law flows from this definition. By contrast, the term haggadah refers to a form of interpretation of biblical verses and implies discovery and deciphering of something previously concealed. Thus, haggadah refers not only to the deciphering of aggadah, divine secrets and mysteries which are unknown and sealed, but also to the deciphering of any text which requires explanation and clarification. The subject interpreted may be related to halakhah but the looser interpretive technique deployed results in its classification as haggadah. The talmudic objection to ruling from haggadot¹¹ is grounded in the fact that they utilize methods of interpretation inappropriate for halakhah, in

¹¹ See yPe'ah 2:4, 10a; yHag 1:8, 76a.

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contrast to the geonic objection to aggadah, which is based on the latter's content.

While Lifshitz argues that the target of the geonic interdiction against deriving law from aggadot never included all the material now labeled aggadah, Yair Lorberbaum argues that the geonic prescription has been mistakenly viewed as an accurate description of the stature of aggadah within classical rabbinic literature itself. Lorberbaum singles out two critical factors among many that led academic scholars to accept the geonic approach as not merely prescriptive but also descriptive. One was the desire to divorce halakhah from any nonrational or mythical elements. The second was the dominance of the formalist conception of law not only in the Lithuanian yeshivot of the nineteenth century and in the thought of influential twentieth-century Jewish philosophers such as Soloveitchik and Leibowitz, but also in early twentieth-century jurisprudence. Formalist and positivist conceptions of law, which confine the sources of law to concrete rules, now have significant rivals within the legal academy. Foremost among them is the interpretive model proposed by Ronald Dworkin.¹² Dworkin argues that, in the Anglo-American legal system, legal sources are not confined to rules; rather, they also consist of moral and political principles, abstract values implanted in the legal system at its base which must be coordinated with the rules to yield answers to hard legal cases. Although Dworkin's model is not a general theory of law but, rather, a description of a particular jurisprudence, Lorberbaum finds it more congruent with the integrationist approach of the Talmud than formalist models and a useful tool for redescribing aggadah as part of the legal corpus. In his view, the rabbinic legal corpus contains not only halakhot, rules, but also more open-ended moral or theological principles embedded in the aggadot, around which the rules are shaped, and which are equally sources of law.

¹² Dworkin, *Law's Empire*.

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The five articles in the next section “Law as Narrative, Narrative as Law,” explore a variety of ways in which law and narrative are integrated in both classical rabbinic sources and in the Dead Sea Scrolls. Steven Fraade contrasts the different attitudes toward law and narrative in the Damascus Document and the Mishnah. In the Damascus Document, the prefatory Admonition functions as a frame or master narrative for the laws in much the way the narrative sections of the Bible do. The Laws in the Damascus Document take on meaning through the Admonition, which is essentially a script for the sect’s annual covenant renewal ceremony. The Admonition transforms the laws from mere rules into expressions of commitment and enables them to function not just “juridically, but also pedagogically and liturgically.” Despite many striking similarities between the Damascus Document and the Mishnah, which Fraade enumerates, they differ markedly in the way law and narrative intersect. In the Mishnah, narratives are scattered throughout the text and rules are exemplified or traced to stories about sages. The Mishnah’s approach is best thought of as ‘law as narrative’ while the Damascus Document’s approach may be termed ‘law and narrative.’

Moshe Simon-Shoshan and Suzanne Last Stone both concentrate on the way discrete stories about sages or pious figures within rabbinic literature are misleadingly classified as aggadah in contradistinction to halakhah. Simon-Shoshan suggests that the relative halakhic or aggadic nature of a given story depends on its context. The same story may be presented in an aggadic context which marginalizes or even eliminates its halakhic content or may be presented in a halakhic context which highlights halakhic aspects of the story which might otherwise escape the reader. He analyzes one sage story originally composed in an aggadic context which was read for its implied halakhic content and attached to a legal dispute between Rabbi Judah and Rabbi Meir. Borrowing from literary theory, Simon-Shoshan terms the strategic use of this story in the Mishnah ‘illustrative.’ The Mishnah carefully crafts the story for purposes of making a legal argument and eliminates all

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idiosyncratic detail that might suggest that the story is not generally applicable as an illustration of a general rule. An alternative approach, which Simon-Shoshan locates in the baraita's version of the story, is 'representational.' Here, details not necessary for the halakhic argument are introduced in order to create a compelling narrative world for the reader who will find it reasonable to apply the information and values presented in the story in his or her life.

Stone reaches similar conclusions in her analysis of the story of Ḥoni the Circle-Drawer. While Simon-Shoshan contends that "the wonder and complexity of the story" overtook its introduction into the Mishnah in a halakhic context, Stone contends that the later reworkings of the story in both the Palestinian and Babylonian Talmuds are integrally connected to the legal discussion of the mishnaic rule to which the story was originally attached. The narrative in the Mishnah contributes to a particular reading by each Talmud of the scope of the mishnaic rule forbidding prayers for the cessation of rain. Then the story is reworked in both Talmuds to reflect their respective re-interpretations of the mishnaic rule. The legal rule and the narrative 'case' are thus harmonized. Whereas Simon-Shoshan turns to literary theory to explore the implications of using narratives as law, Stone turns to legal theory: the common law method of discerning rules and exploring their boundaries through reflection on factually-specific cases, both actual and hypothetical. According to Stone, the legal stature of aggadot may be compared to cases in classical common law, which occupied an interstitial role between examples of the law in application – that is, evidence pointing ambiguously and indirectly to the law – and a supporting or attacking hypothetical, a vehicle for refining a rule. She also draws a conceptual parallel between 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, and the rewriting of earlier versions of the Ḥoni story, so that the aggadah reflects and supports the legal conclusion reached in the Talmud about the import of the mishnaic rule.

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Both Jeffrey Rubenstein and Barry Wimpfheimer address the dialogic character of both law and narrative in the Talmud. Rubenstein shows how aggadic narratives are constructed and reworked to mirror legal forms, using the same compositional methods applied to the legal material. These texts open insights into the rhetorical focus and literary style of the post-amoraic sages who redacted the talmudic text and underscores their predominant interest in dialectic and modes of argumentation, rather than in legal conclusions. Wimpfheimer, by contrast, is interested in the dialogue between legal rules and other cultural contexts or disciplines – such as sociology, psychology, anthropology, etc. – which takes place within the rabbinic legal corpus through the dialogue between halakhah and aggadah. Thus, Wimpfheimer views law as an arena for generating cultural meaning, and he calls on us to rethink the question of appropriate genres for conveying such legal information.

The three short essays comprising the final section, “Comparative Reflections,” offer brief examples of how law and narrative is combined in both Maimonides’ *Mishneh Torah* and in other legal traditions. As Lorberbaum points out, not all post-geonic scholars necessarily adhered to the geonic approach. Whether Maimonides, like the scholars of Ashkenaz, relied on aggadic sources in halakhic determination is a matter of lively current debate, in which Lorberbaum himself has joined issue. Zev Harvey provides another window onto the debate by reminding us that the *Mishneh Torah*, no less than the Mishnah on which it was self-consciously modeled, is a legal work difficult to classify. Maimonides seamlessly integrates law and philosophy in the *Mishneh Torah* and the aggadah plays a central role in this integrative process. Harvey investigates three aggadic themes in the *Mishneh Torah*, each concerning the *pardes*, and shows how aggadah and philosophy interrelate and, in turn, how both aggadah and philosophy are deployed to suggest law’s foundation in reason. Charles Donahue offers a comparison to the aggadic “sage story,” drawn from twelfth- and thirteenth-century Western jurists. Of course, as Donahue notes, the hot-house

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atmosphere of the legal academy will invariably produce such stories. But, more importantly, the stories functioned as openings into fundamental problems with which the jurists were struggling. They highlighted both ways in which custom was not in accord with the law as expounded and defects in the result that the Roman texts required one to reach. Like aggadot, such stories highlight the divide between law in theory and law in action and also function as implicit dissents. Noah Feldman's essay offers a fascinating example of the derivation of law from narrative within the Islamic legal tradition. While deriving legal norms from narrative is a pervasive feature of Quranic exegesis, Feldman notes, his example is a rare instance where the Quran itself interprets biblical narrative as having normative legal consequences.

Finally, we note that three essays presented at the Harvard conference appeared in other publications. In each case, we have translated them from their original language. Thus, portions of Berachyahu Lifshitz's article, which appeared in *Shenaton ha-Mishpat ha-'Ivri*,¹³ and a chapter of Yair Lorberbaum's book, *Image of God*,¹⁴ appear here in English for the first time, while an article by Jeffrey Rubenstein, originally published in *Journal of Jewish Studies*,¹⁵ appears here in Hebrew for the first time. The inclusion of these previously-published articles in new translations reflects a new editorial policy of presenting articles in translation from time to time in order to enhance collaboration between our Hebrew- and English-speaking audiences.

13 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.

14 Yair Lorberbaum, *Image of God* (Hebrew) (Tel-Aviv & Jerusalem: Schocken, 2004).

15 Jeffrey L. Rubenstein, "The Thematization of Dialectics in Bavli Aggadah," *JJS* 53 (2003), 71-84.