1 • Introduction

> R. Simlai preached: Six hundred and thirteen commandments were communicated to Moses, three hundred and sixty-five prohibitions, corresponding to the number of days in the solar year, and two hundred and forty-eight positive precepts, corresponding to the number of limbs in the body. Said R. Hamnuna, what is the biblical source for this? "Moses charged us with Torah, an inheritance etc." (Deut. 33:4). The numerical value of "Torah" is six hundred and eleven. [To this we add] "I am" and "You shall have no other Gods" (Exodus 20:2–7) which were heard directly from the mouth of the Almighty.
>
> —Bavli, Makkot 23b–24a

THIS COMBINED HOMILY WAS, in time, to become one of the best known of all rabbinic teachings. Since the closing of the Babylonian Talmud (sixth century to seventh century) and its eventual predominance over the religious lives of premodern Jews, every Jewish child came to know that the Torah contains 613 commandments, divided into 365 prohibitions and 248 positive commandments. Given the homiletic basis of the "calculation," one may wish to question the authority of this specific number; nevertheless, a total of some six hundred biblical commandments is certainly about right, however (and whether) one chooses to actually count them.[1] And yet, these same children and their teachers knew perfectly well that the (rabbinic) Judaism they actually lived and practiced contained many, many times that number of commandments. In fact, Jewish religious practice as it developed over time and

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as it achieved expression in the literature of the rabbis, the ancient sages and teachers of Jewish law, consists primarily of observances not explicitly stated in the Torah. This fact in turn leads to the question "How do we know this?" (more literally, "Whence do we know this?"), which is asked regarding hundreds of observances and laws, explicitly or implicitly, on virtually every page of the Talmuds, the great compendia of Jewish legal thought. That is, the question is asked, "How do we know that a particular observance is required of Jews, if it is not explicitly stated in the Bible, the revealed word of God?"

When one looks at the teachings of the rabbinic sages that spanned the first six Christian centuries, one finds two basic types of response to this question—one wholesale, in the sense that it seeks to deal with the question *tout court,* one retail, in that it seeks to provide a source for each and every law, one by one. The wholesale response is found almost exclusively within the Aggadah, or the nonlegal segments of the various documents that comprise what we call rabbinic literature, and is primarily attributed to *Amoraim,* rabbinic sages who flourished from the third to the fifth centuries of the Christian era. This response insists that virtually all extrabiblical practices[2] originate from an oral communication of God to Moses at Mount Sinai, where the Torah was given. This communication consisted of explanations of how to implement the laws actually stated in the Torah, as well as many other laws. Together, the written and oral Torahs, as they were called, represented a complete divine instruction to the people of Israel, outlining what it is that God wants of his people. In this wholesale response, everything that God actually demands was imparted at the revelation at Mount Sinai, part in writing, part orally. One rabbinic sage is quoted as having said that even the things that a student will one day bring to light were already said to Moses at Sinai.[3] Another sage is quoted to the effect that even the observances first noted in the Book of Esther—indeed, the Book of Esther itself, which relates to a time one thousand years after that of Moses—were already stated to Moses at Mount Sinai.[4] There is, of course, ample room to debate how literally such pronouncements were meant to be taken, particularly since they often depend on rather far-reaching exegeses of biblical verses. Nevertheless, there are enough such statements spread throughout the documents that comprise rabbinic literature to suggest that at least some rabbinic sages understood that together with a written Torah, God revealed a fully developed oral one as well.[5]

The retail response, which predominates in virtually all halakhic discussions in the literature, makes no such sweeping generalizations, but rather suggests that practically every law is to be derived from the

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written text of the Torah in some way. The answer to the question, "How do we know this?" is almost always, "We learn it from a verse." That is, the extrabiblical commandments are seen as primarily the product of exegesis. In the halakhic discussions of the Talmud, only a very small number of laws are identified as laws given to Moses at Sinai, or some other kind of tradition or decree.[6] Thus, if we collect all the responses to the question, "How do we know this?" we will note that most observances are considered the product of exegesis, while a few are categorized as laws given to Moses at Sinai or as some other form of tradition.[7] While both responses insist that God revealed laws and legal explanations orally, the retail response seems to suppose that such orally communicated laws are relatively few in number.

In my opinion, it is impossible to recover what any individual rabbi may have thought regarding the origins of extrabiblical practices, even if we were to accept all attributions at face value.[8] Both the wholesale and the retail responses might find expression in the teachings of a particular sage. The wholesale response is too readily interpreted as hyperbole to be certain just what a particular speaker had in mind. Further, the language in which the wholesale response is communicated is sufficiently pliable that it can allow for exegetical innovation in time and still claim that this represents the original intent of the divine lawgiver. We cannot, then, say anything about any particular sage and his opinion on the matter. What we can say is that whatever one wishes to do with the aggadic pronouncements that maximize what God gave and minimize the role humans play in shaping the contours of Jewish practice, the relentless insistence on the exegetical foundations of Jewish practice that dominate halakhic discussions of the various rabbinic documents leaves little doubt that, in general, these documents are informed by the belief that many Jewish practices are to be derived from the Torah exegetically.[9]

Exegesis of the Torah was the means through which the rabbis established the authority of the extrabiblical laws and practices they inherited; it was the medium they employed to create new laws in their own times; and it was the tool they used to resolve more far-reaching problems, such as contradictions within the Torah, or between the Torah and other biblical books.[10] It was, as we shall see presently, the tool they used to account for the Bible's verbosity and repetitiveness; in virtually all cases they accounted for a particular repetition by seeing it as the source of a specific law. Whatever the historian may wish to say about the origins of extrabiblical Jewish practice (a question that this book makes no effort to address),[11] the judgment of the rabbinic documents seems to me to be beyond question: the vast majority of those

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practices not explicitly stated in the Bible emerges through human exegesis of the Bible's language.

This may be seen most readily from the numerous rabbinic texts that contain legal exegesis of the Torah. There are, first and foremost, a series of texts sometimes called "tannaitic midrash" because, it is claimed, they derive from the time of the *Tannaim,* rabbinic teachers who flourished in the first two centuries of the Christian era. These texts are also called "midreshe halakhah" because they contain exegesis pertaining to halakhic matters, although they also contain exegesis that is not concerned with legal matters. The dates of these texts are the subject of scholarly dispute, with the third, the fourth, the fifth and the eighth centuries all receiving some support.[12] My own view is that the advocates of a third-century date, by far the majority, have made the most compelling argument. In any event, for the purposes of the present study it is not crucial that we resolve this, so long as we agree that much of the material now contained in these texts, although not necessarily all, predates the redaction of the two Talmuds and that this material was known to the Talmud's redactors and was considered by them as tannaitic. This far I think even the most skeptical of scholars will go.

The four main, apparently complete, midreshe halakhah are the *Mekhilta de-Rabbi Ishmael*, a commentary on Exodus; the *Sifra*, a commentary on Leviticus; the *Sifre Bemidbar*, a commentary on Numbers; and the *Sifre Devarim*, a commentary on Deuteronomy.[13] In addition to these and other fragmentary collections of midreshe halakhah,[14] the two Talmuds, the Bavli and Yerushalmi, contain substantial amounts of halakhic exegesis, often seeking to determine the exegetical reasoning that undergirds laws in the Mishnah, the authoritative early third-century legal collection.[15] In addition, a certain amount of halakhic midrash may be found in the Mishnah and the Tosefta, as well as the so-called aggadic midrashim. The contents of these texts, as we shall see, validate the claim that legal exegesis played a central role in the cultural orientation of early rabbinic Judaism.

Now, to be sure, exegesis of the Bible for legal purposes was scarcely an innovation of the rabbis of the first five Christian centuries. Exegesis of the Bible is as old as the biblical documents themselves, which frequently contain exegetical reworkings of antecedent biblical passages.[16] Similarly, as the nineteenth-century scholars Samuel David Luzzatto, Zacharias Frankel, and Abraham Geiger first argued, the ancient Greek and Aramaic translations of the Pentateuch exhibit intensive exegetical reflection on the Hebrew text(s) from which they were translated. Further, as Geiger argued brilliantly if not always compellingly, the Masoretic text itself may be seen as the product of politically

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and religiously oriented "exegesis" (read, *eisegesis*) of an antecedent Hebrew text.[17] The Samaritan Pentateuch may also reflect religiopolitical exegetical reworkings of received materials, and in any event Samaritan religion incorporates numerous exegetical extensions of the Torah.[18] The extent of the connection between these exegetical endeavors and rabbinic exegesis is subject to debate, although few would deny that there is some phenomenological overlap, if not direct historical connection.[19]

Beyond the texts and translations of the Bible, the various religiously and culturally identifiable groups that comprised the intellectual elite of the ancient world all developed systems of exegesis of important texts. The Samaritans, the Sadducees (about whose exegetical approaches we know little), the Qumran community, the Greek philosophical schools, and the early Christian communities all engaged in textual study and interpretation. Although rabbinic legal exegesis contains features that distinguish it from all these approaches, there are considerable parallels between each of them and the interpretations of the rabbis.[20] If one wishes to understand rabbinic exegesis against its historical background, one must attend to all these parallels and potential influences.

In the present work, however, I am not interested in presenting rabbinic exegesis in its appropriate historical context; indeed, in some ways, my project would be undermined by doing so. For the primary focus of the present work is the *reaction* to the existence of rabbinic exegesis and the claim advanced by its practitioners that it serves as a source of law. In trying to understand this reaction we must look at the literature as did previous generations of committed rabbinic Jews, and as did those committed to the reform or rejection of rabbinic Judaism. Among such people, rabbinic methods of scriptural interpretation were seen as sui generis; indeed, from the Middle Ages on, many Jews understood these methods as divinely revealed.[21] Others, less sympathetically inclined, saw these methods and their application as the height of absurdity and "turbidity."[22] Few of them understood rabbinic legal exegesis as reflective of a broader interpretive culture of the ancient world. Until the academic study of Judaism began to flourish in the twentieth century, the exegetical assumptions of the ancient rabbis were seen, for better or worse, as reflective of a historically unique approach to the interpretation of texts—the contrary example of the twelfth-century Karaite, Yehuda Hadassi notwithstanding.[23]

What we are interested in here is the historically repercussive approaches to Jewish exegesis and the practical conclusions that ostensibly issue from it. For in Jewish intellectual history the question, "How do we know this?"—what is the authority of the corpus of Jewish law—is frequently reopened, and numerous *Kulturkämpfe* have emerged

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revolving around how one answers that question. This is particularly true of the nineteenth century, since all the emerging forms of Judaism needed to address the viability of continued observance of Jewish law. The debates necessarily centered on the role and intelligibility of rabbinic readings of Scripture that seemed so foreign when judged by contemporary standards of textual meaning and linguistic significance.

To some extent the problem post-talmudic Jews faced is similar to that faced by any group whose exegetical (or any other kind of) traditions have achieved authoritative status, while exegetical assumptions change. Under such circumstances, one's sacred literature can become a distinct intellectual burden. The problem is particularly interesting in Jewish religious history in the Christian era, for rabbinic Judaism is characterized, in general, by a belief that earlier sages had greater religious authority than later ones.[24] Later authorities may not generally disagree with the *Tannaim,* who were, to repeat, the earliest rabbinic teachers, who flourished during the first two centuries of the Christian era. Furthermore, it is precisely the *Tannaim* who are viewed as the authors of the largest percentage of rabbinic legal exegesis, or midrash halakhah. Even when all acknowledge that no *Tanna* actually composed a given piece of midrash, it is often assumed by traditional students of the Talmud that the midrash accurately reflects what the *Tanna* was thinking in issuing a legal ruling without explicit exegetical underpinnings (there being little question that the ruling had such underpinnings).[25] When a law is transmitted in the name of a *Tanna* and an exegetical reconstruction of how the *Tanna* arrived at that law is offered, the midrash will be understood as the *source* of the law in question. If there are no disputes reported, the legal teaching will become normative, and the midrash will generally be considered the authoritative source of that law.

One problem faced by later generations is the fact that the midrashic literature considered tannaitic contains many disputes of an exegetical nature. To cite but one example, the Torah (Exod. 22:11) states that when an item has been entrusted to someone to guard (according to rabbinic interpretation, such a person is being paid for his services) and it is stolen, the guardian must pay compensation. The *Mekhilta de-Rabbi Ishmael*, a presumably tannaitic commentary on Exodus, asks, "Whence do we know that the trustee is liable if the item was lost," which is not stated in the Bible? It proceeds to offer two responses, in the names of two rabbis; one, an argument a fortiori, the other, an inference drawn from the use of *kefel lashon* (doubled language), here the use of the infinitive absolute with the conjugated verb. While the Talmud tries to explain the underlying dispute (Bavli, B.M. 94b), in this passage and in hundreds like it, one is left with the impression that

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exegesis represents nothing more than the personal preference of different sages, and, therefore, one might conclude that its results cannot be considered part of the essential message of the divine lawgiver.

Here the problem for a hypothetical post-talmudic Jew is compounded by the fact that the Yerushalmi cites yet another exegetical option from which we may learn that a lost object is the same as a stolen one in terms of liability: we have the presence of the word *'o*, "or," in the verse. Now, for the rabbinic Jew living in the post-talmudic period, the law that apparently derives from this exegetical chaos is unquestionably authoritative as a biblical law. Yet, once moved to reflect on the matter, he would be quite confused as to precisely how this biblical law had been derived.

Also problematic from the perspective of post-talmudic rabbinic culture is that with the close of the Talmud (5th–6th centuries), the gates of halakhic exegesis were effectively, if not entirely, closed. That is, later authorities generally refrained from deciding legal issues by turning to a biblical text and interpreting it.[26] Thus, subsequent Jewish culture inherited a body of biblical exegesis that undergirded the ritual and legal practices that defined it; in general, it could not add to it and it could not disagree with its legal conclusions without a revolutionary reshaping of Jewish legal culture.

What happens when times change and exegetical preferences change? That is the question this book seeks to answer. In particular, we are interested in the modern period, which has seen a radical shift in textual assumptions and the perception of religious authority. However, in order to fully appreciate the issue confronting modern Jews of varying religious commitments, it is necessary to first get a sense of the role midrash halakhah played in premodern Jewish intellectual and religious history. We shall take this up in chapters 2, 3, and 4. The remaining chapters will then turn to modern times and the role the perception of midrash halakhah played in the Jewish *Kulturkampf* of the nineteenth century.

The Exegetical Problem

Before turning to that, the potential problem of midrash halakhah, the exegetical foundations of Jewish law, needs to be spelled out more concretely and in greater detail.[27] We need to understand how midrash halakhah works (or was traditionally understood to work), and to determine its implicit and explicit claim to legal creativity. Let us consider the following example. The Book of Deuteronomy (24:16) states, "Fathers shall not be put to death for sons, nor sons for fathers; a man

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shall be put to death for his own sin." A modern reader, unfamiliar with the criteria used in midrash halakhah and unfamiliar with the rest of the Bible, will have no difficulty understanding the simple meaning *(peshat)* of this verse. It means that each individual will be held accountable for his or her own actions, and only he or she may suffer the ultimate punishment, if appropriate. Guilt is not hereditary, nor is it visited upon ancestors.[28] A reader with knowledge of the rest of the Bible might see in this verse an admonition directed towards kings not to visit punishment on the children of those whom the king executes, such a practice not being uncommon.[29] None of these readers is likely to be overly troubled by the verse's verbosity and redundancy. This the modern reader will attribute to stylistic preference.

Those with some legal training, aware of the importance of statutory construction, may, however, be troubled by these features. They may seek to tease more meaning from the verse or they may simply attribute the verbosity to different legal standards or, perhaps, to sloppy construction. They might choose to argue that this is not a legal principle at all, but a theological statement, meaning that God will not punish fathers for sons, etc., although such a claim is not justified.[30] But what if the option of sloppy construction were not available? What if one took for granted that the author was incapable of sloppy construction, indeed, incapable of less than perfect construction? What if one took for granted that, even in "mere" theological statements, there can be no redundancies in this text? One would then be forced to find in each of the clauses a distinct statement that eliminates the redundancy, and, indeed, that is precisely what the *darshan* (the author of a piece of midrash) in the *Sifre Devarim*, a presumed tannaitic commentary on Deuteronomy, does with this verse:

> "Fathers shall not die for sons." What does this clause come to teach us? That fathers shall not die for sons, nor sons for fathers? Does it not already say "a man shall die on account of his own sin"? Rather [it comes to teach that] fathers shall not die through the *testimony* of their sons, nor sons through the *testimony* of their fathers. And when it says "*and* sons" (*u-vanim*) it includes [other] relatives; and these are they: his brother, his father's brother, his mother's brother, his sister's husband, the husband of his father's sister, the husband of his mother's sister, his mother's husband, his father-in-law and his brother-in-law. [When it says] "a man shall die on account of his own sin" [this means] fathers die on account of their own transgression and sons die on account of their own transgression.[31]

In the hands of this *darshan* the verse, apparently intended to establish a relatively straightforward principle of human justice, becomes the source for an important law unstated in the Torah, but of biblical authority,

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namely that people may not testify against (or on behalf of) their relatives. This last point is established by the appearance of the conjunctive "and" (in Hebrew, a one-letter prefix), also deemed superfluous. As we shall see in chapter 4, at a later time Jews would be unable to resist asking whether this is what the verse meant. At the same time, they were, of course, unable and unwilling to argue against the principle excluding relatives from bearing witness, even in formal ritual matters.

The problem is compounded because in the *Sifre Bemidbar*, a presumed tannaitic commentary to Numbers, we find a different midrash that derives the prohibition of relatives bearing witness from another source. Num. 35:24 states "In such cases the assembly shall decide *between* the slayer and *between* the blood-avenger" (emphasis added). The *Sifre* asks, "[W]hence do we know that relatives may not judge. Scripture says 'between the slayer and between the blood-avenger'?" This apparently means that the judging body must in some sense stand between the parties, equidistant, as it were, from each.[32] Of course, to this point all that has been established is that relatives may not be judges. The *Sifre* goes on to establish that they may not be witnesses either, by an argument a fortiori.[33] We should note that this passage is cited (with variations) in the Yerushalmi (San. 3:9). Each of these midrashim takes as its starting point the conviction that God encoded within the language of the Bible the additional information that relatives may not serve as witnesses. Yet each sees this important information encoded within different linguistic anomalies. Once again, our hypothetical Jew living in the post-talmudic period would acknowledge as an undisputed *scriptural* imperative the ineligibility of relatives to serve as witnesses.[34] At the same time, he would be confronted with a problem, given the two distinct exegeses rabbinic literature proffers. The problem becomes more difficult when his own sense of the meaning of Scripture shifts; then he may well ask whether either verse is an appropriate source for the law in question. That is, he may wonder whether Scripture actually "says" relatives may not serve as witnesses, and whether the sages who claim it does truly thought so.

How then, we must go on to ask, did the authors of midrash halakhah read the text of Scripture? What features triggered midrashic comment? Attempts to answer this question usually lead to a discussion of the thirteen hermeneutical principles attributed to the *Tanna,* R. Ishmael, and their assumptions. Such discussion strikes me as inadequate for two reasons. First, as has been noted by many, most of the principles are rarely, if ever, actually applied in a rabbinic text. Further, even those that are used scarcely exhaust the techniques used in rabbinic legal midrash. There are more exegetical techniques than are encapsulated in this list of principles.[35]

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Second, and more important, understanding the techniques used to interpret Scripture is only half the battle. Acknowledging that many legal passages stand *ke-feshutam* (according to their simple meaning), we must ask what scriptural problems excite midrashic interpretation. When do the rabbis comment, and when are they content to allow Scripture to stand as is?

To answer this fully, we must digress for a moment. Many scholars have argued that this is not really the right question to ask. For them, it is clear that the existing corpora of midrash halakhah are not primarily concerned with Scripture but with the Mishnah, that is, the body of law incorporated within this fundamental text. They claim that midrash halakhah represents an attempt to locate within the scriptural text sources or supports for laws that exist independently of it. In this reading, the starting point for midrash is not Scripture at all, but "traditional" law; midrash is not elicited by scriptural anomalies, but by the needs of the legal system. From this position, Jacob Neusner has gone on to locate within the so-called tannaitic midrashim, particularly the *Sifra,* a sustained polemic arguing the superiority of revelation over human logic.[36]

Neusner's position strikes me as attending only to the formal and rhetorical presentation of the midrashic passages, but not their content. Form and rhetoric are crucial, but not more so than content. Attention to content will show that neither his distinction between logic and revelation nor his reading of these passages can be sustained.[37] The overall claims regarding the relationship of the midrashim to the Mishnah needs to be taken more seriously. Certainly, the midrashim as we now have them at times take pains to indicate when the verse being explicated served as the "source" of Mishnaic law. On the one hand, some, probably most, midrashic passages strike us as inconceivable unless one assumes that the legal conclusion was already known. On the other hand, we must note that some midrashim deal with legal issues untouched by the Mishnah,[38] and the legal conclusions of others sometimes disagree with those of the Mishnah. This indicates that, while the relationship between the midrashic corpora and the legal corpora (the Mishnah and the Tosefta) is quite complex, the midrashic texts have their own integrity and direct relationship to Scripture, or, at least, to something other than the Mishnah. Furthermore, the historical issue of where Jewish law actually came from is less important for our purposes than the inner systemic judgment regarding the source of Jewish practice. Here, it seems clear to me, the texts are advancing the claim that they are interpreting the Torah with an eye to revealing all the laws encoded within its multivalent language.

Thus, even when as historians or literary critics we would insist

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the law is obvious and/or readily known, or explicitly stated in the Mishnah, we must note that the exegetes are still concerned with scriptural anomalies that in their view *create* law, rather than with anchoring in a scriptural passage what they acknowledge is existing law . A good example of this is the *Sifra*'s discussion of Lev. 1:3, to be treated below. However much the rabbinic exegetes may wish to anchor the Mishnah's laws in Scripture, they must operate with a theory of Scripture to achieve this. They must be able to answer the question "How do we know this" by plausibly showing that the norm in question is encoded within scriptural language; without this encoding the norm would never have been known, and would remain devoid of biblical authority. Whatever their historical point of departure, the *systemically recognized* point of departure for these exegeses is Scripture, not the Mishnah or some other source of traditional law.[39]

To return then to the issue under discussion, we must ask what scriptural anomalies elicit the use of midrashic techniques. An analysis of midrash halakhah that delves beyond the superficial form in which it is presented will not fail to note the extent to which concern for *yittur lashon*, (superfluities in language)—which, for our purposes, includes repetitions, extra words, even extra letters—is the prime mover (as in the text from Deuteronomy discussed above).[40] To the authors of this material, Scripture never says in two words what it can say in one, nor in three what it can say in two. It also never says the same thing twice. When it does, it is up to the *darshan* to show that it is not the same thing; something has been added by virtue of the repetition. In some cases the wording is slightly different, and this fact will hold the key to extrapolating a new legal result. In other cases, the wording of the repeated law is identical; then the imagination of the *darshan* must look to other possible applications of the law to explain this otherwise unacceptable anomaly.

Certainly the most famous resolution of the difficulty of scriptural repetition is the midrash halakhah that explains why Scripture says "You shall not seethe a kid in its mother's milk" three times. The first time prohibits cooking, precisely as the wording demands. The second time it cannot intend merely that, for that has already been established. Thus, Scripture must intend prohibiting consumption of a kid seethed in its mother's milk. The third time, Scripture intended to prohibit any benefit drawn from a kid seethed in its mother's milk, such as, to take a contemporary example, serving it to another in a restaurant.[41]

Another example, this time where the wording is different, may be seen in various interpretations of Leviticus 20 preserved in rabbinic sources, and today found in the printed editions of the *Sifra*.[42] As is well known, many of the prohibited sexual relationships spelled out in

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this chapter of Leviticus are repetitions of those stated in Leviticus 18. In the latter source a blanket punishment (namely, *karet*)[43] for all violations is given in verse 29, while in chapter 20, almost every verse carries a statement of the appropriate punishment (death, by an undefined method, or by burning). Chapter 18 is then understood as stating the prohibitions, while chapter 20 states the punishment. Indeed, an ad hoc legal principle is developed for these cases, insisting that both the prohibition and the punishment be explicitly promulgated. The blanket statement of punishment in 18:29 applies only to those transgressions not repeated in chapter 20. There is, thus, no superfluity in the text; each verse provides new legal information.

To the authors of midrash halakhah, even prepositions should not be used indiscriminately, even if that is the way people normally speak; the appearance of a preposition whose use could have been avoided calls forth a search for further meaning. For example, Lev. 1:2 and 3 make use of the phrase "from the herd" (*min ha-bakar*) in describing an animal to be brought for sacrifice. While this may appear to be a perfectly normal way of indicating what kind of animal is to be brought,[44] the interpreter(s) in the *Sifra* apparently felt that the word *min*, "from," is unnecessary; in his/their reading it is exclusionary, designed to indicate that only some from the herd may be brought as a sacrifice, while others cannot. The "from" that appears in verse 2 excludes cattle that have been used for idolatry. The *Sifra* continues:

And when it says "from the herd" below (i.e., in verse three), [this phrase is unnecessary; thus it must come to impart additional information, namely] it comes to exclude a *terefah*.[45] But would we not know this by an argument a fortiori. If a blemished animal, which is permitted [to be consumed] as *ḥullin*[46] is unfit for the altar, a *terefah* which is forbidden [even] as *ḥullin* is obviously unfit for the altar.

We must carefully attend to the force of this argument. The Torah used an allegedly superfluous word; the author states that the word is designed to exclude a *terefah* from the altar. Another voice enters the discussion and says that this is obvious. One would know this without a verse, and one has therefore not dissolved the superfluity. Note that the argument a fortiori has the same force as an explicit scriptural statement; indeed, an irrefutable argument a fortiori is sufficient to render "explicit" scriptural statements unnecessary. Thus, the superfluous *min* remains unaccounted for. The passage continues:

The fat and blood [of the animal] will show that this line of reasoning is not correct, for they are unfit for consumption as *ḥullin* but are fit for the altar.

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At this point, the fat and blood of the animal show that not all things forbidden to ordinary individuals outside a cultic context are also forbidden to the altar. Perhaps the *terefah* is comparable to fat and blood, and therefore it too would be permitted to be brought to the altar. Thus, the argument a fortiori does not work, and we need the verse; it is not superfluous. The passage goes on, however:

No, if you say this in regard to blood and fat, which come from that which is otherwise permitted (namely, the healthy animal, and that is why they are permitted to the altar), can you say it with regard to a *terefah* which is entirely forbidden?

The author(s) note that the blood and fat are not really comparable to a *terefah,* even though they share the characteristic of being forbidden for everyday consumption. The blood and fat are acceptable on the altar, for they derive from an animal that is otherwise acceptable as *ḥullin*; only those particular parts are not permitted. The *terefah* on the other hand, is entirely forbidden as *ḥullin*. The point here is that blood and fat do not render the argument a fortiori unacceptable, as previously claimed. The argument remains valid, the explanation that the verse comes to exclude a *terefah* from the altar is thus unacceptable, the verse remains superfluous, and we've still got a problem. The passage continues:

[Then] the nipping [off the head] of the bird will show that this line of reasoning (the original argument a fortiori) is not correct. [For a bird killed in such a manner] is entirely forbidden [as *ḥullin*], and yet acceptable on the altar.

Yet again the *Sifra* shows that the argument a fortiori does not follow, for a bird killed by nipping off its head, which is the prescribed manner for killing birds intended for the altar (Lev. 1:15, inter alia), may not be eaten under noncultic circumstances; it is, though, acceptable on the altar. Thus, the argument is not good, and the verse is necessary to prohibit a *terefah* from the altar. The passage goes on:

No, if you say this in regard to nipping the bird, which is forbidden [as *ḥullin*] by the very act that makes it sacred, can you say it in regard to a *terefah*, which is not forbidden by an act that makes it sacred? And since it is not forbidden by any act that makes it sacred, is it not unfit for the altar?

As above, the midrash shows that the disproving case is not comparable to the case of *terefah*. Thus, the argument a fortiori remains valid, and the superfluity of the verse is unresolved. The passage concludes:

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And if you reply to this, [I say] when it says "from the herd" below, this is only necessary to exclude the *terefah*.

The conclusion is perplexing, and resolving this perplexity occupies the better part of a page in the Babylonian Talmud (Menahot 5b–6a), with varying attempts to show that the argument a fortiori is not valid and therefore a verse is necessary. Whether the author of the passage in the *Sifra* had any of these arguments in mind, I cannot say. What I think can be said is that the author took for granted that the argument a fortiori that made the resolution of the superfluity unacceptable could be challenged and this was sufficient to establish the necessity of the verse.

Now what is going on here? We may take for granted, at least for the sake of argument, that the unacceptability of the *terefah* on the altar precedes this midrash; indeed, it would seem to be directly implied by the prophet Malachi (1:8). We must remember too that the Temple was no longer standing when this *derashah* was formulated. It seems most unlikely to me that in the Temple animals having the characteristics of *terefot* were sacrificed on the altar. Was the *darshan,* then, simply interested in supporting this law with a scriptural basis? Perhaps. But in the end, this could be established by the argument a fortiori; that the argument a fortiori is sufficient to provide biblical authority is, indubitably, the operating assumption of the entire passage. If establishing the biblical authority of the law excluding *terefah* from the altar were all the *darshan* had in mind, he could have relied on this argument. Rather, it seems undeniable to me that the *darshan* was perplexed here by what he considered an anomalous scriptural phrase. In his view the Torah should not have used the word *min* if its interest was simply in conveying the surface message of this verse. There must have been a deeper message; something must be excluded by the word *min*. That the *darshan* identifies an apparently well-established principle as that deeper message does not change the fact that his primary goal is to rescue Scripture from a superfluity, an imperfection. The only way for him to do that is to suggest that this superfluity exists to impart the law of the *terefah, which we would otherwise not have known*. If the *darshan* considered the unacceptability of the *terefah* to be a traditional law, this passage would be totally incoherent. Thus it is Scripture, and not the traditional law or the Mishnah, that is the exegete's point of departure, and it is the reconstruction of the creation of the law, not its ex post facto justification, that is his destination.

Let us turn again to our post-talmudic Jew, and this time he need not be hypothetical. That a *terefah* was ineligible for sacrifice was affirmed by all; it was clearly stated in the Mishnah (Zeb. 9:3, Bek. 7:7,

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Tem. 6:1,5). How does one know this however? Does the word *min* in the verse actually convey this information? With the exception of Rashi, none of the major Bible commentators appears to think so.[47] To be sure, this may be because the Talmud complicates matters by introducing other verses to fully establish the point.[48] Still, the proposed meaning of "from the herd" is nowhere challenged in the Talmud. Yet later exegetes seem not to find this *derashah* so compelling as to see it as determining the meaning of the verse—not even Rashbam, who affirms the importance of *yittur lashon* as a trigger for exegetical expansion. The most radical position is that of Maimonides, who connects the unsuitability of a *terefah* to Mal. 1:8, possibly suggesting that the law is not based on the authority of the Torah.[49] Clearly, Maimonides did not find the interpretation of the *Sifra* definitive. How he and others dealt with this will be discussed more fully in chapter 4. Thus, the halakhah excluding *terefot* was affirmed by all, and, with the possible (albeit unlikely) exception of Maimonides, with the authority of the Torah. Yet, most commentators appear untroubled by the scriptural anomaly that triggered the derashah, and they therefore do not consider the midrashic interpretation of the verse definitive.

There is another, very common form of midrash in which the concern, perhaps obsession, of the authors of midrash halakhah with scriptural pleonasm and the laws that derive from it becomes clear. I wonder whether we can even call this commentarial pattern "midrash", for it seeks to draw little or no additional meaning from the scriptural text. It may leave the plain meaning of the passage intact, or it may add some piece of information that would be readily deduced anyway. While this form may not seek to add much to the text, it is troubled by the sense that there was no need for the particular scriptural statement that serves as its point of departure. It asks, "Why does this statement appear since it is superfluous, perhaps even inappropriate?" That is, a more general prohibition would appear to establish the particular point Scripture goes on to elaborate. The darshan then creates an argument, usually a fortiori, to show that the inclusion of the particular is not obvious, indeed, we would have had ample reason to think otherwise. Now, these arguments are usually thoroughly contrived; they exist for the sole purpose of removing the (justified) impression that Scripture repeats itself, or, as in the case to be cited, Scripture includes an inappropriate phrase.

To illustrate the point, let us consider the *Sifra*'s comments to Lev. 13:42.[50] The passage and our discussion of it are rather technical, and will probably be more difficult to follow that what we have seen heretofore. Leviticus 13:42-44 reads:

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(42) But if a white affection streaked with red appears on the bald part in the front or at the back of the head, *it is a spreading leprosy* on the bald part in the front or at the back of the head. (43) The priest shall examine him; if the swollen affection on the bald part in the front or at the back of his head is white streaked with red, like the leprosy of body skin in appearance, (44) the man is leprous; he is unclean. The priest shall pronounce him unclean; he has the affection on his head. (Emphasis added)[51]

I think one will readily agree that the passage is quite wordy. I wish for now to focus only on the italicized portion, for it is the point of departure for the Sifra's comments on verse 42. The phrase "it is a spreading leprosy" is not appropriate here; for this verse is merely describing symptoms that may be leprous. It is only after the priest examines the patient (verse 43) that it can be determined that the patient is leprous (verse 44).[52] On the term "leprosy" in this phrase the *Sifra* comments:

A leprosy: This teaches that it [the bald spot] is rendered unclean with live flesh. For we would logically have learned otherwise: If the boil and the burning, which are unclean because of a white hair, are not unclean because of live flesh, a bald area in the front or back of the head, which is not unclean because of white hair, should certainly not be unclean because of live flesh. Scripture states "leprosy"; this teaches that it is rendered unclean with live flesh. (*Sifra,* Negaim 11:1) [53]

Given that the word "leprosy" is inappropriate in verse 42, the *darshan* argues that it was added to the verse to teach that (one of) the signs of uncleanness in bald pates is the presence of live flesh. But this adds little, since live flesh is one of the regular signs of uncleanness in scaly leprous spots on the body (see Lev. 13:9–11, 14–17; Mishnah, Negaim 3:3, inter alia), to which the condition of the bald pate is compared. (We must note that the Torah does not describe what signs the priest is looking for other than the determination that the affection resembles bodily leprosy.) We would then have little reason to think that live flesh was not a symptom of uncleanness here. The *darshan* therefore goes on to explain why this additional piece of information is significant. For, without Scripture telling us this we would have thought otherwise, even though live flesh is a normal sign of uncleanness for scaly leprous spots. For boils and burns, another category of uncleanness, do not require the presence of live flesh in order to be considered unclean (see Lev. 13:18–28; Mishnah, Negaim 3:4). They do require the presence of a white hair. Thus, "logic" demands that a possibly leprous bald head also does not require the presence of live flesh in order to be considered unclean. "Scripture states . . . ," thus showing that live flesh is (one of) the sign(s) of uncleanness on a bald pate.

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Now in some sense the formal requirements for a good argument a fortiori are present here. After all, one could make the case that the fact that a white hair renders one unclean in the case of boils and burns does seem to establish that they are "severer" cases than reddish/whitish bald spots, which are not rendered unclean by the presence of white hairs. This is particularly the case once we have added one more piece of information. In addition to scaly affections to a bald head, and boils and burns, there is yet another category relevant here, namely, leprous spots on the body. These may be rendered unclean by live flesh, white hairs, or spreading flesh, while boils and burns are rendered unclean by spreading flesh or white hairs only. This seems to establish that live flesh is a more stringent requirement that in "lesser" cases may be dispensed with. The "logic" then goes as follows: (1) bodily leprous spots are rendered unclean by the presence of one of three things; (2) boils and burns are rendered unclean by one of two things, dropping live flesh as a concern; (3) reddish/whitish scaly spots on a bald head, which are not rendered unclean by one of the two conditions *included* in step (2) (namely, white hairs; this is established by the *Sifra* in 11:2), ought not to be rendered unclean by the condition *dropped* in step (2). We should, then, have three levels: bodily leprous spots, rendered unclean by any of three conditions; boils and burns rendered unclean by two conditions; and leprous bald spots rendered unclean by one condition. The conclusion we reach with this logic is that since the boils and burns are not unclean due to live flesh, neither should the leprosy on a bald head be unclean. Thus, we need a verse to teach us the opposite.

It does not, however, take much thought to realize that this "logic" is thoroughly contrived. Obviously, a bald pate cannot be rendered unclean by the presence of hairs! It is *bald,* after all![54] The only reason Scripture needs to treat the status of bald pates at all is precisely because, unlike the other forms of uncleanness dealt with in Lev. 13, they, by definition, are devoid of hairs. They are then in no sense "less severe" than boils and burns, and dropping white hairs as a sign of uncleanness scarcely makes them so; they are simply different. It is inconceivable that, had we not had an "explicit" scriptural statement, one would have doubted that live flesh is a sign of the impurity of a leprous bald head because of the absence of the white hair possibility. What the darshan has accomplished is to make a formal, ultimately contrived, case for the necessity of what would otherwise be a scriptural anomaly. This was his goal here, and this he has achieved. He has made the case by showing that this scriptural anomaly did not actually create law, but *prevented* us from erroneously creating a law based on the normally acceptable technique of *qal va-ḥomer*. That one could

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create laws with this technique under normal circumstances is the sine qua non for the intelligibility of this passage.

I could go on and provide hundreds of examples of the concern for repetitions and allegedly excessive wording in the scriptural text, drawn from all of the tannaitic midrashim, but it would serve little purpose. The question *lamah ne'emar* or *mah talmud lomar* (why was this word or phrase stated?) appears on virtually every page of the midrashim. Even when it is absent, as in the passage just considered, the question if often implicit. The answer is always that the anomalous phrase creates law, or redirects the creative process of deriving laws. However complex the relationship of midrash halakhah and traditional law may be, the halakhic midrashim represent a remarkably sensitive reading of Scripture, informed by a sense of verbal economy that tolerates no excess; it accounts for what would otherwise seem to be excess by seeing it as the source of law.[55]

Of course, scriptural verbosity is not the only feature that triggers midrashic comment, although it is, overwhelmingly, the most frequent. Sometimes only the most obtuse would deny that a given midrashic comment tries to resolve a conflict between the legal demands of a verse and the rabbinic sense of what justice and halakhah demands. Yet, even here the *darshan* is aided by his sensitivity to scriptural anomalies, which allows him to "derive" the law from the Bible. A case in point is Lev. 20:14. The verse states: "If a man marries a woman and her mother, it is depravity; both he and they shall be put to the fire, that there be no depravity among you." The meaning of this verse seems simple enough. It envisions a situation in which a man "marries" (Hebrew, *yiqaḥ*) a woman and her mother, and they set up a ménage à trois. This is depravity, and all three should be put to the fire. This understanding would even seem to be confirmed by a statement attributed to R. Aqiba (on which see below).

The problem with this biblical statement is that it conflicts with the laws as the rabbis develop them. For, no matter how one analyzes it, whichever woman he married first he married legally. His original relationship with her was fully licit; his continued relationship with her, while now illicit, is, in rabbinic thinking, not a capital crime. Why, then, is she to be burned? The verse cannot be allowed to stand as is; the halakhic considerations demand that the first "wife" be seen as innocent of a capital crime. Establishing a reading of the verse that conforms to this requirement is obviously the goal of R. Ishmael's exegesis (see below). Yet, even here, he takes note of, and works with, an unusual scriptural form that calls out for explanation.[56]

Literally, the verse reads "burn him and them in fire." The Hebrew word for "them" is *et-hen* rather than the more common *otan*.

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Thus in a passage found in current versions of the *Sifra*[57] we find "him and them; him and one of them, the words of R. Ishmael. R. Aqiba says him and both of them."[58] It appears that R. Aqiba (a second-century *Tanna*) is simply interpreting in accord with the simple meaning of the verse. However, in the Bavli, the fourth-century sages Abbaye and Rava obviously consider such a suggestion absurd. They, each in his own way, interpret R. Aqiba's remark so that the first woman married is spared burning. The same talmudic passage justifies R. Ishmael's reading of *et-hen* as "one of them" by noting that *hen* is "one" in Greek. Thus, the word *et-hen* is here seen as a Hebrew-Greek compound indicating that only one of them—the second one on board—is subject to death by burning. As to why the Torah would speak thus, another talmudic passage notes that while only one is to be burned, in the event the court is unable to carry out the death sentence, *both* women would be prohibited from remaining with the husband. Thus, the unusual *et-hen* communicates that one is to be burned, but both are henceforth prohibited to the man. Certainly, this is a lot of mileage to get from one word.

The issues are complex, and there is a Yerushalmi version that is again different, although it too maintains one is to be burnt, while both are prohibited. What is important to note is that the exegesis of two important *Tannaim,* as their teaching was refracted through the prism of the Talmuds (which is the way our hypothetical post-talmudic Jew would look at them), completely obliterate the obvious meaning of the biblical verse.[59] It is of interest that here virtually all traditional commentators go along.[60] Even Abraham Ibn Ezra (1089/92–1164/67), generally known for his allegiance to the *peshat,* accepts that the verse intends only one of them to be burned.[61] Now, certainly here the primary difficulty is the halakhic result of letting the verse stand as is. Even so, the close attention to scriptural formulation is evident, and again the result is the notion that the acceptable legal norm is encoded within Scripture.

I have cited a number of examples designed to show the scriptural problems that elicit midrashic comment. Along the way we have seen how the midrashim resolve these problems. Often the *darshan* will indicate that the superfluous word or phrase exists to include or exclude something from the purview of the verse, and this is one way in which the *darshan* may fill the legal lacunae of the biblical text. To take the leprosy example, the Torah does not specify what symptoms the priest is looking for, other than to say a spot that resembles leprosy of the body. Which characteristics of this kind of leprosy are relevant to the bald pate is not stated. The darshan uses a scriptural anomaly as his

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pretext for filling in the details.[62] Similarly, Scripture nowhere specifically prohibits the sacrifice of a *terefah*; while one would have little difficulty deducing it, an extraneous scriptural phrase, which must be accounted for, will be enlisted to fill in this detail.

Sometimes, to be sure, the "filling in" of biblical lacunae seems thoroughly arbitrary, and one cannot imagine arriving at the particular conclusion if the said conclusion was not, in fact, foregone. Certainly, the ineligibility of relatives as witnesses (or judges) predates the formulation of the midrashim we examined. Still, the goal of such midrash halakhah is to account for Scripture by showing how its anomalies encode information, which the exegete must decipher. There are, however, numerous instances in which even historians standing outside the system have come to the conclusion that the legal norms do indeed emerge as a result of the midrashic exegesis.[63] Be that as it may, the impression of arbitrariness is, at times, inescapable. Occasionally the collections we have show awareness of the arbitrary character, and ask, for example, "Why have you included *x* and excluded *y*, when you could just as easily have done the opposite?" The answer will generally argue that *x* is better suited to the legal and/or exegetical occasion.[64] It is important for us to note here that, arbitrary or not, the response that extraneous phrase *a* includes/excludes *x* or *y* is the single most common retort to the question, "Why does Scripture say this?"

We have also already seen the response, "Scripture needed to say this because otherwise we would have 'logically' concluded otherwise." The logic here is scarcely impeccable. The point is to account for Scripture by showing how it governs legal options. Another possible response to the identification of a word or phrase as extraneous is to use that word in a *gezerah shavah* (a lexical comparison), one of the "thirteen principles of R. Ishmael." The force of this response is that Scripture included the word in question to call attention to a desired comparison between its legal context and some other where the word also occurs. Such instances are specifically identified in the *Mekhilta de-Rabbi Ishmael* and the *Sifre Bemidbar*; that is, these documents identify the word in question as "available" for a *gezerah shavah*; the other documents do not specify this. This has led scholars to assert that the technique is only found in these documents, and reflects only one "school" of rabbinic midrash.[65] This needs to be refined however. The *Sifra*, without specifically stating that extraneous word *x* is "available" for a *gezerah shavah*, occasionally accounts for such a word by using it as part of an analogy. That is, it uses the same technique without the same terminology.[66]

The sometimes arbitrary extension or limitation of a verse's purview, the explanation that a word was included to preclude a different "logical" conclusion, and that it was included to elicit a *gezerah shavah*

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