

Reflections on the Halakhic Status of Aggadah

Yair Lorberbaum^{*}

A. Halakhah and Aggadah in Research

In a study I wrote on *Imago Dei* – the idea that man was created in the image of God – in early rabbinic literature, I noted that scholars tended to limit the scope of the tannaitic conception of *Imago Dei* to the realms of morality and halakhah. Nonetheless, scrutiny of references to *Imago Dei* in midrashic and talmudic literature indicates that the idea also extended to that part of talmudic literature that does not directly affect halakhic matters – namely, aggadah. The aggadic elaboration of *Imago Dei* is suffused with theological and theosophical significance. Moreover, a deeper look at the halakhic sources reveals that they are similarly suffused with these aspects. Talmudic literature presents a multifaceted conception of *Imago Dei* comprising anthropological, ethical, and political foundations, all reflected in both halakhah and aggadah. The variegated aspects of the idea are seamlessly interwoven, all deriving from their common theosophical core. This need not surprise us, as the conception of *Imago Dei*, in its most fundamental sense, is rooted first and foremost in “divine matters” (to use Maimonides’ formulation). One of the conclusions of that study was that, at least with respect to the subject of *Imago Dei*, halakhah and aggadah are inseparably intertwined throughout talmudic literature.

^{*} This paper is an adaptation of chapter three of my book, *Image of God* (Hebrew) (Tel-Aviv & Jerusalem: Schocken, 2004). The paper was translated by Michael Prawer.

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Prima facie, this conclusion is hardly novel: both halakhah and aggadah originated in the same religious schools, usually as the product of study and extrapolation from one source, the Bible. Furthermore, these two seemingly distinct literary genres originate from and are located in the same literary collections. Interwoven sections of halakhah and aggadah comprise the major part of talmudic literature: Mishnah, Tosefta, halakhic midrashim, and Talmuds.¹ This literary feature characterizes the Bible as well, which similarly integrates collections of overlapping statutes and narratives. In this sense, too, the biblical canon established the format of talmudic literature, which relies upon it.

The terms 'halakhah' and 'aggadah' actually appear as distinct categories in the tannaitic sources, but they are neither mutually exclusive nor antithetical.² The authors of the midrash were also the formulators and transmitters of the halakhah. From their perspective, as well as from that of the editors of the midrashic compilations, the Mishnah was a single, unified literary entity, comprising halakhah and aggadah, law and theosophy. In the words of Yaacov Sussmann: "Halakhah and aggadah are two sides of the same coin – a single ideational world and a single literary corpus, all authored by the very same sages – and it is absolutely impossible to distinguish between them."³

- 1 Leopold Zunz, *Ha-Derashot be-Yisra'el ve-Hishtalshelutan ha-Historit* (trans. M. Zak; Jerusalem: Bialik, 1954), 44, notes that aggadah comprises about three-sevenths of the *Sifre* on Deuteronomy. See Albeck's notes, *ibid.*, ad loc.; M. D. Herr, "Midrash," *Encyclopedia Judaica* 11:1507-14. Regarding the Tosefta see Zunz, *Ha-Derashot*, 46; Yonah Frenkel, *Darkhe ha-'Aggadah veka-Midrash* (Masada: Yad la-Talmud, 1991), 5.
- 2 See, e.g., mNed 4:3; *Sifre Deuteronomy* §306 (339); *Mekhilta, Vayassa'* 1 (96); see below, end of section B4.
- 3 Yaacov Sussmann, "The Scholarly Oeuvre of Professor Ephraim Elimelech Urbach" (Hebrew), in David Assaf (ed.), *Ephraim Elimelech Urbach: A Bio-Bibliography* (Jerusalem: The World Union of Jewish Studies, 1993), 7-116, 64-65. In this description of Sussmann one discerns his identification with Urbach's approach; see E. E. Urbach, *The Sages: Their Concepts and Beliefs* (trans. Israel Abrahams; Cambridge, MA: Harvard University Press, 1979), 2; Jacob Katz, *Halakhah and Kabbalah* (Hebrew) (Jerusalem: Magnes, 1984),

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Nonetheless, apart from a few exceptions, scholarship has generally shied away from examining the points of contact between the halakhah and aggadah in talmudic literature. Scholarly literature is generally divided between the study of halakhah and the study of philosophical and hermeneutical midrash, and only rarely do scholars trained in one field resort to materials located in the other. This suggests that many scholars do not subscribe to the strong connection between halakhah and aggadah, at least not for the purposes of their particular areas of research. Apart from E. E. Urbach, who highlighted the links between halakhah and aggadah,⁴ many scholars generally tend to regard them as distinct literary categories. As a result, both methodologically and phenomenologically, the two areas were classified as separate realms of research.

Even studies that combined halakhah and aggadah failed to demonstrate their substantive inter-connectedness. Halakhah and aggadah were generally combined by scholars in one of the following forms: (a) incidentally – studies devoted to halakhah accorded only negligible significance to the aggadic sources and, conversely, studies focusing on aggadah dealt perfunctorily with halakhic sources; (b) selectively – studies that focused solely on halakhah tended to ignore “obscure” aggadot, and even those actually dealing with aggadot failed to discern in them any traces of the halakhah; (c) rationalistic interpretation of aggadic sources in accordance with the categories I have surveyed elsewhere;⁵ (d) discussion of the aggadah within the context of *ta’amei ha-mitsvot* (rationales for the commandments), which are external to the

12; Ithamar Gruenwald, “Ha-Metodologyah shel Heker Maḥashevet Ḥazal,” *Melot 2* (1984), 173-84, 173; Frenkel, *Darkhe ha-’Aggadah*, 5; Louis Ginzberg, *’Al Halakhah va-’Aggadah: Meḥkar u-Massah* (Tel Aviv: Devir, 1960), 13-14; Menachem Elon, *Jewish Law: History, Sources, Principles* (trans. Bernard Auerbach and Melvin J. Sykes; Philadelphia: Jewish Publication Society, 1994), 49.

4 See Urbach, *Sages*; idem, *The World of the Sages* (Hebrew) (Jerusalem: Magnes, 1988), 97, 125, and 179, respectively.

5 See Lorberbaum, *Image of God*, chapter two.

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halakhah itself, thus divesting aggadic elements of any normative, authoritative status.

Why did scholarship take the direction of bisecting the Talmud into generic parts? What factors were at work? Firstly, study of the links between halakhah and aggadah in talmudic literature should be examined within the broader context of the study of talmudic halakhah, the history of which was summed up in the following manner by Yaacov Sussmann:

Study of the history of the halakhah during the Second Temple period and until the closing of the Talmud was one of the major goals of the academic study of Judaism almost since its inception ... But the realization of these hopes was frustrated ... the reality is that this field of research has been almost totally neglected during recent generations, and since the end of the previous century classic talmudic research has increasingly bastioned itself in the research of the “halakhic literature” and virtually ignored the research of the halakhah itself.⁶

Under these circumstances it need not surprise that the relationship between halakhah and aggadah was likewise ignored. Gershom Scholem described the state of research of halakhah in his scathing comments concerning the *Wissenschaft des Judentums*. Scholem, who attributed greater importance to phenomenology than to history, wrote: “Entire blocks of problems have been ignored. The halakhah, not as the history of its literature but as the research of problems, has remained largely outside their sphere of interest. As a religious problem it has no importance.”⁷ However, the paucity of research on the links between halakhah and aggadah is also the product of other unique

6 Sussmann, “Urbach,” 89. For a discussion of this development, see idem, “The History of *Halakha* and the Dead Sea Scrolls – A Preliminary to the Publication of 4QMMT” (Hebrew), *Tarbiz* 59 (1990), 11-76, 12-14.

7 Gershom Scholem, *Explications and Implications: Writings on Jewish Heritage and Renaissance* (Hebrew) (Tel Aviv: Am Oved, 1975), 397; and see Sussmann, “Urbach.” Scholem’s comments further on are also instructive: “Just

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factors, several of which Scholem alludes to; I will deal with some of them below.

1. Historical Background

The record of scientific study of halakhah, aggadah, and their connection to one another originated in the Geonic period. Apparently it was R. Saadya Gaon who coined the dictum that “one does not rely on aggadah,”⁸ a rule that was widely regarded – by halakhists, exegetes, and scholars – as characterizing the status of the “non-halakhic” sections of talmudic literature. R. Hai Gaon, who shared this view, suggested the following rationale:

It should be known that the words of aggadah do not have the status of oral tradition (*shemu'ah*), and each person conjectures as he pleases, employing such terms as “perhaps” and “it could be said,” so that the issues are not clearly defined. For that reason we cannot rely upon them ... And these *midrashot* are not tradition (*shemu'ah*) and not halakhah but were only stated by way of conjecture.⁹

Due to its idiosyncratic nature (“each person conjectures as he pleases”) and its vagueness (“not clearly defined”), R. Hai views the aggadah as lacking halakhic authority. However, he negates the authority of aggadah not only for its readers but even for its authors. R. Hai’s assumption about the secondary status of aggadah was stated explicitly by R. Shemuel b. Ḥofni: “Where the words of the early authorities contradict intellectual perception, we are not obliged to accept them.”¹⁰

try to understand anything about it [the halakhah] from the writings of Zechariah Frankel or Isaac Hirsch Weiss! As a religious problem it was no less mysterious for them than the Kabbalah.”

8 *’Otsar ha-Ge’onim* (B. M. Lewin, ed.; Haifa, 1928-1943), *Berakhot*, Commentaries, §271, p. 91. Similarly, we find during the geonic period that “one does not refute based on Aggadah,” *’Otsar ha-Ge’onim*, *Ḥagigah*, §67, pp. 59-60; see Saul Lieberman, *Sheki’in* (Jerusalem: Sifre Vahrman, 1970), 83.

9 *’Otsar ha-Ge’onim*, *Ḥagigah*, §67, pp. 59-60 (my translation).

10 *’Otsar ha-Ge’onim*, *Ḥagigah*, §5, p. 4; see David E. Sklare, *Samuel ben Ḥofni Gaon and His Cultural World* (Leiden: Brill, 1996), 39-43.

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The aggadot are not authoritative because they are not rational. Notably, the aggadot referred to here are primarily the anthropomorphic ones. As opposed to R. Hai, R. Shemuel's comments indicate that originally, in the eyes of their authors, these aggadot bore authoritative status.¹¹ Even though the allegorical interpretation of the aggadot was a geonic innovation, the Geonim were primarily concerned with halakhah. Protection of rabbinic Judaism from Karaite incursions, on the one hand, and from Islamic theology, on the other, necessitated driving a wedge between halakhah and aggadah – in other words, denying the latter any status as a “binding halakhic source.” The particular interpretative mode adopted in relation to aggadah was of secondary importance. The impetus for the allegorical (rationalistic) interpretation of aggadah originated in its total detachment from halakhah.¹²

For the Geonim, halakhah and aggadah (especially the “obscure aggadah”) do not belong to the same literary corpus, nor do they even belong to the same ideational world. As such, the aggadah should not be seen even as providing the “rationales for the commandments,” that relate to halakhah from the ‘outside.’ Given that aggadah is not considered authoritative theology, the Geonim attempted to reject it from their academies. Nonetheless, the comments of the Geonim are not commensurate with the stature of aggadah in rabbinic literature. The Mishnah freely intertwines halakhah and aggadah, drawing no distinction between them; the same holds true with respect to the halakhic midrashim and the Tosefta. The Babylonian Talmud abounds with challenges to the aggadah while relying upon it in halakhic matters.¹³

11 However, see the particularly sharp comments of R. Shemuel b. Ḥofni, in a letter from the year 985, cited by Simha Assaf, *Tekufat ha-Ge'onim ve-Sifrutah* (Jerusalem: Mosad ha-Rav Kook, 1955), 283.

12 For a discussion of additional factors that led the Geonim to distinguish between halakhah and aggadah, see Sklare, *Samuel ben Hofni*, 39-43.

13 R. Hai Gaon was aware of this and was therefore more cautious with respect to the aggadah in the Bavli; see *Sefer ha-Eshkol* (H. Albeck, ed.; Jerusalem: Mekitse Nirdamim, 1935), part 1, 158. Despite his more cautious

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As such, if the dictum “one does not rely on the aggadah” is descriptive and not just normative-prescriptive, then it is inapplicable to talmudic literature. The geonic approach was endorsed by a number of medieval scholars, primarily in Spain and North Africa.¹⁴ The Ashkenazic scholars adhered to the talmudic tradition, viewing aggadah as an authoritative source, and as a subject for study and extrapolation.¹⁵

Following the model of the geonic approach to rabbinic aggadah, modern scholars have tended to divest the aggadah of any halakhic authority, and in so doing have divorced it from the halakhah. As we shall presently observe, whereas during the Geonic period this position was considered novel, over the course of time it became a natural, almost self-evident distinction. Zunz defines the aggadah as “that which is not halakhah”¹⁶ and in discussing the differences between them, he describes the interpretative “freedom” (or looseness) that characterizes the aggadah. Halakhah, on the other hand, represents “the strict authority of the law and the study house.” He further adds:

But this freedom did not purport to distort Scripture and divest it of its natural meaning, for it only functioned in the elucidation of the

approach, however, R. Hai denied any authority to the aggadah in the Bavli; see Israel M. Ta-Shma, *Early Franco-German Ritual and Custom* (Hebrew) (Jerusalem: Magnes, 1992), 73, n. 100.

14 See sources cited by Lieberman, *Sheki'in*, 81-83.

15 Regarding halakhic decision-making on the basis of aggadah, see Avraham Grossman, “Shorashav shel Kiddush ha-Ḥayyim ve-Ḥeruf Nefesh: Tarte de-Satre?” in Isaiah Gafni and Aviezer Ravitzky (eds.), *Sanctity of Life and Martyrdom* (Hebrew) (Jerusalem: Merkaz Zalman Shazar, 1993), 99-130, 107-108, and his references in n. 21; Katz, *Halakhah and Kabbalah*, 255ff. Maimonides also relies on aggadic sources in his determination of the halakhah in, e.g., his Epistle on Martyrdom; see Yair Lorberbaum and Haim Shapira, “Iggeret ha-Shemad' la-Rambam: Vikuah Hartman-Soloveitchik Bir'i 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, on the standing of aggadah in this work.

16 Zunz, *Ha-Derashot*, ch. 4.

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abstract idea and played no role in the binding precepts. At the same time that greater flexibility was increasingly allowed for the aggadic elucidation of Scripture, that flexibility became restricted to the words of the individual, and as such the aggadah has no binding authority, neither as an interpretative method, nor as a regulator of everyday life.¹⁷

Yonah Frenkel noted the similarity between these comments and the statements of R. Hai Gaon.¹⁸ This approach reverberates, both expressly and implicitly, in the writings of a number of modern scholars of talmudic literature.¹⁹

2. On the Separation between Aggadah and Halakhah in Jewish Tradition and in Hebrew Culture in Recent Generations

Apart from this halakhic-ideological tradition, which, as mentioned, originated with the geonim, the dearth of research on the connection between halakhah and aggadah resulted from a number of other factors as well. The dichotomy of halakhah and aggadah finds expression in various fields of Jewish tradition in recent generations, and even in modern Hebrew culture.

In his famous essay “Halakhah and Aggadah,” Hayyim Nahman Bialik describes the distinguishing features of the two. The halakhah is “severe, strict, hard as iron” and the aggadah “compliant, merciful, softer than oil.” The halakhah is “piety, fossilized, duty and yoke,” wearing a “stern face,” whereas aggadah is “eternal renewal, freedom,

17 Ibid., ch. 19.

18 Frenkel, *Darkhe ha-Aggadah*, 546.

19 See, e.g., J. N. Epstein, *Introduction to the Mishnaic Text* (Hebrew) (3rd ed.; Jerusalem: Magnes, 2000), 919. This approach is also implied by Lieberman, *Sheki'in*; idem, *Hellenism in Jewish Palestine* (New York: Jewish Theological Seminary of America, 1950), 51; Shmuel Safrai, “The Attitude of the Aggadah 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.

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leniency,” wearing a joyous face.”²⁰ Nonetheless, according to Bialik, halakhah and aggadah are “two [phenomena] which are in essence one, two aspects of the same creation.” Bialik was not referring specifically to the research of Talmud, but rather to the entire community of those shaping the nascent Jewish culture. For Bialik, “halakhah” and “aggadah” are cultural categories representing the concrete and ephemeral as opposed to the abstract and infinite – barren symbolism as opposed to narrow practicality.²¹ In his famous essay, Bialik calls upon Hebrew literature to return to the bedrock of authentic Jewish culture, which dialectically combines these two categories. Bialik’s words were subject to criticism from numerous quarters, including authors such as J. H. Brenner, and M. J. Berdyczewski, who were adamantly opposed to any manner of inspiration from the exile-burdened Jewish tradition.²² Contrary to Bialik’s intentions, and with the assistance of his opponents, the ensuing polemic only served to intensify the phenomenological differences between halakhah and aggadah. These differences also left their imprint on talmudic scholars, and further fortified the dichotomous tendency that was already rife in scholarship prior to the controversy.²³

Evidently, the study of halakhah, and especially of the relationship between halakhah and aggadah, was also influenced by the world of traditional Jewish learning. In the world of yeshivot, especially those in Lithuania, central Europe, and Eastern Europe, in the past, and in Israel and the United States over the last few generations, an almost categorical distinction is made between *lamdanut* (traditional casuistic study), focusing exclusively on halakhic matters, and *aggadta* (i.e., aggadah, primarily of the Babylonian Talmud). The latter is not, and has

20 Hayyim Nahman Bialik, “Halakhah va-’Aggadah,” in *Divre Sifrut* (Tel Aviv: Devir, 1964), 55.

21 In the language of Zipora Kagan, *Halacha and Aggadah as a Code of Literature* (Hebrew) (Jerusalem: Bialik, 1988), 11.

22 *Ibid.*, 98-99, and see references in nn. 8-10.

23 See e.g. Frenkel, *Darkhe ha-’Aggadah*, 481ff. and 652 n. 30; Kagan, *Halacha and Aggadah*, 111ff.; but cf. Ginzberg, *’Al Halakhah va-’Aggadah*, 13-14.

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never been, included in the classical yeshiva curriculum.²⁴ As is well known, these circles were inclined to formalistic study, and among certain schools this tendency had its own, quasi-systematic terminology.²⁵ Notably, many leading academic scholars of talmudic literature spent their formative years in these circles.²⁶

The study of halakhah was also influenced by two of the most important Jewish philosophers of the last generation: Joseph B. Soloveitchik and Yeshayahu Leibowitz, both of whom believed – each in his own fashion – that the halakhah is essentially formalistic. Soloveitchik’s characterization of the halakhah combines the talmudic formalism of Rabbi Haim Soloveitchik of Brisk²⁷ with epistemological Kantian

24 Research of these circles has been woefully neglected. To date, see the observations of Jacob Katz in his article “Halakhah ve-Kabbalah ke-Nose’è Limmud Mitharim,” in his *Halakhah and Kabbalah*, 70-101, 97ff.

25 In this context I will also mention “*pilpul*” (dialectic casuistry), a particularly formalistic method of analysis, different versions of which were widespread in the yeshivot. For its history, see bibliography cited by Elchanan Reiner, “The *Yeshivas* of Poland and Ashkenaz During the Sixteenth and Seventeenth Centuries – Historical Developments” (Hebrew), in Israel Bartal, Ezra Mendelsohn, and Chava Turniansky (eds.), *Studies in Jewish Culture in Honour of Chone Shmeruk* (Hebrew) (Jerusalem: Merkaz Zalman Shazar, 1993), 9-80, 11-13 nn. 3 and 6. Regarding the terminology that served Ashkenazic *pilpul* until the eighteenth century, see Haim Z. Dimitrovsky, “Al Derekh ha-Pilpul,” in Saul Lieberman (ed.), *Sefer ha-Yovel Likhvod Shalom Baron* (Jerusalem: American Academy for Jewish Research, 1975), 111-81.

26 See Peter Schäfer, “Research into Rabbinic Literature: An Attempt to Define the ‘Status Quaestionis’,” *JJS* 37 (1986), 139-52, 139-40, who refers to the research method of S. Lieberman and Y. N. Epstein as “halakhic-traditional.” He refers to these scholars’ approach to halakhah as “systematic-theological” (140). See Chaim Milikowsky, “The ‘Status Quaestionis’ of Research in Rabbinic Literature: A Response to Peter Schäfer,” *JJS* 39 (1988) 201-11, 201 n. 2. Regarding the synthesis between “criticism” and “tradition” in Lieberman’s work, see H. Z. Dimitrovsky, “Mi-Parshanut le-Mehkar,” in *Le-Zikhro shel Sha’ul Lieberman* (Jerusalem: The Israeli National Academy of Sciences, 1984), 34-49.

27 See Joseph B. Soloveitchik, *Halakhic Man* (trans. Lawrence Kaplan; Philadelphia: Jewish Publication Society, 1983); idem, “Mah Dodekh mi-Dod,”

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formalism. Soloveitchik viewed halakhah as a quasi-mathematical discipline, invoking terms such as “apriori” and “ideal.” “The halakhah,” he writes, “is based on a comprehensive deductive system; the halakhah has its own methodology, a logical analytical method, and its own conceptual thinking.”²⁸ Yeshayahu Leibowitz, on the other hand, is motivated by the desire to safeguard Jewish tradition from what he perceives as “idolatry.” The antithesis to this is “service of God,” which he defines as “worship for its own sake” (*avodah lishmah*). According to Leibowitz, “service of God” means unconditional obedience to God, the sole expression of which is complete submission to the precepts of the halakhah. In his portrayal of halakhah as “worship of God for its own sake,” Leibowitz expunges from it any trace of ethical, utilitarian, spiritual, or even metaphysical content, thereby transforming it into a purely formalistic system. Anyone abiding by its dictates thereby guarantees the disinterested nature of his religious worship. “The halakhah is its own basis and foundation,” he writes, “and its evolution over the generations reflects the factors that are immanent to its self-perception.”²⁹ One may safely assert that the approaches of these circles embody their *zeitgeist* in relation to halakhah. One cannot dismiss the possibility that the strict formalism which they attributed to the halakhah similarly permeates academic research, especially influencing the research of the relations between halakhah and aggadah.

Scholars have noted the exceptional sensitivity of Orthodox Jews to academic study of the halakhah, as a result of which, already during the “*Wissenschaft*” period, many of them “sought refuge in the study of

in *Divre Hagut ve-Ha'arakhah* (Jerusalem: World Zionist Organization, 1981), 57.

28 See Avi Sagi, “Rabbi Soloveitchik and Professor Leibovitch as Theoreticians of the Halakhah” (Hebrew), *Da'at* 29 (1992), 131-48, 136-37, and see references there to their writings, nn. 31-34.

29 Yeshayahu Leibowitz, *Emunah, Historyah, va-'Arakhim* (Jerusalem: Akademon, 1982), 136-37. For more moderate formulations and analysis of this concept, see Sagi, “Rabbi Soloveitchik,” 137ff.

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halakhic literature rather than that of the halakhah itself.”³⁰ Orthodoxy (then, as today) is primarily concerned with the damage wrought by research into the “transcendental, ahistorical nature of the halakhah.”³¹ Even greater sensitivity might emerge with respect to study of the relations between halakhah and aggadah, whose interaction might suggest that halakhah is an irrational, even mythic system. As Jacob Katz surmised, this kind of research may reveal that “originally [in tannaitic sources], the provisions of the halakhah and their irrational foundation are inseparably interwoven, to the extent that the halakhah may be regarded as a practical, ritualistic manifestation of the very same conception that found its verbal formulation in the aggadah.”³²

3. Rabbinic Judaism as a Legalistic Religion

We should draw attention to another prominent tendency in the history of scholarship that has had a profound impact on the modern study of halakhah. Over eighty years ago G. F. Moore described the attitude of Christian authors towards Judaism, from the nineteenth century until his own time.³³ These authors made no effort to conceal their own ideological motives, deriving directly from Pauline-Protestant theology. Their approach is succinctly expressed in the following comments of their most important spokesman, Ferdinand Weber:³⁴

From this fundamental conception of God as the Absolute, Jewish theology deduces two further (in reality antithetic) elements, which must be regarded as characteristic of the Jewish idea of God; namely, abstract monotheism and abstract transcendentism.

30 In the words of Sussmann, “Urbach,” 92.

31 Ibid., 90 n. 99, and 92 n. 205.

32 Katz, *Halakhah and Kabbalah*, 12.

33 George Foot Moore, “Christian Writers on Judaism,” *HTR* 14 (1921), 197-254.

34 Ferdinand Weber, *Altsynagogalische Palästinensische Theologie* (Leipzig, 1880), cited in Moore, “Christian Writers,” 230. Regarding Weber’s essay, see Sussmann, “Urbach,” 68 and n. 127.

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On this, Moore comments:

It is equally important to remark that the 'fundamental conception' of an inaccessible God ... is derived from the principle that legalism is the essence of religion, from which, according to Weber, it follows by logical necessity.³⁵

These scholars also had a particular assessment of the rabbinic view of the status of aggadah (and the Jewish tradition that evolved therefrom). In the words of Moore:

To much of this material – to the exegetical ingenuities and homiletical conceits of the Midrash and the playful imaginations of the Haggada, for example – the Jews attached no theological character or authority.³⁶

Ferdinand Weber's perception of Judaism's legalistic essence established both the framework and principles for many scholars of the Jewish religion (both Christians and Jews) who followed him, and especially those who specialized in the study of tannaitic literature.³⁷

As stated, many Jewish scholars also endorsed these views.³⁸ But unlike the Christians, there were those who presented this point of view in a favorable light. A prominent exemplar of this approach is Gershom

35 Moore, "Christian Writers," 230.

36 *Ibid.*, 232.

37 See, e.g., W. D. Davies, *Paul and Rabbinic Judaism* (London: S.P.C.K., 1955), 53. A similar approach is taken by E. R. Goodenough, in the twelve volumes of *Jewish Symbols in the Greco-Roman Period* (New York: Pantheon Books, 1953-1968). Goodenough describes rabbinic Judaism as a religion that eschews mysticism and spirituality, being exclusively concerned with obedience to the arid law. He contrasts this to the popular Jewish religion, which draws its vitality from the surrounding pagan environment. For an assessment of Goodenough's approach, see Morton Smith, "Goodenough's *Jewish Symbols* in Retrospect," *JBL* 86 (1967), 53-68, esp. 62-63.

38 Moore, "Christian Writers," 226; see Urbach, *Sages*, 7, emphasizing Weber's influence and his tendency "to underscore the legalistic character of Judaism"; and see Sussmann, "Urbach," 87.

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Scholem. Relating to the anti-mythical nature of rabbinical monotheism, Scholem makes the following comments regarding the halakhah:

For what, in Rabbinical Judaism, separated the Law from myth? The answer is clear: the dissociation of the Law from cosmic events ... it is no longer in any sense regarded as the representation of a mythical event in cult ... And nothing perhaps characterizes this separation of an almost self-subsisting Law from its emotional roots than a little Talmudic anecdote that is frequently cited in Rabbinical literature ... Let speculative philosophy concern itself with the reasons for laws; to the Rabbinical mind the question was irrelevant or at most took on a certain significance in eschatological perspectives. And this divorce of the Law from its emotional roots is one of the great and fundamental, but also dangerous and ambivalent, achievements of the *Halakhah*, of normative Rabbinical Judaism.³⁹

Scholem's comments are premised on Mircea Eliade's conception of myth and ritual. Inasmuch as rabbinic halakhah does not, in his view "conform" to this conception,⁴⁰ his conclusion is that it lacks any mythical foundation.⁴¹ For Scholem, not only is the halakhah intrinsically non-mythical; it is also indifferent to the rationales for the commandments (*ta'amei ha-mitsvot*). Even if the aggadah tends to provide such reasons, these cannot be regarded as constituting the foundation of the halakhah,⁴² and this distinction is the foremost

39 Gershom Scholem, *On the Kabbalah and Its Symbolism* (New York: Schocken Books, 1965), 94-95. Further on he writes: "The world from which they came, the strict monotheism of the Law, of the *Halakhah*, the ancient Judaism in which they knew themselves to be rooted, could not readily accept this eruption of the myth at its very center" (98).

40 See Moshe Idel, "Some Concepts of Time and History in Kabbalah," in Elisheva Carlebach et al. (eds.), *Jewish History and Jewish Memory* (Hanover, MA: Brandeis University Press, 1998), 153-87; idem, "Rabbinism Versus Kabbalism," *Modern Judaism* 11 (1991), 281-96.

41 A similar approach is found in Martin Buber, "Ha-Mitus ha-Yehudi," in *Te'udah ve-Yi'ud* (Jerusalem: ha-Sifriyah ha-Tsiyonit, 1963), 1:80-88, 83.

42 For a more moderate version of this view, see Urbach, *Sages*, 388.

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achievement of rabbinical Judaism. Scholem's characterization of the halakhah as legalistic, as "self-subsisting," and as divested of any "emotional roots,"⁴³ reflects the state of research regarding halakhah, at least until recently.⁴⁴

4. Study of Halakhah and Legal Formalism

The study of halakhah and, especially, of its relationship to aggadah, was also influenced by a rigid jurisprudential approach to the halakhah, inspired by the formalistic conception that prevailed in jurisprudence (particularly in the English tradition) during the first half of the twentieth century.⁴⁵ According to this approach, legal systems are, *inter alia*, closed systems, consisting of "legal rules" which are governed by "legal reasoning" (or "legal logic"). In other words, the legal rules are all logically related to each other, and their application is deductively based. According to this conception, law is a form of mathematics, in which conclusions flow from assumptions by means of rigid logical deductions. "Logic" of this kind, when applied to the rules of the law, enables the legal system, much like mathematics or geometry, to be self-sustaining. Both of these assumptions – the foundation of the law on fixed, closed rules, and the logical-deductive nature of legal reasoning –

43 This approach is directly related to Scholem's view of the chasm between "Rabbinic Judaism" – representing "established and conservative" religious authority – and mysticism, which is essentially "revolutionary." See Scholem, *Kabbalah and Its Symbolism*, 9ff.

44 Compare with Scholem's statements in *Explications and Implications*, 397-98, cited above at n. 7.

45 See, e.g., Joel Roth, *The Halakhic Process* (New York: Jewish Theological Seminary of America, 1986), which relies primarily on the positivistic jurisprudential model proposed in John W. Salmond, *Jurisprudence* (12th ed.; London: Sweet and Maxwell, 1966). Prior to becoming confined to the research of halakhic literature, the research of halakhah in the nineteenth century was influenced by the F. K. Savigny school of German jurisprudence; see Jay M. Harris, *How Do We Know This? Midrash and the Fragmentation of Modern Judaism* (Albany: State University of New York Press, 1995), 193.

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engendered the illusion of the mathematical essence of the law. This jurisprudential approach is known as “legalism” or “legal formalism.”

The term “legalism” usually indicates the technical application of rules to specific cases without taking into consideration additional aspects of the law, on the assumption that the law consists exclusively of what is formulated on the level of its rules. Theoreticians provided a similar characterization of legal formalism.⁴⁶ By contrast, for an anti-legalistic, anti-formalistic approach, “the Law” does not consist exclusively of a conceptual analysis of the particular terms it deals with, nor of the deductive application of its fixed rules in relevant cases. This approach to law invests it with far more than what is included in the superficial language of the rules. It comprises, *inter alia*, principles, policies, values, and world-views. All of these constitute its foundation, or are complementary to it, as an integral part of the law itself.⁴⁷ As such, the application of the law in particular cases is neither mechanical nor deductive. It also (or primarily) requires discretion of a different nature.

Most of the approaches and studies dealt with above, and those to be discussed below, identify the halakhah either expressly or implicitly with legalistic jurisprudence. This view has two deficiencies: first, it is questionable whether rigid “deductive” legalism is an appropriate characterization of any legal system. I will attempt to demonstrate below that this characterization is certainly not consonant with the nature of tannaitic halakhah. Second, it is inadequate to speak of a uniform jurisprudence of the halakhah. Even if we were convinced that legalism describes the approach of a particular halakhic work, authority,

46 Ernest J. Weinrib, “Legal Formalism: On the Immanent Rationality of Law,” *Yale Law Journal* 97 (1988), 949-1016, 962, 964-65; and see also Frederick Schauer, “Formalism,” *Yale Law Journal* 97 (1988), 509-48.

47 Bernard S. Jackson, “Legalism and Spirituality: Historical, Philosophical, and Semiotic Notes on Legislators, Adjudicators, and Subjects,” in Edwin B. Firmage et al. (eds.), *Religion and Law* (Winona Lake, IN: Eisenbrauns, 1990), 243-61, 259.

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or even of a particular period, it does not follow that it indeed typifies the phenomenon of “halakhah” *per se*. Halakhic traditions are varied and distinct from one another, not only in terms of their halakhic minutiae, but also in terms of their jurisprudential foundation, which may indeed be the main distinguishing factor between them. Hence, the jurisprudence reflected in Maimonides’ *Mishneh Torah* and *Sefer Ha-Mitsvot* differs from the jurisprudence that infused the halakhah of the countries of Ashkenaz in the eleventh and twelfth centuries, and both of these differ from the jurisprudence that characterizes the Mishnah or the Talmud.⁴⁸

It would be more precise to refer to numerous philosophies of halakhah, expressed in a range of compilations and periods, in time and place. Both flexibility and sensitivity are required in determining the relevant jurisprudential conceptions of the halakhah during its different periods, and ultimately these concepts should derive from the halakhic sources themselves. I do not deny that the halakhah has certain salient general features that characterize its various stages, but it cannot be taken for granted that a characterization of the halakhah appropriate for a particular time and place will be appropriate in another time and place.⁴⁹

48 For the distinction between the sectarian-Sadducean conception of the law and rabbinic conception of the law, see Daniel R. Schwartz, “Law and Truth: On Qumran-Sadducean and Rabbinic Views of Law,” in Devorah Dimant and Uriel Rappaport (eds.), *The Dead Sea Scrolls: Forty Years of Research* (Leiden: Brill, 1992), 229-40. For discussions of the Maimonidean conception of the law, see Jacob S. Levinger, *Maimonides’ Techniques of Codification: A Study in the Method of Mishneh Torah* (Hebrew) (Jerusalem: Magnes, 1965); Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven: Yale University Press, 1980), 39; Moshe Halbertal, “*Sefer Ha-Mizvot* of Maimonides – His Architecture of *Halakha* and Theory of Interpretation” (Hebrew), *Tarbiz* 59 (1990), 457-80; Lorberbaum and Shapira, “*Iggeret ha-Shemad*.” On Ashkenazic halakhah, see Ta-Shma, *Early Franco-German Ritual*, 35ff.

49 I. Englard, “Research on Jewish Law – Its Nature and Function” (Hebrew), *Mishpatim* 7 (1977), 34-65, 55-56.

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For example, tannaitic halakhah can be distinguished from halakhah at its later stages of development.⁵⁰ The former was a formative period during which it was difficult to distinguish between theosophy-theology and law, particularly in the context of a normative system that, together with its creation of legal rules, also created countless ritualistic-religious precepts. Indeed, it is difficult to understand the prevalent claim in modern scholarship that the halakhah is a self-sustaining system in the context of early rabbinic halakhah. Unless one assumes a linkage between halakhah and aggadah, it is difficult to fathom what animates and sustains the sages, who both created and refashioned these halakhot. These comments are especially true of R. Akiba and his school of thought, who are renowned for their innovations both in halakhah and aggadah.⁵¹

5. Between Man and God – Between Man and Man

One branch of research that tended to endorse these jurisprudential concepts was the *mishpat ivri* (Jewish Law) school.⁵² In striving to adapt the halakhah to the modern world, this branch of research discerned these jurisprudential categories in the halakhah and described it accordingly. The problem in this realm, at last as depicted by some of its foremost scholars, is already evident in its title – *mishpat ivri* – which represents its aspiration to isolate *mishpat*, the “law,” from the entirety of the halakhah, and the laws governing interpersonal relationships

50 This was Katz’s view, *Halakhah and Kabbalah*, 12, and I think it is correct.

51 At more advanced stages halakhah and aggadah are liable to disconnect, each having its own exclusive definition and parameters, operating in accordance with its own internal rules, but this process is not inevitable, and is not reflective of the entire halakhic complex in all its derivations (see above, n. 15). See the debate between Jacob Katz (“Response to Criticism by I. Ta-Shma” [Hebrew], *Tarbiz* 60 [1991], 667-72) and Israel M. Ta-Shma (“Response to Criticism by J. Katz” [Hebrew], *Tarbiz* 60 [1991], 673-75).

52 The jurisprudential path taken by scholars in this field is not uniform. For a survey of the research, see Englund, “Research on Jewish Law,” 47.

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from the laws between man and God.⁵³ By extension, this tendency separates the religious foundation, including the aggadah, from “Jewish Law.” This point of departure of the *mishpat ivri* school, the ideological goals of which are explicitly declared by its most prominent spokesmen,⁵⁴ was sharply criticized by Yitzhak Englard:

In our view there is no scientific justification for narrowing legal research to those particular areas of the halakhah which have their parallels in other legal systems or to those that can potentially be incorporated into the law of the State. All of the normative material of the halakhah is deserving of academic inquiry within the framework of an integrated field of research. Not only can one not ignore the religious foundation of the halakhah, but it must in fact serve as one of the primary foci of research.⁵⁵

As I showed elsewhere with reference to the subject of the “Image of God,” civil-social law is inextricably intertwined with the religious law and aggadah. This connection is expressed, *inter alia*, in procedural and substantive criminal law, and in some of the laws of assault, the laws of procreation, and the related laws of divorce.⁵⁶

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The relationship between aggadah and halakhah has been in a state of flux from the tannaitic period until our times. The above comments do not purport to exhaust the maze of connections and conflicts ascribed to halakhah and aggadah in different periods and places. Nor do they exhaust the factors that separate halakhah from aggadah and their

53 See Asher Gulak, *Yesode ha-Mishpat ha-’Ivri* (Jerusalem: Devir, 1922), 1:6ff.; Elon, *Jewish Law*, 1:163ff.; but cf. at 168. Regarding these two works, see Englard, “Research on Jewish Law,” 47ff.

54 See Elon, *Jewish Law*, 1:154-58; Englard, “Research on Jewish Law,” 55.

55 Englard, “Research on Jewish Law,” 37; and see also *ibid.*, 64.

56 See Lorberbaum, *Image of God*, chs. 7-9.

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relative weight. However, a clear pattern is nonetheless discernible: the process that led to the severance of the aggadah from the halakhah during the geonic period is clearly related to modern scholarship's approach to halakhah, especially as it relates to aggadah. Over the generations, and particularly during the twentieth century, this approach was joined by other factors, which further deepened the chasm between halakhah and aggadah and caused the halakhah to be assessed exclusively in terms of legal, formalistic categories. The use of a legalistic model in the study of halakhah was not motivated exclusively by the presumption that formalism provides the basis for an ideal jurisprudential model. The use of this model also facilitated the severance of the halakhah from the aggadah and particularly from its non-rational, mythical aspects. The formalistic model thus provided an ideal shelter for any rationalist who holds the halakhah dear. According to this approach, which classifies the halakhah and the aggadah as two distinct literary genres, it is pure folly to regard them as a "unified literary corpus."

B. Legal Principles and Halakhic Principles

Assistance in the liberation of halakhic research from the confines of legalism and formalism may be sought in the debate held over the last few decades in the fields of jurisprudence and philosophy of law. During the early 1960s, various legal theorists, in the process of criticizing their predecessors, began to extricate themselves from the rigid definitions of legal categories. A renewed examination of the basic concepts of jurisprudence engendered the development of new and fresh conceptual tools for the understanding of legal systems. These tools merged into an alternative jurisprudential model, more open and more flexible, which may be suitable for the study of talmudic halakhah in general, and specifically for the relationship between aggadah and halakhah. This model explains, *inter alia*, the flexibility of legal systems with respect to principles, policies, values, and world-views. It should

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be noted that these models are the product of a survey of modern legal systems, primarily the Anglo-American ones. Its components are not all necessarily commensurate with talmudic halakhah. These models only serve, therefore, as heuristic devices. Despite its unique breadth, substantive foundations, and other features, halakhah can indeed be classified as a legal system from the conceptual perspective to be discussed below.⁵⁷

1. Principles and Rules

One of the methods used for examining the relationship between aggadah, philosophy, ethics, myths, and the like, on the one hand, and statutes and laws on the other, is through the concept of the “legal principle,” and its halakhic counterpart, the “halakhic principle.” Over the last few decades the attention of many scholars of jurisprudence and the philosophy of law has been occupied by legal principles, which have come to be recognized as one of the keys to understanding the manner in which legal systems operate.⁵⁸

The “legal principle” is generally distinguished from the “legal rule.”⁵⁹ The latter usually refers to a section of a statute or ruling (in a binding judgment) which provides solutions to a particular problem. Legal principles, by contrast, are those general values that do not

57 See Eliezer Goldman, “Ha-Musar, ha-Dat, voha-Halakhah,” *De’ot* 22 (1963), 65.

58 There is a vast literature on this subject. I will just mention the books that laid the foundations for volumes of ensuing discussion: H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), chs. 2, 3, and p. 46 n. 2, in which he refers to additional bibliography; Joseph Raz, “Legal Principles and the Limits of Law,” *Yale Law Journal* 81 (1972), 823-54; idem, “Legal Principles and Judicial Discretion” (Hebrew), *Mishpatim* 2 (1971), 317-28.

59 Regarding the distinction between rules and principles, see Dworkin, *Taking Rights Seriously*, 22-31; and see the critique of Raz, “Legal Principles and the Limits of Law,” 831.

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govern a particular case, but rather establish the abstract value that informs and guides the solution of categories of specific cases. An example of a legal rule is the section of the statute prescribing that a person convicted under the Israeli enactment to bring to justice the Nazis and their collaborators is liable for the death penalty. An example of a legal principle is the “principle of the sanctity of life,” which guides the legislature to refrain from imposing the death penalty for other offences in the penal code and guides the court to limit its application in the cases it adjudicates. This principle may also induce the legislature to enact laws intended for the preservation of human life, such as “the Good Samaritan Law” (the law imposing an obligation to save a person whose life is in danger). An example of a halakhic principle is “*And you shall love your neighbor as yourself* (Lev 19:18) – select an easy death for him (*beror lo mitah yafah*),”⁶⁰ which guides the halakhic authorities in formulating the methods for executing those sentenced to death.

Legal principles, like halakhic principles, may be abstract to a greater or lesser degree. The same applies to legal rules, making it impossible to draw a sharp distinction between them. For example, R. Akiba’s dictum, “*And you shall love your neighbor as yourself* (Lev 19:18) – this is a great principle of the Torah,”⁶¹ conveys a halakhic, not (only) an ethical principle, which is more abstract than the one referred to above. There is a continuum that links the different levels of generality of any particular set of rules, and the same applies to a set of principles. A similar continuum exists with respect to the levels of generality of the rules of the law and its principles, but characteristically a distinction can be made between them.

Legal systems consist of a large range of concomitant legal principles, which on occasion may also be in conflict. In such cases, priority attaches to the legal principle commanding greater weight. For example,

60 tSan 9:11; bSan 45a; and elsewhere.

61 yNed 9:4, 41c. See also *Sifra, Kedoshim* 4:12 (Weiss, ed.), p. 89b; *Avot R. Nat.* B ch. 26 (Schechter, ed.), p. 53; and parallels.

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two principles are discernible in rabbinic laws of judicial execution: first, the desire to avoid mutilating the convicted person's body during the execution process, and second, the desire to minimize suffering during the execution. Both of these principles may combine to formulate the laws governing a particular mode of execution, while in other cases they may conflict, in which case the controlling principle will be the one to which the rabbis ascribe greater weight. The fact that a particular principle was not decisive in a particular case does not invalidate or disqualify it for purposes of the system as a whole. The most that can be said is that in a particular case it was accorded less weight than a competing principle. Nevertheless, it may still be decisive in numerous other cases. The centrality of a principle in any legal system is determined by the degree to which it shapes the rules of the particular legal framework to which it applies, and its degree of priority over other principles.⁶²

Like legal rules, legal principles pervade all of the law's sources: statutory law, case law, custom, etc. Principles may be inferred from a series of legal rules or originate independently of them. Accepted morality, ideal morality, social and political ideologies, theological viewpoints, and myths, may all serve as sources for legal principles. It therefore follows that the boundaries of a legal system are not well-defined and are, in fact, far more fluid than would seem at first glance.⁶³

2. Legal Principles and the Law as a System

Legal principles are of critical importance in structuring a collection of laws into a system. In their absence, the legal system would be no more than a long series of rules, lacking any unifying, organizing structure. Such a description does injustice to the character of the law as a system,

62 Raz, "Legal Principles and the Limits of Law," 837; Dworkin, *Taking Rights Seriously*, ch. 4.

63 This proposition is the source of a dispute between Dworkin and Raz. See Raz, "Legal Principles and the Limits of Law," 848-49, and his references there; Dworkin, *Taking Rights Seriously*, ch. 4. The position depicted above is closer to that of Dworkin.

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and consequently misrepresents the meaning and function of its particular rules.⁶⁴ Any rule or, for our purposes, any halakhah is fully understood only when explained in the context of its connection to the system as a whole, or at least to the particular halakhic area to which it belongs. In the words of Moshe Greenberg:

For it is not possible to comprehend the law of any culture without an awareness of its key concepts, its value judgments. Yet much of the comparative work done in Israelite-Near Eastern law has been content with comparing individual laws rather than law systems or law ideologies. But until the values that the law embodies are understood, it is questionable whether any individual law can be properly appreciated, let alone profitably compared with another in a foreign system.⁶⁵

These comments focused on biblical law, but they may be imported as an accurate commentary on post-biblical halakhah as well. For example, the meaning of each one of the four mishnaic modes of judicial execution derives from the principles governing the modes of execution as a whole. Indeed, we find that they also derive from the principles shaping the entire edifice of criminal procedure in tannaitic halakhah. This does not negate the value of those studies that focus upon a particular halakhic rule without attempting to discern the underlying structural principles that position the rule within the halakhic system. Studies of this kind may contribute significantly to an understanding of the genealogy of the law, or what theoreticians refer to as its “diachronic aspect.”⁶⁶ Nonetheless, with all their importance, these

64 See Joseph Raz, *The Concept of a Legal System* (Oxford: Clarendon, 1980); idem, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon, 1979), 78-121.

65 Moshe Greenberg, “Some Postulates of Biblical Criminal Law,” in Menahem Haran (ed.), *Yehezkel Kaufmann Jubilee Volume* (Jerusalem: Magnes, 1960), 5-28, 8; see also E. Adamson Hoebel, *The Law of Primitive Man* (New York: Atheneum, 1968), 3-46.

66 Englard, “Research on Jewish Law,” 40.

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studies are usually incomplete, because they fail to explain the law within the context of its internal conceptions.

On the other hand, we should avoid presenting an overly sophisticated conception of the law and of making it appear excessively systematic.⁶⁷ Every legal system has contradictions which cannot be easily reconciled, and the halakhic system is no exception. Contradictions may attest to ideational, ideological, and societal tensions in all social spheres, including its legal system. They may also be the result of pragmatic considerations, which occasionally impede the uniform application and integration of principles, or interfere with the process of striking a balance between legal rules. These remarks are of particular importance with respect to historical research, whose goal is to reconstruct an ancient system in general and its principles in particular, which are generally implicit rather than explicit. However, acknowledgement of the existence of contradictions in legal systems only attests to the fact that they are imperfect; contradictions do not diminish the centrality of principles in any system of law, including the halakhah.

3. Legal Principles and Interpretation

The last point underscores the importance of principles as tools for interpretation. The second half of the twentieth century witnessed the intensified study of hermeneutics, and with it an increased awareness of the complexity of the interpretative act. The field of law was no exception, and as with literature and history, it became clear in law as well that interpretation was not just a technical performance. In many cases, the application of a principle to a particular case cannot be reduced to a simple deductive calculation. The interpretative process involves complex considerations relating to the precise meaning of the rule, its formulation, its relevance to the particular case being discussed, and the relevance of other rules. Legal principles play a central role in the resolution of these questions because they create a context for

⁶⁷ *Ibid.*, 43.

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determining the contents of the rules and the manner of their application in particular cases.

The interpretative process is reasonably complex with respect to an operative system of law, but when dealing with legal systems from the past it may become considerably more intricate. In a living and functioning legal system the interpreter sits among his contemporaries, and in addition to the books of law he also has access to other “sources” of law. This is not the case regarding legal systems from the past, in which a large part of what comprises the “unwritten” sources of law are unavailable, at least not in the “official” legal material; the interpreter is thus called upon to utilize all the material at his disposal for purposes of his reconstruction. Literary and historical material, which at first blush seem foreign to the legal system, may be particularly significant in this act of reconstruction.

In sum, according to the jurisprudential model proposed here, a legal system cannot be defined exclusively in terms of its rules; it also includes principles, which cannot be viewed as extra-legal norms or as abstract philosophical constructs that relate to the legal system from without,⁶⁸ but rather are part of the system itself. These principles are intrinsic both to the construction of the law and to the interpretation of its rules. Its sources are diverse, and indeed, this fact tends to blur the boundaries of the law and undermine its aspiration for stability and certainty. Nonetheless, the model that integrates the principles into the system is able to provide a theoretical underpinning for productive research of early rabbinical halakhah and for the illumination of its interconnectedness with the aggadah.

4. Halakhic Principles and Aggadah

As noted above, aggadah is generally defined as the non-halakhic (non-legal)⁶⁹ part of talmudic literature. This definition is adequate to the

68 Hart, *Concept of Law*; Raz, “Legal Principles and the Limits of Law,” 883; Dworkin, *Taking Rights Seriously*, ch. 1.

69 See, e.g., Marc Saperstein, *Decoding the Rabbis: A Thirteenth Century*

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extent that it differentiates the aggadah from “halakhic rules” – in other words, from specific, measured, halakhot. But as we observed, in scholarly literature, the expression “non-halakhic” has a broader connotation. Aggadah is considered to be “non-halakhic” in the sense that it is devoid of halakhic principles, models, and basic concepts. A more moderate formulation of this line of thought would assert that the aggadah – primarily its non-“obscure,” “rational” elements and its ethical themes – indeed belongs to the ideational world of the halakhah, but only in the sense of providing a rationale for the commandments. In other words, the aggadah relates to the halakhah from without. Yet, from a halakhic point of view the aggadah is invalid. These approaches are the result of an evaluation of the halakhah by way of a formalistic model, which separates the aggadah from halakhic discourse.

By contrast, a number of scholars have recently drawn attention to meaningful connections between various portions of aggadah and halakhah in the Mishnah. As opposed to the prevailing scholarly view, Shlomo Naeh showed how the story of R. Hanina b. Dosa in *mBerakhot* 5:5 is a model for the formulation of a number of the laws of prayer in that tractate.⁷⁰ Israel Knohl explained how halakhic disputes surrounding the laws of reciting Shema between the Schools of Hillel and Shammai can be illuminated in light of aggadic sources pertaining to the ceremonial aspects of its recital.⁷¹ Aharon Shemesh demonstrated that one of the central principles guiding the formulation of the laws of flagellation in *mMakkot* 3 is in fact based upon the manifestly aggadic source cited therein.⁷² The links identified by these scholars between

Commentary on the Aggadah (Cambridge, MA: Harvard University Press, 1980), 213 n. 1.

70 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.

71 Israel Knohl, “A Parasha Concerned with Accepting the Kingdom of Heaven” (Hebrew), *Tarbiz* 53 (1984), 11-32.

72 Aharon Shemesh, “Onesh ha-Malkot Bimkorot ha-Tanna’iyim” (PhD diss., Bar-Ilan University, 1994), 223ff.

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the halakhah and aggadah in the Mishnah enabled them to intertwine ostensibly unrelated halakhot and aggadot scattered throughout the talmudic literature. These studies tend to refute Zunz's determination that "the rigidity of the halakhah (in the Mishnah), and its succinctly organized mode of expression, almost close the door upon the aggadah."⁷³ Similarly, the studies run counter to conclusions such as those drawn by Frenkel, that "the mishnaic approach to its own 'aggadah' indicates that the mishnaic authors were deeply aware of the religious problem posed by the halakhah: occasionally, by virtue of its manifestly legal structure, it fails to provide people with religious guidance."⁷⁴ In contrast to these observations, the aforementioned scholars have demonstrated – at least in the cases focused on, and particularly in relation to the Mishnah – that halakhah and aggadah are not necessarily at cross purposes. Quite the opposite: they share the same philosophical-theological foundations and belong to the same literary corpus.

The conclusions stemming from these studies corroborate our own proposal to regard the aggadic sources, and particularly the ones incorporated into the halakhic collections, as quasi-halakhic principles.⁷⁵ The jurisprudential model outlined in the previous section supplies its theoretical paradigm. Viewing talmudic literature from this perspective accommodates an understanding not only of how the halakhah and the aggadah echo the same ideational world, but also of their integration into one and the same literary corpus. This phenomenon is especially manifest in the Mishnah. In the rabbinic corpus, the Mishnah is a relatively early document, and its editorial structure is unique, consisting of a quasi-codification of the halakhah by subject, with each subject internally organized in a manner resembling the organization of statutes in a legal system.⁷⁶

73 Zunz, *Ha-Derashot*, 44.

74 Frenkel, *Darkhe ha-'Aggadah*, 487.

75 The aggadah itself provides examples of halakhic rules, i.e., where a particular ruling is inferred from a case in point.

76 For our purposes it is irrelevant whether the editor, R. Judah the Prince,

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In this sense, the Mishnah differs from aggadic and halakhic midrashim, which were usually organized according to the order of the biblical verses, and apparently by later editors.⁷⁷ The Mishnah is primarily based on a particular school of sages, that of R. Akiba.⁷⁸ This school was normally characterized by an anonymous majority opinion, and the opinions of those sages identified with the school were relatively well established. It is also easy to identify the opinions of sages who belonged to divergent traditions.

For our purposes this fact is important because the Mishnah, and to a certain extent the Tosefta, provides the framework for the discussion of tannaitic halakhah as a legal system. Apart from structural considerations, the editing is based on substantive, content-based considerations.⁷⁹ The

intended to edit the Mishnah in the form of a statute, representing the settled law, or to satisfy a confluence of academic and pedagogic needs. The Mishnah includes contradictions, repetitions, variant opinions without any clear resolution, and other features that are normally anathema for a system of laws. Nonetheless, its consistency and systematization, the division into subjects, and internal order are characteristic of a legal system. See Avraham Goldberg, "Purpose and Method in Rabbi Judah Hannasi's Compilation of the Mishna" (Hebrew), *Tarbiz* 28 (1968-1969), 260-69, esp. 264-65; Chanoch Albeck, *Introduction to the Mishna* (Hebrew) (Jerusalem: Bialik, 1959), 105-106. Most scholars accept Epstein's view, namely that R. Judah intended to create a definitive and binding legal codex. See Epstein, *Introduction to the Mishnaic Text*, 225-26.

77 Some scholars contend that the two categories (Mishnah and halakhic midrash) reflect two different methods of study, but it is likely that the tannaim dealt with them simultaneously. See Avraham Goldberg, "The Early and the Late *Midrash*" (Hebrew), *Tarbiz* 50 (1981), 94-106; David Weiss Halivni, *Midrash, Mishnah and Gemara: The Jewish Predilection for Justified Law* (Cambridge, MA: Harvard University Press, 1986), 58-59; Sussmann, "History of *Halakha*," 58 n. 185; Marc Hirshman, *A Rivalry of Genius: Jewish and Christian Biblical Interpretation in Late Antiquity* (trans. Batya Stein; Albany: State University of New York Press, 1995), 109.

78 Goldberg, "All Base themselves upon the Teachings of Rabbi 'Aqiva" (Hebrew), *Tarbiz* 38 (1969), 231-54; Albeck, *Introduction to the Mishna*, 99ff.; Epstein, *Introduction to the Mishnaic Text*, 71.

79 See esp. Knohl, "Kingdom of Heaven," 29; and Naeh, "Creates the Fruit of Lips," 71.

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Mishnah is therefore a broad complex from which one can extract principles and conceptions, in other words, its underlying, implicit thought-structures. These complexes illuminate the meaning of the particular minutiae of rules that make up its small units. The presumption that the Mishnah is based on consolidated, unified, original thought-structures is supported by the fact that it is not eclectic. It is dominated, as stated, by one school of thought – that of R. Akiba.

The Mishnah provides fertile ground for an analysis of the nature of the connection between halakhah and aggadah. In contrast to the theory that mishnaic aggadah is mere rhetoric, or alternatively, that it presents a religious ideal extending beyond the ideal ensconced in mishnaic halakhah, it suggests precisely that the aggadah contains the key to the reconstruction of the Mishnah's underlying halakhic principles or conceptual constructs.

The integrated reading of halakhah and aggadah is also based on another consideration, this one working in the opposite direction. For while the definitive, particularistic nature of the halakhot may occasionally preclude an understanding of their underlying rationale, it certainly facilitates the precise identification of their contents. This is equally true of the disputes between the rabbis regarding the halakhot. But this cannot be said of the aggadic sources, the contents of which are often shrouded in obscurity, due to their literary structure. For example, it is not always clear whether aggadic sections transmitted by different sages necessarily reflect variant opinions. Assuming the validity of my assumption regarding the symbiotic relationship between rabbinic halakhah and aggadah, an integrated reading is not only productive in terms of the explanations given for the specific halakhot, but also enhances the understanding of the ostensibly obscure thought-structures ensconced in the aggadah. The deficiency of one area is compensated for by the advantages of the other.

As a rule, the aggadah expresses wide-ranging ideas related to values, ideals, and religious habits, as well as to conceptions of God, Man, and the World. These ideas may be formulated in a variety of

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ways: stories, homilies, interpretations of biblical verses, adages of a theosophical, mystical, or magical nature, etc. Their literary form and modes of expression may induce the student to conclude that halakhah and the aggadah are fundamentally distinct categories. Indeed, in its mode of expression aggadah differs from the measured, specific halakhah. However, it is precisely that aspect which distinguishes principles from rules in any legal system. It must be remembered that aggadah – like legal principles – also operates external to the halakhah: in theosophical discourse, public sermons, education, propaganda, and the like. However, these differences do not detach principles from the legal system, nor do they establish or reflect a fundamental antagonism or dichotomy between aggadah and halakhah.

There were scholars who distinguished between “halakhic discretion” and “aggadic discretion.”⁸⁰ If the meaning of “aggadic discretion” is the choice of a literary (aggadic) mode to express beliefs, conceptions, and values, whereas “halakhic discretion” refers to the intellectual process of applying halakhic rules and principles in specific cases, then the distinction is both clear and justified.⁸¹ On the other hand, “aggadic discretion” may also be understood as connoting the aggadah’s conceptual kernel, abstracted from its concrete literary apparel. If the latter is the case, then one cannot speak of a fundamental or an inevitable dichotomy between aggadic discretion and halakhic principles. Quite the opposite; they are both premised on similar conceptions and insights.

This conclusion, however, must be qualified on three counts: first, the claim that the aggadah may evince halakhic principles does not imply that all aggadah is relevant to halakhah. The aggadah is highly

80 Frenkel, *Darkhe ha-Aggadah*, 495.

81 Many scholars, following the prevalent formalistic trend in literary research, have tended to focus on the aggadah’s various literary forms (“Midrash as Literature”). See Marc Hirshman, “On the Forms and Methods of Midrash” (Hebrew), *Madda’e ha-Yahadut* 32 (1992), 83-90, 88. This also contributed to the tendency over the last generation to sever the halakhah from the aggadah.

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variegated and its contents are not necessarily connected *in totum* to the halakhah, either directly or indirectly.⁸² Second, while the halakhah also comprises “aggadic considerations” that are value laden, theosophical, magical, or other, this does not preclude the existence of conceptual, formal, and “legal” considerations, all of which participate in its formulation and fulfill the need for reliability, certainty, and other practical requirements. These types of considerations are integral to the structure and the development of any legal system and are equally important to the molding of the halakhah, imbuing its rules with their measured and definitive quality. Nonetheless, one must be wary of mistakenly predicating the halakhah exclusively on this category of considerations. Third, halakhic principles do not reside exclusively in “aggadah.” Naturally, the formulation of certain principles is purely “halakhic,” in other words, measured and incisive. In this context it should be emphasized that in legal systems too there is no clear-cut distinction between rules and principles, and in numerous cases it is a matter of degree. Typically, the principles formulated as halakhic rules will be at a low level of abstraction.

I mentioned above that the terminological distinction between aggadah and halakhah already appears in sources attributed to the tannaim, while noting that the distinction is not necessarily indicative of separation or conflict between the two dimensions. Conceivably, the enlistment of these terms in many of the midrashim attests to an affinity between them, akin to the connection described above. One example is the following section of the *Mekhilta*:

And He said: If thou wilt diligently harken [...] To the voice of the Lord thy God, meaning the ten commandments that were given “mouth to mouth” in ten sounds. And will do that which is right in His eyes, meaning excellent sayings (haggadot ha-meshubbahot) which are to be listened to by all men, and will give ear to His commandments,

82 Another related phenomenon is where the halakhah included in the aggadah differs from the halakhah that comprises the “halakhic sources”; see Safrai, “Attitude of the Aggadah.”

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meaning the decrees (*gezerot*), and keep all of His statutes, meaning *halakhot*.⁸³

This paragraph avoids setting a dichotomy between “excellent sayings” (*haggadot ha-meshubbaḥot*), which are understood by all people,⁸⁴ and *halakhot*. Quite the opposite, *haggadah* is subsumed within the general category of performance of commandments. The midrash infers the phrase “excellent *haggadot*” from the word “[you] will do” (*ta’aseh*), and they are integrated together with normative categories such as “decrees” (*gezerot*) and *halakhot*.⁸⁵ The allusion is therefore to the normative, applicable aspect of the *aggadah*. The connection between *halakhah* and *aggadah* is also implied in the following passage from *Sifre Deuteronomy*:

Another interpretation: *My doctrine shall drop as rain*: Just as rain falls on trees and infuses them with the particular flavor (of their fruit) – the grapevine according to its flavor, the olive tree according to its flavor, the fig tree according to its flavor – so also the words of the Torah are all the same (*divre torah kullah aḥat*), yet they comprise Scripture, *Mishnah*, *Talmud*, *Halakhah*, and *Haggadah*.⁸⁶

83 Jacob Z. Lauterbach, *Mekhilta de-Rabbi Ishmael* (2nd ed.; Philadelphia: Jewish Publication Society, 2004), Tractate *Vayassa*, 1:228-29.

84 This *derashah* distinguishes between “excellent sayings” and the *aggadah* as a whole. The nature of this distinction is not clear, but for our purposes it is immaterial.

85 Regarding the terms “decrees” and “statutes” in talmudic literature, see Bacher, *Erkhe Midrash* (trans. A. Z. Rabinovits; Tel-Aviv, 1922). The precise distinction between them is not important for our purposes.

86 *Sifre Deuteronomy* §306. Translation taken from Reuven Hammer, *Sifre: A Tannaitic Commentary on the Book of Deuteronomy* (New Haven: Yale University Press, 1986), p. 306. See also *Sifre Deuteronomy* §48, p. 113. Avraham Rosenthal, “Torah she-’Al Peh ve-Torah mi-Sinai: Halakhah u-Ma’aseh,” in Moshe Bar-Asher and David Rosenthal (eds.), *Mehqerei Talmud, Volume Two* (Jerusalem: Magnes, 1992), 448-87, n. 41, found the latter passage problematic, and did not offer a solution that was consistent with his approach. There are many other passages in tannaitic literature expressing a similar idea.

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This midrash depicts the different components (*Talmud*,⁸⁷ *halakhot*, and *aggadot*)⁸⁸ of the Written Law and the Oral Law as a plurality stemming from and rooted in unity (“the words of Torah are all the same”).⁸⁹ The midrashic author emphasizes the particular merit of the Torah, which is simultaneously “all the same” and multifaceted. At the same time, he alludes to the conception that the myriad reflections of the Torah are all rooted in a single source. More than merely identifying the unified source of biblical and mishnaic authority (*Talmud*, *halakhot* and *aggadot*), it intimates that their contents are nourished by one and the same source. Like the water that provides life and sustenance for innumerable types of trees, the one Torah reveals itself in a multiplicity of diverse realms. Identical contents are individuated into *halakhot* in one place, and given ideational-poetic expression in other places (*haggadot*).⁹⁰

87 The term *Talmud* apparently means “midrash” (=learning by way of exegesis). See Rosenthal, “Torah she-‘Al Peh,” 463 n. 48, and his references.

88 This reading of the text is based *inter alia* on *Sifre Deuteronomy* §344, p. 401; see Epstein, *Introduction to the Mishnaic Text*, 804; Rosenthal, “Torah she-‘al Peh,” 455-56.

89 Conceivably, the underlying conception of this midrash conflicts with the conception expressed in the *Sifra*, *be-Hukkotai* 8:12 (Weiss, ed.), p. 112b: “*These are the statutes and judgments and laws* – this teaches that two Torot were given to Israel, one Written and the other Oral.”

90 This relationship between *halakhah* and *aggadah* prevails throughout talmudic literature; see, e.g., *ySan* 11:4, 30a, “It is written, ‘If any matter arises ... which is too difficult for you to judge’ (Deut 17:8) – this indicates that Scripture speaks of the most distinguished member of the court. ‘for you’ – this refers to counsel. ‘matter’ – this refers to *aggadah*. ‘between blood and blood’ – the difference between the blood of menstruation and hymeneal blood ... ‘between plea and plea’ – refers to trials for property cases and trials for capital cases. ‘between plea and plea’ – refers to cases in which the death penalty is executed through stoning, burning, decapitation, or strangulation.” See also *tSan* 7:7; *‘Avot R. Nat.* B ch. 18 (Schechter, ed.), p. 39; *yBer* 9:1, 9a; *yKil* 9:3, 32b; *yPesah* 5:3, 32a; *yBB* 10:2, 16c; *yHor* 3:5, 48a; *bḤag* 14a; *bBB* 9b; *bNid* 70b; *Sifre Deuteronomy* §49, p. 115; *Lev. Rab.* 1:36; *Num. Rab.* 14. See Louis Finkelstein, *Sifra on Leviticus* (Hebrew) (Jerusalem: The Jewish Theological Seminary of America, 1991), 5:100-104; Saul Lieberman, “Ha-Halakhah sheba-Aggadah” in *Studies in Palestinian Talmudic Literature*

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These midrashic passages can be read as a poetic (aggadic) expression of the jurisprudential model presented above.⁹¹ Moreover, whereas with respect to principles of law, the jurisprudential model described above leaves room for dispute between philosophers as to the source of their authority, there is no dispute regarding the source of authority of the haggadot. According to these midrashim, the haggadah, like the halakhah, derives its authority from the Torah, which “is all the same.” The conclusion would thus seem to be that the jurisprudential model that limits the law to its rules, and the Torah to its halakhot, is far removed from the foundational conceptions of these midrashic passages.

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In this essay I attempted to demonstrate that two principal factors led to the dichotomy between halakhah and aggadah in the research of Talmudic literature. The first is the perception of talmudic halakhah as a paradigm of formalistic jurisprudence. This factor was supported by prevailing trends in legal theory during the first half of the twentieth century, and this approach created a conceptual-methodological barrier to an integrated understanding of halakhah and aggadah. The second factor – which I regard as the more powerful one – is the desire to purge the halakhah of any aggadic, non-rational elements. These two factors, occasionally in coordination and occasionally in isolation, sundered the halakhah from its “emotional” and theosophical roots.⁹²

(Hebrew) (Jerusalem: Magnes, 1991), 116-17; idem, “Me-Aggadah le-Halakhah,” in *ibid.*, 118-22. See also bSan 57b: “R. Jacob b. Aḥa found it written in the scholars’ Book of Aggadah: A heathen is executed on the ruling of one judge, on the testimony of one witness, etc.”

91 Compare Frenkel, *Darkhe ha-’Aggadah*, 15. The passage in *Sifre Deuteronomy* §306 also touches upon the connection between a source (here, the Bible or Mishnah) and its interpretation (Mishnah, Talmud, Haggadot). See Finkelstein, *Sifra*, 5:104-105.

92 As in the words of Scholem, *Kabbalah and Its Symbolism*, 95, who was referring to talmudic halakhah and not to its academic research.

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To overcome this methodological barrier, I proposed an alternative jurisprudential model, one that is more congruent with talmudic halakhah. This model provides a conceptual framework for research of talmudic halakhah in general, and for research into the interaction of halakhah and aggadah in particular.